

A MARATHON CHALLENGE TO CLAIM WROTHAM PARK DAMAGES FOR BREACH OF CONFIDENTIALITY

- ▶ Former employees kept copies of confidential information belonging to previous employer
- ▶ Breach of confidentiality clearly established
- ▶ How to assess damages where no use made of the confidential information?

What's it about?

This case concerns the copying and retention of a significant number of documents by two former employees of Marathon Asset Management LLP (the **Claimant**). The court held that the employees (the **Defendants**) had breached their contractual and common law duties of confidence.

However, forensic investigation showed that little, if any, use had been made of the documents. The Claimant could not show, therefore, that it had suffered any loss as a result of their removal and the Defendants had not made any profit as a result of their wrongdoing.

Why does it matter?

The Claimant sought to claim "Wrotham Park damages", relying on the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*. That case related to the breach of a restrictive covenant not to develop land. The value of the land had not been diminished by the breach and the Claimant had suffered no damage but, having identified the profits made by the developer, the Court awarded a fair proportion of those profits. The rationale was that this payment would have been required by the landowner to relax the covenant. The same principle has been applied in other types of case by assessing what would have been paid by a defendant for releasing him from the obligation he has breached: a notional "licence fee".

The Claimant argued that any hypothetical negotiation of a licence fee should be not only for copying the information and documents, but also having them available to use for the length of time that the Defendants held them. This "fee" was assessed by the Claimant at between £2.5million and £39.4million, an approach that was rejected by the Court. In the judge's view any licence fee needed to match the legal wrong for which it was intended to provide a remedy. Therefore, the starting point was to identify the wrongful acts. In this case there had been little use of the confidential information and the documents had been delivered up at an early point in proceedings. Future misuse could only be relevant where the Defendants still possessed the confidential information.

As the Claimant had not pleaded an alternative case on damages, the Judge concluded that he could not award damages on any other basis and awarded nominal damages only (£1 for each of the two Defendants).

Now what?

This decision shows that where there is evidence of breach of confidentiality, but on investigation there appears to have been no misuse of the relevant information, careful thought is needed about what to do next: pursuing a claim to financial compensation in those circumstances is likely to be a very risky strategy.

[*Marathon Asset Management LLP and another v Seddon and another* \[2017\] EWHC 300 \(Comm\)](#)

For further information on this or any other IP related matter please contact [Rachel Cook](#) on 020 7160 3028