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WROTHAM PARK DAMAGES

Principles and Practical Issues

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"*Wrotham Park* damages" are damages for breach of a restrictive covenant. They are measured not by reference to the claimant's pecuniary loss, but by the sum of money which the claimant could have demanded from the defendant for relaxing the covenant.

Such damages were first awarded by the English High Court in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*"). That case dealt with damages for the breach of a restrictive covenant over land.

Since then, *Wrotham Park* damages have been extended to other areas, including restrictive covenants over the use of intellectual property and confidential information. These developments have sparked debate in both Singapore and England on the doctrinal basis of *Wrotham Park* damages and widened the scope of their potential application.

This article first analyses these developments in Singapore and England. It will then argue that unlike England (which recently excluded *Wrotham Park* damages for breaches of non-compete agreements), there should be no similar exclusion in Singapore. Finally, it will also deal with practical issues on the quantification of *Wrotham Park* damages.

TAY Yong Seng
MA (Oxford), BCL (Oxford);
Partner, Allen and Gledhill LLP.

ANG Ann Liang
LLB (Hons) (University College London);
Senior Associate, Allen and Gledhill LLP.

I. Introduction

1 *Wrotham Park* damages were first awarded in the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[1] ("*Wrotham Park*").

2 In that case, landowners sold part of their land to a developer, subject to a restrictive covenant that the land would not be developed except in accordance with plans approved by the landowners. A developer breached the restrictive covenant, built houses on the land and sold the houses to purchasers. The landowners sued.

3 Brightman J held that the plaintiffs had a *prima facie* entitlement to a mandatory injunction requiring the houses to be moved, but such relief would be refused as a matter of discretion. The plaintiffs suffered no loss to their estate, so damages measured on loss of value to their estate would result in nil or nominal damages, which the court felt was "a result of questionable fairness".[2]

4 Instead, the court awarded damages representing "such a sum of money as might reasonably have been demanded by the plaintiffs from [the defendant] as a quid pro quo for relaxing the covenant".[3] Such damages were assessed at 5% of the developer's anticipated profit.[4]

5 Since then, there has been extensive discussion of *Wrotham Park* damages in Singapore and England.

6 In *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*[5] ("*PH Hydraulics*"), a five-judge panel of the Singapore Court of Appeal held:[6]

> … '*Wrotham Park* damages' [are] (based on the seminal decision by Brightman J in the English High Court in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ('*Wrotham Park*')). *Such damages are quantified not by reference to a plaintiff's pecuniary loss (which may be nominal or difficult to*

1 [1974] 1 WLR 798.
2 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 812.
3 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 815.
4 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 816.
5 [2017] 2 SLR 129.
6 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].

> *quantify) but by reference to the sum of money which the plaintiff could have reasonably demanded in return for permitting the defendant to breach a restrictive covenant or other legal restriction.* [emphasis added]

7 The Singapore courts have affirmed their authority to award *Wrotham Park* damages.[7] However, they have also imposed strict qualifying criteria to such claims.

8 In England, the courts have awarded substantial awards of *Wrotham Park* damages, typically in cases concerning breach of a restrictive covenant over (a) land,[8] (b) intellectual property rights,[9] and (c) confidential information.[10] The damages awards can be very large. In *CF Partners (UK) LLP v Barclays Bank plc*, the sum awarded was €10m.[11]

9 Outside of (a) land, (b) intellectual property rights and (c) confidential information, however, the majority of the UK Supreme Court in the recent decision of *Morris-Garner v One Step (Support) Ltd*[12] ("*One Step Support*") expressed reservations about the availability of *Wrotham Park* damages. In particular, the majority Supreme Court justices held that *Wrotham Park* damages should not be available for breaches of non-compete obligations.[13]

II. Position in the UK

10 In *One Step Support*, the UK Supreme Court reviewed the circumstances under which *Wrotham Park* damages can be awarded.[14]

11 Lord Reed, in the majority,[15] began his analysis with the genesis of *Wrotham Park* damages to prevent breaches of

7 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [335]; *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193 at [210]; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [168].

8 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 815.

9 *Experience Hendrix LLC v PPX Enterprises* [2003] EWCA Civ 323 at [45].

10 *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [1195].

11 *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [1298] and [1309].

12 [2018] 2 WLR 1353.

13 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [93].

14 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [1].

15 The majority Supreme Court justices were Lord Reed, Lord Wilson, Lady Hale and Lord Carnwarth. The minority was Lord Sumption.

restrictive covenants over land.[16] The benefit of a restrictive covenant bound not just the original parties but also successors in title to the land. The benefit and burden thus ran with the ownership of the land. The benefit of a restrictive covenant thus began to be recognised as "a new kind of property right created by equity".[17]

12 The right over *land* was treated as an asset with commercial value. Where the plaintiff's right was injured, an appropriate sum in damages could be determined in considering what the plaintiff could fairly and reasonably have charged for relinquishing the right voluntarily.[18]

13 Lord Reed then went on to examine cases where *Wrotham Park* damages were awarded.[19] These cases involved breach of confidentiality and the court awarded damages based on the commercial value of the *confidential information* which was misused.[20]

14 Finally, Lord Reed considered *intellectual property rights*, using the Court of Appeal decision in *Experience Hendrix LLC v PPX Enterprises*[21] ("*Experience Hendrix*") as an example.[22] In that case, Jimi Hendrix's estate had a copyright agreement with PPX, under which PPX was allowed to grant licences for certain early Hendrix recordings, but not other recordings. PPX breached the agreement by granting licences for the prohibited Hendrix recordings.[23]

15 The Court of Appeal decided that damages should be awarded, assessed by reference to the royalties which the claimant might hypothetically and reasonably have demanded from the defendant for the licences in question.[24]

16 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [48].
17 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [53], citing Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade the Law of Real Property* (Sweet & Maxwell, 8th Ed, 2012) at para 5-026.
18 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [54] and [62].
19 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [84].
20 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [84], citing *Vercoe v Rutland Fund Management* [2010] EWHC 424 (Ch).
21 [2003] EWCA Civ 323.
22 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [86].
23 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [86].
24 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [87]; *Experience Hendrix LLC v PPX Enterprises* [2003] EWCA Civ 323 at [45].

16 Lord Reed explained *Experience Hendrix* as a case which gave the claimant a valuable right to control the use made of PPX's copyright.[25] When the copyright was wrongfully used by PPX, the claimant was prevented from exercising that right and consequently suffered a loss equivalent to the amount which could have been obtained by exercising it.[26]

17 From his analysis, Lord Reed drew the following conclusions. *Wrotham Park* damages are awarded when the breach of contract results in the loss of a valuable asset created or protected by the contractual right which was infringed.[27] 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.[28] The defendant has taken something for nothing, for which the claimant was entitled to require payment.[29]

18 Lord Reed acknowledged the possible objection that "there is a sense in which any contractual right can be described as an asset, or indeed as property".[30] However, he made it clear that it is only certain contractual rights whose breach can result in an identifiable loss equivalent to the economic value of the right, even if the claimant did not suffer any pecuniary loss at all. Lord Reed identified classes of assets: *rights over land*, *intellectual property rights* and *rights over confidential information*.[31]

19 It is noteworthy that Lord Reed expressly excluded rights under non-compete agreements from such assets (whose breach can give rise to *Wrotham Park* damages). In his Lordship's view, "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

25 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [89].
26 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [89].
27 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [92] and [95(10)].
28 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [92] and [95(10)].
29 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [92] and [95(10)].
30 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [93].
31 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [93].

absence of such loss, it is difficult to see how there could be any other loss".[32]

20 Lord Reed also stated that the effect of a breach of a non-compete agreement:[33]

> was to expose the claimant's business to competition which would otherwise have been avoided. The natural result of that competition was a loss of profits and *possibly of goodwill*. The loss is difficult to quantify, and some elements of it may be inherently incapable of precise measurement. Nevertheless, it is a familiar type of loss, for which damages are frequently awarded. It is possible to quantify it in a conventional manner …
>
> *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.*
>
> [emphasis added]

21 Lord Sumption wrote a separate judgment and took a different view. Lord Sumption doubted whether the characterisation of a contractual right as an "asset" (in Lord Reed's sense) "contributes anything to the argument". In one sense, almost any legal right can be described as a right of property, including business and goodwill which have been appropriated by a breach of a non-compete covenant.[34]

22 In fact, Lord Sumption suggested that goodwill was closely analogous to a species of property. The defendants who had entered into a non-compete agreement with the claimants had done so to procure a sale of the defendants' business to the claimants. The value of the business sold by the defendant to the claimant included the business's goodwill. By breaching the non-compete agreement, the defendants had appropriated the goodwill of the business which they themselves had sold to the claimants.[35]

23 Hence, in Lord Sumption's view, the use of the "notional release fee" technique in *Wrotham Park* damages was simply an evidential tool for assessing a party's loss in

32 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [93].
33 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [98] and [99].
34 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [120].
35 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [125].

appropriate cases.[36] There was no need to expressly exclude its application in the present case (which involved a non-compete agreement).[37]

III. Singapore position

24 In *Clearlab SG Pte Ltd v Ting Chong Chai*[38] ("*Clearlab*"), the Singapore High Court affirmed its authority to award *Wrotham Park* damages, in the specific factual context of breach of confidence.[39]

25 In that case, the plaintiff, a contact lens manufacturer, sued its former employees and other parties for misuse of confidential manufacturing information belonging to the plaintiff. After the plaintiff discovered the defendants' breaches, the plaintiff commenced legal proceedings and obtained an interim injunction. At the end of the trial, the court ordered a final five-year injunction against the defendants prohibiting them from misuse of the confidential information.[40]

26 The plaintiff also claimed *Wrotham Park* damages from the defendants at the trial. The court held that in principle, *Wrotham Park* damages were available for breach of confidence:[41]

> [Such] damages for breach of confidence could reflect the market value attached to the confidential information, or … the price which the owner of the confidential information could reasonably have demanded for agreeing to relax the restriction in question. A necessary implication of an award of such damages is that the defendants are regarded as having made an outright purchase of the confidential information. Once the damages are assessed and paid, the confidential information would belong to the defendants as if they had bought it in an agreement of sale.

27 However, the court refused to award *Wrotham Park* damages.

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36 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [123].
37 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [124].
38 [2015] 1 SLR 163.
39 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [335].
40 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [330] and [334].
41 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [335].

28 First, the plaintiff had already secured an interim injunction before trial and a final five-year injunction from the date of judgment. If the *Wrotham Park* damages were to compensate the plaintiff for the "hypothetical sale" of its confidential information after the injunction period, that would be double recovery for the plaintiff. The defendants would have to pay *Wrotham Park* damages to the plaintiff to "purchase" the confidential information, and yet still be injuncted from using the plaintiff's information.[42]

29 Second, as for the past misuse of the plaintiff's confidential information prior to the issue of the interim injunction before trial, *Wrotham Park* damages would not face the same "double recovery" objection. The plaintiff argued that there was a period between breach and the interim injunction that needed to be compensated for.[43]

30 However, the court rejected that argument. In the court's view, no agreement could have been struck for that limited initial period. It had "no regard for commercial reality"[44] and was "outside the bounds of realistic commercial acceptability".[45]

31 In coming to its conclusion, the court noted that under the hypothetical agreement, the defendants would have to pay a licence fee for a limited initial period, only to have the licence retracted just as they were ready to commercially exploit the confidential information by selling the products manufactured with that information. The value of a licence for such temporary and restricted use was zero.[46]

32 The *Clearlab* approach was applied in the Singapore High Court decision of *JES International Holdings Ltd v Yang Shushan*.[47] The court recognised the availability of *Wrotham Park* damages in Singapore[48] but refused to award such damages. The court held that, realistically speaking, no

42 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [336] and [339].
43 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [341].
44 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [342].
45 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [343].
46 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [343].
47 [2016] 3 SLR 193.
48 *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193 at [211].

commercially acceptable agreement could hypothetically have been reached on the facts of that case.[49]

33 In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[50] ("*Turf Club*"), the Singapore Court of Appeal expanded on the principles of *Wrotham Park* damages, including in relation to its qualifying criteria and the assessment of such damages. In that case, the respondents brought a claim against the appellants for breaches of a consent order. Having found that the appellants were so in breach, the question before the court was what remedies and damages ought to flow from the breaches.

34 The Court of Appeal held that *Wrotham Park* damages are available only when the following conditions are satisfied:[51] (a) the court must be satisfied that orthodox compensatory damages and specific relief are unavailable, (b) there must have been a breach of a negative covenant and (c) the case must *not* be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis.

35 Each of these requirements was underpinned by clear principles.

36 In relation to requirement (a), the court held that *Wrotham Park* damages should only be "a limited remedy to address the *remedial lacuna* which arises in cases where the court is unable to award orthodox compensatory damages or grant specific relief, but where there is still a need to provide the plaintiff with a remedy to protect the plaintiff's performance interest".[52] This does not mean that *Wrotham Park* damages are available whenever orthodox compensatory damages are "difficult" to assess or "inadequate".[53] Courts invariably face difficulties in the assessment of damages in the face of incomplete evidence. Instead, the "remedial lacuna" exists only where the plaintiff may have suffered some financial loss, but it is "practically impossible" on the facts

49 *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193 at [217].
50 [2018] SGCA 44.
51 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [217].
52 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [219].
53 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [174].

and circumstances of the case to assess compensatory damages based on either expectation loss or reliance loss.[54]

37 For requirement (b), the court held that the "remedial lacuna" was most acute in the context of negative covenants, where demonstrating financial loss may be practically impossible. For positive covenants, the plaintiff can typically obtain substitute performance when a defendant fails to do what he has promised to do, and damages can be measured by the additional cost of the substitute performance which the plaintiff has been made to procure.[55]

38 As for requirement (c), it is a practical and principled limitation on the doctrine of *Wrotham Park* damages.[56] It is practical because the court cannot arbitrarily pluck a figure out of thin air in an attempt to do justice. It is also principled because there would be situations where the hypothetical bargain measure cannot be rationally or realistically applied – for example, an agreement for a "licence fee" to divulge official State secrets.[57]

39 It is noteworthy that the Singapore Court of Appeal declined to follow the majority decision of the UK Supreme Court in *One-Step Support* to confine the availability of *Wrotham Park* damages to only specific categories of circumstances wherein the contractual right breached is considered an economically valuable asset – *eg*, land, intellectual property rights and confidential information.[58]

40 The Singapore court explained, *inter alia*, that *One-Step Support*'s approach could unduly narrow the scope of *Wrotham Park* damages and revive a narrow proprietary conception of the doctrine which was expressly rejected in the earlier authorities.[59] The court was also concerned with protecting the performance interest of a plaintiff. It was therefore not clear to the court "why it should be any more permissible to expropriate personal rights than it is permissible to

54 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [174] and [221]–[225].
55 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [227(a)].
56 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [231].
57 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [231]–[232].
58 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [278].
59 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [280].

expropriate property rights; and the fact that the contractual right breached was of a personal nature does not detract from the need to protect the plaintiff's performance interest by addressing the remedial lacuna which arises where orthodox contractual remedies are otherwise unavailable".[60]

41 It is respectfully submitted that the Singapore position is correct in rejecting any limitation on *Wrotham Park* damages based on certain specific classes of property rights. Particularly, it is respectfully submitted that *Wrotham Park* damages should be available for breaches of non-compete agreements.

IV. Non-compete agreements

42 Unlike the UK, Singapore does not currently exclude *Wrotham Park* damages for breaches of non-compete agreements. It is respectfully submitted that Singapore should maintain this position and not follow the UK position.

43 First, from a company's perspective, its client contacts and goodwill are valuable assets as they form the foundation for future business and custom.

44 In *One Step Support*, Lord Sumption commented that when vendors of a business sold the business, the value of the business included its goodwill.[61]

45 Hence, in the law of restraint of trade, trade connections or client contacts are often seen as the legitimate proprietary interests of the company which can justify the validity of the company's non-compete agreement.[62]

46 This is especially so when the company has spent time and expense building up its client connections. In *GFI Group Inc v Eaglestone*[63] ("*GFI v Eaglestone*"), the English High Court held that where its employee's personal relationships with the company's customers have been "carefully and expensively fostered" at the company's expense (at £300,000 in a single

60 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [280].
61 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [125].
62 *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [93].
63 [1994] IRLR 119.

year), that goodwill and customer connection belonged to the company and could be protected by way of injunction against the employee.[64]

47 Hence, it is respectfully submitted that Lord Sumption's view in *One Step Support* should be preferred to the majority view. A company's goodwill is analogous to its property. Goodwill is acquired by significant investments of money and time. It is a form of valuable property for the company. Its loss should be measurable by *Wrotham Park* damages like other forms of company assets in an appropriate case.

48 Further, this is consistent with the objectives of *Wrotham Park* damages as stated by the Singapore Court of Appeal in *Turf Club*.[65] A company has a performance interest in the employee adhering to his non-compete obligation, in order to safeguard the company's trade connections and client contacts. The company's performance interest is deserving of protection.

49 Second, from the errant employee's point of view, it is often the case that a company will find his breach of non-compete obligation hard to detect and the loss of goodwill difficult to quantify.[66] An errant employee may be emboldened in these circumstances to treat his company's customers as fair game and deliberately make a quick profit for himself (or a competitor) after leaving the company.

50 Meanwhile, from the company's perspective, it may find it practically impossible to obtain evidence of loss to claim ordinary compensatory damages. Customers poached by the errant employee may be unwilling to testify in favour of the company against the employee.

51 It is submitted that it is precisely in these circumstances that the potential availability of *Wrotham Park* damages will be useful in deterring deliberate breaches of

64 *GFI Group Inc v Eaglestone* [1994] IRLR 119 at [29]–[32]. See also *Euro Brokers Ltd v Rabey* [1995] IRLR 206 at [18] and [19].
65 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [219].
66 *GFI Group Inc v Eaglestone* [1994] IRLR 119 at [32] and [33].

contract. As the Singapore Court of Appeal held in *PH Hydraulics*:[67]

> The legal requirements for the award of … [*Wrotham Park*] damages – *the defendant's deliberate breach of contract for its own reward, the plaintiff's difficulty in establishing financial loss, and the plaintiff's interest in preventing the defendant's profiting from a breach of contract … suggest that it has the effect of deterring deliberate breaches of contract*. [emphasis added]

52 The majority position of the UK Supreme Court in *One Step Support* is markedly different. As mentioned above, in deciding whether *Wrotham Park* damages were available, the majority position concentrated on whether the relevant contractual right could be characterised as a valuable asset. Many other factors which were erstwhile held to be relevant – including whether the breach of contract was *deliberate* – were seen to be irrelevant.[68]

53 For the reasons already given above, it is respectfully submitted that the Singapore Court of Appeal's position should be preferred. Amongst other things, *Wrotham Park* damages form a useful deterrent remedy against deliberate breaches of contract.

54 From the company's perspective, in order to claim ordinary compensatory damages, the company would have to show that it lost customers because the employee had approached such customers in breach of his non-compete obligation. It would have to show that but for the employee's breaches, the customers would have remained with the company. The company would also be required to show that the customers who did leave did not do so because of purely commercial reasons unrelated to the employee's breaches.

55 In many instances, the company's evidential burden would not just be "difficult", but "practically impossible".[69] Even if the company could call the customers as witnesses to testify as to the cause of the customers leaving the company, more often than not, the economic reality is that customers

67 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].

68 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [90].

69 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [174] and [221]–[225].

may not wish to be involved in a legal dispute between the company and the employee, especially if the employee has joined a competitor that is a major player in the market. Further, customers who have obtained better terms of business with the employee than they did with the company, or who maintain close relations with the employee, may choose not to side with the company in a legal dispute. This is notwithstanding the fact that the employee has gained an unfair advantage for himself at the expense of the company.

56 In the circumstances, it is respectfully submitted that damages for breach of non-compete obligations should be available, along the principles in *Turf Club*.

57 Third, Singapore courts retain a wide level of discretion in assessing *Wrotham Park* damages. As noted above, the third requirement for *Wrotham Park* damages in *Turf Club* allows the court to deny recovery "where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis".[70]

58 In *Clearlab*, the Singapore High Court applied the criteria of "commercial reality" and "realistic commercial acceptability" in determining whether to award *Wrotham Park* damages in breach of confidence.[71] Allowing *Wrotham Park* damages to remain technically available in breach of non-compete agreement cases will not open a floodgate of claims, as the court will still retain significant discretion in deciding whether to award such damages and to assess quantum.

59 For example, in *Marken Ltd (Singapore branch) v Scott Ohanesian*,[72] the Singapore High Court refused to award a company *Wrotham Park* damages against its former employee because the claim for *Wrotham Park* damages appeared to be "just another way to dress up their claim for loss of profits". The court relied on the fact that company did not plead or prove that the employee had made gains pursuant to his breach of contract. There was no evidence for the court to form any view of the "commercial reality" of the hypothetical bargain that forms the heart of *Wrotham Park* damages. The

70 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [217](c) and [230]–[237].
71 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [342] and [343].
72 [2017] SGHC 227.

court thus remained unmoved by the company's repeated appeals to the justice of the case.[73]

V. Principles of quantification

60 While the notion of a "hypothetical" fee potentially brings about uncertainty, it is respectfully submitted that this should not be a bar to awarding *Wrotham Park* damages. General principles and parameters have been established from case law. There are also practical methods by which *Wrotham Park* damages can be assessed.

61 The following general principles can be extracted from established cases.[74]

62 First, the primary basis for assessment of *Wrotham Park* damages is to consider what sum would have been arrived at in negotiations between the parties, had (a) each been making reasonable use of their respective bargaining positions, (b) bearing in mind the information available to the parties and the commercial context at the time that negotiation takes place.[75]

63 Second, the fact that one or both parties would in practice not have agreed on a hypothetical release fee is irrelevant.[76] It follows that the court does *not* require actual proof of the amounts parties would have demanded as the hypothetical release fee.[77]

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73 *Marken Ltd (Singapore branch) v Scott Ohanesian* [2017] SGHC 227 at [40].

74 The principles are also summarised in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 at [1204] and in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [386]. See also *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [243]–[249].

75 See *Experience Hendrix LLC v PPX Enterprises* [2003] EWCA Civ 323 at [45]; *WWF v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445 at [55]; *Lunn Poly Ltd v Liverpool* [2006] EWCA Civ 430 at [25], citing *AMEC Development v Jury's Hotel (UK) Ltd* (2001) 82 P & CR 22 at [11]–[13]; *Pell Frischmann Engineering Ltd v Bow Valley* [2011] 1 WLR 2370 at [49]; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [244].

76 *Pell Frischmann Engineering Ltd v Bow Valley* [2011] 1 WLR 2370 at [49].

77 The court may take into account the subjective factors which a claimant says would have influenced the negotiations for the hypothetical release fee, but the reasonableness of the factors, and what weight is to be accorded to them, is a matter for the court. Thus, in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch) at [1208], the court *rejected* the contention that the claimant's quantum of the hypothetical release fee

(*cont'd on the next page*)

64 Third, as a general rule, the assessment of the *Wrotham Park* damages is to be made at the date of the breach.[78] However, given the quasi-equitable nature of *Wrotham Park* damages, a court may select a different valuation date or choose to take into account post-breach events, where there are good reasons to do so.[79]

65 Fourth, aside from the above, the court can choose to take into account other relevant circumstances, including delay on the part of the claimant in asserting its rights.[80] Some potential circumstances and factors are discussed below.

66 At the outset, the assessment of *Wrotham Park* damages is a matter of judicial assessment. Given the hypothetical nature of the release fee, it should be up to the judge hearing the dispute to (a) decide what factors are relevant in assessment and (b) how much weight to ascribe to those factors.[81]

67 The court could first have regard to any evidence on parties' actual negotiations relating to the hypothetical release fee. However, in a case where there have been no actual negotiations, the court can consider looking into the eventual outcome and consider whether it is a useful measure of *Wrotham Park* damages.[82]

68 Thus, for example, if the claimant has suffered losses as a result of the defendant's breaches, the quantum of such losses may inform the court's assessment of the *Wrotham Park* damages. In *One Step Support*, Lord Sumption identified patent infringement cases as examples of these. Where, for example, an infringer infringes on a patent, the patentee's measure of

was unchallenged by the defendant and therefore ought to be fully accepted by the court. See also *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [244] and [245].

78 *Lunn Poly Ltd v Liverpool* [2006] EWCA Civ 430 at [29]; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [246].

79 *Pell Frischmann Engineering Ltd v Bow Valley* [2011] 1 WLR 2370 at [50], citing *Lunn Poly Ltd v Liverpool* [2006] EWCA Civ 430 at [27]–[29].

80 See *Pell Frischmann Engineering Ltd v Bow Valley* [2011] 1 WLR 2370 at [54]. In that case, the Privy Council held that the claimant's delay was relevant to quantum but could not be decisive.

81 See, *eg*, *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [94]; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [247].

82 See *Pell Frischmann Engineering Ltd v Bow Valley* [2011] 1 WLR 2370 at [54].

his hypothetical release fee may be the profits which he has lost by the diversion of sales to the infringer.[83]

69 What happens if the claimant finds it practically impossible to prove that any loss in profits is due to the defendant's breaches? What if the claimant is unable to establish causation of loss?

70 In such situations, the Court of Appeal in *Turf Club* held that the practical impossibility of proving loss is not a bar to recovery of damages.[84] In fact, the court stated, tentatively, that the doctrines of causation and remoteness (to show a sufficient link between the defendant's breach and the plaintiff's loss) do not appear to be relevant to *Wrotham Park* damages at all.[85]

71 It is submitted that recovery is especially justified where the wrongdoer is in deliberate breach of his obligations. As noted above, the Singapore Court of Appeal has held in *PH Hydraulics*[86] that *Wrotham Park* damages ought to be available when the defendant has, amongst other things, committed a deliberate breach of contract for its own reward.

72 The court could take into account release fees that have been clearly set out in the contract between parties or were the subject of prior negotiation. Pre-negotiated release fees would not be irrational or unrealistic. These express contract figures, or prior negotiated figures, could potentially be used to support (or undermine) a subsequent quantification of the alleged losses flowing from the defendant's breach.[87]

73 Finally, it is respectfully submitted that the court should also be able to take into account the money invested by the claimant into the subject matter of the defendant's restrictive covenant. Using the facts of *GFI v Eaglestone*[88] as an

83 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [116]. It should be noted that while this point was made by Lord Sumption in the minority, it was not contradicted by the majority.
84 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [174] and [221]–[225].
85 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 at [248].
86 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [80].
87 *Morris-Garner v One Step (Support) Ltd* [2018] 2 WLR 1353 at [94].
88 *GFI Group Inc v Eaglestone* [1994] IRLR 119 at [29]–[32].

example, the company had spent £300,000 into fostering the employee's customer connections over the course of a year. The court found that these customer connections belonged to the company as they were developed with significant expense to the company. The defendant sought to leave the company and join a competitor in breach of his non-compete agreement, and his clients contacts were likely to follow him to the competitor.

74 If the company were to sue the employee for damages for breach of the non-compete agreement, it is submitted that it should at least be able to recover the sum of £300,000 – that being the sum the company had invested in the employee to build his client contacts. This sum could represent the appropriate sum which the company, hypothetically speaking, would have agreed to receive in exchange for releasing the former employee from the non-compete.

VI. Conclusion

75 *Wrotham Park* damages are a powerful remedy to deter deliberate breaches of contract. They are also a valuable forensic tool to measure loss where the claimant has genuine difficulty in establishing pecuniary loss.

76 Although *Wrotham Park* damages are still relatively new in Singapore, a significant body of case law has developed on the application of such damages and methods of assessing them. As a result, it is believed that *Wrotham Park* damages are likely to be applied for and considered more frequently in the Singapore courts.