Economic Torts Unravelled

On 2 May 2007, the House of Lords handed down its judgment in respect of three cases involving economic torts:

- OBG Ltd and others v Allan and others (OBG)
- Mainstream Properties Ltd v Young and others (Mainstream)
- Douglas and another v Hello! Ltd and others (Hello!)

The three cases were heard consecutively and were dealt with in a single judgment because of the overlapping issues of law.

Economic torts is an obscure and esoteric branch of the law, which, over the years, has been characterised by inconsistent judicial observation and conflicting academic opinion. Consequently, the law was in a mess and, in making its judgment in OBG, Mainstream and Hello!, the House of Lords had to pick its way through approximately 350 reported cases and academic writings. The result is a comprehensive judgment that provides helpful guidance and clarification in respect of the following economic torts:

- Interference with contractual relations
- Causing loss by unlawful means
- Inducing breach of contract
- Conversion
- Breach of confidence

Separating the Torts – A Question of Intention

Since the decision in DC Thomson & Co Ltd -v- Deakin in 1952, the tort of causing loss by unlawful means and the tort of inducing breach of contract have been treated as two species of the wider tort of interference with contractual relations. However, the House of Lords has now ruled that they should be treated as separate economic torts, each having different conditions for liability. Both torts have been described as "torts of intention," but the results that the defendant must have intended in each tort are different.

Inducing Breach of Contract

The test for establishing liability for inducing breach of contract was first set out in Lumley -v- Gye (1853) which applied the general principle that a party which procures another to commit a wrong incurs liability as an accessory. In this case, the particular wrong is the breach of contract and the liability of the party procuring the breach of contract is secondary to the liability of the contracting party.

The result that the defendant must have intended is the breach of contract. It does not matter if the defendant did not intend to cause damage or even thought that the breach might, in some way, benefit

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the claimant. The breach of contract must be an end in itself or, at least, the means to an end. If the breach is merely a foreseeable consequence of the defendant's action, then it cannot be said to have been intended.

**Causing Loss by Unlawful Means**

In the tort of causing loss by unlawful means, there is no wrong for which the defendant is liable as accessory: a defendant's liability is primary – for intentionally causing the claimant loss by unlawfully interfering with the liberty of others. If, for example, the unlawful means is a threat directed at a potential customer, the immediate cause of the loss would be the decision of the potential customer to submit to the threat and take his business elsewhere.

The result that the defendant must have intended is damage to the claimant (usually as a means of enhancing the defendant's own economic position). Damage to economic expectations is sufficient, so an intention to interfere with contractual rights is not necessary. Unlawful actions which interfere with the freedom of a third party to deal with the claimant, however, are required, so neither actions that are detrimental to the claimant but are nevertheless lawful, nor actions which are unlawful but do not affect the third party's freedom to deal with the claimant, are sufficient to establish liability.

**OBG**

**The Facts**

In 1992, OBG had become insolvent. A creditor of OBG, which had taken an assignment from a third party of a debenture secured by a floating charge over OBG's assets and undertaking, appointed the defendants as administrative receivers under the floating charge. However, OBG had owed nothing to the third party and no secured debt was assigned to the debenture. The creditor was not, therefore, entitled to appoint receivers, but it and the receivers believed in good faith that the appointment was valid.

The receivers accordingly took control of OBG's assets and undertaking on 9 June 1992. OBG claimed that by their doing so, the receivers became liable in damages for the value of its assets and undertaking as of that date. The cause of action was, with respect to OBG's land and chattels, trespass and conversion and, with respect to its contractual claims, wrongful interference with contractual relations. OBG's alternative claim was that the defendants had converted its entire assets and undertaking, including the contractual claims.

The defendants admitted liability for trespass to the land and conversion of the chattels, but denied that they had interfered with the contractual relations. To OBG's alternative claim, the defendants' answer was that conversion is a tort against chattels not against contractual claims.

The judge at first instance found that OBG had a cause of action for interference with contractual relations, but dismissed the alternative claim for conversion of contractual rights. The Court of Appeal upheld the dismissal of the conversion claim, but reversed the finding with respect to interference with contractual relations.

**Interference with Contractual Relations**

Applying the analysis summarised above, the House of Lords found that there were only two possible causes of action: inducing breach of contract and causing loss by unlawful means. With respect to the first, there was no breach or non-performance of any contract to which accessory liability could attach. As to the second, the defendants had neither employed unlawful means nor intended to damage OBG. Therefore, the requirements for liability under neither tort was satisfied.

**Conversion**

Conversion is a tort of strict liability that applies to the wrongful interference with tangible personal property: anyone who does something with someone else's goods or chattels that is inconsistent
with the rights of the owner, whether knowingly or innocently, is liable for the loss caused by his conduct.

OBG’s claim for conversion of its contractual rights required an extension of this tort to encompass choses in action (i.e. intangible property rights) as well as tangible property. The House of Lords found that there was no authority for extending the tort to impose strict liability either for interference with choses in action or for pure economic loss (liability for which is extremely limited under English law). The House of Lords therefore dismissed OBG’s claim.

**Mainstream**

**The Facts**

In breach of their contractual and fiduciary duties to obtain property for their employer, two employees of Mainstream, a property development company, diverted a development opportunity to a joint venture consisting of themselves and a third party, Mr. De Winter, who financed the project. The question before the House of Lords was whether Mr. De Winter was liable for inducing the two employees to breach their contracts.

The court of first instance found that, although his involvement was causative, since Mr. De Winter had raised the question of conflict of interest with the two employees and had been given assurances that there was none, Mr. De Winter did not intend to procure a breach of contract. This finding was upheld by the Court of Appeal.

**The Decision**

The House of Lords focused on Mr. De Winter’s intention and found that, since he had honestly believed that assisting the employees with the joint venture would not involve them in the commission of breaches of contract, he had not intended to cause a breach of contract and could not, therefore, be liable for inducing breach of contract. Equally, since Mr. De Winter neither intended to cause loss to the claimant, nor used any unlawful means, he could not be liable for having caused loss by unlawful means.

**Hello!**

Of the three cases, because of its celebrity connections, Hello! has undoubtedly been the most high profile. However, this is not just a case about celebrity exclusives and tabloid spoilers, but has important implications for the protection of any commercially valuable information.

**The Facts**

In November 2000, Michael Douglas and Catherine Zeta Jones (the Douglases) entered into a contract with OK! magazine for the exclusive rights to publish photographs of their forthcoming wedding. OK! paid the Douglases £1 million for the rights in preference to its rival, Hello! magazine. The Douglases agreed to engage a photographer and to supply OK! with photographs of their choice. The Douglases also agreed to use their best efforts to ensure that no one else would take any photographs at their wedding.

Despite the efforts made by the Douglases, a freelance photographer infiltrated the wedding and took photographs which he then sold to Hello! magazine. OK! magazine obtained an injunction restraining Hello! magazine from publishing the photographs, but the injunction was discharged by the Court of Appeal and Hello! magazine published the photographs the following day, just hours after OK! magazine had published the official photographs. Also on the same day, some of the unauthorised photographs were published, without Hello! magazine objecting, in various national newspapers.

OK! magazine sued Hello! magazine for breach of confidence and for the tort of causing loss by unlawful means.

**Breach of Confidence**

The court of first instance held Hello! magazine liable for breach of
impose an obligation of confidence and were in control of the information.

Causing Loss by Unlawful Means
In view of its conclusion that OK! magazine was entitled to sue Hello! magazine for breach of confidence, the House of Lords did not examine in detail OK! magazine's alternative claim that Hello! magazine had caused it to suffer a loss by unlawful means.

However, the House of Lords did observe that it would have held that Hello! magazine had the necessary intention to cause loss. It stated that it would have rejected Hello! magazine's argument that it did not intend to injure OK! magazine by spoiling its exclusive but only intended to protect itself from the damage it might suffer as a result of having lost the exclusive. Its reasoning was that the injury inflicted on OK! magazine was the means by which Hello! magazine protected its own position and not just a foreseeable consequence of the same. The House of Lords also stated that it would have held that Hello! magazine had not interfered by unlawful means with the actions of the Douglases, since it had not done anything to obstruct the liberty of the Douglases either to deal with OK! magazine or to perform their obligations under the agreement.

For this reason, the House of Lords noted that the concept of intention in the tort of causing loss by unlawful means should not be given such an artificially narrow meaning as to enable anyone who has used unlawful means to injure a third party to say that he only intended to protect himself from loss.

Implications
The separation of the general tort of interference with contractual relations into two distinct torts has clarified this obscure but important branch of the law. The intention-based tests for liability for causing loss by unlawful means and inducing breach of contract are logical and relatively clear. Further, establishing the principle that using unlawful means to enhance one's own position and using
unlawful means to damage another person's position can be two sides of the same coin, closes a loophole by which defendants have previously sought to avoid liability. However, it seems that defendants will still be able to avoid liability for inducing breach of contract if they can prove that they genuinely did not believe that their actions would induce a breach.

The House of Lords’ decision in relation to breach of confidence has clear implications for the media and should deter the paparazzi from seeking to profit from infiltration of celebrities’ exclusive events. However, by extrapolation, the photographs of the Douglases’ wedding could equally have been any confidential information that another party was willing to pay for and the House of Lords’ decision suggests that the existence and scope of the obligation of confidence attaching to a particular piece of information can, to a great extent, be determined by its commercial value and the level of control over the information held by the person imparting it. These criteria can be applied to any confidential information of commercial value, such as business know how or market-sensitive information, and the implication is that the greater the value of the information, the greater the obligation of confidence attaching to it.

As to the tort of conversion, it is unsurprising that the OBG’s claim was dismissed and the House of Lords has reaffirmed that conversion can only apply to tangible personal property.
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