

THE TURF CLUB ARTICULATION OF WROTHAM PARK DAMAGES: A CURIOUS KIND OF COMPENSATION?

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I. INTRODUCTION

What happens when a negative covenant is breached, specific relief is not available, and no financial loss was suffered? Owing to the ingenuity of the common law, one can claim for *Wrotham Park* damages. Formulated by Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*¹ [*Wrotham Park*], *Wrotham Park* damages represent a *hypothetical* sum of money that might reasonably be demanded by the claimant as *quid pro quo* for releasing the defendant from the obligation breached (‘hypothetical bargain measure’).² While Brightman J’s creation was admirably inventive, it also incited a wellspring of controversy in succeeding years.³ In particular, a great deal of ink has been spilt in determining the conceptual basis of *Wrotham Park* damages – are they compensatory or restitutionary?

The recent case of *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*⁴ [*Turf Club*] sought to resolve this controversy.⁵ According to the SGCA, *Wrotham Park* damages are an established part of our

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¹ [1974] 1 WLR 798 [*Wrotham Park*].

² *Ibid* at 815. On the facts, this was assessed to be 5% of the profits that the defendants were expected to make from developing the land in breach of the negative covenant.

³ See Andrew Burrows, “Are ‘Damages on the Wrotham Park Basis’ Compensatory, Restitutionary, or Neither?” in Djahongir Saidov & Ralph Cunnington, eds, *Current Themes in the Law of Contract Damages* (Oxford: Hart Publishing, 2008) 165. See also David Pearce & Roger Halson, “Damages for Breach of Contract: Compensation, Restitution and Vindication” (2008) 28:1 Oxford J Leg Stud 73 [*Pearce & Halson*], where the authors observed the following trend at 91-92: “The judicial consensus appears to favour a compensatory analysis. Academics seem, on the whole, to prefer a restitutionary interpretation”.

⁴ [2018] SGCA 44 [*Turf Club*].

⁵ For a summary of the case, see Singapore Law Watch, “Supreme Court Note: Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal [2018] SGCA 44 (legal principles relating to the award of Wrotham Park damages)” (7 August 2018), online: <<http://www.singaporelawwatch.sg/Headlines/supreme-court-note-turf-club-auto-emporium-pte-ltd-and-others-v-yeo-boong-hua-and-others-and-another-appeal-2018-sgca-44-legal-principles-relating-to-the-award-of-wrotham-park-damages>>.

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contractual firmament, and may be characterised by three features. First, they are an “independent head” of damages.⁶ Second, they are “measured objectively” by simulating a hypothetical bargain between parties, and quantifying the award with reference to the defendant’s anticipated profits (as opposed to actual profits).⁷ Third, they are aimed at compensating the plaintiff for the “loss of the performance interest itself”,⁸ thereby making them compensatory and not restitutionary.⁹

The final point is the most controversial, and raises a central question that this article seeks to answer: Is the SGCA guilty of strong-arming *Wrotham Park* damages into a compensatory framework? Or is the decision a shining testament to the remedial flexibility of compensation? This article will show that the latter is the case. Going further, it will also explain why a compensatory account of *Wrotham Park* damages is nevertheless novel, and consider alternative accounts.

II. THE TEST DETERMINING THE AWARD OF WROTHAM PARK DAMAGES

Before dealing with the conceptual basis of *Wrotham Park* damages, it is critical to note the legal test that has to be satisfied before they will be awarded. According to the SGCA, *Wrotham Park* damages should only be awarded “in a specific and limited category of cases”,¹⁰ where the following three requirements are satisfied.¹¹

- (a) First, there must be a remedial lacuna, which arises when both orthodox compensatory damages and specific relief are unavailable, and yet “there is still a need to provide the plaintiff with a remedy to protect the plaintiff’s performance interest”.¹²

⁶ *Turf Club*, *supra* note 4 at [150], [164], [286].

⁷ *Turf Club*, *supra* note 4 at [199], [205], [247], [268].

⁸ *Ibid* at [205], [268].

⁹ *Ibid* at [193].

¹⁰ *Ibid* at [215].

¹¹ *Ibid* at [217]. For a comprehensive case summary, see Singapore Law Watch, “Supreme Court Note: Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal [2018] SGCA 44 (legal principles relating to the award of *Wrotham Park* damages)” (7 August 2018), online: <<http://www.singaporelawwatch.sg/Headlines/supreme-court-note-turf-club-auto-emporium-pte-ltd-and-others-v-yeo-boong-hua-and-others-and-another-appeal-2018-sgca-44-legal-principles-relating-to-the-award-of-wrotham-park-damages>>.

¹² *Turf Club*, *supra* note 4 at [219].

- (b) Second, the obligation breached must be a negative covenant. This is because the hypothetical bargain measure underpinning *Wrotham Park* damages is most relevant and appropriate in cases involving negative covenants.¹³
- (c) Third, the fiction of the hypothetical bargain cannot be taken too far. The court must be able “construct a hypothetical bargain between the parties in a rational and sensible manner”.¹⁴ This means that *Wrotham Park* damages will not be awarded in a case 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”.¹⁵ A clear example of this is when it is legally impermissible to negotiate for the release of the covenant.¹⁶

III. THE CONCEPTUAL GRID ON WHICH WROTHAM PARK DAMAGES HANG: MY LOSS OR YOUR GAIN?

To support its holding that *Wrotham Park* damages were compensatory in nature, the SGCA leveraged heavily on the concept of *performance interest*. The *Wrotham Park* measure was simply another tool in the court’s remedial arsenal that seeks to make good the plaintiff’s loss, thereby protecting his interest in contractual performance.¹⁷ What then, does performance interest mean?

A. Performance interest and the remedies that protect it

A good place to start is Friedmann’s seminal article, *The Performance Interest in Contract Damages*. It was duly cited by the SGCA in *Turf Club*,¹⁸ and is significant for a number of reasons. First, it established the plaintiff’s right to performance (and the defendant’s correlative duty to perform) as a fundamental aim of contract law.¹⁹

Second, it explained the remedial ways in which this right to performance is protected.²⁰ Specific performance for instance, directly vindicates the right, with the plaintiff receiving exactly

¹³ *Ibid* at [227].

¹⁴ *Ibid* at [230].

¹⁵ *Ibid* at [230].

¹⁶ *Ibid* at [232].

¹⁷ *Ibid* at [170], [190]. Indeed, this concurs nicely with *Pearce & Halson*, *supra* note 3, where the authors argue that the purpose of contract damages is not only to indemnify loss caused by the breach, *but also to ‘vindicate’ the contractual right*. The latter explains certain awards such as *Ruxley* damages, the broad ground in *Panatonn*, and *Wrotham Park* damages.

¹⁸ *Turf Club*, *supra* note 4 at [170].

¹⁹ Daniel Friedmann, “The Performance Interest in Contract Damages” (1995) 111 Law Q Rev 628 at 629 [*Friedmann*].

²⁰ *Ibid* at 629-630.

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what he contracted for. In contrast, compensatory damages vindicate this right in economic terms, with the plaintiff receiving monetary compensation to the extent necessary to put him in the same position as if the contract had been performed.²¹

Third, it stressed the importance of distinguishing between rights and remedies.²² Indeed, it is easy to forget that the right to performance is *almost never fully honoured* at the remedial end. Compensatory damages—if awarded—are often cut back for one reason or another²³ (see for example, the *Ruxley* reluctance to award cost of cure damages,²⁴ or the discount applied when awarding loss of chance damages).²⁵ This reveals how our compensatory remedies protect the plaintiff's right to performance modestly at best. As such, the recognition of a measure of compensation as hypothetical (and one might say, fictitious) as *Wrotham Park* damages is nothing short of bold. It is therefore no surprise that the SGCA spent a great deal of time justifying and defending the compensatory nature of *Wrotham Park* damages. This will be discussed below.

B. The approach adopted: Wrotham Park damages as objective compensation

One of the perennial objections that the SGCA had to address was how *Wrotham Park* damages cannot be compensatory because the plaintiff did not suffer any identifiable loss for which compensation is warranted.²⁶ The SGCA's riposte was that the infringement of the plaintiff's right to performance was itself a loss that merited compensation.²⁷ In assessing the value of this lost

²¹ The well-accepted compensatory principle finds its origins in Parke B's classic formulation in *Robinson v Harman*, (1848) 1 Exch 850, which has since been approved by a spate of local cases. See *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal*, [2017] 2 SLR 129, [2017] SGCA 26 at [62], and *Turf Club*, *supra* note 4 at [123]-[128].

²² *Friedmann*, *supra* note 19 at 639.

²³ Mindy Chen-Wishart, "Specific Performance and Change of Mind" in Graham Virgo & Sarah Worthington, eds, *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) at 112.

²⁴ *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344, endorsed locally in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd*, [2009] 1 SLR (R) 385, [2008] SGHC 161.

²⁵ *Chaplin v Hicks*, [1911] 2 KB 786.

²⁶ This objection was raised by the *amicus curiae*, Associate Professor Goh Yihan, at [205]. Also see Leo Zhi Wei, "Wrotham Park Damages Revisited" (February 2018), *Gazette Feature*, online: <<https://lawgazette.com.sg/feature/wrotham-park-damages-revisited/>> [Leo] who states that the case of *Wrotham Park* "is an example of an instance where the claimants were unable to prove any financial loss. In the absence of loss, it would be quite inaccurate to describe *Wrotham Park* damages as serving any compensatory function for the claimant at all".

²⁷ *Turf Club*, *supra* note 4 at [205], [215]. This line of reasoning was analogised from the 'user principle' in the context of the tort of wrongful detention. Just as how the 'user principle' regards the invasion of property rights as *itself* a loss which yields proper recompense, so too the *Wrotham Park* doctrine regards the infringement of the right to performance as a loss that merits compensation (see [206]-[207]).

right, the court will employ the hypothetical bargain measure. Crucially, the fact that such compensation is premised solely on the infringement of an abstract right to contract performance, without requiring the plaintiff to point to any subjective loss suffered, is what makes *Wrotham Park* damages so novel. Cunnington calls this *objective* compensation, which is distinct from *subjective* compensation. Its award is not based on any subjective loss identification, but on the objective valuation of the plaintiff's right to performance.²⁸ While this subjective-objective distinction to compensation was not expressly adopted in *Turf Club*, it is immensely useful in helping us understand why *Wrotham Park* compensation occupies such a special place in the landscape of contractual compensation.

When the law awards compensation for a breach, it is often taken for granted that such compensation is measured in subjective terms. This is why the plaintiff must prove “the fact of damage” before he can be compensated for it.²⁹ Conventional compensation is subjective and therefore contingent on loss identification. In *Turf Club* however, the SGCA silently departed from this convention by grounding *Wrotham Park* compensation in objective terms instead. Such compensation would not flow from proving subjective loss, but from the objective infringement of performance interest.³⁰ The significance of this shift cannot be overstated, as it boldly recognises a head of compensation that does away with loss identification.

However, this does not explain *why* the objective compensation account should be accepted over other accounts. One alternative is to persist in the compensatory analysis, but rationalise *Wrotham Park* damages as subjective compensation by creatively locating the loss in the lost opportunity to bargain for a release of the obligation breached.³¹ Another alternative is to relinquish the compensatory analysis altogether, and instead concede that *Wrotham Park* damages are restitutionary. The first alternative can be easily rejected – section C will show that such loss-based reasoning is too strained to make sense. In contrast, the second alternative does show some promise – this will be explained further in section D.

²⁸ Ralph Cunnington, “The Assessment of Gain-Based Damages for Breach of Contract” (2008) 71:4 Mod L Rev 559 at 562-563 [Cunnington].

²⁹ *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and Another*, [2008] 2 SLR 623, [2008] SGCA 8 at [27], citing *McGregor on Damages*, 17th ed (Sweet & Maxwell: 2003) at para 8-001.

³⁰ Admittedly, judicial recourse to the performance interest for the purpose of justifying certain remedial responses is not new. For instance, this was the very basis on which the ‘*Panatonn* broad ground’ was conceived (originating from *Alfred McAlpine Construction Ltd v Panatonn Ltd*, [2000] 3 WLR 946).

³¹ Robert J Sharpe & S M Waddams, “Damages for lost opportunity to bargain” (1982) 2:2 Oxford J Leg Stud 290 [Sharpe & Waddams], cited in *Turf Club*, *supra* note 4 at [144].

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C. Alternative account 1: Wrotham Park damages as subjective compensation

The first alternative is to locate the plaintiff's loss in the lost opportunity to bargain for a release of the obligation breached (*i.e.* 'lost opportunity' articulation).³² Unfortunately, this articulation runs into two problems. Firstly, it carries more than a whiff of artificiality. Such an articulation is constructed from a fictional narrative which casts the parties as willing negotiators, even though they may not actually have been willing to negotiate on the facts.³³ It thus makes no sense to claim that there was a loss, because any 'loss' is entirely imaginary.

Secondly, close scrutiny reveals that this 'lost opportunity' articulation is not strictly a loss at all.³⁴ A *Wrotham Park* loss is not a loss of future opportunity that may or may not materialise. Instead, it is a *missed past opportunity* that exists only in the hypothetical realm. In fact, one could even go as far to say that it was not so much lost as it was given up or foregone. The examples below illustrate this difference.

- (1) Suppose P goes to a hairdresser (D) who offers the following service: In consideration of P donating a minimum length of hair (say, 5 inches) which D will then sell it to a wig manufacturer for a profit, he will waive any hairdressing charges that would otherwise apply. P enters into a contract with H, telling him that she is only willing to donate the minimum 5 inches, in return for the free haircut promised. However, D ends up cutting off over 15 inches in breach of contract, and proceeds to sell them for a good profit of \$200. Assume also that D would have made a far lower profit of \$50 had he only cut off 5 inches as promised. If the 'lost opportunity' articulation were recognised, P's 'loss' would be the missed opportunity to demand from D a sum of money for cutting off an extra 10 inches of hair. This is what a missed opportunity to negotiate would look like.
- (2) The facts remain the same. But suppose also that because of D's breach, P is now left with a short bob that precludes her from participating in a beauty pageant, causing her to lose the chance to be crowned a beauty queen. This is what a loss of opportunity would look like.

³² Formulated by *Sharpe & Waddams*, *supra* note 31, and relied on in subsequent English cases like *Jaggard v Sawyer*, [1995] 1 WLR 269, and *Gafford v Graham*, (1998) 77 P & CR 73.

³³ *Leo*, *supra* note 26, *Cunnington*, *supra* note 28 at 562-563.

³⁴ This point was forcefully put in *Pearce & Halson* at 92: "The difficulty with characteri[s]ing the award as compensatory arises, not because the loss cannot be expressed in financial terms, but because there was no loss at all." *Cf* Jill Poole, *Textbook on Contract Law*, 12th ed (Oxford: Oxford University Press, 2014) at 421-422.

Example (1) shows how there is no subjective loss at all in a *Wrotham Park* situation. This stands in contrast to example (2), where P's subjective loss is the chance to become a beauty queen. It is thus submitted that the 'lost opportunity' articulation is less of a loss and more of a method of monetising the breached obligation *as if* it were a bargained-for contractual right that the defendant managed to obtain from the plaintiff. On the facts of example (1), we are valuing D's breach by asking how much it would cost him if he were to bargain for the right to cut 10 more inches off P's hair. This demonstrates how the *Wrotham Park* compensation that P receives does not flow from any loss, but from the above valuation exercise. In fact, this seems to be the underlying principle behind the SGCA's decision to rationalise *Wrotham Park* damages as objective compensation for the infringement of the plaintiff's right to performance – with this right being valued in terms of the amount the plaintiff would charge the defendant for releasing him from the obligation breached.³⁵

D. *Alternative account 2: Wrotham Park damages as restitutionary remedy*

The other alternative is to rationalise *Wrotham Park* damages as gain-based restitution. Despite the academic support for the restitutionary account,³⁶ the SGCA rejected it, stating that it is “unprincipled in so far as it implies that *Wrotham Park* damages should be available only where the defendant concerned derives a benefit from [his] breach of contract”.³⁷ Accordingly, this is objectionable because it leaves an opening for a defendant to avoid making restitution on the basis that he did not make any gains from his breach.³⁸

However, this objection assumes that the plaintiff's restitutionary award can only be measured on a subjective basis, when it can also be measured on an objective basis.³⁹ The concern that the

³⁵ *Cunnington, supra* note 28 at 564: “In the absence of a factual pecuniary loss, the [*Wrotham Park*] award places an objective value on the claimant's right to performance—a right which has been infringed by the defendant—and the award requires the defendant to pay for the right infringed.”

³⁶ See Ralph Cunnington, “The Measure and Availability of Gain-Based Damages for Breach of Contract” in Djahongir Saidov & Ralph Cunnington, eds, *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008), Craig Rotherham, “‘*Wrotham Park* Damages’ and Accounts of Profits: Compensation or Restitution?” (2008) LMCLQ 25 [*Rotherham*].

³⁷ *Turf Club, supra* note 4 at [200].

³⁸ *Ibid*, citing *Yenty Lily (trading as Access International Services) v ACES System Development Pte Ltd*, [2013] 1 SLR 577, [2012] SGHC 208 at [66].

³⁹ *Cunnington, supra* note 28 at 565 explains the difference between the objective and subjective restitutionary account well.

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defendant can avoid making restitution if he did not make any subjective gains no longer finds purchase under an objective approach, for he will still have to make restitution based on the objective gains he would have made as a result of his breach. What then, would be the objective gain made by a defendant in a *Wrotham Park* situation? Going back to example (1), this would be the expense saved by D from not having to bargain with P for the right to cut off an extra 10 inches of hair. In other words, the objective gain should relate to a *saved negotiation expense*.⁴⁰ An objective restitutionary account that seeks to reverse the benefit gained by the defendant from saving himself a negotiation expense therefore proves to be very promising, as it explains many once puzzling features of *Wrotham Park* damages:

- (a) It explains why *Wrotham Park* damages are calculated by reference to the defendant's anticipated (and not actual) profits, as it concerned with objective (and not subjective) gains.
- (b) It also explains why *Wrotham Park* damages are calculated by reference to a percentage of such anticipated profits. That percentage represents the expense that the defendant would have incurred in procuring a release from his contractual obligation, but which he saved because he chose to breach it instead.

This shows that a strong case could potentially be made for a restitutionary account of *Wrotham Park* damages. Unfortunately, English authorities have generally eschewed the restitutionary account.⁴¹ *Turf Club* shows that Singapore is following the same trend. Indeed, the other objections raised by the SCGA in rejecting the restitutionary account relate to contract law's aversion to punishment,⁴² and the weight of past authority supporting a compensatory analysis.⁴³ While it is hoped that future cases will examine the merits of a restitutionary account more satisfactorily, it seems that the rationalisation of *Wrotham Park* damages as objective compensation has been settled for now.

⁴⁰ Lionel D Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1994-1995) 24 Can Bus LJ 121 at 138.

⁴¹ See *Rotherham*, *supra* note 36 where the author observed at 26 that the compensatory account of *Wrotham Park* damages is "presently enjoying something of a renaissance".

⁴² *Turf Club*, *supra* note 4 at [197].

⁴³ *Turf Club*, *supra* note 4 at [202].

IV. CONCLUSION

In closing, this article has shown how *Turf Club's* account of *Wrotham Park* damages as objective compensation is bold step forward, creating a novel head of compensation that does away with loss identification and premising it instead on the valuation of the performance interest. To that extent, *Wrotham Park* damages are, as the title suggests, a truly curious kind of compensation.