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THE LAW OF RESTITUTION

by The Late Peter D. Maddaugh and John D. McCamus

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What's New in this Update:

- In *Morris-Garner v. One-Step (Support) Ltd.*, 2018 UKSC 20, the United Kingdom Supreme Court reconsidered one aspect of the reasoning of the House of Lords in *Attorney General v. Blake*, [2001] 1 A.C. 268, the leading modern English authority granting the restitutionary remedy of an accounting of profits made by a breach of contract in exceptional circumstances. The decision in *One Step* did not address the question as to whether an accounting of profits could be available in a breach of contract case. Rather, the Court's analysis was confined to the question of the availability of what are sometimes referred to as "*Wrotham Park*" damages. In *Wrotham Park* itself, the defendant developer had exceeded a limit on the number of residences that could be built on a parcel of land set out in a restrictive covenant. The breach did not cause injury to the covenantee as it did not reduce the value of contiguous property. Nonetheless, the Court awarded

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damages determined to represent the fee that the defendant would reasonably have paid for a release from the restriction. In *One Step*, the Supreme Court referred to these damages as "negotiating damages" or as a "hypothetical release fee". In *Blake*, the House of Lords had referred to *Wrotham Park* damages as an illustration of the fact that under prior law, contractual damages were occasionally calculated on a profit-taking measure and thus offered some support for the recognition of the granting of an accounting for profits in a breach of contract case. In *One Step*, however, the Supreme Court objected to this characterization of *Wrotham Park* damages as restitutionary or profit-stripping in nature. Rather they were to be characterized as contractual in nature as they were designed to compensate the plaintiff for the loss of an asset (in *Wrotham Park*, the control over the extent of development) which, when wrongfully appropriated by the defendant through breach of contract, must be compensated for by an award that estimates the value of the misappropriated asset. The imaginary negotiation is merely a tool for arriving at the value. Further, the Court expressed the opinion that such awards should, in the future, be restricted to cases involving proprietary interests such as a right to control land, or rights to intellectual property or confidential information.

- In *Provost v. Bolton*, 2018 BCSC 1090 (B.C.S.C.), the British Columbia Supreme Court illustrated the general availability of subrogation as a remedy to prevent unjust enrichment in the context of a claim by an employer who, though not required to do so, indemnified an employee for loss of income resulting from severe personal injuries caused by the defendant's tortious conduct. The employer, the Attorney General of Canada was not required either by a collective agreement or other contractual arrangements to provide such indemnification to the employee, an RCMP officer. Nonetheless, the employer was entitled to an equitable subrogation claim for the cost of indemnification to prevent the tortfeasor's unjust enrichment.
- In *Lowick Rose LLP v. Swynson Ltd.*, [2017] UKSC 32, [2018] A.C. 313, the United Kingdom Supreme Court held that claims for equitable subrogation to prevent unjust enrichment were limited to situations in which moneys were advanced by a claimant under a transaction that has been disrupted by unexpected circumstances of some kind, as, for example, where moneys are advanced on the faith of an undertaking by the borrower that security will be provided to secure repayment and that undertaking proves to be unenforceable. On the facts in *Lowik*, a lender advanced moneys to a borrower for the purpose of enabling the borrower to discharge a debt owed to a

third party corporation in which the lender held an interest. The funds were used by the borrower to discharge that debt. The borrower having become insolvent, the lender sought to subrogate itself to the third party's tort claim against its accountant for negligent advice pertaining to the initial and now discharged loan issued by the third party to the borrower. The Supreme Court held that the lender's contract with the borrower was both enforceable and successfully performed and that the lender assumed the risk of the borrower's insolvency. The lender could not subrogate itself to the third party's claim against the accountants with respect to a breach of duty unconnected to the lender's transaction with the borrower.

- In *Ontario (Finance) v. Traders General Insurance (Aviva Traders)*, 2018 ONCA 565, the Ontario Court of Appeal awarded restitution to the Crown which indemnified an individual for injuries sustained in an automobile accident. When the insurer of the vehicle improperly refused coverage to the victim, the Crown exercised its statutory discretion under applicable motor vehicle accident claims legislation to compensate the victim. The insurance policy in question, when interpreted properly, did apply to the accident. The plaintiff Crown was granted restitution against the insurer to prevent its unjust enrichment.