

The "Most Wrong" Equity Cases 1990 – 2003: Attorney General V Blake

THE "MOST WRONG" EQUITY CASES 1990 – 2003*

ATTORNEY GENERAL v BLAKE

by
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Attorney General v Blake [2001] 1 AC 268 is a decision that does not fit principle. In that sense, it is a bad case. Whether it is a bad equity case or a bad common law case is a matter for debate. It may be a bad common law case because it makes an equitable remedy available in a case calling for a common law remedy. It may be a bad equity case because it misapplies the equitable remedy.

It will be recalled that the speech of Lord Nicholls of Birkenhead, with whom all but one of the other members of the House of Lords agreed, begins: "My lords, George Blake is a notorious, self-confessed traitor". That set the scene for the loss by George Blake of the profits he was receiving from the British publisher of his memoirs written in exile in Moscow. The only peg on which to hang such a deprivation was breach of contract. The contract was an undertaking Blake had signed when he joined the secret service in 1944 not to divulge any official information obtained as a result of his employment either in the press or in book form. The undertaking was expressed to continue after his employment ceased – as it did when he was convicted and imprisoned for espionage. The problem for the Government was that it could not show that it had suffered loss through the publication of Blake's memoirs. The Government was undeterred. Even though fiduciary duties were over and done with, the House of Lords ordered an account of profits as a remedy for breach of contract.

The House of Lords decision was given on 27 July 2000. The first Australian reference to the aspect of it concerned with account of profits appears to be in the judgment of McKechnie J at first instance in **Dalecoast Pty Ltd v Guardian International Pty Ltd** [2001] WASC 199 (1 August 2001). His Honour apparently accepted the possibility of following **Blake** but found the circumstances not to be of the exceptional kind to which the remarks of members of the House of Lords were directed. Two days later, the full Federal Court left no doubt where it stood. In **Hospitality Group Pty Ltd v Australian Rugby Union Ltd** (2001) 110 FCR 157 (3 August 2001) Hill, Emmett and Finkelstein JJ went straight to **Commonwealth v Amann Aviation Pty Ltd** (1991) 174 CLR 64 and its approval of the venerable principle in **Robinson v Harman** (1848) 1 Exch 850 that the aim of contract damages is to place the plaintiff in the same position he would have occupied had the contract been performed. When **Blake** was in the Court of Appeal, the Master of the Rolls had suggested that the law of contract might be considered "seriously defective" if the court could not award disgorgement damages. The Federal Court judges said that, however that may be, the position in Australia is that the loss recoverable for breach of contract is limited as stated in **Robinson v Harman**, with the aggrieved party entitled only to compensation. They went on:

"If he has suffered no loss, he is not entitled to be compensated. In an appropriate case, the aggrieved party may be able to recover (by a claim in restitution) benefits that he has made available to the wrongdoer; for example, he may be able to recover the price under an incomplete contract or recover possession of goods sold but not paid for. Presently, however, it would be inconsistent with the current principles laid down by the High Court to confer a windfall on a plaintiff under the guise of damages for breach of contract."

Two months ago, on 27 June 2003, the Full Court in Western Australia gave judgment in an appeal in the **Dalecoast** case: see **Dalecoast Pty Ltd v Guardian International Pty Ltd** [2003] WASC 142. Curiously, perhaps, there was no reference to the Full Federal Court's decision in **Hospitality Group**. Worryingly, perhaps, the Western Australia Court – with Murray J delivering the leading judgment and Wallwork and Anderson JJ concurring – dealt with **Blake**-based submissions on their merits in deciding that an account of profits would not be awarded for breach of contract. The

judges appear to have accepted the correctness of **Blake** – or at least they did not question it – although, in the end, they decided that the conditions it laid down for such a remedy had not been satisfied. In this, they took, as will be seen, the line that has most frequently been taken in England.

Remaining in Australia for the moment, it may be noted that, in the Supreme Court of New South Wales, **Blake** has been referred to in passing by Mason P in **Harris v Digital Pulse Pty Ltd** (2003) 44 ACSR 390 (7 February 2003) and by Gzell J in **Mainland Holdings Ltd v Szady** [2002] NSWSC 699 (22 August 2002). Campbell J mentioned (but did not embrace) an interesting possibility in **Town & Country Property Management Services Pty Ltd v Kaltoum** [2002] NSWSC 166 (26 March 2002). He raised for consideration the thought that our law may have got, perhaps unwittingly, to the point reached in **Blake**, but at an earlier time and by a different route, being the road that goes via constructive trust. He pointed to observations in **Hospital Products v United States Surgical Corp** (1984) 156 CLR 41 by Justice Deane, who was admittedly in dissent, which categorised the defendant’s conduct as breach of contract rather than breach of fiduciary duty and said that a constructive trust might be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he obtained in breach of contractual or other legal or equitable obligations. That might be a way in which equity will lead to an account of profits for breach of contract. But it might also be a way that is no more principled than **Blake** itself. Campbell J’s conclusion was that something more than a mere breach of contract is necessary to justify an account of profits.

How has **Blake** fared in England? There are at least three cases in which **Blake**-type relief has been sought but refused and one in which it has been granted. The three are **World Wide Fund for Nature v World Wrestling Federation** [2001] All ER(D) 50 (Aug) (1 October 2001), **AB Corporation v CD Company (The “Sine Nominee”)** [2002] 1 Lloyd’s Rep 805 (19 November 2001) and **Experience Hendrix LLC v PPX Enterprises Inc** [2003] EMLR 25 (20 March 2003). The case where the claim was successful is **Esso Petroleum Co Ltd v Niad Ltd** [2001] All ER(D) 324 (Nov) 22 November 2001. In the House of Lords – in **Kuddus v Chief Constable of Leicestershire Constabulary** [2001] UKHL 29 (7 June 2001) – there has been an observation in passing, citing **Blake**, that sometimes damages may be measured not by the plaintiff’s loss but by the profit obtained by the defendant from his wrongdoing. The observation was a piece of reinforcement. It was an observation of Lord Nicholls.

The applicability of the **Blake** doctrine has been seen in all the English cases as turning on the question whether the particular circumstances are of the “exceptional” kind to which the House of Lords referred. Lord Nicholls recognised that his innovation would produce commercial uncertainty. He hastened to attempt to dispel it by saying that an account of profits might be awarded “exceptionally” where “a just response to a breach of contract so requires”. He went on to say something about the “exceptional cases” he had in mind; but, he said, “no fixed rules can be prescribed” – not something, one would think, that seekers after commercial certainty wanted to hear. One important factor, however, will be whether the plaintiff had “a legitimate interest in preventing the defendant’s profit-making activity and hence in depriving him of his profit”. Lord Nicholls found to be of no assistance some other criteria suggested by the Master of the Rolls in the Court of Appeal; and he expressly rejected as insufficient three factors likewise rejected by the Master of the Rolls: the fact that the breach was cynical or deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract, the defendant put it out of his power to perform his contract with the plaintiff.

One of the subsequent English cases in which the exceptional criterion has been found not to be met was the decision of the Court of Appeal in the **Hendrix** case. The three members of the court there identified three factors as indicative of the exceptional status to which the House of Lords was referring: first, the special and sensitive nature of national security; second, the notoriety which accounted for the magnitude of Blake’s enhanced capacity to earn royalties by breaching his contract; and, third, the fiduciary analogy clearly drawn upon by Lord Nicholls – Blake, of course, was the kind of fiduciary someone is when he or she used to be a fiduciary but is not quite a fiduciary any more.

When one considers these limitations, it seems unlikely that there will be another case that fits the specifications until another notorious self-confessed traitor who has signed a confidentiality contract decamps in highly publicised circumstances and then makes a lot of money by writing his autobiography. That general impression is borne out by the subsequent English cases, with the exception of **Esso Petroleum Co Ltd v Niad Ltd**. It was held in that case that a service station proprietor who took the benefits of a marketing campaign run by his petrol supplier but did not deliver what he was meant to deliver in order to obtain the benefits was liable to the oil company plaintiff for damages or, at the plaintiff’s option, for an account of profits for breach of contract or for a form of

restitutionary remedy. Lord Nicholls' message about the extraordinary nature of the account of profits remedy, although mentioned, was, it seems, largely ignored. The reasons why the remedy was said to be appropriate were, first, that damages would be an inadequate remedy; second, that there had been breach of what was called a fundamental obligation; third, that there had been several complaints by the plaintiff to the defendant about non-compliance to which the defendant did not demur, although as it turned out, he had been guilty of more widespread breaches than were known; and, fourth, that the plaintiff had a legitimate interest in preventing the defendant from profiting from its breach – whatever that meant in those circumstances. The defendant seems to have been considered a particularly cynical and unrepentant breaker of his contract. It seems to be that, and that only, that sets **Esso v Niad** apart; and it is just that that was considered insufficient by the Court of Appeal in **Hendrix** – which, it must be noted, was decided after **Esso v Niad**.

Blake has been referred to in at least two cases in Canada. In one of them (**Amertek v Canadian Commercial Corp** (8 July 2003) ONSC 96-CU-113354)), the **Esso v Niad** line was taken on the basis of the defendant's "shocking behaviour". Researches have discovered nothing in New Zealand, although it would be surprising if **Blake** has not been raised there. In Ireland, interestingly, the **Blake** approach was considered open, although, on the facts, not applied, as long ago as 1976 in **Hickey & Co Ltd v Roches Store (Dublin) Ltd (No 1)** [1993] RLR 196 (14 July 1976).

What is the problem of principle with the **Blake** approach? The remedy of account of profits is for cases where someone misuses a position of ascendancy or influence or trust and obtains something that ought to have gone to a person in a position of protection, vulnerability or beneficial entitlement. Appreciation and accommodation of parties' positions in those comparative terms is not something with which *pacta sunt servanda* is concerned.

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