NEGOTIATING DAMAGES:

When are they available and how are they calculated?

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by

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Introduction

As a general rule monetary claims in tort and for breach of contract are intended to compensate a claimant for the loss which it has suffered. The position is different where there is a breach of fiduciary duty: a director who makes a secret profit out of its position is liable to pay the whole of that profit to the company even if the company itself would never have been able to earn that profit. But for claims in contract and tort it is generally irrelevant what if any profit the defendant has earned as a result of its wrong.

There are two exceptions but they apply only in the most extreme circumstances. The first is where exemplary damages are awarded to punish the defendant for its wrong. The second is where, as in *AG v Blake*[1], disgorgement of profit is awarded even for breach of contract.

Where, as in the usual case, a monetary claim is limited to compensation for the claimant's loss such loss will in the typical case be assessed by considering the claimant's financial position. Thus, if a client sues a solicitor who has been negligent the compensation to which it is entitled will be assessed by comparing the financial position the client is in fact in with the financial position it would and should have been in had the solicitor not been negligent.

But a moment's reflection shows that the loss to a claimant is not always assessed by reference only to the claimant's financial position. If I negligently injure James I am liable to pay him damages even though the injury was not serious enough to require him to take time off work. If I arrange a holiday through a travel company and the holiday is a disaster I have a claim against the travel company for loss of enjoyment which again does not depend on my suffering any financial loss.[2] So too if whilst I am away on holiday for two weeks Alex picks the lock on my front door and occupies my house without my consent she is liable as damages for trespass to pay me the reasonable letting value of the house notwithstanding that she has caused no damage to my property and that I would not have let it to her even if she had asked.

[1] [2001] 1 AC 268. The decision has not been followed in any subsequent case and was treated with a considerable lack of enthusiasm in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 .

[2] *Jarvis v Swans Tours* [1973] QB 233; and see *Ruxley Electronics v Forsyth* [1996] AC 344

This last case is an example of what since the recent Supreme Court decision in *One Step (Support) Ltd v Morris-Garner*[3] we are to call "negotiating damages" and which used to be called "user damages" or "Wrotham Park damages" after *Wrotham Park v Parkside Homes*.[4]

The idea is that damages are assessed as 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 invasion of the rights in question.[5] They are assessed on the basis of a hypothetical negotiation between a reasonable person in the position of the claimant and a reasonable person in the position of the defendant. Where this enables the defendant to make a profit that it would otherwise not have made then the sum of money in question will usually be a percentage of that anticipated increased profit.

Damages on this basis are regarded as compensatory[6] but instead of assessing damages by comparing the difference between the position in which the claimant is in and the position it would have been in had the defendant not infringed the claimant's rights, damages are assessed as the value of the right infringed. In the case where Alex occupies my house whilst I am on holiday for two weeks, she has taken from me the exclusive right for those two weeks to control who has access to my home and she is thus required to pay the reasonable sum that I might reasonably have demanded if she had asked for permission to occupy my home whilst I was away.

Two important questions arise: when are negotiating damages available; and how are they calculated.

When are negotiating damages are available?

Apart from cases where one person has wrongly occupied another's property, it is well established that negotiating damages are available where one person has wrongly passed over another's land in excess of the rights granted by a right of way[7]. It has been

[3] [2018] UKSC 20

[4] [1974] 1 WLR 798

[5] *Pell Frischmann v Bow Valley Ltd* [2009] UKPC 45 at [48]

[6] see *One Step (Support) Ltd v Morris-Garner* resolving the previous debate in which it had been suggested that they were restitutionary.

[7] *Bracewell v Appleby* [1975] Ch 408

similarly so held where a person has built in breach of a restrictive covenant[8] or has wrongly interfered with a right of light[9]. We can safely generalise in saying that negotiating damages are available in all cases in which a right or interest in real property is infringed.

It is not however confined to cases of interference with real property rights. Long before *Wrotham Park v Parkside Homes* gave rise to the notion that negotiating damages were available for interference with property rights damages on this basis were regarded as available in case of interference with chattels.[10] Damages have also been held to be available on this basis for breach of intellectual property rights, that is patent and copyright cases and also for breach of confidence.[11]

But in the case of the breach of an ordinary commercial contract it is equally clear that negotiating damages are not available. Assume that James has agreed to paint my house for £3,000. My neighbour offered him much more money (£10,000) to paint his house instead which is identical to mine thus making him a clear £7,000 extra profit. James had offered me a very good price and it cost me £4,000 to get the house painted by someone else. Clearly I have a claim for £1,000 being the difference between the sum I had agreed to pay James and the sum which I incurred in employing a substitute painter. But it cannot sensibly be suggested that James is liable to pay me the sum which James would have agreed to pay me to get out of his contract with me so that he could make a greater profit by painting my neighbour's house, that is a share of the extra £7,000 profit which he has earned. Negotiating damages are not available in these circumstances and the damages to which I am entitled are limited to the financial loss I have suffered.

Between these two extremes (interference with rights property rights, rights to chattels and intellectual property rights) on the one hand and claims for breach of ordinary commercial contracts on the other hand lies considerable uncertainty. In *One Step*

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[8] *Wrotham Park v Parkside Homes* [1974] 1 WLR 798; *Jaggard v Sawyer* [1995] 1 WLR 269

[9] *Carr-Saunders v Dick McNeil Associated Ltd* [1986] 1 WLR 922; *Tamares v Fairpoint Properties Ltd (No. 2)* [2007] EWHC 212 (Ch). Lord Carnwarth was thus in error In stating in *Lawrence v Fen Tigers* [2014] UKSC 13 at [248] that negotiating damages had not been awarded in rights of light cases.

[10] See dicta of Lord Shaw in *Watson Laidlaw & Co v Pott, Cassels & Williamson* 1914 SC (HL) 18 (horse); and of the Earl of Halsbury LC in *The Mediana* [1900] AC 113

[11] *Pell Frischmann v Bow Valley* supra; *Vercoe v Rutland Fund Management* [2010] EWHC 424 (Ch)

(Support) ltd v Morris-Garner[12] the Supreme Court sought to define the boundary between cases in which negotiating damages were and were not available. Lord Reed JSC speaking for the majority said that negotiating damages are available in three sets of circumstances.[13] The first is for "*the invasion of rights to tangible moveable or immoveable property*" and on a similar basis "*for patent infringement and breaches of other intellectual property rights*".

The second is where damages are awarded under Lord Cairns' Act in substitution for specific performance or an injunction where it is "*for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of an injunction*" as to which:

> "*One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.*"

He described the third set of circumstances in which negotiating damages may be awarded in these terms:

> "*Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant is entitled to payment.*"

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[12] [2018] UKSC 20

[13] at [95]

The first of these categories is straightforward although it should be noted it is intended to cover, so far as real property is concerned, only cases of trespass not cases of breach of restrictive covenants or of interference with property rights. Those are covered, if at all, only under the second category. There is no doubt that cases of restrictive covenant are intended to fall within the second category since Lord Reed referred with approval both to *Wrotham Park v Parkside Homes* and *Jaggard v Sawyer*. It also seems clear that interferences with easements would fall with this second category too since Lord Reed referred to both *Bracewell v Appleby* and *Jaggard v Sawyer* as cases where by refusing an injunction for a trespass the defendant was in effect compulsorily acquiring a right of way and also because he referred to the restrictive covenant in the *Wrotham Park* case as creating a new property right "*rather like a negative easement*".[14]

However, it is not clear from his summary of the relevant principles when negotiating damages would be awarded where an injunction or specific performance is refused. On the one hand he said it was a matter for the judge to determine what will give a fair equivalent for what is lost by the refusal of specific relief[15] but on the other hand he said, at least in respect of damages within the third category, that they were not a matter of discretion.[16] His analysis of the *Wrotham Park* case seems to provide the solution. He said that the measure of damages awarded in that case "*reflected the fact that the refusal of an injunction had the effect of depriving the claimant of an asset which had an economic value*". The test then, as with the third category, appears that to be that the infringement of the right in question should be regarded as the loss of an "asset".

If those are the circumstances in which in the second category negotiating damages are to be awarded it gives rise to two questions: first, is there really any difference between the second and third categories at all; and secondly, when will the infringement of a right be treated as the loss of an asset.

Apart from the fact that Lord Reed conceived of the second and third categories as separate, it is notable that, although not deciding the point, he inclined to the view that

[14] at [53]

[15] at [95(5)]

[16] at [95(12)]

for a case to fall within the second category an injunction had to have been claimed in the proceedings and there should have been at least some prospect of it being granted.[17]

It is suggested that the contrary views of Lord Walker JSC in *Pell Frischmann v Bow Valley*[18] and Mance LJ in *Experience Hendrix v PPX Enterprises*[19] that it is not necessary for injunctive relief to be claimed or for there to be any prospect of such relief being granted for negotiating damages to be awarded in non-contract cases are to be preferred. Take an example. Assume that a restrictive covenant is imposed prohibiting land being developed otherwise than in accordance with an existing planning permission. The purpose of imposing the covenant was not in fact to prevent development of the land at all but to ensure that the developer would have to pay for relaxation of the covenant if it wanted to develop the land in the future for a more profitable use. Assume then that the dispute is between successors in title of the benefitted and burdened land so that the claim is not one in contract but for breach of a restrictive covenant, a form of property right. Injunctive relief would be refused since the owner of the benefitted land does not genuinely want it. What it wants is a sum for relaxation of the covenant. In circumstances similar to these the Court of Appeal in *Surrey County Council v Bredero Homes Ltd*[20] awarded only nominal damages. But the decision attracted much academic criticism and was roundly criticised by Lord Nicholls in *Attorney General v Blake.*[21] It is suggested that negotiating damages would be available notwithstanding that there was no prospect of injunctive relief.

The circumstances in which the infringement of a right will be treated as the loss of an asset was considered in the following passage in Lord Reed's judgment:[22]

> "*It might be objected that there is a sense in which any contractual right can be described an asset, or indeed as property, In the present context however, what is important is that the contractual right is for such a kind that its breach can result*

[17] at [45]

[18] [2009] UKPC 45 at [48]

[19] [2003] EWCA Civ 3232 at [34]

[20] [1993] 1 WLR 1361

[21] [2001] 1 AC 268 at 283

[22] at [93]

in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such a right to control the use of land, intellectual property or confidential information, but by no means all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss."

The *Morris-Garner* case itself involved a breach of restrictive covenants not to compete with the claimant, solicit its clients or use its confidential information by a former director and former manager of the claimant which had set up a competing business. Lord Reed said that although the breach of confidentiality might in isolation have been considered as giving rise to negotiating damages, the breach of the non-compete and non-solicitation covenants were the most significant breaches so that damages should be limited to the financial loss which the claimant actually sustained.

It is not easy on the face of it to distinguish the *Morris-Garner* case from *Experience Hendrix v PPX Enterprises*[23]. In the Hendrix case PPX agreed with the Hendrix estate to pay a fee for licensing certain recordings and not to licence certain other recordings. In breach of that contractual undertaking PPX did licence those other recordings and was held liable to pay negotiating damages. Since copyright rested in PPX the claim was not for breach of copyright but simply for breach of contract. The decision was expressly approved by Lord Reed on the basis that the agreement gave the Hendrix estate the valuable right to control the use made of PPX's copyright.[24] Thus the estate's right was not an intellectual property right as such but a contractual right to control the use of intellectual property. It might however be said that the non-solicitation and non-compete covenants in *Morris-Garner* were similarly contractual rights to control the use of the claimant's intellectual property, that is its goodwill in its business.

But this would be to take too broad a view of "asset". The question, it is suggested, is not simply whether something is regarded in the commercial world as an asset but

[23] [2003] EWCA Civ 323

[24] at [89]

whether it is so treated in law. Rights to tangible real property and chattels are clearly so treated. They are good against the whole world and so unless disposed of or lost in specified ways (by transfer or adverse possession for example) the "owner" of such property has a right of action for recovery of the property or its value. The same applies to patents and copyright. Confidential information is also treated in the same way. A duty to keep information confidential depends only on the receipt of such information knowing that it is confidential. It does not depend on a breach of contract nor where such information is imparted to a third party on that third party being liable for procuring a breach of contract or unlawful means conspiracy. Confidential information is treated in the same way as property.

Goodwill is different. Although commercially it is regarded a property it is not protected in law directly. It may be protected indirectly insofar as there is for example any disclosure of confidential information but competition with a business and soliciting its customers is not protected as such. Thus there is nothing to prevent me setting up a coffee shop next door to a Costa and trying to get some of their business. It is for that reason that the interest protected by non-solicitation and non-compete covenants is not regarded an asset. It may be an asset in the minds of commercial people but it is not an asset regarded as such by the law.

That is what, for example, makes a restrictive covenant over land different. Such a right is a right which the law regards as an interest in property and protects it as such.

Whilst Lord Reed's use of the word "asset" needs to be understood as an asset recognised as such by law and protected so as to be capable of exploitation by the owner of the asset in question, some difficult cases remain. Let me conclude this part by considering two cases prior to the *Morris-Garner* case in which it was held that negotiating damages were available. Would they be decided in the same way today?

The first is the decision of Lightman J in *Crestfort v Tesco Stores Ltd*[25] in which a tenant underlet premises without a full repairing covenant in breach of a covenant which required any underletting to be with the landlord's consent and upon the same terms as the lease. The undertenant was aware of the breach of covenant by the tenant and so was liable to the landlord in tort for procuring a breach by the tenant of its covenant with the landlord. The tenant and undertenant were ordered to effect a surrender of the

[25] [2005] EWHC 805 (Ch)

underlease and both parties were held liable to pay negotiating damages to the landlord being the sum which might reasonably have been demanded by the landlord for relaxation of the alienation covenant.

The second case is the decision of the Court of Appeal in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd*[26] in which a landlord of a shopping centre blocked up a fire door to which the tenant of one unit was entitled and replaced it with a new door in a different location. The tenant was held entitled to negotiating damages for breach by the landlord of its covenant for quiet enjoyment.

The *Morris-Garner case did not refer to Crestfort v Tesco Stores* but reference was made (without any apparent disapproval of the result) to the *Lunn Poly* case. On the face of it the result in both cases seems questionable in the light of *Morris-Garner* since it is not at all obvious that an alienation covenant or a covenant for quiet enjoyment are contractual rights designed to be exploited as assets. An alienation covenant is designed to protect the value of the landlord's reversionary interest and a covenant for quiet enjoyment is intended to protect the tenant's interests in enjoying its property.

However, the result in *Lunn Poly* at least can be justified. The Court of Appeal's judgment contained no detailed analysis of the cause of action. Although reference was made to the covenant for quiet enjoyment Neuberger LJ also said that the existing fire door was something "*which the tenant not merely had the right to use under the lease, but which was included in the demise*". It seems likely that the tenant had an easement express or implied to use the fire door which was a property right interfered with by the works carried out by the landlord. The case on analysis is thus no different from cases where negotiating damages have been awarded for interference with a right of light.

Crestfort v Tesco cannot be subjected to similar analysis however. It is true that the alienation covenant was imposed in the context of a property relationship and was such as bound successors in title to the original tenant and benefitted successors of the original landlord. However, it might be doubted that it was something that was designed to be exploited and the mere fact that it was a provision included in a lease ought not to be sufficient to give rise to a claim in n negotiating damages. If that were the case then

[26] [2006] EWCA Civ 430

despite the fact that negotiating damages are not available for breach of a building contract they would be available for breach of a similar obligation in a building lease.

But it must also be accepted that some fine lines would need to be drawn if negotiating damages are not to be awarded for breach of an alienation covenant. What for example of breach of a user covenant? Again, it might be said that the user covenant was intended to preserve the value of the landlord's reversion (for example by maintaining the tenant mix in a shopping centre). But what if the lease was for a term of 999 years with a covenant not to develop the land otherwise than in accordance with an existing planning permission. Why should the position be any different than if the freehold of the land had been sold subject to a restrictive covenant in the same terms.

The fact that there is no easy answer to these questions means that we must be careful before making assumptions that negotiating damages are available in property cases save in established cases where property rights are interfered with. In other cases careful reflection will be required on whether the purpose of the right which has been breached was to give the right holder an asset capable of exploitation.

How are negotiating damages calculated?

The basic idea for calculating negotiating damages is clear enough. One imagines a hypothetical negotiation between the claimant and the defendant in which the claimant will give up its right to the extent that the defendant has infringed it for a sum of money. Both the claimant and the defendant are assumed to act reasonably and to be willing to reach a deal whether in fact that is so or not. The position is thus similar to a hypothetical negotiation on a rent review under a lease. But beyond the simplicity of this basic position a number of points require consideration.

First it follows from the conclusion in *Morris-Garner* that negotiating damages are compensatory and designed to make the claimant's loss that there are not discretionary. Nor is there any question of electing between damages on this basis and damages on the basis of changes in the claimant's financial position. The court must first consider how compensation is to be assessed which depends on the nature of the right which has

been infringed. If negotiating damages are appropriate then they will be awarded on that basis whether or not the claimant has suffered a financial loss.[27]

Secondly it follows that the defendant's conduct or any difficulty in assessing the claimant's financial loss are both irrelevant to the question of whether negotiating damages are available or as to the quantum of such damages.[28]

Thirdly a question arises as to the date of assessment of such damages. Three different dates might be justified. First the date when the hypothetical negotiation would have taken place if the parties had acted reasonably; secondly the date when the defendant was first in breach; and thirdly the date of the hearing. The first date makes obvious sense and simply extends the hypothesis of a negotiation between the parties to that question. It was the date favoured by the deputy judge in *Amec Developments v Jury's Hotel Management (UK) Ltd*[29]. The second date corresponds with the usual date for assessing damages for breach of contract or in tort. The third date reflects the fact that at least where such damages are awarded under Lord Cairns' Act they are awarded in substitution for the fact that at trial injunctive relief or specific performance is refused. In *Lunn Poly*[30] it was held that the second date is normally the correct one although the judge might, where there are good reasons to do so, select a different valuation date or direct that a specific post-valuation event be taken into account.

In *Morris-Garner* Lord Carnwarth[31] suggested that where damages were awarded in lieu of an injunction the third date was the correct one but in other cases the second date was correct. Without deciding the point Lord Reed indicated he was inclined to agree with this view.[32] This is problematic for two reasons. First, as mentioned above it is difficult to see why the second category of case where damages are awarded in lieu of an injunction should be regarded as any different from the third case. Secondly, if damages are to be assessed at the date of breach rather than an earlier date when the

[27] see *Morris-Garner* supra at [95]-[97]

[28] *Morris-Garner* at [97]

[29] (2001) 82 P & C R 22 at [31]-[32]

[30] [2006] EWCA Civ 430; and see *Pell Frischmann v Bow Valley* supar at [50]

[31] at [159]

[32] at [56]

parties would acting reasonably have in fact negotiated it may lead to the claimant getting a windfall. Assume the case of a building being erected which will interfere with the light to a neighbour's property. The infringement of the light may occur only when the foundations and steelwork for the whole building have been erected. If the negotiation takes place before construction has started it will simply reflect the difference in the profit of the building which the developer proposes to erect and the building which it would be entitled to erect without infringing the neighbour's right to light. However if the negotiation is assumed to take place only immediately before the light is infringed it will also take into account the additional cost to the defendant of altering the steelwork which has been erected and of the wasted costs of foundations which may be more extensive than required for a smaller building.

A further question is how the figure which would have been reached in a hypothetical negotiation is to be assessed. In the ordinary case the defendant will be able to increase the profit it will make if it is entitled to interfere with the claimant's rights, for example by building a higher building in which the claimant's rights of light are interfered with. The question is then what percentage of that increased profit would be agreed in a hypothetical negotiation. Support can be found in the authorities for various percentages. For example, 5% was awarded in *Wrotham Park*, 40% was awarded in *Bracewell v Appleby* and in *Tamares v Fairpoint* the judge started at a one third and then reduced the resulting figure further. This is an area in which it is particularly difficult to give clear guidance. Sometimes it is suggested that the appropriate percentage is 50% on the basis that both claimant and defendant must participate if the profit is to be earned. However, in my view that fails to take sufficient account of the different positions of the parties. The developer, unlike the neighbouring owner, is taking the risk that the development may not be as profitable as predicted. In practice it will factor in that risk by reducing the percentage it is willing to pay. On that basis one third of the anticipated profit probably represents the high-water mark of any potential award.

What however if the development is not intended to produce a profit at all. This might be the case if the development was a school or hospital or some vanity project of a high net worth individual. There is no doubt that negotiating damages would still be awarded and so it is necessary to consider what the parties would rely on for guidance on the relevant amount. I think in that situation the costs intended to be incurred by the developer and the price which it paid in purchasing the land would all be considered relevant. Of course, the cost of construction is not to be equated with profit and so any

percentage assessed on that basis would be likely to be much smaller than if a percentage of profit was awarded.

Problems also arise where there are multiple claimants. Again, developments provide the most common examples of this. Assume that the proposed development would interfere with the light to three different neighbours. Assume also that one of these neighbouring properties is let. However, much is each to obtain? In my view the starting point is one multi party negotiation between the defendant and all adjoining owners. The overall sum which the defendant will pay will not be more than if there had only been one claimant and a decision must be made how to divide that between different properties and those with different interests in the same property.

There is no authority on how this is to be done but the solution I think is to be found in an important principle underpinning the calculation of negotiating damages. A mistake which is often made is to regard the result of the hypothetical negotiation as necessarily determining the amount of such damages. Negotiating damages seek to value the right infringed. The technique of considering a hypothetical negotiation is only a tool designed to assist in that process. It is for that reason that the *Amec* case the judge said "*at the end of the day the deal has to feel right*".[33] This is reflected in Lord Reed's comment in *Morris-Garner* that the question for the judge is what will give a "*fair*" equivalent for what is lost by the refusal of an injunction.

A couple of examples form rights of light cases should make this clear. Assume that a developer's profit would be reduced by £30 million if it were to respect the light of an adjoining owner with a flat worth £300,000. It might make sense to award the flat owner £100,000 by way of negotiating damages but it would not seem fair or feel right to award it £10 million.

Assume that instead of being a flat worth £100,000 it is an office block worth £300 million occupied by a tenant for 10 years under a contracted-out tenancy at a rack rent. Assume that if the freeholder was in possession negotiating damages would amount to £10 million. It does not seem right that this should be shared on a 50/50 basis with the tenant. The tenant's share should reflect the short duration and limited value of its interest.

[33] at [35]

Conclusion

Negotiating damages are an important remedy in the property field and given their approval in the *Morris-Garner* case it is now possible to state with confidence certain situations in which they will be available. However it is important not to assume that they will necessarily be available in any property related case and a careful examination of the purpose of the right which has been infringed is required in any but the established categories in order to ascertain whether the right in question is treated in law as an asset capable of exploitation. Even when it is concluded that negotiating damages are available the question of the precise quantum of such damages remains a matter that is difficult to predict with any certainty.