Wrotham Park Damages

Revisited, Reviewed, Rationalised

Marathon Asset Management LLP v Seddon & another

[2017] EWHC 300 (Comm)

CASE NOTE

Stuart Ritchie QC

Fountain Court Chambers[1]

Introduction

1. Judgment has been handed down on the last of the outstanding claims between Marathon Asset Management (MAM) and its former Global Team run by Jeremy Hosking, arising from the well-publicised retirement of Mr. Hosking from MAM in 2012.

2. The instant claim concerned the circumstances in which four members of the Global Team resigned from MAM. Three of them subsequently formed a company Seculum, before working with Mr. Hosking in his new venture Hosking Partners. MAM alleged a conspiracy on the part of the team members. The conspiracy claims were settled prior to trial.

3. The trial concerned alleged misuse of MAM's confidential information by Mr. Seddon (D1) and Mr. Bridgeman (D3). D3 admitted that between July and October 2012, prior to his departure from Marathon, he had electronically copied and retained some 40,000 documents, and had acted in breach of contract. Those files contained a mixture of confidential and non-confidential information. D3 delivered up the files in 2013.

4. The trial concerned two principal issues:

    a. Whether D1 was liable (jointly with D3) for copying some or all of the files pursuant to a common design to misuse confidential information;

    b. Whether substantial damages (claimed in the minimum sum of £15million) were payable by Ds in circumstances in which MAM did not seek an account of profits, nor was it asserting that it had suffered any financial loss as a result of the Defendants' activities. Thus the claim was solely for negotiating damages following the case law deriving from *Wrotham Park v Parkside Homes*. The Judge preferred the term "licence fee damages" to capture the idea that the damages

[1] Stuart Ritchie was instructed by Stephen Ross and Lesley Timms of Withers LLP on behalf of the Third Defendant together with Victoria Windle and Can Yeginsu.

represent a fee that would reasonably be agreed between the parties to licence the Defendants' wrongful activity.

Decision

5. The Court found that the Defendants had acted in breach of contract and confidence[2] and that they had acted pursuant to a limited common design in respect of 33 documents. However, it rejected the claim for substantial damages, awarding nominal damages of £1 against both Defendants.

Analysis

6. MAM claimed that it was entitled to (at least) £15m being the sum that it said would have been agreed pursuant to a notional negotiation to release the Defendants from their obligations of loyalty and confidence. It claimed that the relevant wrong on the part of the Defendants was the copying and retention of the documents. MAM made no claim to damages based upon the actual use made of the documents.

7. D3 admitted that he had accessed 52 of the MAM files prior to delivering them up,[3] but the Court found that he had not copied them to any other device; nor had he used the documents to target any of MAM's clients or former clients; nor had he shared the documents with his colleagues or their new venture. Further, the Court found that there was no evidence to suggest that D3 (or the new venture) derived any material benefit from looking at the documents.

8. Thus, as the Court observed[4], there was a vast gulf between the extent of use of the documents which MAM alleged could have been made of the files removed by D3 and the very limited use which was in fact made of them.

9. That gulf gave rise to the real contest on the law. MAM's argument was that damages were to be assessed on the basis of a negotiation which assumed that the Defendants were free to (and would or could) make unlimited use of all of the information contained in the files removed.

10. The Defendants' position was that the hypothetical negotiation underlying licence fee damages was a construct to value the wrongdoing which had in fact occurred, not wrongdoing which might potentially have occurred but never did.

11. MAM argued that the extent of actual use of the documents was irrelevant. Leggatt J held that there was an extremely modest benefit obtained by D3 and a total absence of benefit to D1. The Judge observed that to have sought an award based on actual use (even in the

[2] The judgment contains a helpful analysis between contractual and equitable duties of confidence in an employment context.

[3] 11 of which contained client information, 16 contained compliance and regulatory information and 12 contained information about funds.

[4] At para 110

alternative) would have highlighted the enormous mismatch between any gain by the Defendants and the amount of money which MAM was seeking[5].

12. The Court's essential reasoning in rejecting the claim for substantial damages was as follows[6]:

    a. It was wrong to adopt the date of breach of copying the documents as the date of valuation and to assume as part of the valuation construct a set of hypothetical future events and risks which never in fact eventuated. Such an approach was not required pursuant to the decision in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430 and was inconsistent with the approach to valuation of damages more generally[7].

    b. MAM's approach failed to match the remedy sought to the wrong committed. If the wrong for which a remedy was sought was limited to the copying of files, it was complete when the copying took place and did not include any other breaches of duty committed afterwards. The remedy awarded had to respond only to that wrong. It could not include redress for D3's other subsequent breaches of duty in retaining and making use of the files that he copied. Still less could the remedy include redress for subsequent breaches of duty which might have been feared or anticipated at the time when D3 was copying files by someone aware of that fact, but which he never in fact committed.

    c. No reasonable negotiator would pay more than a token sum for a licence to copy or retain MAM's information unless it also had permission to use the information for purposes other than those of MAM. The wrongdoing relied on did not extend to such use.

    d. MAM's approach was contrary to the requirement laid down in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SDA [2013] EWCA Civ 1308* that the hypothetical negotiation had to focus on the nature and extent of the wrongdoing actually committed. Leggatt J held that the contrary approach taken by the Court at first instance in *C&F Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049[8] was wrong in principle:

    "The only circumstance in which it is relevant to consider future misuse of confidential information is where, at the time of the court's decision, the defendant still possesses and is threatening to misuse the information and the court is considering whether to grant an injunction to prevent such misuse or to award damages instead of an injunction"[9].

[5] At para 243
[6] At paras 243-280
[7] Including decisions in Bunge v Nidera [2015] UKSC 43 and The Golden Victory [2007] 2 AC 353, 396-397
[8] Where the Court took a valuation date and valued a licence to cover prospective breaches.
[9] At para 268

e. The Court rejected analogies borrowed from the field of interference with goods (market price of hire irrespective of use) and the well-known "dictionary" analogy deployed by Lewison LJ in obiter dicta in *Force India Formula One Team Ltd v Aerolab SRL* [2013] EWCA Civ 780 [2013] RPC 36. In that case the Judge at first instance had found that only limited use of certain design files for a formula 1 racing car had been made. The Court of Appeal rejected an appeal against that decision, but observed as follows:

> *"Whether Aerolab's aerodynamicists and CAD draftsmen regarded themselves as free to use the CAD files as they thought fit is essentially a question of fact, which turns on the state of mind of the people in question. … I do not consider that we are in a position to make a finding of fact that the judge did not make. That said, if the judge had made that finding, then it seems to me that compensation should have been assessed on the basis of the value to Aerolab of the whole corpus of information. After all, if A wrongfully retains B's dictionary, it does not matter that he only looked up a few definitions.[10]"*

f. The Court in *Marathon* rejected the relevance of the wrongdoer's "state of mind" or "intention" in valuing a licence fee for wrongdoing. The question was what the defendant had done wrong, not what he may have intended to do wrong, but did not. Leggatt J explained the dictionary analogy on the basis that, in order to do lawfully what was done unlawfully, the wrongdoer would have to buy the whole dictionary. He rejected the dictionary analogy on the facts of the instant case because the information taken was not a single corpus of information, but a disparate collection of individual documents:

> *"In order to value the benefit of using one of the files, it would not be necessary or relevant to assess what it would have cost to obtain lawfully the information contained in the entire collection. It would only be relevant to assess what it would have cost [D3] to obtain lawfully the information which he in fact used.[11]"*

g. Had the Court considered it appropriate to value the benefit to the Defendants of acquiring unlimited use of all the information in the 40,000 files, it would have adopted the valuation approach summarised in the summary of the *obiter* analysis below but it was not appropriate to do so.

h. The Court considered whether to award damages on the basis of the use which D3 in fact made of the 52 documents accessed by the exercise of a "*sound imagination and the practice of the broad axe*" (*see Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* [1914] SC (HL) 18 at 29-30. However, MAM having gone all out for "jackpot" damages and expressly disavowed such an alternative claim it would not be just to permit such an exercise.

---

[10] Cited in the instant decision at para 276

[11] Para 279

(Obiter) Rationalisation of the "licence fee damages" remedy[12]

13. Of wider interest to practitioners is likely to be the Court's (strictly obiter) analysis of the availability generally of licence fee damages and the proper approach to their assessment. Leggatt J has sought to rationalise and explain this construct and to give it coherence within the wider remedial framework.

14. Amongst a number of points which are likely to be considered in subsequent case law Leggatt J's central analysis was as follows:

    a. The licence fee damages remedy is "compensatory" only in the broad sense that it provides redress for wrongdoing. It does this, not by providing compensation for loss, but by ordering the defendant to pay to the claimant a sum of money which represents a gain made by the defendant from its wrongful act.

    b. The fact that the claimant has not suffered any loss as a result of a defendant's breach of contract is not a reason to award damages representing a gain made by the defendant; it is a reason to award only nominal damages. A finding that the claimant has failed to prove loss is tantamount to a finding that the claimant has not suffered loss. Where loss is difficult to prove there are legal principles and presumptions which may assist the claimant. Where, even with the aid of those principles, loss cannot be established the claim should fail.

    c. Awarding a gains-based remedy can only be a just response where compensatory (i.e. loss-based) damages are an *inherently* inadequate remedy because they would not represent adequate redress for the wrong done to the claimant even where any loss caused can be fully identified and reversed.

    d. Under an ordinary commercial contract the claimant's legitimate interest in performance of the contract is limited to its "expectation" interest. In general, the claimant has no legitimate interest in preventing the contract-breaker from making a profit which is not reflected in loss suffered.

    e. Such a legitimate interest does exist where the purpose of the contract is to protect a proprietary right.

    f. It was difficult to identify the principle on which the Court of Appeal in *One Step (Support) Ltd v Morris-Garner* [2017] QB 1 considered that the Judge in that case was entitled to award licence fee damages.

    g. When considering whether to award an account of profits or licence fee damages two factors will be key (see *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at paras. 333-339 per Sales J): first, the strength of the interest which the law recognises as deserving protection; and secondly (a factor which may correlate with the strength of the interest requiring protection but is distinct from it) the question whether the defendant could reasonably have expected to obtain the

[12] See paragraphs 208-242

benefit enjoyed by its infringement of the claimants' right by paying for it. Adopting the analysis in *Vercoe:*

"*it may be more appropriate to award an account of profits where the right in question is of a kind where it would never be reasonable to expect that it could be bought out for some reasonable fee*".[13]

15. Thus, the Court held that there was a coherent framework which was capable of explaining the cases, and would operate as follows:
    a. The first question is to ask whether there was an alternative means by which the defendant, acting lawfully, could have obtained the benefit gained by its unlawful act or an equivalent benefit. That test will be met where the benefit consists of using property which can be bought or hired in a market.
    b. Even where there is no available market the benefit may be one which the defendant could have obtained in another way, through paying consultants or the like;
    c. Where the defendant could not have obtained an equivalent benefit from another source, it is necessary to ask whether the defendant's activity is one which it was reasonable to expect that the claimant would licence in return for payment of a reasonable fee. If so, then it is likely to be appropriate to value the benefit obtained by the defendant by estimating the licence fee that would reasonably have been charged.
    d. Where it is unrealistic to value the benefit obtained by the defendant in this way because the defendant could not reasonably have expected to purchase a licence from the claimant for its activity (and could not have obtained a benefit from another source) Leggatt J held[14] that:

    "it makes no sense to value the benefit by postulating a hypothetical negotiation between a willing seller and a willing buyer. Such a method makes no sense because in such a context the negotiation is not merely fictional in the sense that it did not actually happen but fictional in the stronger sense that it lacks any verisimilitude. The law ought not to employ fictions of the latter sort."

    e. In those cases, the appropriate method of valuation is to assess the amount of profit made by the wrongdoer which is fairly attributable to its wrongful use of the claimant's property (or other wrongful act) either by an account of profits, apportioning the profits made as necessary, or to order a payment of a percentage of the profit as licence fee damages (see *Experience Hendrix).* The Judge stated that:

    "It may be that, as the law of remedies in this area develops further, these two different methods of awarding a percentage of profits made by a wrongdoer will be harmonised into a single measure. For the time being, however, they remain doctrinally distinct"[15].

16. The judgment therefore serves both as a useful precedent as well as providing a critical appraisal of the law in this difficult area which may attract the interest of the Supreme Court when it considers the appeal in *One-Step v Garner* later in the year.

---

[13] At para 231
[14] at para 235
[15] At para 236.