THE CALCULATION OF DAMAGES IN LIEU OF INJUNCTION

Introduction

1. Since the decision of the Supreme Court in ***Coventry v Lawrence*** **[2014] AC 822** early last year, and its disapproval of authorities such as ***Regan v Paul Properties DPF No 1 Ltd*** **[2007] Ch 135** and ***Watson v Croft Promo-Sport Ltd*** **[2009] EWCA Civ 15**, increased attention should be given to the possibility of the Court making an award of damages in lieu of injunction.

2. The jurisdiction to make such an award arises out of Section 50 of the Senior Courts Act 1981 ("**the Act**"), whose origins are to be found in the Chancery Amendment Act 1858. Section 50 states:

> "*Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance*."

3. A similar power is available in county court proceedings by virtue of Section 38(1) of the County Courts Act 1984

Some Basics

4. At the outset, one should appreciate that damages under the Act are quasi-equitable in nature, albeit that they have a statutory origin. In consequence, as explained by Mr Anthony

Mann QC in ***Amec Developments Limited v Jury's Hotel Management (UK) Limited*** **[2001] 82 P&CR 22**, at [36]:

> "… *the sort of damages questions involved in cases like the present are matters of judgment which are incapable of strict rational and logical exposition from beginning to end* …"

5. This point was reinforced by Peter Smith J in ***WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*** **[2006] EWHC 184**, at [164], where he referred to:

> "… *the flexibility of the court, as to the calculation of damages under [the Act] when applied to the facts of the case* …"

6. Or, as Neuberger LJ put it in ***Lunn Poly Limited v Liverpool & Lancashire Properties Ltd*** **[2007] L&TR 6**, at [22]:

> "… *The court is not limited to any specific basis for assessing damages in lieu of injunction* …"

7. Although, at [21], he said:

> "*The approach to assessing damages under the Act must not be arbitrary, nor should it be indefensibly consistent with the approach to assessment of damages and valuations in other fields; nor should it be unpredictable and therefore likely to lead to litigation* …"

8. In ***Lunn Poly***, at [22], Neuberger LJ identified the three normal bases for awarding damages in lieu of injunction under the Act. These are:

> "… *(a) traditional compensatory damages – i.e. a sum which compensates the claimant for past present and future losses as a result of the breach but not for the loss of the covenant; (b) negotiating damages – i.e. a sum based on what reasonable people in the position of the parties would negotiate for the release of the right which has been, is being, and will be breached; and (c) an account – i.e. a sum*

> *based on an account, that is, on the profit the defendant has made, is making and will make as a result of the breach*."

9. This seminar will focus on the second of these categories, i.e. 'negotiating damages.' However, it should be noted that an award of such damages may not be appropriate in all cases. So, for example, in an obiter passage in ***Coventry v Lawrence*** **[2014] AC 822**, at [248], Lord Carnwath doubted whether such damages would be suitable at least in a nuisance case. He said:

> "*... In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate "price". The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority*."

10. His views attracted some support from Lord Neuberger, at [131]:

> "*... there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted ...*"

11. Although, Lord Clarke added, at [173]:

> "*... where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused by the nuisance, including, for example, an award which represented a reasonable price for a licence to commit the nuisance*."

12. As an aside, damages in lieu of injunction are frequently referred to as '***Wrotham Park*** damages,' after the famous decision of Brightman J in ***Wrotham Park Estate Co Limited v Parkside Homes Limited*** **[1974] 1 WLR 798**.

13. This may be a convenient shorthand expression. However, in ***Pell Frischmann Limited v Bow Valley Limited*** **[2011] 1 WLR 2370**, at [46], Lord Walker warned:

> "*…it can become misleading if it is not made clear … whether it refers to (1) every type of compensatory damages which exceed the actual financial loss to the claimant by an actionable breach of duty; or (2) damages awarded (in lieu of specific performance or an injunction) under the jurisdiction created by section 2 of the Chancery Amendment Act 1858 … ('Lord Cairns's Act') or (3) damages awarded under Lord Cairns's Act in respect of a non-proprietary breach of contract (that is, a breach of contract not involving the invasion of a property right). The expression is probably most helpful as a description of the second, intermediate category, which includes but is not limited to the third, narrow category …*"

<u>The Hypothetical Negotiation</u>

14. In ***Attorney General v Blake*** **[2001] 1 AC 268**, at 282, Lord Nicholls considered the jurisdiction of the Court to award damages in lieu of an injunction under the Act, the effect of which was to permit the Court to award damages instead of an injunction for the future, thus in practice sanctioning the indefinite continuance of a wrong. The power to give damages in lieu of an injunction imported the power to give an equivalent for what was lost by the refusal of an injunction. He said:

> "*The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct. The court's refusal to grant an injunction means that in practice the defendant is thereby permitted to perpetuate the wrongful state of affairs he has brought about ...*"

15. Or, as was explained by Arnold J in ***HTC Corporation v Nokia Corporation*** **[2013] EWHC 3778 (Pat)**, at [12]:

> "*… where damages are awarded in lieu of an injunction, they are to be assessed 'once and for all' in respect of all future infringements, so that any further claim in respect of future infringements would be struck out as res judicata. The quantum of such damages will be the amount of money which could reasonably have been demanded by the claimant for his consent to such acts …*"

16. This approach to damages was adopted by Mr Anthony Mann QC in ***Amec*** (referred to above). That case related to a breach of a covenant by the defendant not to build nearer to the claimant's property than a specified line. In assessing the award of damages, Mr Anthony Mann QC said, at [12]:

> "*... the basic approach to this case should be the same as that in a number of cases in which there have been infringements of easements and restrictive covenants but damages have been awarded in lieu of an injunction. That approach is to ascertain* "such a sum of money as might reasonably have been demanded by [the Claimant] from [the Defendant] as a quid pro quo for [permitting the encroachment]"*, to use (and adapt) the formulation of Brightman J in* Wrotham Park v Parkside Homes [1974] 1 WLR 798*, at 815D* ..."

17. To a similar effect, in ***Stadium Capital Holdings (No.2) Limited v St Marylebone Property Co Limited*** **[2012] 1 P&CR 7**, at [69], Vos J described the approach as seeking to ascertain:

> "*… the price which a reasonable person would pay for the right of user, or the sum of money which might reasonably have been demanded as a quid pro quo for permitting the trespass …*"

18. Likewise, in ***Pell Frischmann***, at [49], Lord Walker said:

> "*… It is a negotiation between a willing buyer (the contract-breaker) and willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation …*"

19. Or, as it was put by HHJ Cooke (sitting as a Deputy Judge of the Chancery Division) in ***Kettel v Bloomfold Limited*** **[2012] EWHC 1422 (Ch)**, at [61]:

> "*… damages are to be assessed on what was referred to in the trial as the 'release fee' basis, that is to say, the sum which would be negotiated between willing parties for the right to do what cannot be done without the [claimant's] consent …*"

20. It goes without saying that the parties should be careful to define what is to be taken to be the subject matter of the hypothetical negotiation. So, for example, in the case of a trespass

lasting only a finite period of time, the Court should "*have regard to the actual period of trespass and … treat the parties as having negotiated on that basis*" rather than to assume that the parties to the hypothetical negotiation would not have known at the commencement of the trespass for how long it would last: see ***Eaton Mansions (Westminster) Limited v Stinger Compania de Inversion SA*** **[2013] EWCA Civ 1308**, at [12], per Patten LJ.

21. In some cases, it may be difficult to define the subject matter of the negotiations. So, for example, the parties may need to consider whether the licence granted by the hypothetical negotiation should be "*exclusive or whether it would contain quality control provisions*." See ***The National Guild of Removers and Storers Limited v Statham*** **[2014] EWHC 3572 (IPEC)**, [12], per Judge Hacon. This will very much depend on the facts of the case and the realities of the circumstances in which the parties were hypothetically negotiating.

The Date of the Hypothetical Negotiation

22. Once the parties have ascertained the subject matter of the hypothetical negotiation, it is necessary to consider the date on which that negotiation should be taken to have occurred.

23. In ***Lunn Poly***, at [18], Neuberger LJ said:

> "*… There is only a presumption that damages under the Act will be assessed as at the date of the breach, and that is a presumption which will sometimes not be applied, in the same way as a similar presumption is often not applied where common law damages for breach of contract are to be assessed …*"

24. To this he added, at [23]:

> "*… one would normally expect that damages … would be assessed at the date of breach …*"

25. This reflects the observations of Mr Anthony Mann QC in ***Amec***, at [32], where he said:

> "*I think that, at least in this case, the correct date for imagining the negotiation is a date before the building works were started … The authorities, while not dealing with this point in terms, are in my view consistent with this approach. In* Wrotham Park *Brightman J calculated damages by reference to what the parties would perceive the likely gain as being, which presupposes that there has been no gain and no development at the time of the assessment, and said: "I think that in a case such as the present a landowner faced with a request from a developer which, it must be assumed, he feels reluctantly obliged to grant, would have first asked the developer what profit* he expected to make *from his operations" (my emphasis) …*"

26. However, the date of the hypothetical negotiation may be moved, depending on the facts of the case. A good example is given in the ***Amec*** case, immediately after the passage quoted above:

> "*… The position might be different in other cases - for example, where one party conceals its acts from the other so as to steal a march and postpone the date at which that other realises that his rights are being infringed. I can see a case for adjustment of compensation there, and it might be useful to shift any imaginary negotiations forward in time …*"

27. Ultimately, each case will turn on its own facts. So, for example in ***HKRUK II (CHC) Limited v Heaney*** **[2010] EWHC 2245 (Ch)**, the Court considered that the developer of two additional stories to a building would need to know he had the 'all clear' some months before the erection of the offending structure commenced.

Post-Negotiation Events

28. The date of the hypothetical negotiation may be of real practical consequence given the approach of the Court towards the impact of post-negotiation events on the assessment exercise.

29. In ***Lunn Poly***, at [27], Neuberger LJ said:

> "*… consistency, fairness, and principle can be said to suggest that a judge should be careful before agreeing that a factor which existed at [the date of the hypothetical negotiation] should be ignored, or that a factor which occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which they would arrive …*"

30. This is entirely consistent with the 'usual' approach to valuation, described by HHJ Finlay QC (sitting as Judge of the High Court) in ***Gaze v Holden*** **[1983] 1 EGLR 147**, at 151B, as follows:

> "*... 'valuation in the usual way' means taking into account the events which have happened as at the date when the [the subject of the valuation] falls to be valued ... [The valuer] is not entitled to take into account events which happened subsequently* ..."

31. Of course, in practice, events which occur after the date of the hypothetical negotiation, may be compelling evidence in determining an appropriate award of damages. So, for example, in ***Pell Frischmann***, at [51], Lord Walker remarked:

> "*In a case ... where there has been nothing like an actual negotiation between the parties it is no doubt reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide as to what the parties would have thought at the time of their hypothetical bargain …*"

32. Ultimately, however, as befits the quasi-equitable nature of damages in lieu of injunction:

> "*… the judge may, where there are good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account …*" (per Neuberger LJ in ***Lunn Poly***, at [29]).

33. There is no fixed rule as to when the Court might make such a direction. As Neuberger LJ added, at [27]:

> "*It is obviously unwise to try and lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events which have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts …*"

34. This is entirely unsurprising given that the purpose of an award of 'negotiating damages' under the Act is to find out what would be a fair result of a hypothetical negotiation between the parties.

The Significance of the Parties' Characteristics & Circumstances

35. It is important to appreciate that the parties to the hypothetical negotiation do not share the same characteristics and attributes of the actual parties to the dispute. Most obviously, as Lord Walker said in ***Pell Frischmann***, at [49]:

> "… *Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored* …"

36. Beyond this, the law is somewhat unclear. Just how hypothetical are the parties to the hypothetical transaction?

37. In ***Stadium Capital***, at [71], Vos J remarked:

> "… *personal characteristics of the parties are to be disregarded in the postulated hypothetical negotiation ... The personal characteristics of the parties, as opposed to the objective facts with which they were faced, are to be ignored* …"

38. On this basis, the judge could not assume that:

> "… *a reasonable hypothetical site owner has either the easygoing characteristics of [former owners of the site] any more than the exceptionally aggressive approach of [the claimant]*."

39. ***Irvine v Talksport Limited*** **[2003] EWCA Civ 423** indicates that a defendant's financial circumstances are not material, as such. The case involved the assessment of damages for passing off. At first instance, at [74], the judge had concluded that the defendant's financial position was irrelevant because there was "*no question of a reasonable endorsement fee being assessed on the basis that the defendant had no money and therefore could not pay*."

On appeal, at [106], Jonathan Parker LJ (with whom Schiemann and Brooke LJJ agreed) said that the judge had been right on this point.

40. However, the foregoing may be contrasted with ***Field Common Limited v Elmbridge Borough Council*** **[2009] 1 P&CR 1**, at [78], where Warren J said (with emphasis in the original):

> "*… in the cases where the hypothetical negotiation has been adopted, it has been the case that the value of the benefit to the particular defendant can be seen to be the value of the benefit which any person in the position of the defendant would receive. That may not be so in all cases. Where it is not so, a hypothetical negotiation may not give the right answer. Or, if that approach nonetheless has to be applied, it will be important to recognise that it is designed to establish the value of the wrongful use to the defendant and not some objective figure as between hypothetical persons negotiating for a hypothetical license: after all, even if damages are to be seen as compensation for loss of an opportunity to negotiate, that negotiation would be one between the actual parties, albeit that they are to be treated as parties willing to deal with each other with a view to reaching a reasonable result*."

41. Likewise, in ***General Tire & Rubber Co v Firestone Tyre & Rubber Co Limited (No.2)*** **[1975] 1 WLR 819** (a patent infringement case), at 833, Lord Wilberforce observed:

> "*The 'willing licensor' and 'willing licensee' to which reference is often made ... is always the actual licensor and the actual licensee who, one assumes, are each willing to negotiate with the other – they bargain as they are, with their strengths and weaknesses, in the market as it exists …*"

42. As it was put succinctly in ***HKRUK***, at [89], by HHJ Langan QC (sitting as a Deputy Judge of the Chancery Division): in carrying out the valuation exercise, the Court should "*plant its feet in the real world*." This accords with the remarks of Rose J in ***Vestergaard Frandsen A/S v Bestnet Europe*** **[2014] EWHC 3159 (Ch), at [82]**, where she said (with emphasis in the original):

> "*The hypothetical negotiation is designed to establish the value of the wrongful use* to the defendant *and not some objective figure as between hypothetical persons negotiating for a hypothetical licence. The negotiation would be one between the*

actual parties, albeit that they are to be treated as parties willing to deal with each other with a view to reaching a reasonable result."

43. Notably, the decision of Vos J in ***Stadium Capital*** contemplates a distinction between the subjective attributes of the actual parties and the objective factors with which the parties found themselves.

44. Such a distinction is well-illustrated by ***Sinclair v Gavaghan*** **[2007] EWHC 2256 (Ch)**. That case concerned a trespass over the tip of a triangular piece of land registered in the name of the Claimants, which the Defendants had used to gain access to a development site. In assessing the correct measure of damages, Patten J said, at [17]:

"*On the basis of these findings the court must then assess what payment would have been agreed for the temporary use of the Claimants' land. It is not of course open to the Defendants as part of this exercise to say that they would (if confronted with a demand for payment) have avoided making any use of the Claimants' land. The purpose of the assessment is to calculate a sum which compensates the Claimants for the financial benefits which the Defendants actually made from using [the land]. But the alternative possibilities open to the Defendants are of course highly relevant as factors which would have influenced the hypothetical negotiations. Clearly the Defendants would not have been prepared to pay and the Claimants would not have been able to demand a fee which was disproportionate to the actual financial advantages of using the [land] as opposed to postponing the works or creating an alternative access point …*"

45. On the facts, it would have been possible for the Defendants to obtain access to the development site via other land that they owned, rather than the Claimants' land. Thus, the parties to the hypothetical negotiation would have known that the Defendants could have avoided using the Claimants' land, although it would have been less convenient to do so and would have made, e.g. deliveries, more complicated and expensive. Patten J concluded, at [43]:

"*The Defendants by their limited use of the Claimants' land obtained a more convenient way of servicing their development in the pre-contract period but they did not achieve anything more and in my judgment they would not have paid or been asked by any reasonable land owner in the Claimants' position to pay more than a relatively modest sum for that privilege …*"

46. Reference may also be made to ***Enfield LBC v Outdoor Plus Limited*** **[2012] EWCA Civ 608**. That case concerned advertising hoardings which had been erected in part on land belonging to the Claimant and in part on neighbouring land (referred to as 'No. 67'). At first instance, the judge awarded only nominal damages on the basis that the Defendants would have moved the hoardings on to No. 67 had they realised that they were encroaching on to the claimant's land. The Court of Appeal allowed an appeal. Henderson J, with whom Mummery and Tomlinson LJJ agreed, said, at [47], that the judge had addressed the wrong question:

> "*The judge asked himself, in effect, what would actually have happened if the question of possible trespass had been appreciated by the parties before the erection of the first hoarding, and his answer to this question was that no trespass would in fact have occurred because the hoarding would then have been placed wholly within No.67. But that, with respect to the judge, is to misunderstand the nature of the exercise which the court has to perform in cases of the present type. The starting point is the admitted trespass which took place for nearly five years, and the function of the hypothetical negotiation is to ascertain the value of the benefit of that trespass to a reasonable person in the position of [the Defendants]. As Vos J. said in* Stadium Capital Holdings *at [69], the value of that benefit is 'the price which a reasonable person would pay for the right of user, or the sum of money which might reasonably have been demanded as a quid pro quo for permitting the trespass'. For that purpose, it has to be assumed that the hypothetical negotiation would have resulted in an agreement, even if the parties might in fact have refused or been unwilling to agree. It also has to be assumed that the actual trespass which has occurred would in fact take place, because the whole point of the exercise is to reach a reasonable measure of compensation to the claimant for that trespass. This point was made with great clarity by Patten J. in* Sinclair v Gavaghan *at [17], which the judge cited, but of which he seems to have lost sight when formulating his conclusions*."

47. Later in his judgment, Henderson J said this, at [51]:

> "*I fully accept that any ability on the part of a trespasser to achieve the object of the trespass by alternative means is a factor which must be taken into account in the hypothetical negotiation. The alternative must, however, be one which is consistent with the trespass and which can co-exist with it. An alternative cannot be taken into account if it would eliminate the trespass itself, because that would again negate the very basis of the exercise ... [What] the defendants wish to do in the present case is to rely on the possibility of placing the hoarding entirely within No.67, not as an alternative to the admitted trespass, but as a means of eliminating it. Such a procedure cannot be legitimate, because it would subvert the basis of the negotiation*."

48. Referring to this passage, in ***Force India Formula One Team Limited v Aerolab SRL*** **[2013] EWCA Civ 780**, at [107], Lewison LJ said:

> "*In this passage Henderson J clearly accepts that the availability of alternatives is a legitimate consideration in assessing compensation. It could hardly be otherwise. In any negotiation the parties to the negotiation will be considering what their alternatives are to doing the deal. There is no reason why a hypothetical negotiation should be any different in that respect. It is, of course, different from a real negotiation in one respect because in the hypothetical negotiation not doing the deal at all is not an alternative …*"

49. There are, however, limits to the circumstances that may be taken into account for the purposes of the hypothetical negotiation. For example, in ***Lunn Poly***, the landlord had bricked up an existing fire door, and the tenant obtained an interlocutory injunction entitling it to reinstate the fire door and restraining the landlord from interfering with it. The landlord claimed forfeiture for an entirely separate alleged breach of covenant. The judge held that the tenant had breached the covenant not to part with possession, but that the tenant should have relief from forfeiture, and that the landlord had been in breach of its covenant for quiet enjoyment in respect of the fire door. The judge did not grant permanent injunctive relief and decided that damages should be assessed under the Act at a figure that would have been arrived at as a result of hypothetical negotiations between willing parties in the position of the landlord and the tenant for the 'sale' of the tenant's right to prevent the landlord from blocking the existing fire door and relocating it. The basis of negotiation was that the parties were not to be assumed to take into account the fact that the tenant risked losing its lease as a result of forfeiture proceedings. The appeal on the assessment of damages was dismissed.

50. Referring to the issue of forfeiture of the tenant's lease, Neuberger LJ said, at [35]:

> *"… the factor that the landlords wish to have taken into account is not merely extraneous to the issue of the subject of the hypothetical negotiations, but it relates to the specific parties, namely the actual landlords and the actual tenant. I should not be taken as suggesting that that would therefore disqualify the factor from being taken into account in a classic contractual or statutory valuation. However, the fact*

> *that it is not merely extraneous, but a factor that relates to the actual parties rather than representing an external feature, which would affect any hypothetical negotiating parties, renders it easier to justify its being excluded as a factor from the hypothetical negotiations. For instance, if the actual tenant had been abroad and out of contact at the valuation date, it could not sensibly be suggested that this would mean that the landlords could justify only a nominal payment on the basis that the hypothetical tenant could not have negotiated more …*"

51. It may be that the authorities above can be reconciled when one considers that an integral feature of the hypothetical negotiation is that the parties should act reasonably; and, by acting reasonably, the parties to the hypothetical negotiation would not seek to take into account various factors which would not have any meaningful effect on valuation. Or, as it is put by Arnold J in ***Force India Formula One Team Limited v 1 Malaysia Racing Team SDN BHD*** **[2012] RPC 29**, at [426]:

> "*… the licence fee … would be negotiated between a willing licensor and willing licensee each making reasonable use of their respective bargaining positions …*"

The 'Trump Card' in Negotiations

52. How should the Court deal with the existence of a trump card in the hypothetical negotiation? This is an important question. As Vos J said in ***Stadium Capital***, at [69]:

> "*[The hypothetical] negotiation is taken to be one between a willing buyer and a willing seller at an appropriate time … The fact that one party might have refused to agree is irrelevant. But the fact that one party held a trump card and could have stopped the defendant obtaining any benefit is a relevant matter*."

53. Thus, in ***HKRUK***, HHJ Langan QC observed, at [87]:

> "*… The right to prevent a development (or part) gives the owner of the right a significant bargaining position …*"

54. Equally, in ***Pell Frischmann***, the parties signed a confidentiality agreement by which the Defendants agreed to work exclusively with the Claimant on an oilfield development and not to approach the oil company directly without the Claimant's express written consent.

This agreement gave a party in the Claimant's position an advantageous position in the context of a hypothetical negotiation. As Lord Walker said, at [56], the Claimant had:

> "*… a power of veto which stood between its erstwhile competitors and what they saw as a valuable opportunity*."

55. However, the concept of a 'trump card' in these circumstances is somewhat elusive. In ***Eaton Mansions (Westminster) Limited v Stinger Compania de Inversion SA*** **[2012] EWHC 3354 (Ch)**, at [50], Mr Edward Bartley Jones QC (sitting as a Deputy Judge of the Chancery Division) explained:

> "*… the very fact that the claimant had the right to refuse consent and prevent the trespass is not any form of 'trump' card. The purchase of the appropriate consent is the very subject matter of the hypothetical negotiations … When* [Vos J in Stadium Capital] *went on to identify the fact that one party had a trump card which could have stopped the defendant obtaining any benefit was a relevant matter, he was quite clearly, talking about an extraneous trump card, and not about the necessity for obtaining the very consent itself (which is the subject matter of the hypothetical negotiations) …*"

56. So far as the author is aware, there is currently no reported authority which elaborates on what is meant by an "*extraneous*" trump card in this context. Watch this space!

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