WROTHAM PARK DAMAGES – RECOVERING A SLICE OF THE WRONGDOER'S PROFITS

What are Wrotham Park Damages?

The case itself[1] involved land that was purchased by a developer knowing it was subject to a restrictive covenant who built upon it in defiance of the covenant. The beneficiaries of a covenant sought a mandatory injunction the houses now in place should be pulled down but this was refused as an unpardonable waste of housing. In lieu of that injunction there was an award of damages calculated by reference to the sum which they would have received on a negotiated release of the covenant – being 5% of the developer's anticipated profit.

So note this is not a payment to compensate for a loss suffered in the usual course (e.g. damage to a building from vibration) but rather akin to an opportunity cost.

Although Wrotham Park is a first instance case and there are not many similar awards made it is a well established part of the law[2].

Note also that the remedy of an account may achieve a much higher recovery but it is not proposed to discuss that remedy here.

Issues still at large

There are really two main issues that arise for commercial practitioners when reviewing whether to add a claim for Wrotham Park damages to a claim:

(i) When can they be recovered?

(ii) What sort of monies will the court award?

These inter-relate because they are the two sides of any cost/benefit analysis of adding them to a claim. However the first in fact indicates when a practitioner may be forced by practical considerations to mount such a claim anyway (as below).

When can they be claimed?

The recent Court of Appeal decision in Morris-Garner v One Step (Support) Limited [2016] EWCA Civ 180 has essayed a detailed review of this issue but has been able to identify for us guidelines rather than some hard and fast rules – in fact they jettisoned some suggested clear-cut limitations.

The following is something of an explanatory checklist:

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[1] Wrotham Park Estate Co Ltd. v Parkside Homes Ltd [1974] 1 WLR 798

[2] For instance see the clear approval of the Privy Council in Pell Frischmann Engineering Ltd. v Bow Valley Iran Ltd. & Ors [2009] UKPC 45

(i) A deliberate breach of contract by the wrongdoer for his own financial advantage – so knowing that there a restrictive covenant and going ahead anyway or selling a business with restraint of trade covenants and then setting up in covert competition.

(ii) The claimant would have difficulty in establishing their financial loss. It had been argued that if the Claimant could have a stab at assessing damages then Wrotham Park damages were simply not available, and we all know cases where assessing damages can be very difficult/speculative. This suggested limitation failed. A classic example is valuing the damage caused to the goodwill of a business that has been bought with a restraint of trade that has been flouted. Equally the fact that no conventional damages for which compensation could be awarded – as in Wrotham Park itself – is not a ground for refusing the Wrotham Park remedy. The assessment of whether it is too difficult for the Claimant is very much a matter for the first instance judge to assess and, of course, whether the justice of the case calls for such an award (in part might the Defendant otherwise "get away with it"). One could also instance disturbance of the market as an area where assessing damages could be very difficult or breaking a de facto monopoly. There has been some stress on the need for judges to be robust in this assessment i.e. not to be coy or conservative in approaching the sum to award.

(iii) The Claimant should have a legitimate interest in preventing the Defendant's profit-making activity. This seems to the writer a guideline likely to be added to by accretion since it may reflect a case by case basis for identifying which are the "exceptional" cases where Wrotham Park damages can be awarded.

(iv) It is doubtful if interim relief could be obtained to prevent the Defendant's breach. The fact that interim relief has not been sought is no bar to seeking Wrotham Park damages.

(v) The remedy is exceptional but practitioners seeking to differentiate cases that are or are not exceptional face exactly the same difficult as the Judges find establishing the key indicia. That means one is thrust back on the reported factual instances where it has been granted as a starting point. Plainly Judges do not want this remedy to be seen as the norm.

(vi) The remedy must be specifically pleaded. Plainly the above areas should be considered to incorporate into the pleading as a build up to the remedy.

(vii) There is certainly a starting point of assessing damages at date of breach – this is natural in a case where the assessment is what the parties would have bargained for to release the right but one can foresee cases where this will not meet the justice of the case (as has been recognised in the reported cases).

Size of Award

Readers familiar with Stokes v Cambridge Corp (1961) 13 P&CR 77 may have already contrasted a fairly standard starting point of 33% with the 5% award in Wrotham Park itself. As is well know awards under Stokes v Cambridge can go appreciably higher than 33% and in fact if the object of the

exercise is in part to punish the wrongdoer (per encourager les autres) it seems curious to leave them with any profit at all. In Morris-Garner the talk was of "(a) fairly modest percentage of the profit..." which does not suggest a sword of Damocles hanging over would be contractual breakers to deter them from risking a breach for profit.

In Preston & Newsom's Restrictive Covenants Affecting Freehold Land 10th Ed at §9-26 et seq there is a detailed discussion of quantification but of especial interest to practitioners will be the analysis of a variety of Wrotham Park awards at §9-31 with instances of 26/28%, 35% and 40%.

In reality it is difficult to predict the size of the award but it is obvious that this remedy may yield very substantial sums quite removed from the sums that can in some circumstances be established as suffered and liable to be compensated for in a conventional award of damages.

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