Client Alert | Commercial Litigation

Bad news for jackpot damages: *Wrotham Park* and the Supreme Court

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The uncertain prospect of an award of "*Wrotham Park*"[1] damages, seen by its critics as "jackpot damages",[2] while being advanced by claimants who struggle to establish economic loss, has historically been unnerving for litigators advising clients who enter regularly into restrictive covenants. These typically include, for example, the types of restrictions arising every day in non-compete, non-solicit and non-disclosure agreements.

The Supreme Court's decision in *Morris-Garner and another (Appellants) v One Step (Support) Ltd (Respondent) [2018] UKSC 20*, published on 18 April 2018, materially narrows the scope of this unusual category of damages. Thus, in allowing the appeal, the Supreme Court provided welcome guidance and clarity on the more limited circumstances in which they should be awarded.

Background

"*Wrotham Park*" damages, also sometimes known as "licence fee" or "negotiating damages", represent damages for such an amount as would notionally/hypothetically have been agreed between the parties, at arm's length and acting reasonably, as the price for releasing a defendant from its obligations to the claimant. The circumstances in which such damages are awarded, until this recent decision, have been unclear. Further, assessment of damages in this way is inherently uncertain, and thus difficult to predict. Still, on occasion an award of negotiating damages could entitle a claimant to damages which exceed the conventional measure for awarding damages for breach of contract (i.e. by reference to the actual financial loss suffered by the claimant, in order to put the claimant in the position it should have been in had the contract been properly performed).

Facts of the case

The Respondent company, One Step (Support) Ltd ("**One Step**") had purchased from the Appellants a business providing support for young people leaving care. As part of that transaction, the Appellants agreed to be bound for three years by restrictive covenants prohibiting them from competing with One Step or from soliciting its clients. The Respondent brought proceedings alleging breach of that agreement.

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1 Pronounced "Rootam" and named after *Wrotham Park Estate Company Limited v Parkside Homes Limited* [1974] 1 WLR 798.

2 *Marathon Asset Management LLP v Seddon and others* [2017] EWHC 300 (Comm), paras 282-283.

At first instance, the judge held that the Appellants had breached the restrictive covenants and that One Step was entitled to damages to be assessed either in the usual way (ordinary compensatory damages) or on the *Wrotham Park* basis (for such amount as would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligations).[3] That decision (i.e., that One Step was entitled on both bases) was upheld by the Court of Appeal.[4]

The Judgment

The appeal was allowed by the Supreme Court, on the basis that the trial judge and the Court of Appeal had erred in their approach to the question of damages. Lord Reed, giving the majority judgment,[5] found that damages for breach of contract have the objective of compensating the claimant for the loss sustained as a result of non-performance of a contract, and should be assessed by reference to that objective. It would be necessary to quantify that loss as accurately as the circumstances permit, and as best it can on the available evidence. Evidential difficulties in establishing the measure of loss do not justify the use of an alternative basis for an award of contractual damages based on the benefit gained by the wrongdoer.

Lord Reed found that the award made in *Wrotham Park* itself, and in the cases in which it was followed during the next quarter century, were made in the exercise of a unique statutory jurisdiction under the Lord Cairns' Act[6] to award damages in lieu of an injunction (and all concerned either a tortious interference with property rights, or the breach of a restrictive covenant over land). Later, "negotiating damages" took on a wider meaning and have been treated as available at common law in cases of breach of contract. However, neither the original "*Wrotham Park*" damages, nor the wider "negotiating damages" are a separate method for assessing contractual damages, but are based on the conventional understanding of damages for breach of contract.

A useful summary of Lord Reed's conclusions can be found at paragraph 95 of his judgment. He ultimately found that the "Court of Appeal was mistaken in treating the deliberate nature of the breach, or the difficulty of establishing precisely the consequent financial loss, or the claimant's interest in preventing the defendants' profit-making activities, as justifying the award of a monetary remedy which was not compensatory."[7] Taking the conventional approach to assessing contractual damages, Lord Reed held that the Respondent suffered financial loss as a result of the Appellants' breach of contract, the effect of which was to expose the Respondent's business to competition which would otherwise have been avoided. The breach therefore resulted in a loss of profit and goodwill. Although this was difficult to quantify, damages would still have to be assessed on that basis.

Lord Reed held that "negotiating damages" should only be awarded for breach of contract in circumstances (which were not found to apply to the present case) where the loss suffered by the claimant is most appropriately measured by reference to the economic value of the right which has been breached, considered an asset. These circumstances can exist in cases where "the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement, or a confidentiality agreement."[8]

Practical implications

Restrictive covenants of the type considered in *One Step,* in particular non-compete and non-disclosure agreements, are common clauses in commercial contracts (and are effectively "boilerplate" in certain fields, for example, of acquisitions and employment). It is a similar reality that businesses may breach these types of agreements, often deliberately, for many, disparate reasons, and in doing so remain potentially exposed to claims which are often intimated without the alleged loss being clearly quantified, or quantifiable.

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3 *One Step (Support) Ltd v Morris-Garner* [2014] EWHC 2213 (QB).

4 *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180.

5 Lady Hale, Lord Wilson and Lord Carnwath agreed with Lord Reed. Lord Carnwath gave a concurring judgment. Lord Sumption gave a separate judgment, agreeing that the appeal should be allowed.

6 Chancery Amendment Act 1858, section 2.

7 Para 97.

8 Para 92.

It is in that respect a welcome development that the Supreme Court has materially narrowed of the scope and circumstances in which "*Wrotham Park*" damages may be awarded, as the exception, and not the rule.

The difficulties inherent in assessing negotiating damages mean that this is likely to remain a controversial area. The decision should nevertheless reduce the scope for speculative and/or opportunistic litigants to capitalise upon uncertainties around the prior jurisprudence, so as to assert an entitlement to unquantified or even "jackpot" damages. In other words, claimants should heed this express[9] reminder that if they cannot establish economic loss resulting from a breach, the normal inference is that they have not suffered loss – and cannot, therefore, be awarded more than nominal damages.

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9 Para 95(9).