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HOW TO MEASURE DAMAGES WHERE LOSS IS DIFFICULT TO QUANTIFY: A LOOK AT THE COURT OF APPEAL'S DECISION IN *GAO V ZESPRI GROUP LTD*

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Abstract:

This paper assesses the different approaches to calculating damages which could have been applied by the Court of Appeal in Gao v Zespri Group Ltd. This case created difficulties in awarding damages due to there being significant impact on the plaintiffs but insufficient evidence to measure any of their loss or the defendant's gain. Various potential approaches the Court might have taken are considered. Each approach is critiqued with reference to principles of compensation and damages at common law and the ability to adequately remedy the situation. Ultimately, this paper concludes that the Court's use of a hypothetical bargain, even where the plaintiffs would not have made such bargain, was the best approach available. Other approaches fail to practically remedy the situation offering inappropriate sums and uncertain calculations. However, the failure of hypothetical bargains to follow ordinary principles of compensation cannot be ignored as it was by the Court of Appeal. There is room for the Courts to consider the approach an exception to ordinary principles of compensation. Doing so is necessary to ensure a fair and reasonable measure of damages can be achieved. Recognising this approach as an exception to ordinary compensatory principles will also ensure issues surrounding causation, remoteness and proportionality may be more readily considered, and that such principles are not slowly eroded away by legal fictions.

Keywords: *"damages", "intellectual property", "user principle", "hypothetical bargain"*

Contents

I `Introduction

In 2021 the Court of Appeal of New Zealand awarded Zespri Group over 12 million New Zealand Dollars in damages.[1] The award remedied the unlawful export of G3 kiwifruit budwood over which Zespri Group holds exclusive rights under the Plant Variety Rights Act 1987 (PVR).[2] The award against the exporter, Mr Gao, represented the sum that hypothetically could have been charged to license the growth of G3 to those who Mr Gao exported to.[3]

However, the decision on how to award and calculate damages for unlawful export of budwood was a difficult one with several practical and conceptual issues. Both the High Court and Court of Appeal agreed there had been an unlawful breach of Zespri's PVR rights and that this breach resulted in G3 budwood being planted in China.[4] This breach was considered likely to lead to potentially uncontrollable spread, which would have massive impacts on Zespri's business.[5] However, Zespri could not prove any loss of profits and were unable to point to any diversion of sales.[6] Neither could any profits which Mr Gao made be established and measured.[7] As such, it is difficult to measure loss using traditional methods and an account of profits cannot be awarded.

Ultimately, Zespri's award of damages following the hypothetical bargain which could have been struck between Zespri and Mr Gao, was considered to compensate by placing

[1] *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219 at [147].

[2] At [1].

[3] At [132]–[144].

[4] *Zespri Group Ltd v Gao* [2020] NZHC 109, (2020) 151 IPR 495; *Gao v Zespri Group Ltd*, above n 1.

[5] *Gao v Zespri Group Ltd*, above n 1, at [134].

[6] At [134].

[7] At [125].

Zespri in the position they would have been in had no export taken place.[8] However, Zespri would never have licensed to Mr Gao in the first place, as they did not license G3 to Chinese growers at that point in time.[9] As such, the manner in which some hypothetical bargain might restore Zespri's position is highly questionable.

Therefore, it is necessary to consider what approach to damages in *Gao v Zespri Group Ltd* should have been taken.[10] It is important to ensure that damages in difficult cases such as this are both principled and practically meet the need for a remedy given the large impact on Zespri. If these issues are not properly considered by the Courts, then there is a risk that foundational principles of damages may be ignored, or damages be awarded that do not provide an adequate remedy. To properly consider the approach to remedies that should have been taken in *Gao v Zespri Group Ltd*, it is first necessary to understand the unique facts of the case.[11] Against these facts we must then analyse the several different approaches to remedies which might have been taken, on both a conceptual and practical basis.

II The case

A Factual background

Zespri holds exclusive rights over the G3 and G9 varieties of golden kiwifruit via the Plant Variety Rights Act.[12] These rights give Zespri the exclusive ability to sell reproductive material and propagate the varieties for commercial production.[13] The G3 variety, known

[8] *Gao v Zespri Group Ltd*, above n 1, at [134]; see also *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA); *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL); James Edelman *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at 12–14; and Bill Atkin "Remedies" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1315-1316.

[9] *Zespri Group Ltd v Gao*, above n 4, at [162].

[10] *Gao v Zespri Group Ltd*, above n 1.

[11] *Gao v Zespri Group Ltd*, above n 1.

[12] At [1].

[13] Plant Variety Rights Act 1987, s 17.

as SunGold, is the only commercial variety of kiwifruit resistant to Psa3 – a disease which devastated the kiwifruit industry in the early 2010s.[14] This resistance, attractiveness to consumers and other economically desirable factors, have made the variety extremely commercially successful.[15]

Mr Gao, along with his wife Ms Xue and their company Smiling Face Ltd (the respondents), were involved in the New Zealand kiwifruit industry, as contractors and later as growers themselves, throughout the 2010s.[16] From 2012 onwards, Mr Gao exported G3 budwood to multiple different persons in China and purported to licence them to grow G3 kiwifruit.[17] Whilst the High Court initially found both the sale and licencing breached Zespri's PVR rights,[18] the Court of Appeal later found that only the sale was a breach, with issues of extra-territoriality and jurisdiction ensuring the New Zealand Courts could not consider overseas licencing.[19] It is thus the unlawful sale of G3 budwood which gives rise to the need for a remedy.

B Remedies against this background

The scope for awarding damages in this case, arises out of both Plant Variety Rights Act infringements and breaches of contracts with Zespri under which Mr Gao obtained G3 budwood.[20] Discussion in the High Court generally centred on the statutory infringement, although any damages under contract were considered justified by the same actions.[21]

[14] *Gao v Zespri Group Ltd*, above n 1, at [13]–[15]; see also *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [1], [24]–[31] and [44]–[48]; and Thomas Manch "Zespri signs on with Chinese state-owned firm to buy illicit SunGold kiwifruit" *Stuff* (online ed, New Zealand, 7 December 2020).

[15] *Gao v Zespri Group Ltd*, above n 1, at [15].

[16] At [17].

[17] At [21]–[40].

[18] *Zespri Group Ltd v Gao*, above n 4, at [38]–[40].

[19] *Gao v Zespri Group Ltd*, above n 1, at [120]–[122].

[20] *Zespri Group Ltd v Gao*, above n 4, at [119]–[178].

[21] At [119]–[171] and [184]–[187].

However, given the Court of Appeal only fully considered the award of damages under the statute, it is this form of damages which must be considered.[22] The Plant Variety Rights Act establishes that in awarding damages the Court must take into consideration "any loss suffered or likely to be suffered" by the rights holder, "any profits or other benefit" which were received as a result of the infringement and "the flagrancy of that infringement".[23]

This factual background creates several problems when it comes to awarding damages for the breach of Zespri's PVR rights. First, the nature of the rights as intellectual property means loss is difficult to assess and conceptualise. This is especially so as Zespri could not point to any diversion of sales or decrease in profits.[24] This is because demand exceeded supply for SunGold kiwifruit.[25] Secondly, there had been no clearly established profit made by Mr Gao.[26] Even if profit was made it was likely small in comparison to the impact of the exporting.[27]

However, the need for a remedy remains important. The illegal export of G3 budwood was considered likely to cause significant disruption to Zespri's business strategy and monopoly on G3 kiwifruit.[28] This concern has since materialised with the recent proliferation of G3 kiwifruit throughout China.[29] This proliferation has caused Zespri to consider new strategies in the marketing and production of G3 kiwifruit, highlighting the profound effect such wrongdoing can have in these situations.[30]

[22] *Gao v Zespri Group Ltd*, above n 1, at [133] and [142].

[23] Section 17(4).

[24] *Gao v Zespri Group Ltd*, above n 1, at [134].

[25] At [134].

[26] At [125].

[27] At [125].

[28] At [134].

[29] China is now estimated to contain more vines of G3 kiwifruit than New Zealand with significant spread in recent years. See "China has more gold kiwifruit vines than New Zealand - but none of it is legal" RNZ (online ed, New Zealand, 24 March 2022).

[30] See Manch, above n 14.

Even without reference to the potential consequences of a breach, a meaningful remedy is important to ensure the Plant Variety Rights Act can function as intended. The Plant Variety Rights Act sought to implement New Zealand's obligations at the time under the International Convention for the Protection of New Varieties of Plants 1978.[31] The convention includes various obligations to protect new varieties of plants and set up the International Union for the Protection of New Varieties of Plants (UPOV).[32] UPOV and the convention aim to "encourage the development of new varieties of plants, for the benefit of society".[33] They aim to achieve this by ensuring each member state has in place a system for plant breeders to obtain intellectual property rights in new plant varieties.[34]

The approach of UPOV follows one common view that the granting of exclusive intellectual property rights will encourage innovation and research by providing the opportunity to exclusively benefit from new ideas, processes, products and varieties.[35] Such innovation is desirable within society as these intellectual property rights are of limited duration.[36] When this limited period ends the intellectual property falls into the public domain. Once in the public domain, this knowledge may be more widely utilised and developed by other members of society, benefitting society as a whole.[37] Under such

[31] See *Gao v Zespri Group Ltd*, above n 1, at [8]; and International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised at Geneva on 10 November 1972 and on 23 October 1978 1861 UNTS 281 (opened for signature 23 October 1978, entered into force 8 November 1981) [1978 UPOV Convention]; There is a more recent 1991 revision of this convention which parliament is currently seeking to implement, although the overall purpose and approach to damages remains similar, see Plant Variety Rights Bill 2021.

[32] 1978 UPOV Convention, above n 31.

[33] International Union for the Protection of New Varieties of Plants "UPOV Report on the Impact of Plant Variety Protection" (2005) UPOV <upov.int> at 12.

[34] 1978 UPOV Convention, above n 31, art 2.

[35] James and Wells *Intellectual Property Law in New Zealand* (online looseleaf ed, Thomson Reuters) at [35.1.3].

[36] Plant Variety Rights Act, s 14(2).

[37] James and Wells, above n 35, at [35.1.3].

a scheme, the need to remedy these rights can be seen as part of a larger need to maintain the ability of the scheme to meet these goals.

C Unavailable remedies

At this point, it is useful to note that some forms of potential remedies were simply unavailable to the Court due to the specific circumstances under which the breach of Zespri's rights occurred. Non-financial remedies such as injunctions and delivery up of infringing materials were not available for two reasons. First, delivery up may not be an available remedy under the Plant Variety Rights Act. In other areas of intellectual property law, such as copyright law, statute expressly provides for the delivery up of infringing materials.[38] Despite being generally similar in its approach to remedies, the Plant Variety Rights Act offers no such express power.[39] The absence of such provision within an otherwise similar legislative scheme suggests this power was not intended to be given by parliament and thus does not exist. Secondly, regardless of whether delivery up is legally possible, it is not practically possible in this case. The territorial effect of the legislation coupled with the export of infringing materials means the Courts do not have the jurisdiction to make or enforce such remedies.[40] Simply put, the actual infringing material is outside the reach of the Courts. Therefore, any remedy must be a financial one for practical reasons.

III Methods to award damages

Given the difficulties before the Court, the issue becomes how the Court should have awarded damages in this case and others like it. Generally, we might consider three approaches available to the Court. First, the Court might employ a traditional approach to

[38] Copyright Act 1994, s 122.

[39] Section 17.

[40] See discussion in *Gao v Zespri Group Ltd*, above n 1, at [97]–[122].

compensatory damages, despite the evidential difficulties.[41] Under this approach the Court would attempt to measure the loss to Zespri in terms of the loss of value in their PVR rights. Secondly, the Court might consider that evidentiary difficulties were simply too great a burden in measuring loss and instead only award exemplary damages. Finally, the Court could measure damages following a hypothetical bargain which could have been struck between Zespri and Mr Gao for licencing fees. This is the approach the Court of Appeal took and thus it will be considered first.[42]

A Hypothetical bargain

The Court of Appeal affirmed the decision of the High Court and found that damages could be awarded against the respondents with reference to the hypothetical bargain that could have been struck between them.[43] This approach is also sometimes referred to as the "user principle".[44] The use of such damages was deemed appropriate due to the elusive nature of both Zespri's loss and Mr Gao's profit.[45]

In this case, this approach meant calculating damages by applying hypothetical licencing fees to the area in which Mr Gao's exports had enabled G3 to be planted in China.[46] The Court's hypothetically bargained fee was simply the most recent competitive tender for licencing G3 within New Zealand at $171,000 per hectare.[47] This was applied to 141.3 hectares, representing the area which Mr Gao "enabled to be cultivated".[48] The Court applied a discount of 50% to this figure to reflect the fact the orchards were not fully planted

[41] See *Cox & Coxon Ltd v Leipst*, above n 8, at 26; Lord Blackburn in *Livingstone v Rawyards Coal Co*, above n 8, at 39.

[42] *Gao v Zespri Group Ltd*, above n 1, at [124]–[142].

[43] *Gao v Zespri Group Ltd*, above n 1, at [134].

[44] *Zespri Group Ltd v Gao*, above n 4, at [156]. For the sake of clarity and consistency though this approach will continue to be referred by as the use of hypothetical bargains throughout this essay.

[45] *Gao v Zespri Group Ltd*, above n 1, at [134].

[46] At [134] and [144].

[47] At [139].

[48] At [139].

in the G3 or G9 varieties, the evidentiary uncertainty around orchards sizes in China and that Zespri should also be expected to pursue their PVR rights under the Chinese legal system.[49]

The application of a hypothetical bargain creates a simple and practical approach to measuring damages in difficult cases. The Court of Appeal considered such an approach recognises that the defendant "takes something for nothing, for which the owner was entitled to require payment".[50] In this sense the approach was said to be compensatory in nature by "putting the plaintiff in the position they would have been in had the wrong … not been committed".[51] The purported restoration of the plaintiff's original position is where we can begin to identify issues with the use of a hypothetical bargain to measure damages in *Gao v Zespri Group Ltd*.[52]

It is difficult to see exactly how a hypothetical bargain in *Gao v Zespri Group Ltd* will place Zespri in the position they would be in had no unlawful export and sale occurred.[53] In considering this issue, we might consider two different manners in which this approach may be said to compensate and restore the position of Zespri. First, to compensate for the lost licencing fees which otherwise might have been earned. Secondly, to help estimate some other loss, such as a disruption to business, via the loss in value of the PVR rights

[49] *Gao v Zespri Group Ltd*, above n 1, at [141].

[50] At [134] citing *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649 at [95].

[51] At [134]. See also *New Zealand National Party v Eight Mile Style, LLC* [2018] NZCA 596, [2019] 2 NZLR 352 at [35]–[39]; and *Eight Mile Style, LLC v New Zealand National Party* [2017] NZHC 2603, (2017) 127 IPR 318 at [338].

[52] *Gao v Zespri Group Ltd*, above n 1.

[53] *Gao v Zespri Group Ltd*, above n 1.

themselves. These two competing approaches may both be seen in past cases applying hypothetical bargains to similar situations.[54]

1 Lost licencing fees

Perhaps the most simple manner in which a hypothetical bargain could be said to restore the position of the plaintiff is by compensating for the lost opportunity to licence and fees that could have been received.[55] The Court of Appeal in *New Zealand National Party v Eight Mile Style, LLC* established that a hypothetical bargain compensates "the owner of a valuable right for the loss of value of its exercise".[56] In this sense, a hypothetical bargain can be seen to restore the loss of income the rights holder could have received by way of licences had the wrongdoer acted lawfully.[57] Compensation on this basis has also been the understanding of various academic and extra-judicial writings.[58]

This approach simply cannot justify the use of a hypothetical bargain in *Gao v Zespri Group Ltd* and other similar cases such as *New Zealand National Party v Eight Mile Style,*

[54] See *Gao v Zespri Group Ltd*, above n 1, at [134]; *Zespri Group Ltd v Gao*, above n 4, at [156]–[157]; *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 (HL) at 824–827; *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [26]–[30] and [38]; *Eight Mile Style, LLC v New Zealand National Party* (HC), above n 51, at [308]–[312]; *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157 (CA) at 164–165; *Morris-Garner v One Step (Support) Ltd*, above n 50, at [30]; and *Geostel Vision Ltd v Oraka Technologies Ltd* [2020] NZCA 256, (2020) 152 IPR 500.

[55] See *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [35]–[39]; *Morris-Garner v One Step (Support) Ltd*, above n 50, at [30]; and *Geostel Vision Ltd v Oraka Technologies Ltd*, above n 54, at [21].

[56] *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [39]. In this case copyright in Eminem song was infringed upon by the New Zealand National Party.

[57] *Geostel Vision Ltd v Oraka Technologies Ltd*, above n 54, at [21].

[58] See James Howarth "What's the Damage? Availability and Assessment of Damages for Loss of Opportunity to License" (2011) 6 JIPLP 547; and Ian Gault "The User Principle in New Zealand Copyright: 'the exercise of a sound imagination and the practice of the broad axe'?" (2019) 116 IPF 18 at 22.

LLC.[59] In both cases there were never any loss of licencing fees which otherwise might have been earned. The rights holders would never have licenced to the respective defendants.[60] Zespri did not licence growers in China, thus there was never any opportunity for Zespri to receive licencing fees in the first place.[61] The lack of such opportunity is therefore not due to the unwillingness of Mr Gao to act lawfully, but the unwillingness of Zespri themselves to licence to foreign growers.[62] To award damages which compensate for lost licencing fees where fees could never have been received would plainly not put the plaintiff in the position they were in had no wrongdoing occurred.

The underlying issue with justifying the use of a hypothetical bargain where no bargain could have occurred has been recognised by past courts discussing these issues.[63] The use of a hypothetical bargain to measure damages has historically been recognised as a separate approach to simply awarding lost licencing fees.[64] In *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, the House of Lords identified three broad approaches to damages in patent cases.[65] First, the loss of profit for manufacturers who sell their own goods.[66] Secondly, the licencing fees the wrongdoer would have paid where patent holders ordinarily licence their rights.[67] Thirdly, a hypothetical bargaining situation where no loss of profits or ordinary licencing fee can be established.[68]

[59] *Gao v Zespri Group Ltd*, above n 1; *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51.

[60] *Zespri Group Ltd v Gao*, above n 4, at [162]; *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [12].

[61] *Zespri Group Ltd v Gao*, above n 4, at [162].

[62] At [162].

[63] *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54.

[64] At 824-825.

[65] At 824–827.

[66] At 824.

[67] At 824–825.

[68] At 826–827.

The House of Lords noted that awarding ordinary licencing fees compensates for the loss of licencing fees which the licensor would have received.[69] In this instance the damages payable is what the wrongdoer "would have paid by way of royalty if, instead of acting illegally, [they] had acted legally".[70] In contrast, a hypothetical bargain is said to guide the Court in estimating damages in a manner closely analogous to the ordinary licencing situation.[71] This distinction between ordinary licencing fees and a hypothetical bargain illustrates how a hypothetical bargain where no bargain would have occurred cannot simply be considered to award lost licencing fees.

Furthermore, even if there were some licencing fees that otherwise would have been received, this approach would still fail to restore the plaintiff's position.[72] Compensating for lost licencing fees seeks to put the plaintiff in the position they would have been in had the defendant acted lawfully and licenced the rights from the rights holder in the correct and lawful manner.[73] However, the position which Zespri would have been in, had no wrongdoing occurred, is one where no sale of the budwood took place, not one where Mr Gao lawfully sold the budwood.[74] Whilst Mr Gao could have avoided wrongdoing by obtaining a licence, his failure to do so is not wrongdoing itself.[75] The wrongdoing was the sale of budwood.[76]

[69] *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54, at 825.

[70] At 825.

[71] At 826.

[72] See *Cox & Coxon Ltd v Leipst*, above n 8, at 26; Lord Blackburn in *Livingstone v Rawyards Coal Co*, above n 8, at 39; and Edelman, above n 8, at 12–14.

[73] *Geostel Vision Ltd v Oraka Technologies Ltd*, above n 54, at [21].

[74] *Cox & Coxon Ltd v Leipst*, above n 8, at 26, See also Atkin, above n 8, at 1315-1316; compare *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488.

[75] See *Gao v Zespri Group Ltd*, above n 1, at [121]–[123]. Compensating for the failure of Mr Gao to obtain a licence would be closer to the approach which might be taken if a contractual duty to pay Zespri sublicensing fees was breached, see for example *Cox & Coxon Ltd v Leipst*, above n 8, at 26; and *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd*, above n 74.

[76] *Gao v Zespri Group Ltd*, above n 1, at [121]–[123].

Accordingly, awarding damages following a hypothetical bargain simply cannot be justified by reference to any lost licencing fees. These licencing fees never would have been received and accepted by Zespri. Even if such fees would have been received, they fail to measure the position Zespri would be in if no wrongdoing occurred. Therefore, we must look to the second potential explanation for how a hypothetical bargain might restore the position of Zespri. This follows the distinction, and latter justification, identified by the House of Lords in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*.[77]

2 Lost value

The use of a hypothetical bargain might be said to compensate Zespri for their loss with reference to the lost value in their rights which have been invaded. A hypothetical bargain could be seen to place a value on the harm to Zespri's PVR rights and award damages accordingly. This follows with the general approach of physical damage to property, whereby the measure of damages is the "the amount by which the value of the goods has diminished".[78] None of the lost value in *Gao v Zespri Group Ltd* resulted from physical damage to goods.[79] However, the general approach of compensating for the loss in value of property remains useful as the Plant Variety Rights Act expressly establishes the rights granted under it are proprietary in nature.[80]

This approach appears to be the justification given in *Gao v Zespri Group Ltd*.[81] The Court of Appeal noted that the damages calculated via the hypothetical bargain "compensate the right-holder for the unilateral expropriation of the value inherent in the right to control exploitation".[82] Furthermore, after establishing the lack of any measurable loss of profit, the Court stated that the wrongdoing "disrupts" Zespri's global marketing strategies and

[77] *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54, at 826.

[78] Edelman, above n 8, at [37-003].

[79] *Gao v Zespri Group Ltd*, above n 1.

[80] Section 17(4).

[81] *Gao v Zespri Group Ltd*, above n 1.

[82] At [134].

"exposes [Zespri] to potentially uncontrollable competition" due to the potential spread of budwood.[83]

This approach recognises that the loss in this case is the potential loss of value in Zespri's rights which the breach by Mr Gao will cause.[84] This loss of value is due to potentially uncontrollable spread and the accompanying inability for Zespri to maintain their monopoly.[85] This approach is more justified than a lost licencing fees approach as it focusses on how Zespri's position has changed because of Mr Gao's sales, thus identifying some proper loss. However, issues begin to arise when we consider how hypothetical licencing fees connect to, and measure, this loss.

It is difficult to see how a hypothetical bargain could be seen as directly measuring the value of the PVR rights and any damage to them. Calculating lost value in such rights would surely need to include an actual calculation of the initial value of the rights and the harm to them. Licencing fees which might hypothetically arise may be relevant as they illustrate the value which can be extracted from those rights.[86] However, it is unlikely to be the only factor in calculating any lost value, as it does not engage with the extent to which the wrongdoing has damaged the right.[87] The profits that might be earned from all sources before and after the wrongdoing, and various other economic and practical factors would also likely be relevant.[88]

It could be contended that a hypothetical bargain measures lost value by pricing the risk and harm of such licencing. These licencing fees might be seen as the amount which Zespri

[83] *Gao v Zespri Group Ltd*, above n 1, at [134].

[84] For evidence of the actual spread and business impact which eventuated, see Manch, above n 14; and RNZ, above n 29.

[85] *Gao v Zespri Group Ltd*, above n 1, at [134].

[86] Russell L Parr *Intellectual Property: Valuation, Exploitation, and Infringement Damages* (5th ed, Wiley, Hoboken (NJ), 2018) at 95.

[87] At 95–112.

[88] At 95–112.

considered adequate to justify the risk and harm of licencing due to potential spread and future disruption to business.[89] Consideration of how a hypothetical bargain might reflect the risk of such licencing can be seen in *New Zealand National Party v Eight Mile Style* where the Court considered the impact the political nature of use might have on licencing fees.[90] However, the Court considered such factors to ensure the hypothetically struck licencing fee was accurate and not due to some lost value justification.[91] Nonetheless, the presence of such factors could be seen as ensuring that the risk of future loss due to political use was included within the calculation of damages.

However, this logic simply does not hold. Monopoly pricing exercises are not simply a cost-benefit analysis exercise.[92] Licencing fees are unlikely to be calculated simply with reference to the risk of licencing but by the ability to extract as much profit as possible from a monopolistic right.[93] This is in fact exactly what gives the rights such value in the first place. Consequently, any idea that the lost value must be at least as great as some hypothetical bargain is simply not true. Therefore, the hypothetical licencing fee bargain for exclusive intellectual property rights has limited connection to the potential lost value which might occur from such use.[94] In this sense, a hypothetical bargain is a poor measure of the lost value in these rights.

[89] *Gao v Zespri Group Ltd*, above n 1; see also "Managing China's theft of NZ's SunGold kiwifruit" RNZ (online ed, New Zealand, 8 April 2021); and RNZ, above n 29.

[90] *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [66]–[73].

[91] At [73].

[92] Steven A Greenlaw and David Shapiro *Principles of Microeconomics 2e* (OpenStax, Texas, 2019) at 216–226.

[93] At 216–226.

[94] At 216–226.

Furthermore, this approach lead to the Court of Appeal ignoring potential issues of remoteness and causation.[95] Principles of remoteness and causation require that the loss for which tortious actions compensate be caused by the defendants actions and be reasonably foreseeable as a consequence of these actions.[96] If the Court is to simply estimate a hypothetical bargain without sufficient reference to the actual loss in value which is being compensated, then assessment of remoteness and causation may be ignored.[97] Analysis which focusses on a hypothetical bargain between the parties, without properly considering the actual loss ignores issues of remoteness and causation due to the lack of proper connection between the loss and a hypothetical bargain.

In *Gao v Zespri* there are potential issues of remoteness and causation when considering further spread and business strategy interruption, which were indeed given no thought.[98] Future spread would not be able to occur 'but for' Mr Gao providing budwood to China.[99] However, it is the deliberate actions of those in China and not Mr Gao which would create further spread and lead to much of the potential loss as a result of this spread.[100] Thus, there is an argument the lost value in the rights is due to the actions of third parties which Mr Gao merely provided an opportunity for.[101] This is not to say the loss of business complained of was too remote a loss, as there is an argument this damage was a reasonably

[95] *Gao v Zespri Group Ltd*, above n 1; for principles see *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA) at 221–222; *Inder Lynch Devoy & Co v Subritzky* [1979] 1 NZLR 87 (CA) at 92–93; *McCarthy v Wellington City* [1966] NZLR 481 (CA and SC) at 522 per McCarthy J; and Marcus Pawson *Laws of New Zealand* Damages: Factors limiting compensatory damages: Causation (online ed) at [87]–[89].

[96] *Smith v Auckland Hospital Board*, above n 95, at 221–222; *Inder Lynch Devoy & Co v Subritzky*, above n 95, at 92–93; Pawson, above n 95, at [87]–[89].

[97] See *Gao v Zespri Group Ltd*, above n 1.

[98] *Gao v Zespri Group Ltd*, above n 1.

[99] *Gao v Zespri Group Ltd*, above n 1; see the 'but for' test in *Smith v Auckland Hospital Board*, above n 95, at 221–222; Pawson, above n 95, at 88.

[100] *Gao v Zespri Group Ltd*, above n 1; *McCarthy v Wellington City*, above n 95, at 517 per Turner J; Pawson, above n 95, at 89.

[101] *Gao v Zespri Group Ltd*, above n 1; compare to *McCarthy v Wellington City*, above n 95, at 517 per Turner J; and Pawson, above n 95, at 89.

foreseeable result of Mr Gao's actions.[102] However, the application of a hypothetical bargain to measure the loss in *Gao v Zespri Group Ltd* appears to have ensured the Court did not confront these issues when it might reasonably be expected to do so.[103]

Therefore, once again the use of some hypothetical bargain to measure loss and compensate Zespri for breach of their PVR rights is difficult to conceptually justify. The approach offers a simple and methodical approach to calculating damages which recognises some legitimate loss.[104] However, it fails to properly consider how a hypothetical bargain might measure this loss and restore the position of Zespri.[105] Moreover, the disconnect between the loss and how it restores the position of the plaintiff ensures important issues surrounding causation and remoteness remain unconsidered. Therefore, it is necessary to consider other approaches the Court might have taken to damages.

B Traditional approach

A more traditional approach to damages might also focus on the loss of value to Zespri's PVR rights and the disruption to their marketing strategies.[106] As established above, attempting to compensate for such loss seeks to put Zespri in the position they would have been in had no wrongdoing occurred.[107] However, as is also established above, a hypothetical bargain simply does not provide a meaningful or accurate method to quantify such losses. Instead, the Court might directly consider the likely interruption to business and marketing strategies, the consequent loss in value of Zespri's PVR rights and the extent to which any loss may be recoverable against Mr Gao. Under such an approach, the licencing fees paid by New Zealand growers may still be relevant to illustrate the value

[102] See Edelman, above n 8, at [8-088].

[103] *Gao v Zespri Group Ltd*, above n 1.

[104] At [134].

[105] At [134].

[106] See Edelman, above n 8, at [37-003].

[107] *Gao v Zespri Group Ltd*, above n 1, at [134].

Zespri is able to extract from their exclusive rights.[108] However, it will not be the only relevant factor.[109] The Court would also need to consider the extent to which this ability to extract value has been damaged by Mr Gao's actions.[110]

To measure the loss in value of rights caused by the breach, the Court will need to measure the value of the rights prior to any breach and the value of the rights after such breach.[111] The Court may then compare the two and consider the difference as the loss in value of the right. Whilst this may be more difficult for intellectual property rights due to their unique and intangible nature it is still a process which can be done.[112] Several competing methods exist to measure the value of intellectual property rights.[113] The most appropriate approach is likely the income approach which values rights by measuring all future income, from all sources, that will be received from exploitation of those intellectual property rights.[114] This would mean estimating forecasted income for Zespri from G3 licencing in the future before any breach occurred and comparing this to the forecasted income of Zespri now given the predicted spread of G3 in China. This process necessarily involves consideration of the likely spread of G3 and its impact on Zespri's business.

Such an approach is much more conceptually justifiable than the use of hypothetical bargains alone. This approach resolves the issue of poor connection between hypothetical bargains and the loss they intend to measure. However, the direct measuring of such large and uncertain losses comes with several additional practical and conceptual problems of its own.

[108] Parr, above n 86, at 95.

[109] At 95–112.

[110] Edelman, above n 8, at [37-003].

[111] At [37-003].

[112] Parr, above n 86, at 67–69.

[113] At 71.

[114] At 65, 95, 112 and 128–129.

Valuations of rights measured by expected income both prior to some breach and after it, are by their very nature uncertain. These valuations will rely heavily upon perceived levels of risk and expectations as to the income which Zespri will receive over a large period of time.[115] Estimation is especially difficult to do in cases such as *Gao v Zespri Group Ltd* as the nature of the rights ensures there are no meaningful points of comparison.[116] Zespri's rights, due to their exclusive nature, ensure no other firms licencing the same product in the same market exist.[117] If the rights were not exclusive, then comparisons might be made between other companies, their value and their income, to help determine how valuable these rights are.[118] The lack of points of comparison makes the task of valuation more difficult.

Therefore, any valuation would need to rely heavily on expert witnesses and economic forecasting with limited information.[119] The use of expert witnesses and economic forecasting will undoubtedly bring significant uncertainty, as different expert witnesses may arrive at vastly different valuations.[120] This will ultimately lead to an uncertain measure of the loss, with calculations being based on limited information. Whilst damages need not be measurable with absolute certainty there does need to be sufficient data to measure damages with reasonable certainty.[121] For the reasons given above, this income valuation method lacks such reasonable certainty.

[115] Parr, above n 86, at 112 and 128–129.

[116] At 72–74.

[117] *Gao v Zespri Group Ltd*, above n 1, at [1].

[118] Parr, above n 86, at 72.

[119] For discussion of the lack of evidence on which to measure loss, see *Gao v Zespri Group Ltd*, above n 1, at [125].

[120] See for example Adam Douglas "Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration" in Christina L. Beharry (ed) *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill | Nijhoff, Leiden, The Netherlands, 2018) 1 at 3.

[121] Edelman, above n 8, at [10-002]; see also Richard Mahoney "Overcompensation and the 'user principle'" (1996) 24 ABLR 59 at 60.

As with the use of a hypothetical bargain to estimate lost value, a more direct measure of lost value must also consider issues of remoteness and causation.[122] Whilst a hypothetical bargain essentially ignores issues of causation and remoteness, this more direct approach is likely to involve such considerations. A more traditional approach which directly confronts the fact the Court is seeking to compensate for lost value in the rights, might ensure the Court is more alive to the remoteness and appropriateness of any damages, given the traditional importance of these considerations.[123] Whilst these issues are important, the direct consideration of remoteness and causation may again increase the uncertainty within the measure of damages in *Gao v Zespri Group Ltd*.[124]

If all lost value was found to be properly caused by Mr Gao and not too remote, then any award of damages will be disproportionately large in comparison to Mr Gao's relatively limited exporting.[125] Mr Gao exported a limited amount of G3 budwood to a very limited number of people, such that holding him liable for the spread of G3 throughout a country as large as China may easily be considered disproportionate.[126] Thus, the Court needs to draw the line somewhere. However, where exactly the Court should draw the line will be difficult to determine. The Court would need to determine which spread Mr Gao should be properly liable for and what proportion of any lost value damages can be attributed to this spread.[127] Given the limited information on how and where this spread might occur, assigning some proportion of damages will be extremely difficult.[128] Furthermore, slightly different proportions may result in vastly different sums given the magnitude of potential

[122] *Smith v Auckland Hospital Board*, above n 95, at 221–222; *Inder Lynch Devoy & Co v Subritzky*, above n 95, at 92–93; Pawson, above n 95, at 87–89.

[123] *Smith v Auckland Hospital Board*, above n 95, at 221–222; *Inder Lynch Devoy & Co v Subritzky*, above n 95, at 92–93; Pawson, above n 95, at 87–89.

[124] *Gao v Zespri Group Ltd*, above n 1.

[125] For the importance of proportionality in remedies, see *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (PC) at 422–423 as per Viscount Simonds.

[126] *Gao v Zespri Group Ltd*, above n 1, at [19]–[40].

[127] *Smith v Auckland Hospital Board*, above n 95, at 221–222; *Inder Lynch Devoy & Co v Subritzky*, above n 95, at 92–93; Pawson, above n 95, at 87–89.

[128] *Gao v Zespri Group Ltd*, above n 1.

spread and loss.[129] This again increases the significant uncertainty and difficulty measuring damages.

Therefore, whilst such an approach might allow for a more principled measure of damages, it will create significant uncertainty and practical difficulties in measuring these damages. These practical difficulties are simply too great. If the Court were to follow this approach, then damages would simply be too difficult to measure with any accuracy. In fact, this practical difficulty and lack of evidence is what has seen previous Courts determine a traditional approach too difficult at times, justifying the use of a hypothetical bargain.[130]

C Nominal and/or exemplary damages

Given the conceptual gaps in the use of a hypothetical bargain to measure damages and the practical difficulties making a more direct estimation of loss impractical, we might consider other forms of damages. The Court might simply refuse to award compensatory damages for loss.[131] The Court instead may award nominal and/or exemplary damages for breach of PVR rights.[132]

Nominal damages are awarded where there has been a breach of rights without any real proven measurable loss where a tort is actionable per se.[133] Nominal damages exist to recognise that a breach of rights has still occurred even if no loss occurred or could be proven.[134] Nominal damages appear to be available in this case as the statutory nature of

[129] For evidence of the actual spread and business impact which eventuated, see Manch, above n 14; and RNZ, above n 29.

[130] See for example *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 51 SLR 238 (HL) at 244; and *Gao v Zespri Group Ltd*, above n 1, at [125].

[131] See arguments in *Gao v Zespri Group Ltd*, above n 1, at [130].

[132] Plant Variety Rights Act, s 17(4).

[133] *Baker v Australia and New Zealand Bank Ltd* [1958] NZLR 907 (SC) at 909; *Cousins v Wilson* [1994] 1 NZLR 463 (HC) at 469–470; Atkin, above n 8, at 1336–1338.

[134] Atkin, above n 8, at 1337.

the offence and lack of damage being required within the Act means a breach is actionable per se.[135]

However, nominal damages are a token sum of money.[136] The breach in *Gao v Zespri Group Ltd* was a deliberate breach of valuable intellectual property rights which risked significant spread and loss of control for Zespri.[137] Nominal damages would do no more than act as a declaration that rights had been breached and offer no meaningful protection or enforcement of Zespri's property right.[138] The very nature of the rights breached in *Gao v Zespri Group Ltd* is what creates difficulties in measuring loss.[139] If the very nature of the rights also ensures that only token sums of money can be awarded despite breaches causing significant disruption to the exploitation of those rights, then these rights will effectively be without remedy and functionally useless.[140]

However, another alternative non-compensatory form of damages exists in the form of exemplary damages. Exemplary damages are available under section 17(4) of the Plant Variety Rights Act. Exemplary damages are awarded to punish a defendant who is "guilty of outrageous wrongdoing".[141] Such damages aim to punish and deter.[142] In this sense exemplary damages protect rights not by restoring the plaintiff's position, but by punishing the wrongdoer, seeking to deter such wrongdoing in the first place and discourage any future wrongdoers.[143]

[135] Plant Variety Rights Act, s 17; *Zespri Group Ltd v Gao*, above n 4, at [132].

[136] *Cousins v Wilson*, above n 133, at 470.

[137] This spread later did happen, see Manch, above n 14; and RNZ, above n 29.

[138] For the argument that nominal damages do no more than declare breach, see Atkin, above n 8, at 1337.

[139] See *Gao v Zespri Group Ltd*, above n 1, at [134].

[140] See *Ashby v White* (1703) 2 Ld Raym 938 (KB) at 953; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [Baigent's Case] at 697.

[141] Atkin, above n 8, at 1339; see also Edelman, above n 8, at 415; and *Ellison v L* [1998] 1 NZLR 416 (CA) at 418.

[142] Edelman, above n 8, at 414–415; see also Atkin, above n 8, at 1339.

[143] Edelman, above n 8, at 414–415; see also Atkin, above n 8, at 1339.

Exemplary damages are expressly considered as potentially relevant to the situation before the Court in *Gao v Zespri Group Ltd* with the Court of Appeal noting that such damages are "amply justifiable" although "not in issue in this appeal".[144] Exemplary damages were considered not to be in issue as they were not argued at either the first instance or on appeal.[145] The exact reason exemplary damages were not contended for is difficult to say with certainty. However, it appears they may not have been argued for due to the generally small amounts which have been awarded in similar cases.[146]

In *McDermott v Wallace*, the Court of Appeal canvassed the principles of exemplary damages and tabulated the quantum of various awards.[147] The Court of Appeal noted exemplary damages should only be awarded if "a compensatory award does not sufficiently deter or punish".[148] The need for moderation in awarding exemplary damages has also been noted.[149] The tabulation of the quantum of exemplary damages awarded in several cases preceding *McDermott v Wallace*, demonstrates the highest award of exemplary damages was $100,000.[150] The Court of Appeal has also previously noted claims for $250,000 in exemplary damages or a similar size are "quite unrealistic".[151]

Even more directly relevant to any potential application of exemplary damages to *Gao v Zespri Group Ltd* is the case of *Cropmark Seeds Ltd v Winchester International (NZ) Ltd*.[152] In this case the High Court awarded $5000 in exemplary damages for parties blatantly selling reproductive material covered by PVR rights.[153] Similarly, no

[144] *Gao v Zespri Group Ltd*, above n 1, at [133].

[145] *Zepsri Group Ltd v Gao*, above n 4; *Gao v Zespri Group Ltd*, above n 1.

[146] *Gao v Zespri Group Ltd*, above n 1, at [133].

[147] *McDermott v Wallace* [2005] 3 NZLR 661 (CA) at [92]–[103].

[148] At [95].

[149] At [94].

[150] At [97].

[151] *Ellison v L*, above n 141, at 419.

[152] *Cropmark Seeds Ltd v Winchester International (NZ) Ltd* [2004] BCL 933 (HC).

[153] At [37].

compensatory damages were awarded due to a lack of evidence of either any loss to the plaintiff or profit for the defendant.[154] Whilst compensatory damages were not fully considered in this case, it remains a useful point of reference for the potential quantum of exemplary damages in cases like *Gao v Zespri Group Ltd*.[155]

The above cases illustrate that awards of exemplary damages have tended to be relatively small in a variety of circumstances. It must be acknowledged that the age of these cases does make the exact figures within them less useful in predicting any sum that may have been awarded to Zespri. However, it is still reasonable to conclude that any award of exemplary damages would be relatively small. As with an award of a token sum of money under nominal damages, a relatively small sum under exemplary damage is likely to do little more than act as a declaration that rights have been breached and deter Mr Gao from further wrongdoing.[156]

Whilst it can and has been argued that where loss is difficult to establish and quantify, exemplary damages will be sufficient to protect rights by punishing and deterring, this is simply not the case.[157] Exemplary damages would provide an inadequate remedy to Zespri, given the likely massive impacts on their business.[158] The granting of PVR rights gives the holder the right to exclusively profit from the sale of budwood.[159] In *Gao v Zespri Group Ltd* these rights have been clearly damaged through the loss of exclusive control and the threat of uncontrollable spread.[160] This damage has already been done and cannot be done

[154] *Cropmark Seeds Ltd v Winchester International (NZ) Ltd*, above n 152, at [35].

[155] *Cropmark Seeds Ltd v Winchester International (NZ) Ltd*, above n 152, at [9]. Compensatory damages were not necessary to be considered due to a settlement between the plaintiff and another of the parties involved in the unlawful sale having been made which essentially remedied the situation.

[156] See Atkin, above n 8, at 1337.

[157] *Gao v Zespri Group Ltd*, above n 1, at [130]; Edelman, above n 8, at 414–415.

[158] *Gao v Zespri Group Ltd*, above n 1, at [134]. For evidence of the actual subsequent spread of G3 and its impact, see Manch, above n 14; and RNZ, above n 29.

[159] Plant Variety Rights Act, s 17(1).

[160] *Gao v Zespri Group Ltd*, above n 1, at [134].

again by Mr Gao. Therefore, a remedy which punishes and deters is simply insufficient to protect such the property rights Zespri holds under the PVR.

IV Which approach is best?

Given the shortcomings of all three potential approaches, it becomes necessary to consider how the Court should have approached damages. I propose the approach taken by the Court was the correct one in the circumstances but that it should not be considered so rigidly within the concept of compensation. Whilst a more direct measure of loss or the use of exemplary damages may be more principled, the use of such approaches is practically insufficient to address the breach of Zespri's PVR rights.

A more direct approach to measuring loss is simply too uncertain and not sufficiently backed by evidence. This approach may have resulted in a large award of damages disproportionate to the role played by Mr Gao in the proliferation of the G3 variety. Even if the Court did focus on ensuring damages were proportionate, there is no practical method of measuring what lost value can properly be said to be caused by Mr Gao. Therefore, whilst the traditional approach would more properly seek to restore Zespri to the position they were in prior to Mr Gao's actions, the uncertainty which would be created by attempting to do so is not justifiable.[161]

Similarly, awarding only exemplary damages would also be a more principled approach at common law. However, this would fail to properly recognise the magnitude of the wrongdoing and its effect on Zespri.[162] Zespri's rights grant them the exclusive right to profit from their research leading to the G3 variety.[163] If these rights were only remedied by inconsequential sums via exemplary damages, then the ability of the Plant Variety Rights Act to encourage innovation as it is intended to do may be severely limited.[164]

[161] Edelman, above n 8, at [6-021].

[162] *Gao v Zespri Group Ltd*, above n 1, at [134]; see also Manch, above n 14; and RNZ, above n 29.

[163] At [1].

[164] UPOV, above n 33, at 12.

The use of a hypothetical bargain to measure damages resolves these issues. The award of damages under this approach is not insignificant with Zespri receiving more than 12 million New Zealand Dollars.[165] Furthermore, the measure is not arbitrary and has significant certainty, being based on a clear and methodical calculation. Whilst a hypothetically bargained licencing fee will always include some uncertainty, there is much more evidence to guide the Court in their estimation, ensuring this figure is not entirely arbitrary.[166]

However, if a hypothetical bargain is to be used, the shortcomings of this approach must be considered. The first and most obvious of these is the manner in which the hypothetical bargain can be said to compensate. As discussed above, in *Gao v Zespri Group Ltd*, the Court of Appeal clearly considered that a hypothetical bargain intends to compensate by restoring the plaintiff to the position they would have been in had no wrongdoing occurred.[167] Additionally, in similar cases, both New Zealand and English Courts have considered the purpose of hypothetical bargains to be the same.[168] The Court of Appeal in *New Zealand National Party v Eight Mile Style* even expressly affirmed the compensatory nature of hypothetical bargains.[169] However, as discussed earlier in this essay, hypothetical bargains fail to restore the position of the plaintiff. Therefore, we need to consider whether straying from this principle is an acceptable development for the law.

Generally, whether the law should ever depart from these fundamental principles of compensation is controversial at best. Todd on Torts canvasses the various forms of compensatory damages noting the different ways in which each calculates loss.[170] Included in these different forms are losses for specific measurable damages, loss of use, more

[165] *Gao v Zespri Group Ltd*, above n 1, at [144].

[166] At [139].

[167] At [134].

[168] *Gao v Zespri Group Ltd*, above n 1, at [134]; *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54, at 824; and *Geostel Vision Ltd v Oraka Technologies Ltd*, above n 54, at [21].

[169] *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [35]–[39].

[170] Atkin, above n 8, at 1320–1336.

general unmeasurable damages and many more.[171] Whilst some of these forms may seem to come closer to the use of some hypothetical bargain in *Gao v Zespri Group Ltd*, it is carefully noted at the outset that "all compensatory damages are aimed at restoring the plaintiff to the position it was in before the wrong was committed".[172] These statements strongly reflects the opinion that compensatory damages by their very nature must seek to restore the position of the plaintiff.[173]

This belief has led to criticism of the hypothetical bargains as stretching and bending the traditional notions of compensation.[174] As noted by Richard Mahoney over 25 years ago, the use of hypothetical bargains in various instances makes it "increasingly difficult" to agree that the aim of compensatory damages is restoration to the position the plaintiff would otherwise have been in.[175] This commentary highlights both the issues with hypothetical bargains intending to compensate by restoring the position of the plaintiff, and the underlying school of thought that such intention is the intention when awarding these damages.

Despite the importance of these fundamental compensatory principles and the Court's desire for the use of a hypothetical bargain to accord with them, this might simply not be necessary. The use of hypothetical bargains where no readily measurable loss is forthcoming has been well established for over 100 years.[176] Whilst the way the Courts reasoned the principle to be compensatory over these years can be questioned, the need for

[171] Atkin, above n 8, at 1320–1336.

[172] At 1320; compare *Gao v Zespri Group Ltd*, above n 1, at [132]–[144].

[173] See also Edelman, above n 8, at 13; *Cox & Coxon Ltd v Leipst*, above n 8, at 26; *Livingstone v Rawyards Coal Co*, above n 8, at 39; Atkin, above n 8, at 1315–1316; and Howarth, above n 58, at 547.

[174] See Mahoney, above n 121; and Howarth, above n 58, at 547.

[175] Mahoney, above n 121, at 59.

[176] See *Meters Ltd v Metropolitan Gas Meters Ltd*, above n 54.

hypothetical bargains in difficult cases has remained clear.[177] Therefore, even if we are to recognise the failure of hypothetical bargains to restore the position of the plaintiff, there remains strong precedence for the approach.

Furthermore, despite various Courts considering the intention of a hypothetical bargain is to restore the plaintiff to the position they otherwise would have been in, it has also previously been recognised that this may not be the case.[178] In this sense, the Courts have previously seen hypothetical bargains as straying from traditional notions of compensation.[179] In *Watson, Laidlaw & Co v Pott, Cassells & Williamson*, the House of Lords instead considered the use of hypothetical bargains as justified by a separate principle of "price or hire".[180] This principle states that when one invades another's property then but no loss amounts, damages should still be awarded according to the price or hire that could have been charged.[181] This principles rests on the idea that unlawfully using an item but returning it undamaged should still result in damages being awarded.[182] Under this approach the use of hypothetical bargains to determine damages are themselves seen as justifiable without need to reference the manner in which the position of the plaintiff is restored.[183]

[177] See *Gao v Zespri Group Ltd*, above n 1, at [134]; *Zespri Group Ltd v Gao*, above n 4, at [156]–[157]; *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54, at 824–827; *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [26]–[30] and [38]; *Eight Mile Style, LLC v New Zealand National Party* (HC), above n 51, at [308]–[312]; *Meters Ltd v Metropolitan Gas Meters Ltd*, above n 54, at 164–165; *Morris-Garner v One Step (Support) Ltd*, above n 50, at [30]; and *Geostel Vision Ltd v Oraka Technologies Ltd*, above n 54.

[178] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, above n 130, at 244; and *Attorney-General v Blake* [2000] 1 AC 268 (HL) at 278–279.

[179] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, above n 130, at 244; and *Attorney-General v Blake*, above n 178, at 278–279.

[180] At 244.

[181] At 244–245.

[182] At 244–245; see also *The Mediana* [1900] AC 113 (HL) at 117–118.

[183] At 244.

It has also been contended that where loss is difficult to prove and measure there is a need to allow for "inference, conjecture, and the like".[184] Various Courts applying hypothetical bargains have referred to the idea that compensation in difficult cases may be "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe".[185] In this sense, the Courts have considered that whilst restoring the plaintiff to their original position is desirable, where this is not possible, more practical methods of estimating damages will be justifiable. The use of a hypothetical bargain offers this practical method.

The use of hypothetical bargains in difficult cases as an exception to these fundamental compensatory principles, is further supported by statements of the House of Lords in *Attorney-General v Blake*.[186] The House of Lords recognised that where loss is difficult to establish the common law has been pragmatic and flexible, with damages instead "measured by a different yardstick".[187] The House of Lords referenced the use of hypothetical bargains for patented rights, citing *Watson, Laidlaw & Co v Pott, Cassells & Williamson*, approving of the justifications given there.[188] The House of Lords saw this as "an exception to the general rule" which is entirely justified.[189]

Similarly, the importance of traditional compensatory principles and the way in which a hypothetical bargain might not properly uphold these principles should not prevent meaningful remedy in *Gao v Zespri Group Ltd*.[190] There is room here for the Court to recognise that despite the inability to justify some hypothetical bargain as restoring the

[184] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, above n 130, at 244.

[185] *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, above n 130, at 244; *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 54, at 835; *Gao v Zespri Group Ltd*, above n 1, at [135]; *New Zealand National Party v Eight Mile Style, LLC* (CA), above n 51, at [29].

[186] *Attorney-General v Blake*, above n 178, at 278–279.

[187] At 278.

[188] At 278 citing *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, above n 130, at 244.

[189] At 279

[190] *Gao v Zespri Group Ltd*, above n 1.

position of the plaintiff, there is simply no better alternative. Measuring damages with reference to the price the defendant would have reasonably paid to make their actions lawful, offers a reasonable method for estimating such damages.

Furthermore, if the Courts do not consider such award to simply restore the position of the plaintiff, then issues of causation, remoteness and proportionality may be more openly considered. If a hypothetical bargain is considered as a method to fairly estimate damage, then whether the figures reached by this estimation and inputs into it create a fair and proportional award will naturally be considered. In fact, the Court of Appeal considered the extent to which Mr Gao should be liable.[191] In setting up the hypothetical bargain the Court established the area to which licencing fees are applied, being the area which Mr Gao "enabled to be cultivated".[192] This process already ensures only those consequences directly caused by Mr Gao, namely allowing the budwood to be planted by those he exported to, are considered within the estimation of damages. Therefore, on this case this is not a significant issue. However, this may not always be so. If the Courts consider the use of hypothetical bargains as an exception to ordinary principles of compensation, then these issues might be more specifically considered, due to the open acknowledgement of the fact that the exercise is intended to reach a fair estimation for damages and not some previous position of the plaintiff.

V Conclusion

Initial consideration of the approach taken to damages in *Gao v Zespri Group Ltd* identifies several conceptual gaps in the use of hypothetical bargains to measure damages where no bargain would have taken place.[193] However, this approach is ultimately necessary. Alternative approaches which were reasonably available to the Court, whilst more principled, fail to provide a reasonable measure of damages with sufficient certainty.

[191] *Gao v Zespri Group Ltd*, above n 1, at [21]–[40], [61]–[78] and [139]–[141].

[192] At [139].

[193] At [124]–[142].

Whilst the calculation of damages according to a hypothetical bargain is the only sufficient approach in *Gao v Zespri Group Ltd*, the Court should recognise the conceptual issues with such an approach and the compromise it represents.[194] The legal fiction that a hypothetical bargain compensates for and measures some specific loss restoring the position of the plaintiff, should be avoided. Whilst the desire to accord to these fundamental traditional principles of compensation is understandable given the importance of such principles, the Court should not be afraid to recognise that pragmatism and flexibility sometimes necessitate exceptions.[195]

The Court might recognise that despite the presence of loss due to potential future spread and disruption to business, a hypothetical bargain is not intended to measure this loss. Instead, the Court might consider a hypothetical bargain is simply intended to reach a fair and reasonable sum where loss is evident but difficult to measure. In doing so, the Court would actively consider issues of remoteness, causation and proportionality, and how a hypothetical bargain might be constructed to ensure these issues are accounted for, due to the exercise directly intending to reach a fair sum.

If the Courts do not recognise the shortcomings of using hypothetical bargains and the compromise in calculating damages they represent, then there is a risk such an approach may be misused and applied when more strongly established approaches are better suited. In *Gao v Zespri Group Ltd*, this resulted in issues of causation and remoteness not being expressly considered.[196] Recognising the compromise on more traditional principles that a hypothetical bargain represents, not only allows for meaningful remedy in difficult cases such as *Gao v Zespri Group Ltd*, but ensures these traditional principles remain

[194] See *Gao v Zespri Group Ltd*, above n 1, at [124]–[142].

[195] *Attorney-General v Blake*, above n 178, at 278–279.

[196] *Gao v Zespri Group Ltd*, above n 1.

respected.[197] Justifying hypothetical bargains as an exception to these principles recognises their importance, whilst ensuring damages are properly justified on other grounds.[198]

[197] *Gao v Zespri Group Ltd*, above n 1. See also See Mahoney, above n 121, at 59; and Howarth, above n 58, at 547.

[198] See Howarth, above n 58, at 547.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7710 words.

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