**MORRIS-GARNER v ONE STEP [2018] UKSC 20; [2018] 2 WLR 1353**

**Negotiating damages:**

Damages assessed by reference to the price which the claimant could reasonably have charged the defendant for releasing the defendant from the contractual obligation which has been breached. The court posits:

> a hypothetical negotiation … between a willing buyer (the contract breaker) and a willing seller (the party claiming damages) in which the subject matter of the negotiation is the release of the relevant contractual obligation" (*Pell Frischmann Engineering v Bow Valley Iran* [2011] 1 WLR 2370 at §49, Lord Walker).

The hypothetical negotiation is assumed to take place at or immediately before the time of breach; and both parties are assumed to act reasonably (*Pell Frischmann* at §50).

**Lord Reed (with whom Lords Carnwath and Wilson, and Lady Hale, agreed):**

Terminology:

> the term 'Wrotham Park damages' has been used rather loosely in the authorities … This judgment will abjure the use of the term 'Wrotham Park damages'. … Instead, this judgment will use the expression 'negotiating damages', introduced by Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* (at §2-3).

The test for recoverability of negotiating damages for breach of contract:

At §95(10):

> **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 was entitled to require payment.

At §92-94:

> such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which [user damages in tort were granted]. 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 asset in question. …
>
> It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result 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 as a right to control the use of land, intellectual

> property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as 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.
>
> It is not easy to see how, in circumstances other than those of the kind described [above], a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. …

In other circumstances, damages for breach of contract should be measured in the ordinary way by reference to "*the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed*" (§36). It is "*for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed*" (§95(7)).

However, *"[t]he law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence*" (§95(8)).

Discretionary factors:

Factors previously relied upon to justify the award of negotiating damages are not relevant, including:

(1) the difficulty or impracticability of assessing damages on a conventional basis;

(2) the fact that the defendant acted cynically or deliberately in breaching the contract; and

(3) the claimant's 'legitimate interest' in preventing the defendant's profit-making activities.

(cf. especially *Experience Hendrix v PPX Enterprises* [2003] 1 All ER (Comm) 830 at §58, Peter Gibson LJ; *One Step v Morris-Garner* [2017] QB 1 at §147, Longmore LJ)

At §97:

> The Court of Appeal was mistaken in treating the deliberate nature of the breach, or the difficulty of establishing precisely the consequent financial loss, or the claimant's interest in preventing the defendants' profit-making activities, as justifying the award of a monetary remedy which was not compensatory. The idea that damages based on a hypothetical release fee are available whenever that is a just response, that being a matter to be decided by the judge on a broad brush basis, is also mistaken. The basis on which damages are awarded cannot be a matter for the discretion of the primary judge.

At §35:

> The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance (subject, according to the decision in *Attorney General v Blake*, to a discretion to order an account of profits in exceptional circumstances where the other remedies are inadequate). The damages awarded cannot therefore be affected by whether the breach was deliberate or self-interested.

Historical development of negotiating damages:

User damages are recoverable for the invasion of property rights: see *Whitwham v Westminster Brymbo Coal* [1896] 2 Ch 538; *The Mediana* [1900] AC 113; and *Stoke-on-Trent City Council v W&J Wass* [1988] 1 WLR 1406. They are awarded (per Lord Reed at §66) on the basis that:

> The person who makes wrongful use of property, in breach of another person's valuable right to control its use, prevents that person from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss.

The user principle has been applied by analogy to claims for breach of patent and other intellectual property rights (*Watson, Laidlaw & Co v Pott, Cassels & Williamson* [1914] SC (HL) 18; *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157) and breach of confidence.

The same principle was applied by analogy in *Wrotham Park v Parkside Homes* [1974] 1 WLR 798.

*Attorney-General v Blake* [2001] 1 AC 268 at 283-4, Lord Nicholls:

> The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.

*Experience Hendrix v PPX Enterprises* [2003] 1 All ER (Comm) 830 at §16, Mance LJ:

> the House of Lords decision in *Attorney General v. Blake* … marks a new start in this area of law. … as I see the decision in *Blake*, it freed us from some constraints that prior authority in this court … would have imposed. To apply Lord Steyn's words, *Blake* leaves future courts with the task of 'hammering out on the anvil of decided cases' when and how far remedies such as the appellant now seeks should be available. The original Nibelungen produced a powerful image of restitution. The appellant invites us to fashion a modern and more deliberate equivalent on Jimi Hendrix's legacy.

*Experience Hendrix* and other cases were followed and applied in *Pell Frischmann* and *Vercoe v Rutland Fund Management* [2011] EWHC 424 (Ch).

Per Lord Reed: these cases can be understood as proceeding on the footing that the result of the breach of contract was that the claimants lost a valuable opportunity to exercise their right to control the use of

property or information, and suffered a loss equivalent to the amount which could have been obtained by exercising it (at §54, 84, 89):

> The use to which the defendants wrongfully put [the] property infringed a valuable right held by the plaintiffs to control such use. That justified an award of damages … based on the value of the right infringed, since the refusal of an injunction effectively deprived the plaintiffs of the benefit of their right, and therefore of its value.

Such cases are properly comparable to cases concerning invasion of property rights. It is only in circumstances where the rights and obligations are analogous that it is reasonable to expect some consistency of approach to the assessment of damages (at §76, 77).

The present case was not a case of that kind (at §98):

> This is a case brought by a commercial entity whose only interest in the defendant's performance of their obligations under the covenants was commercial. … The loss is difficult to quantify, and some elements of it may be inherently incapable of precise measurement. Nevertheless, it is familiar type of loss, for which damages are frequently awarded.

**Lord Sumption:**

Lord Sumption concurred with the majority in setting aside the Judge's grant of an option to the claimant to choose the basis of assessment of its damages, but differed in his analysis of negotiating damages. In his view, such damages may be awarded in three categories of cases: (i) where the claimant has an interest in the observance of his rights which extends beyond financial reparation (as for example in a case involving property rights); (ii) where the claimant would be entitled to the specific enforcement of his right, and the notional release fee is the price of non-enforcement; and (iii) where the claimant has suffered (or may be assumed to have suffered) pecuniary loss, and the notional release fee is treated as evidence of that loss (§109, 110).

Lord Sumption considered that the present case may fall into this third category, where the notional release fee is "*a useful surrogate for the loss of profits arising from the breach*" (§106, 115). However, use of a notional release fee was not to be regarded as a rule of law but is "*an evidential technique for estimating the claimant's loss*"; using that technique would be appropriate "*only if there is material on which the notional release fee can be assessed and then only so far as the trial judge finds it helpful*" (§124). Lord Sumption would therefore have modified the Judge's order so as neither to require nor to exclude assessment of the claimant's damages on a negotiating basis (§125).

**Lord Carnwath:**

Lord Carnwath gave a separate judgment commenting on (a) certain aspects of Lord Sumption's analysis, (b) the implications of negotiating damages on the law concerning compensation for statutory interference with property rights, and (c) the date of assessment of negotiating damages. On the latter point, Lord

Carnwath said that logically such damages should generally be assessed at the date of breach, having regard to the knowledge available to the parties at that time (§159). However, where negotiating damages were awarded in lieu of an injunction, there was no reason to exclude information available to the parties up to the time of the judge's decision because such damages "*are not limited to past breaches, but include the judge's refusal of an injunction to restrain future breaches*" (ibid).

**Academic commentary:**

The decision provides a new starting point for considering the question of negotiating damages, but is "*far from a one-stop authority*" when seeking to understand such awards:

> The court chose not to explain negotiating damages as a sensible way of measuring non-pecuniary loss, but despite suggestions (see paragraph 98) did not make clear whether it is necessary that the claimant's interest in performance be non-commercial, in addition to the requirement that the contract obligation protects a proprietary interest. The court did not explain why such a different basis of contact damages is available in these property-related-but-not-breach-of-a-property-right cases … The scope of the award of negotiating damages in lieu of an injunction, but apparently separate to the scope of negotiating damages at common law, remains unclear. Unfortunately, it therefore remains far from easy for lawyers to advise their clients, although at least there is a clear focus on property-protecting obligations for this remedy for breach of contract.

(Adam Kramer, *Landmark decision on Wrotham Park damages*, Practical Law 25.4.2018).

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