



## One Step closer to the end of Wrotham Park damages in employee competition cases

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*Claimants have seen Wrotham Park awards as a valuable remedy where there is difficulty in showing loss, but the award of these 'negotiating damages' has been the subject of considerable judicial and academic debate. In Morris-Garner, the Supreme Court considered the availability of damages for breach of non-compete and non-solicit covenants contained in a business sale contract.*

### **What are Wrotham Park damages?**

Usually, damages for breach of contract are calculated by reference to the financial loss suffered by the claimant as a result of the defendant's actions. The aim is to put the claimant in the position they would have been in had the contract been properly performed. *Wrotham Park* damages are different. They are awards to reflect a hypothetical licence fee: the amount the parties, acting reasonably, would have agreed as the price for releasing the defendant from the obligation, which he or she failed to perform.

The term '*Wrotham Park* damages' is derived from the 1974 case of that name, in which houses were built on land in breach of a restriction. Brightman J refused to grant a mandatory injunction to demolish the houses, but instead awarded the claimant damages. The defendants argued that nominal damages should be awarded because the value of the land had not been reduced. The judge disagreed. He held that it would not be just for the claimant to receive no compensation and to permit the defendants to be 'left in undisturbed possession of the fruits of their wrongdoing'.

Rather than grant an injunction, the judge awarded the claimant damages based on the principle of a notional 'licence fee', an amount to reflect what the defendants would have had to pay in order to secure the claimant's agreement to relax the covenant.

### **Morris-Garner: the facts**

The claimant, One Step (Support), bought a business providing support for young people leaving care which had previously been run by Karen and Andrea Morris-Garner. In connection

with the acquisition, it shortly afterwards entered into an agreement with the Morris-Garners by which the latter agreed for a limited period not to engage in specified modes of competition with the business which they had just sold. In breach of the covenants they had agreed to, the Morris-Garners set up a new company (Positive Living) and did compete with the claimant. One Step brought proceedings against the defendants for those breaches of the agreement.

### **High Court**

At first instance, the trial judge, Phillips J, found that the defendants had breached their non-compete obligations. He allowed One Step to elect for *Wrotham Park* damages because it would be hard to identify the financial loss it had suffered, partly due to the secrecy surrounding the establishment of Positive Living as a competing business. A quantum hearing was fixed but has not yet been held.

### **Court of Appeal**

The Court of Appeal (Longmore, Christopher Clarke and King LJ) dismissed the defendants' appeal and held that *Wrotham Park* damages were not restricted to cases where a claimant has suffered no identifiable financial loss, nor to cases which are exceptional. The test was whether an award of *Wrotham Park* damages was a 'just response' in the particular case. That was a matter for the judge to decide on a broad-brush basis. The defendants appealed.

### **Supreme Court**

The issues before the Supreme Court were (i) where a party

***‘the circumstances in which negotiating damages will be available in employee competition cases are very limited’***

is in breach of contract, in what, if any circumstances, is the other party to the contract entitled to seek negotiating damages; and (ii) whether the Court of Appeal was correct to uphold the judge’s finding that such damages were available in this case.

The Supreme Court unanimously allowed the defendants’ appeal, finding that the courts below had adopted a mistaken approach to the assessment of damages. It was not appropriate to award *Wrotham Park* damages in the circumstances of this case.

Lord Reed gave the main judgment with which Lady Hale, Lord Wilson and Lord Carnwath (who gave a separate judgment) agreed. Lord Reed conducted a detailed review of the law of damages and set *Wrotham Park* in context. Lord Sumption gave a separate judgment in which he agreed with Lord Reed’s conclusions but for different reasons. He also considered that the notional price of a release may be relevant, not as an alternative measure of damages, but as an evidential technique for estimating what the claimant can reasonably be supposed to have lost. Lord Carnwath’s judgment analysed and compared the reasoning of Lord Reed and Lord Sumption and explained why he agreed with Lord Reed.

The Supreme Court held that:

- damages for breach of contract are based on the difference to the claimant between the outcome of performance and non-performance. An award of damages based on a hypothetical release fee depends on considering the outcome as if the contract had not been performed but had, instead, been replaced by a different contract;
- ‘negotiating damages’ (the term adopted by the Supreme Court to replace ‘*Wrotham Park* damages’) can be awarded for breach of contract in circumstances where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. The court gave the examples of breaches of restrictive covenants over land, intellectual property or confidentiality agreements as cases where it may be appropriate to award negotiating damages;
- in cases of breach of non-compete covenants, as in this case, where claimants suffer pecuniary loss resulting from wrongful

competition, such loss is measurable by conventional means. One Step’s case was that it had suffered financial loss and while the loss was difficult to quantify, the Supreme Court made it clear that ‘this is a familiar type of loss, for which damages are frequently awarded’ (para 98) and can be quantified in a conventional manner;

- the idea that damages based on a hypothetical release fee are available whenever that is the just response and that being a matter to be decided by the judge on a broad brush basis, was mistaken. The basis on which damages are awarded cannot be a matter for the discretion of the trial judge;
- as to whether evidence of a hypothetical release fee could be relevant to an assessment of damages for breach of contract, it is a matter for the judge to decide whether, in the particular circumstances of a case, evidence of a hypothetical release fee is relevant and what weight should be placed on it. That fee would not itself be the measure of One Step’s loss in a case of this kind.

#### ***Ramifications***

The Supreme Court’s judgment provides much needed clarity in relation to the availability of negotiating damages for breach of restrictive covenants. It appears that the circumstances in which negotiating damages will be available in employee competition cases are very limited.

It now seems clear that breaches of employee restrictive covenants will not warrant such an award (although there may be circumstances in which negotiating damages may be available for breaches of confidence, but, in practice, this is likely to be fact specific).

#### **KEY:**

<i>Wrotham Park</i>	<i>Wrotham Park Estate Co Ltd v Parkside Homes Ltd</i> [1974] 1 WLR 798
<i>Morris-Garner</i>	<i>Morris-Garner v One Step (Support) Ltd</i> [2018] UKSC 20