

## NO PAIN NO GAIN? THE HIGH COURT PROVIDES GUIDANCE ON WROTHAM PARK DAMAGES

---

### WROTHAM PARK DAMAGES

The conventional view of damages is that they are intended to compensate the wronged party, not to penalise the wrongdoer. This means that damages will normally be assessed by reference to the innocent party's loss, rather than by reference to a wrongdoer's gain. In a breach of contract claim a claimant, who can establish breach but no loss, will usually only be entitled to nominal damages.

This can cause unfairness, for example, where one party flouts its contractual obligations in order to generate a significant profit but the innocent party is left without a meaningful remedy because it is unable to demonstrate that it is worse off (in financial terms) as a result.

One way round this problem is for the Court to award "Wrotham Park" damages, which are measured by reference to a reasonable fee for releasing the wrongdoer from the obligations that it has breached (or, put another way, a reasonable fee for licensing the defendant's wrongful activities). In a number of cases, the Court has calculated this reasonable fee by imagining a hypothetical negotiation between a willing seller, in the innocent party's position, and a willing buyer, in the wrongdoer's position, for a release of the relevant obligation. The Court then awards, as damages, the fee that the parties would have agreed in that hypothetical negotiation. This legal fiction renders it irrelevant that the innocent party has not suffered a loss in the conventional sense.

The great difficulty with Wrotham Park damages is that the cases do not disclose a consistent set of rules on what Wrotham Park damages are, when they should be awarded or how they should be calculated. In *Marathon Asset Management LLP and another v Seddon and another* [2017] EWHC 300 (Comm), Leggatt J sought to provide more coherent guidelines on Wrotham Park damages (or, as the judge preferred to call them, "licence fee damages").

### THE CLAIM

The defendants were former employees of the claimant. Before leaving the claimant's employment, the defendants took copies of confidential information belonging to the claimant. The claimant issued proceedings and sought to recover Wrotham Park damages, arguing that an appropriate measure of damages would be the price which the claimant could reasonably have charged the defendants for releasing the defendants from their obligations of confidence. It valued those damages at £15m, which it said was the minimum price it would have charged for allowing the defendants to take the confidential information.

### THE DECISION

The judge awarded nominal damages of only £2.

The main feature of this case was that, although a large amount of valuable confidential information was taken, very little use was subsequently made of it and the defendants obtained no meaningful benefits from having taken it. The claimant suffered no loss as a result of the defendants' breaches and the confidential information had been returned to the claimant in 2013.

The claimant argued that this did not matter because damages should be calculated at the date when the information was taken (the date of breach). It was irrelevant (according to the claimant) that little use was subsequently made of the confidential information because that eventuality was not known at the date of the hypothetical negotiation between the parties. Damages should therefore be assessed as a reasonable release fee for the defendants to be allowed to make as much use of the confidential information as they saw fit. In other words, the claimant argued that the defendant should be required to pay for the value of the confidential information, notwithstanding the fact that they had made very little use of it.

The judge rejected that argument. For him, the key point was that the remedy awarded must match the wrong committed. Here, the claimant was seeking damages for the copying of the confidential information, not for any subsequent misuse of it. The remedy awarded must "*respond*" to that particular wrong. This meant that "*the relevant question to be asked in quantifying the damages is what price would reasonably have been agreed simply to permit the defendants to copy the files onto USB drives – without releasing them any further from their obligations.*" The "*obvious answer*" was that only a token sum would have been agreed in such a negotiation. To hold otherwise would be to detach the remedy from the wrong actually committed. This meant that the claimant was entitled only to nominal damages.

### THE JUDGE'S COMMENTS ON WROTHAM PARK DAMAGES GENERALLY

The findings and analysis described above were enough to decide the outcome of this particular case. However, the judge also made a number of other (*obiter*) comments about Wrotham Park damages generally, which may have a significant impact on the way claims are decided in the future. In particular, the judge expressed his views on when Wrotham Park damages should be granted and how they should be calculated.

#### WHEN WILL WROTHAM PARK DAMAGES BE AVAILABLE?

Leggatt J expressed the view that Wrotham Park damages should not be available for breach of an “ordinary” commercial contract. This was (broadly) because under an ordinary commercial contract a party’s “legitimate interest” in performance of the contract is limited to receiving the profit it would make from that performance of the contract. In that situation, claimants could adequately be compensated by damages which would put them in the position that they would have been in if the contract had been performed (i.e. by awarding damages assessed on a conventional basis).

According to the judge, the position would be different where “the purpose of the contract is to protect a proprietary interest.” (“Property”, for these purposes would include confidential information.) In that situation, a party’s “legitimate interest” extends to preventing a contract-breaker from making a profit which is not reflected in any loss which the innocent party has suffered. In that situation, normal damages might be an inadequate remedy and Wrotham Park damages would in principle be available.

These comments are *obiter dicta* but, if the same approach is taken in future cases, this will significantly restrict the availability of Wrotham Park damages in breach of contract claims because they will only be available where the purpose of the relevant contract is to protect a proprietary interest. Other circumstances can and do arise where Wrotham Park damages would be the only way of providing a meaningful remedy but, if Leggatt J is right, they will no longer be available; the obvious example being disputes about non-compete and non-solicitation covenants.

#### QUANTIFYING WROTHAM PARK DAMAGES

The judge also set out his views on how Wrotham Park damages should be calculated:

1. First the Court should identify the benefits obtained by the defendants from their unlawful activity and consider whether those benefits could have been obtained using legitimate means. If so, then damages should be measured by reference to the costs of employing those legitimate means. For example, where the benefit consists of using property which could be bought or hired elsewhere, damages will be measured by reference to the market price.
2. If the defendant could not have obtained the benefit lawfully, the Court will consider whether “it was reasonable to expect” that the innocent party would have agreed to

licence the wrongful activity. If so, damages will be the fee which the wrongdoer would reasonably have been charged.

3. If the innocent party would not have agreed to release the wrongdoer from its obligations (for a reasonable fee), the appropriate method of valuation would be to assess the amount of profit made by the wrongdoer which is fairly attributable to its wrongful use of the claimant’s property (or other wrongful act). This can be done either by ordering an account of profits or ordering payment of a percentage of the defendant’s profits. It will be for the judge to decide which of these remedies is more appropriate.

This approach is a departure from previous cases where the emphasis has been on a hypothetical negotiation between the innocent party and the wrongdoer. Leggatt J clearly considered this concept of a hypothetical negotiation (which he described as a “thought experiment”) to be of limited assistance. If judges adopt a similar approach in the future, the idea of a hypothetical negotiation is likely only to be relevant in the (probably unusual) event that the Court finds that the innocent party would have been willing to release the wrongdoer from its obligations for a reasonable fee (see paragraph 2 above). In other cases, sums payable by a wrongdoer will be determined either by the open market value of the benefit it has obtained (see paragraph 1 above) or by reference to profits made from the wrongful activity (see paragraph 3 above).

If the situation is one where (applying these rules) the correct remedy would be an account of profits or an order to pay a percentage of profits, no sums will be payable if the defendant has not actually made a profit from its wrongdoing, no matter how egregious the defendant’s conduct may have been.

#### COMMENT

In this case, Leggatt J sought to set out a more coherent set of rules on when Wrotham Park damages should be awarded and how they should be calculated. It should be noted, however, that there is a tension between what Leggatt J said in this case and the views of other judges expressed in earlier cases.

In particular, in the recent case of *Morris-Garner and another v One Step (Support) Ltd* [2016] EWCA Civ 180, Wrotham Park damages were awarded for breaches of non-compete and non-solicitation covenants and the Court of Appeal adopted a much more flexible approach to the question of whether Wrotham Park damages should be awarded holding, very broadly, that Wrotham Park damages could be awarded where this

would be a “*just response*”. Therefore there remains a degree of uncertainty in this area. The Supreme Court has granted permission to appeal in the *One-Step* case and it is to be hoped that this will result in a clarification of the rules in the not too distant future.

#### CONTACT DETAILS

If you would like further information or specific advice please contact:

##### GEOFF STEWARD

PARTNER  
LITIGATION  
DD +44 (0)20 7849 2341  
geoff.steward@macfarlanes.com

##### JONATHAN PRATT

SENIOR SOLICITOR AND PROFESSIONAL SUPPORT LAWYER  
LITIGATION  
DD +44 (0)20 7849 2525  
jonathan.pratt@macfarlanes.com

**MARCH 2017**

#### MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane [www.macfarlanes.com](http://www.macfarlanes.com)

This note is intended to provide general information about some recent and anticipated developments which may be of interest.  
It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT.  
The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority.  
It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes March 2017