"Negotiating damages" and the compensatory principle

The UKSC decision in Morris-Garner helps clarify the murky area of “negotiating damages”. In applying the orthodox approach premised on traditional compensatory principles, there is now greater certainty where "negotiating damages" are concerned, with the focus on quantifying the value of loss suffered rather than arguments premised on the justice of the case.

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Introduction

The recent 2018 UK Supreme Court (UKSC) judgement in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 (*Morris-Garner*) sets out a new and clear approach to *Wrotham Park* damages, termed by the court as "negotiating damages". *Wrotham Park* damages are awarded as “such a sum of money that as might reasonably have been demanded by the plaintiff…as a quid pro quo for relaxing the covenant”, notwithstanding that the plaintiff would not have been willing to bargain for the relaxation of the covenant in the first place. Prior to *Morris-Garner*, there has been much debate over whether the basis of negotiating damages is restitutionary or compensatory. With the UKSC in *Morris-Garner* finding that negotiating damages are compensatory, this debate can finally be resolved.

Background

The company, One Step (Support) Ltd (One Step), was in the business of providing support to vulnerable young persons and adults with mental health and learning disabilities. One Step’s shares were held by the Morris-Garners and the Costelloes. After a management deadlock, the Morris-Garners sold their shares in One Step to the Costelloes pursuant to a buy-out agreement agreed between the parties. The agreement contained a covenant prohibiting the Morris-Garners from engaging in business that competed with One Step without its consent for a period of three years.

In breach of the covenant, the Morris-Garners used a company which they had earlier incorporated called Positive Living Ltd (Positive Living) to compete with One Step. Positive Living was sold by the Morris-Garners after the restrictive covenants had expired and proceedings were commenced by One Step against the Morris-Garners for breaching the covenants. Both the English High Court and the English Court of Appeal found that the Morris-Garners were in breach of the non-compete covenants and held the Morris-Garners to be liable for damages on a *Wrotham Park* basis as a just response to the breach, with the quantum determined on a “broad brush basis”. The Morris-Garners appealed to the UKSC against the award of damages on a *Wrotham Park* basis.

The Juridical basis of Negotiating Damages

The UKSC allowed the Morris-Garners' appeal, holding that the lower courts were incorrect as the basis for an award of damages is not a matter for the judge's discretion, and had to be determined in a principled manner.

Lord Reed JSC, with whom Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreed, delivered the main judgement and adopted an orthodox approach centred on compensation for loss in determining whether negotiating damages were to be awarded.

Lord Reed's judgement rests on the basic principle that damages for breach of contract are compensatory, to be claimed as of right, and are to be awarded or refused on the basis of legal principle. The claimant must show loss for damages to be awarded. If loss cannot be established, only nominal damages would be awarded.

The UKSC found that the right to control the use of one's property or a right created or protected by contract was a "valuable asset". Negotiating damages, calculated through determining the hypothetical fee for the use of the innocent party's property or a release from the obligation, are to be awarded based on the economic value of the "valuable asset" lost. The hypothetical release fee is not itself a type of loss, but a tool to aid quantification of the economic value of the "valuable asset".

Prior cases dealing with *Wrotham Park* damages were also considered by the UKSC. The UKSC held that common law damages awarded for the purposes of depriving a wrongdoer of profits could only be awarded in exceptional circumstances, applying *Attorney General v Blake* [2001] 1 AC 268. Further, the decision of the UK Court of Appeal in Experience *Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 was also subject to criticism for some of its reasoning despite the result being "support[able] on an orthodox basis". The UKSC stated that difficulty in proving loss does not render it unnecessary to prove such loss or damage, and that legitimate interest in preventing an activity carried out in breach of contract is irrelevant to an award of damages. Further, damages for a breach of contract and an account of profits do not exist on the same continuum.

The UKSC eventually held that the losses suffered in *Morris-Garner* for the breach of contract may be quantified through conventional means, and the issue of a loss of a valuable asset or right created or protected by the contract did not arise.

The Singapore approach

The question of *Wrotham Park* damages has been considered in the Singapore Court of Appeal decision in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and Anor* [2017] 2 SLR 129 (*PH Hydraulics*) which accepted *Wrotham Park* damages as largely compensatory in nature, despite being different from the traditional award of compensatory damages. The Singapore High Court in *Marken Limited (Singapore Branch) v Scott Ohanesian* [2017] SGHC 227 noted that the juridical basis of *Wrotham Park* damages was a vexed question.

The UKSC's clear statement in *Morris-Garner* that *Wrotham Park* or negotiating damages are compensatory is likely to receive a positive reception by the Singapore Courts, should the question of *Wrotham Park* damages arise for decision in the future.

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