Morris-Garner v One Step (Support) Ltd
[2018] UKSC 20

Summary

In 1999, Karen Morris-Garner ('KMG'), a former social worker, started with her civil partner, Andrea Morris-Garner ('AMG'), a business that was designed to support young people leave the care of the social services. In 2002, this business was taken over by One Step (Support) Ltd, a business in which KMG owned 50% of the shares; the other 50% was owned by Martin and Charmaine Costelloe. One Step was run by KMG and Martin Costelloe, with AMG performing a managerial role. The relationship between KMG and Martin Costelloe deteriorated, and in 2008, the Costelloes bought out KMG's interest in One Step. Under the terms of the sale KMG and AMG were required for three years not to compete with One Step or solicit its clients without One Step's consent, which consent was not unreasonably to be withheld. KMG and AMG breached this agreement by setting up a business called Positive Living, which performed much the same services as One Step, and as a result One Step suffered a serious decline in its business. One Step issued proceedings for breach of contract against KMG and AMG, suing KMG and AMG for between £5.6m and £6.3m, which One Step argued was the reasonable fee (so-called '*Wrotham Park* damages') that KMG and AMG would have had to pay to release themselves from their non-compete agreements with One Step.

At first instance, One Step's claim for *Wrotham Park* damages succeeded, as it did in the Court of Appeal. The UKSC dismissed One Step's claim for such damages, which it preferred to call 'negotiating damages' (at [3], per Lord Reed, who gave the leading judgment with the agreement of Lady Hale and Lords Wilson and Carnwath). Lord Reed made it clear that it is not every breach of contract that gives rise to a right to sue for negotiating damages: '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 an ordinary way' (at [93]). KMG and AMG's breach of their non-compete agreement with One Step did not fit the bill: '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' (ibid).

Lord Sumption gave a supporting judgment, in which he held that negotiating damages would be available in three categories of case: '(i) cases in which damages are not limited to pecuniary loss, because the claimant has an interest in the observance of his rights which extends beyond financial reparation; (ii) cases in which 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) cases in which 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' (at [109]). Lord Sumption thought that One Step's case might fall under (iii), drawing an analogy with patent cases where the patent holder seeks to sue a defendant for diverting sales away from the patent holder by infringing the patent, and 'the value of those diverted sales may be measured by the amount that the patentee could reasonably charge the infringer for not enforcing his monopoly against him' (at [119]). Given this, he favoured modifying 'the declaration of the judge so as neither to require nor to exclude the use of a notional release fee as evidence of the claimant's loss' (at [124]). Adopting such a technique to measure the claimant's loss was appropriate, Lord Sumption thought, '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, in the light of such other evidence as may be before him.'

Lord Carnwath gave the final judgment, agreeing with Lord Reed's judgment (at [127]), and going out of his way to express his worries about Lord Sumption's approach to the availability of negotiating damages (at [132]-[137]). First, he thought that Lord Sumption's separating cases where A uses B's property and is held liable to pay negotiating damages to B (a type (i) case in Lord Sumption's view) from cases where A infringes B's patent (a type (iii) case according to Lord Sumption) was unsupported by the caselaw, which tended to treat them as indistinguishable (at [133]); and moreover the caselaw did not support the idea that in a patent infringement case negotiating damages were invoked as a technique for assessing the patent holder's loss (at [134]). Lord Carnwath conceded that 'if one were to turn the clock back 100 years one might question the analogy...between borrowing a horse and infringement of a patent' (at [135]) – but that was no reason for thinking that they have in the past been treated as separate cases. More broadly, Lord Carnwath thought that the 'concept of loss suffered' and the 'concept of a negotiated fee...for use of another's property or for release from an obligation...are different concepts, and the differences should not be blurred. If in a particular context a negotiated fee basis of claim cannot be justified in its own terms, the case is not improved by treating it as an evidential technique for assessing something conceptually different' (at [137]).

Comments

(1) *The function of negotiating damages*. Despite the differences between them, Lords Reed and Sumption seemed agreed that negotiating damages are compensatory and not restitutionary in nature. That is: negotiating damages are designed to compensate for the fact that the victim of a wrong has lost something, and are not designed to strip the wrongdoer of some or all of the gains that he has made from his wrong. (While he agreed with Lord Reed's judgment, we have already seen that Lord Carnwath seemed more hesitant to analyse negotiating damages as compensatory, distinguishing between cases 'governed by the traditional compensatory principle...' and those cases where negotiating damages may be awarded (at [128]).)

So, for example, Lord Reed explains that user damages in tort are intended to compensate a property owner for the loss resulting from their being prevented 'from exercising [their] right to obtain the economic value of the use [of the property] in question' (at [30]); while 'Damages awarded in substitution for an injunction are, as one might expect, a monetary substitute for an injunction' designed to provide compensation for 'loss and damage' resulting from 'the refusal of an injunction' (at [44]). Lord Sumption makes it clear that negotiating damages that are awarded in his type (i) and type (iii) cases are compensatory. As to (ii) (damages awarded in lieu of an injunction), Lord Sumption said that Millett LJ's analysis of such damages in *Jaggard* v *Sawyer* [1995] 1 WLR 269, at 290-91 'repays study. As he pointed out, the award of a notional release fee by way of damages was in fact compensation for pecuniary loss' (at [113]).

Despite this endorsement (leaving Lord Carnwath behind for this purpose) of the idea that negotiating damages are compensatory, I think it would be a mistake to see the decisions in *One Step* as endorsing either (1) Sharpe and Waddams' view (in 'Damages for lost opportunity to bargain' (1982) 82 OJLS 290) that negotiating damages compensate a claimant for what they would have demanded from the defendant as a price for allowing the defendant to commit what would otherwise be a violation of the claimant's rights; or (2) Robert Stevens's view (in *Torts and Rights* (OUP, 2007), 67-68) that negotiating damages

compensate (or in Stevens' preferred terminology, 'substitute for') the right of which the claimant has been deprived by the defendant's infringement. It has to be admitted that there are *dicta* in Lord Reed's speech that support both (1) and (2). In support of (1), Lord Reed argued (at [30]) that user damages in tort are awarded in response to the fact that the defendant 'takes something for nothing, for which the owner was entitled to require payment.' In support of (2), Lord Reed observed (at [54]) that negotiating damages awarded in lieu of an injunction are 'based on the value of the right infringed, since the refusal of an injunction effectively deprived the plaintiffs of the benefit of their right...'. However, neither (1) nor (2) can explain why Lord Reed placed such great emphasis in his judgment on the point that it is not the infringement of any right that can give rise to an award of negotiating damages – the right has to give rise to, or protect, something beyond it for such an award to be justified.

(2) *Lord Reed's one step beyond*. What is this thing that has to exist beyond a right for the infringement of that right to give rise to an award of negotiating damages? For Lord Reed, it is 'a valuable asset created or protected by the right which was infringed' (at [92]). It was the lack of such an asset that accounted for why Lord Reed opposed making an award of negotiating damages in *One Step*: 'The case is not one where the breach of contract has resulted in the loss of a valuable asset created or protected by the right which was infringed...' (at [99]). All the claimant had in this case was a right that the defendants not set up a competing business – that right did not give them any kind of valuable asset such as a monopoly (as in a patent case), or an interest in property (as in a tort case where user damages are awarded) or something analogous to an interest in property (as in a case where confidential information is misused).

However, there are other parts of Lord Reed's judgment that seem to endorse a quite different analysis – that in a case where negotiating damages are claimed, what has to be shown is not just that a right of the claimant's has been infringed but that that right gave (and was intended to give) the claimant *control* over what the defendant could and could not do. For example, Lord Reed analyses the award of negotiating damages in *Experience Hendrix* [2003] EWCA Civ 323 (where the defendants marketed bootleg recordings of Jimi Hendrix in violation of a contractual undertaking to the claimants not to do so) as justified on the basis that 'The agreement gave the claimant a valuable right to control the use made of PPX's copyright' (at [89]). And the award of damages in *Wrotham Park* [1974] 1 WLR 798 itself – where the defendants built and sold properties on their land in breach of a restrictive covenant with the claimant neighbours – was explained by Lord Reed on the basis that 'the use to which the defendants wrongfully put their property infringed a valuable right held by the plaintiffs to control such use' (at [54]).

This alternative analysis of the basis of awards of negotiating damages is consistent with that advanced in McBride, 'Restitution for wrongs' in Mitchell and Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment – Critical and Comparative Essays* (Hart, 2013), at 272-74, where I distinguish two kinds of rights: welfare-oriented rights, and liberty-oriented rights. Welfare-oriented rights are concerned to secure some sort of tangible good for the right-holder. Liberty-oriented rights are concerned to protect or expand the right-holder's freedom to determine how things will go. The violation of a welfare-oriented right poses no problems for the courts in terms of how they will respond: if the violation of the right has deprived the right-holder of the tangible good that the right was meant to secure for the right-holder, then the right-holder will be awarded enough money to obtain that good. However, in the case of a liberty-oriented right 'As the right that was violated in the claimant's case was geared towards protecting his liberty, he may well not have suffered any material harm to his welfare as a result of that right being violated. However, the claimant

will still have lost something – a liberty – that the law thinks he was entitled to have' (ibid, 273). My suggestion was that negotiating damages (or as I prefer to call them 'licence fee damages') are designed to compensate the claimant for the loss of this liberty and as such reflect 'the value of the freedom of which he has been deprived as a result of the defendant's wrong' (ibid). (For a similar suggestion, see Kit Barker's '"Damages without loss": can Hohfeld help?' (2014) 34 OJLS 631, an article that was written pretty much at the same time as I was writing my paper.)

While Lord Reed's analysis of *Experience Hendrix* and *Wrotham Park* itself seems to back up my view of negotiating damages, it has to be admitted that his conclusion – that no negotiating damages could be awarded in *One Step* – is not. This is because the most straightforward interpretation of the non-compete agreement in *One Step* was that it was intended to give the claimant the ability to control whether or not the defendants set up a business competing with the claimant. It was a liberty-oriented right and as such should have attracted a remedy designed to compensate the claimant for the fact that the defendants' violation of that right meant the claimant lost the ability to decide for itself whether to allow the defendants to set up a competing business. That remedy is negotiating/licence fee damages.

In the end, we can compare Lord Reed's judgment to the 'two button' meme that can be popularly found on the Internet nowadays. Lord Reed rightly intuited that not every violation of a right should give rise to a response of negotiating damages. But in trying to determine what it was that marked out a right as giving rise to such a response when it is violated his finger hovered over two buttons, one marked 'ASSET' and one marked 'CONTROL'. In the end, his finger came down on 'ASSET' and the claimant's claim for negotiating damages was lost. Had his finger come down on 'CONTROL', the claimant's claim would have been won. There is enough material in Lord Reed's judgment to support the view that his finger should have come down on the 'CONTROL' button, and I think that would have been the right outcome given the general function performed by awards of negotiating damages.

(3) *The future of Blake*. So why did Lord Reed's finger come down on the 'ASSET' button? One possibility is that he was predisposed to dismiss the claimant's claim for negotiating damages because he wanted to make a general statement about awards of contract damages: 'The law of contract...gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed' (at [31]). What better way of underlining this point about awards of damages in contract law, than to dismiss the claim for negotiating damages in *One Step* and instead order that the judge in *One Step* 'should measure, as accurately as he can on the available evidence, the financial loss which the claimant has actually sustained' (at [100]) as a result of the defendants' breach of contract?

But if this was the intention behind the decision in *One Step*, then the House of Lords' decision to award an account of profits for breach of contract in *Attorney-General* v *Blake* [2001] 1 AC 268 seems completely out of line with the approach to breach of contract cases that was endorsed by the UKSC in *One Step*. Lord Reed observed ominously of *Blake* that 'The soundness of that decision is not an issue in this appeal' and said enough elsewhere to make one pretty confident that *Blake* would have been overruled if its correctness had been an issue. For examples: (i) Lord Reed thought that the damages awarded in a breach of contract case could not 'be affected by whether the breach was deliberate or self-interested' (at [35]; also at [90]); (ii) Lord Reed thought that the victim of a breach of contract had no

power to elect between different remedies for that breach (at [36]) – something which one would expect to be the case if an account of profits were ever available for a breach of contract; (iii) Lord Reed questioned whether Lord Nicholls was right to think in *Blake* that the law should treat breaches of contract and violations of property rights in the same way (at [76]); (iv) Lord Reed found it surprising that Lord Nicholls should have analysed *Wrotham Park* as supporting a restitutionary remedy in a breach of contract case as *Wrotham Park* was not a breach of contract case (at [77]); (v) Lord Reed thought that cases of skimped performance did not need to attract a remedy based on an account of profits, as a standard compensatory remedy would provide the desired remedy (the difference between the value of the goods or services contracted for and those actually provided) (at [80]); (vi) Lord Reed found it 'difficult to agree' with the proposition that 'it is relevant to an award of damages that the claimant has a "legitimate interest" in preventing an activity carried out in breach of contract' (at [90]).

Given the above – and also the general paucity of subsequent caselaw applying *Blake* and bolstering its authority – there is a real case to be made for saying that *Blake* is no longer good law in England. And with the UKSC's clear rejection of the idea that negotiating damages perform a restitutionary function, there is also a case to be made for saying that the law of restitution is now largely irrelevant to the way English law responds to common law wrongs. This is a remarkable turnaround in English law: it remains to be seen whether it sticks or whether future years will see yet another swing of the pendulum towards the adoption of gain-based responses to torts and breaches of contract.

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