Scott Rollwagen
416-865-2896
srollwagen@litigate.com

July 24, 2018

UKSC Dials Back Gains-Based Contract Damage Awards

The law of contracts has been around for a very, very long time. Which is why it is important to take notice when a major appellate Court finds it necessary to restate the applicable principles, if only to settle the law concerning what may appear to be a narrow damages point.

The United Kingdom Supreme Court has recently clarified the terms of a little-used but potentially powerful method of proving contract damages in difficult cases. For decades, courts have flirted with so-called *Wrotham Park* damages, which measure what a hypothetical plaintiff possessing the plaintiff's contract rights would accept from a hypothetical defendant in exchange for allowing the defendant engage in contract-breaching conduct. They were first recognized in the seminal case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

Courts in England and in Canada have been known to reach for *Wrotham Park* damages where there is a clear breach of contract, but where it is difficult if not impossible to measure the economic consequences of the breach in conventional money terms. The *Wrotham Park* case itself awarded these damages as a way of giving a plaintiff a remedy for the defendant's construction of certain houses in clear breach of a negative covenant. An order requiring the houses to be torn down would be wasteful, but money damages to the covenantee would be so small as to deprive the covenant of any meaningful force. Hence the award of a sum that would put into the plaintiff’s pocket an amount that, at least in theory, the plaintiff could have required the defendant to pay in order to obtain permission to build the houses.

In theory, there is much to commend this way of looking at damages in difficult cases. It has the advantage of being easy to describe (if not necessarily to value) and is, in principle, flexible. Left unchecked, however, this measure of damage can overwhelm the ordinary measure of contract damage, which is supposed to place the plaintiff in the position he or she would have occupied had the contract not been breached. Which led the Court to seriously revisit the principled basis for them.

In *Morris-Garner & Anor v One Step (Support) Ltd* [2018] UKSC 20, the Court considered an award of these "negotiating

damages" in a conventional breach of restrictive covenant case. Unlike *Wrotham Park* itself, which concerned a negative covenant in a building context, *One Step* concerned a conventional sale-of-a-business restrictive covenant. The lower court awarded the plaintiff its losses from the breach, but went on to order as an alternative *Wrotham Park* damages, on the apparent theory that the plaintiff was entitled to elect to claim them as opposed to taking a damage award for lost profits.

A majority of the United Kingdom Supreme Court held that this was wrong in principle. The Court made a careful distinction between three basic approaches to damages: "user" damages for breach of property rights, equitable damages awarded as a substitute for an injunction or specific performance, and common law damages.

The majority stressed that while user damages and equitable damages are directed at compensating the plaintiff for loss of a right measured as if it were an asset, contract law damages focus on the economic consequences to the plaintiff of the defendant's breach of contract. They are not a matter of discretion, and only in rare cases will the Court measure the plaintiff's damages in a contract case with reference to the benefit obtained by the defendant as a result of the breach.

The majority in the United Kingdom Supreme Court held that the lower courts in *One Step* erred in accepting that "negotiating" damages could in principle be awarded as an alternative measure of contract damages where, in principle, it was possible to measure the plaintiff's losses, and where there is no question of the plaintiff having a quasi-proprietary right to performance that could be protected by specific performance or an injunction. "Negotiating" damages are only available in special cases and cannot be awarded simply as an alternative way of measuring the plaintiff's economic losses where they can be measured by conventional means. And there can be no question of a plaintiff having a right to elect to claim them.

In this respect there was a sharp disagreement between Lord Reed, writing the majority reasons, and Lord Sumption, who wrote reasons concurring in the result. Lamenting an overly categorical approach to what should be a question of valuation of the plaintiff’s loss, Lord Sumption was not prepared to accept that “negotiating damages” could not in principle be awarded as a practical way of measuring damages in a difficult case.

It remains to be seen how this conceptual clarity will influence Courts in Canada. Canadian courts have on occasion awarded these damages, but when they do they have treated them as unusual damages that only should be awarded in the unusual cases where depriving the defendant of any profit from its

breaching conduct would be appropriate.