



THE LIMITS OF WROTHAM PARK DAMAGES

By Noel Dilworth

“Wrotham Park” damages held to be unavailable where their purpose is to overcome a procedural defect in the pleadings

OCENSA LITIGATION

1. Developments over the last 40 years in the common law approach to measuring damages had demonstrated the flexibility and pragmatism of the common law in circumstances where the application of its principles would otherwise lead to unjust under-compensation. A recent decision in the Technology and Construction Court has identified limitations on that flexibility. In *Arroyo & Ors v Equion Energia Ltd* [2013] EWHC 3150 (TCC), Mr Justice Stuart-Smith held that, in the circumstances of that case, Wrotham Park damages and / or other unquantified claims for General Damages may not be recovered. In particular, such claims could not be made where the claimant had elected to pursue claims for consequential economic damage arising from alleged damage to land and where, by a late application to amend, the claimant had been precluded from recovering compensation for the damage to land by reference to the costs of reinstatement.
2. A brief consideration of the unusual facts of the case is necessary to provide context to Mr Justice Stuart-Smith’s decision. The Claimants, resident in Colombia, issued claims in January 2008 concerning alleged

economic losses flowing from damage to their land against the Defendant in respect of its role in the construction of a pipeline (known as the OCENSA pipeline) through their land, which, they alleged, was responsible for damage to the land. The claims, including the available heads of damage, were subject to the substantive law of Colombia, but the law of England determined the principles to the assessment and quantification of the damage. In mid-2012, the Claimants served revised Schedules of Loss and Damage for each of the Lead Claimants in the group litigation, which, for the first time in the litigation, made extensive reference to the costs of remediation of the land to its previous condition. The Senior Master had refused the Claimants permission to include the claims for the costs of remediation, primarily on the basis of the prejudice that flowed from such a late amendment in circumstances where fields of expertise and expert inspections had been predicated on the nature of the claims as previously pleaded. That decision was not appealed.

3. The Claimants subsequently served Further and Better Particulars of the Claims for General Damages dated 24 April 2013. The Claimants contended that the Court's general functions, complemented by the availability of general damages under Wrotham Park principles entitled them to assert General Damages in sums similar to (and, in some cases, in excess of) the claims for the costs of remediation. The Defendant objected and issued an application accordingly.

ANALYSIS OF WROTHAM PARK MEASURE OF DAMAGE

4. There are two well-established measures of loss for torts affecting land: diminution in value to the plaintiff or, in the case of a plaintiff in possession with full ownership, the reasonable costs of reasonable

reinstatement. In addition, consequential loss of profits may be recovered in accordance with general principles and, in the case of a private individual, such consequential loss as a necessary stay in a hotel, and general damages for inconvenience.

5. However, in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, application of the traditional measures of damage would have deprived the Claimant of compensation and allowed the Defendant to reap an unjust gain. The relevant breach of rights concerned a restrictive covenant whose monetary value was nil. Brightman J held that compensatory damage which exceeds the actual financial loss caused to the claimant by an actionable breach of duty was recoverable. In *Pell Frischmann Engineering Limited v Bow Valley Iran Limited & ors* [2009] UKPC 45, Lord Walker, giving the opinion of the Privy Council, summarised the general principles applicable to what has been termed Wrotham Park damages at paragraph 48 of his speech:

- a. Damages are readily awarded at common law for the invasion of rights to tangible moveable or immovable property (by detinue, conversion or trespass);
- b. Damages were also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character;
- c. Damages under Lord Cairns' Act (the precursor to section 51 of the Senior Courts Act 1981) are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief;
- d. Damages under this head represent “*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 continuation of the breach of covenant or other invasion of right].”

- e. Although damages under Lord Cairns' Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted.
6. However, Lord Walker’s speech does not comprehensively identify all the necessary conditions that obtain for the application of Wrotham Park damages. In particular, the fact that the damages have been awarded where the application of conventional measures of damage to rights in land would lead to no or negligible compensation was not mentioned. Crucially, in *Arroyo*, Stuart-Smith J observed at paragraph 66 that:

“None [of the statements of principle] arose in circumstances where the deficit was attributable to the failure by the party claiming damages to pursue a conventional claim on established principles; and in none was it suggested that the damages might be awarded in substitution for a conventional award in circumstances where such an award would (or should) have been available.”

7. Stuart-Smith J surveyed several authorities in which Wrotham Park had been discussed and formed the view (set out at paragraph 67) that:

“...while it is established that general damages for loss of amenity may be awarded to a Claimant in circumstances where the application of conventional principles for measuring damage to land would lead to under-compensation, I would conclude that English law does not recognise as an alternative approach to the quantification of damages for physical damage to land a head of general damages or

damages at large in circumstances where it would (or should) have been open to a claimant to advance the claim by reference to diminution in value or reinstatement costs or both. I would also conclude that English law does not recognise as an alternative approach to quantification for physical damage to land a measure of “negotiation” damages based upon the putative negotiation that would have occurred between reasonable men if they had been able to foresee the damage that ensued.”

8. The Claimants also placed some reliance on the cases of *Scutt v Lomax* (2000) 79 P & CR D31 (CA) and *Bryant v Macklin* [2005] EWCA Civ 762. However, on closer inspection, as Stuart-Smith J observed at paragraph 62 of his judgment:

“First, in each case the Claimant had claimed damages on the conventional basis for claims for damage to land, i.e. diminution in value or reinstatement costs. The need for general damages arose from the principled approach by the court to assessing what were the reasonable costs of reasonable reinstatement. Second, in each case the general damages that were awarded were awarded in addition to and not in substitution for an award of damages by reference to diminution in value or costs of reinstatement. In other words, the award of general damages was a “top up” to a conventionally framed award of damages and did not replace it. Third, it will immediately be noted that the Courts’ description of the awards as being compensation for loss of amenity suggests that they would fall within the Columbian law heads of damage (Moral Damages and Loss of Amenity) that are already in play in this action.”

COMMENT

9. It is unlikely that the facts of the OCENSA litigation will come together in a similar way to provide such a clear answer to the question whether Wrotham Park damages should be available. Moreover, whilst Stuart-Smith J's decision identifies some limits to the application of Wrotham Park damages, it is appropriate to understand its significance in underlining the general principle that claims and arguments about damages which will necessarily involving complex factual investigation, engaging particular lay witnesses' evidence and specific fields of expertise will need to be set out in pleadings and notified both to the Court and the Defendant. The label which is put on the claim is (or, at least, was considered by Stuart-Smith J, to be) trivial, compared with the information necessary for a party reasonably to appreciate what issues were live in the litigation. Conversely, however, the decision also highlights the potentially wide scope for pleading negotiation damages under principles evolved in Wrotham Park; the key is to do so at the first available opportunity.

Noel Dilworth is being led by **Charles Gibson Q.C.** and **Oliver Campbell**, together with **Kathleen Donnelly**, on behalf of the Defendant in the OCENSA litigation.

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