

## Common law limits on commercial behaviour

HOW DOES THE COMMON LAW REGULATE STANDARDS of competitive behaviour in the market economy?

This rather grand question recently fell to be answered in the less than elevated context of celebrity magazines and world exclusives. The resulting reformulation of the tort sometimes referred to as 'interference by unlawful means' is of widespread significance for practitioners in sectors far removed from the media. The following generic examples illustrate the potential application of principles of tortious liability of this kind:

- 1) A is competing with B to win a tender from C. A lies and gets the work.
- 2) A wins work from C at the expense of its rival B by breaching financial regulations and so cutting costs.
- 3) A has a contract with C. A threatens to break it in order to dissuade C from contracting with B.

In none of these examples has A directly acted against B. The illegality occurs between A and C. However, can B take advantage of it?

Finally, consider case 4:

- 4) B has a contract with C. A persuades C to contract with it instead.

Here, A still has not acted directly against B but the latter has been the direct victim of illegality. B can of course sue C, but under what conditions can it also sue A?

### FACTS OF DOUGLAS V HELLO!

When Catherine Zeta-Jones married Michael Douglas in November 2000, she wanted – according to *OK!* magazine – 'a real family wedding, a real homespun family wedding'. This modest desire did not prevent her and her betrothed from hiring the entire first floor of New York's Plaza Hotel, landscaping it with ten tons of earth and 18,000 roses, and inviting 350 close friends – including Jack Nicholson, Goldie Hawn and Kofi Annan. One guest not invited was a

paparazzo photographer, Mr Thorpe, whose waiter's costume concealed a camera. His trespass allowed *Hello!* magazine to publish in advance of *OK!*'s exclusive, for which that publication had paid the Douglasses £1m under a binding contract.

*OK!*'s lost sales were assessed at £1.3m. Its claim in equity, for breach of confidential information, was open to doubt. The trial judge accepted the testimony of *Hello!*'s proprietor that he acted in commercial self-defence, not revenge against his trade rival – there was no malicious conspiracy. But Mr Thorpe was an illegal intruder at the wedding and *Hello!* was well aware that it was undermining a contractual exclusive – one for which *OK!* had outbid it. Put another way, having lost a legitimate bidding race, *Hello!* had paid only £125,000 for illegitimate coverage of the event. The Douglasses recovered a small sum for violation of their personal privacy rights, but they had not broken their contract to use best endeavours to maintain security and were entitled to their £1m. Could *OK!*, which had played by the book and lost out, recover in tort?

The trial judge and Court of Appeal said not. Although *Hello!* had used unlawful means to achieve its end, the mental element required for this tort was lacking. *Hello!* did not have a specific intention to harm *OK!*. Together with two other appeals, *Douglas & ors v Hello Ltd & ors* ended up in the House of Lords – where a decision was handed down in May 2007 under the name of *OBG Ltd & ors v Allan & ors*. Lord Nicholl's minority speech at paragraphs 143 and 153 pointed out that any legal system must impose some limits on competitors' behaviour.

### DEVELOPMENT OF THE LAW

Over a century ago, the common law had grappled with the same underlying questions in two seminal cases. In *Mogul Steamship Co Ltd v McGregor, Gow & Co*, the lucrative China tea shipping trade was controlled by a cartel. Shippers were told that they would get a special discount – but only if they used only the cartel's vessels. The result was that the claimant was frozen out. At first instance, the Chief Justice held the cartel members liable in conspiracy. They had unlawfully interfered with the claimant's right of trade. The Court of Appeal and House of Lords disagreed. The defendants had done nothing unlawful in itself. They had simply pursued a bitter war of competition to the very end.

In *Allen v Flood*, the competition was between different groups of workers in London's dockyards. Flood was a member of a trade union which permitted its members to work in various different trades (and, by implication, at a cheaper rate). Allen

'Injuring a competitor by the use of unlawful means against a third party is a free-standing tort.'

Charles Béar QC, Fountain Court Chambers  
E-mail: [cbr@fountaincourt.co.uk](mailto:cbr@fountaincourt.co.uk)



was an official of a union which insisted on more rigid demarcation. All the workers were on daily contracts. Allen threatened a strike unless the shipyard dismissed Flood. The courts below, and a majority of the Queen's Bench judges advising the House of Lords, held Allen's action unlawful – his coercion of the employer went beyond the limits of reasonable competition. A majority of the House of Lords, however, held firm. Allen had done, or threatened, no act unlawful in itself. Flood's right to trade could not prevail over Allen's members' selfsame right, which included the ability to decide the conditions under which they would supply their labour.

The judges who rejected these claims recognised, but did not fully explain, the validity of a scattered group of earlier cases in which traders had recovered against competitors. In those cases unlawful means had been used. A good example was *Tarleton v M'Gawley*. Two British ships were lying off the West African coast. The defendant fired his cannon at the approaching natives who were deterred from selling their palm oil. This unlawful assault although a wrong against the unfortunate canoeists grounded an action for the claimant, the master of the other vessel.

#### SEPARATING THE TORTS

During the 20th century, these unlawful means cases were generally assimilated with the more familiar tort of inducing breach of another's contract (stemming from *Lumley v Gye*). In well-known cases, such as *DC Thomson & Co Ltd v Deakin*, the courts spoke of direct or indirect forms of the tort of interference with the claimant's legal rights.

The first change made by the House of Lords in *OBG* was to discard this theory. The two torts are now to be seen as quite different. Inducing breach of contract is simply a form of accessory liability. Illegality occurs between the claimant and the third party. The defendant, by intentionally persuading the contracting party to break the contract, itself becomes liable for that legal wrong. No requirement of intention to harm is required, merely knowledge that there is a contract and an intention that it be broken – or recklessness as to whether it is. The House of Lords recognised that this doctrinal change might have little impact in practice, but thought it necessary for legal clarity.

Thus the House of Lords recognised that injuring a competitor by the use of unlawful means against a third party is a free-standing tort. Here, in contrast with cases of inducing breach, illegality occurs between the defendant and the third party. This fundamental difference in the facts leads to a

different legal analysis. Tortious liability in this class of case requires three elements:

- 1) the use of what might be termed 'relevant unlawful means';
- 2) an intention to injure; and
- 3) the infliction of damage.

#### RELEVANT UNLAWFUL MEANS

For many years, there has been uncertainty about what sort of unlawful means would qualify for the purposes of this tort. The prevailing view until the House of Lords' decision in *OBG* was illustrated by the Court of Appeal judgment in *Douglas*: unlawful means were not limited to any particular legal category. They included not only torts and breaches of contract against the third party (C in the examples given earlier) but also crimes and 'any act which the defendant was not at liberty to commit'.

This was the view of Lord Nicholls in *OBG*. However, the majority of the House of Lords followed Lord Hoffmann (at paras 47-54) in adopting a more limited view. There are now two criteria that unlawful acts must meet before qualifying as grounds for tortious liability of the kind in question. Both criteria, in the words of Lord Walker, involve inquiring into 'the nature of the disruption caused' to the third party's affairs. First, the acts must be actionable by the third party, or would be actionable but for the lack of damage suffered by him. Second, the acts must affect the third party's 'liberty to deal' with the claimant.

Both criteria appear to be aimed at preventing excessive availability of claims under this tort. The first prevents claims being based on, for example, mere breaches of the criminal law – which would inevitably extend to all sorts of regulatory offences. The second criterion excludes cases where the claimant merely suffers a diminution in the value of its relationship with the third party. For example, the third party may have granted an exclusive licence to the claimant. The defendant will not have induced the third party to breach that arrangement but on the contrary, will have acted against the desires of the third party. Thus the tort of inducing breach of contract by the third party will not lie. The exclusionary criterion developed by the majority of the House of Lords in *OBG* closes off an alternative claim under the tort of interference with business. The exclusive licensor's liberty to deal with the claimant is not affected although the value of its transaction may be.

On the other hand, the House of Lords cited with apparent approval cases such as *Lonrho plc v Fayed*, >

where liability was based on dishonest representations by the defendant to a third party who was dealing (or not dealing) with the claimant. It seems that such representations are to be regarded as affecting the third party's 'liberty to deal with' the victim.

#### INTENTION TO INJURE

Pre-*OBG* cases had required some form of targeted intention, which appeared to come close to motive. In reality, this was a major fetter on availability of the tort. Businessmen tend to act out of self-interest rather than spite, so that damaging the opposition is rarely an end in itself, simply a means to the end of self-enrichment. The House of Lords recognised this fact of life. Where gain to the defendant would inevitably involve harm to the claimant, no further intention to injure was required. Thus *Hello!*'s proprietor's protestations of acting only to protect his reputation among his own readers were beside the point. It was enough that he willed the means to that end.

On the other hand, knowledge of consequences is not enough. In *Millar v Bassey*, the Court of Appeal had allowed a claim by a subcontractor against a main contractor who had broken her contract with the inevitable consequence that subcontractors would lose work. The House of Lords has now disagreed. Where damage to a close competitor formed part and parcel of self-enrichment, so that without it the intended self-enrichment would not occur, there is an intention to inflict the damage on the rival. On the other hand, the damage which will occur to subcontractors is simply a knock-on effect of the intended outcome. Knowledge of such consequences is not intention to injure for the purposes of the tort (and had it been, it would have enormously extended liability for most repudiatory breaches of contract).

#### DAMAGE

There is no restriction on the type of economic damage that may ground liability. The tort does not require interference with the claimant's pre-existing legal rights. On the contrary, it is often a mere expectation of such rights (eg, hope of entering into contracts) which will constitute the injury. Where the defendant can be shown to have acted with the

intention of preventing the claimant from gaining such benefits, it will be difficult for them to deny that there was at least a substantial chance that has been lost. A separate question in the law of damages is whether compensation will be paid for such a chance, even though it cannot be shown to have had a greater than 50% prospect of success.

#### APPLICATION OF THE REFORMULATED PRINCIPLES

In *Douglas v Hello!* itself, the tort claim failed but the Court of Appeal's grounds were reversed. The necessary intention to injure was made out. *Hello!*'s intended success inevitably involved *OK!*'s loss. On the other hand, relevant unlawful means had not been used. The Douglasses' freedom to deal with *OK!* was unimpaired, even though the value of that contract had been diminished in practice. *OK!* did, however, recover on its equitable claim for breach of confidence.

We can now re-examine the generic examples given earlier:

- In **case 1** (the dishonest tenderer), A's conduct is actionable by C and would be considered as affecting C's liberty to deal with B. Although A wishes only to benefit itself, it inevitably intends harm to B. The tort is made out.
- In **case 2**, the breach of statutory regulations is not (normally) actionable by C nor does it affect C's freedom to deal with B. The tort is not made out, even though the intentional element may be present.
- In **case 3**, the tort clearly exists: the threatened breach of contract would be actionable by C (had it materialised) and it directly affects C's liberty to deal with B.
- Last, in **case 4**, A uses no independently unlawful means. The claim lies if at all for inducing breach of contract. B must show that A knew of the contract between B and C and knew also that if C dealt with A, C would be in breach.

By Charles Béar QC, Fountain Court Chambers.  
E-mail: [cbr@fountaincourt.co.uk](mailto:cbr@fountaincourt.co.uk)

---

*Douglas & ors v Hello Ltd & ors*  
[2005] EWHC Civ 595

---

*OBG Ltd & ors v Allan & ors*  
[2007] UKHL 21

---

*Mogul Steamship Co Ltd v McGregor, Gow & Co* [1889] 23 QBD 598, CA;  
[1892] AC 25

---

*Allen v Flood* [1898] AC 1

---

*Tarleton v M'Gawley* (1790) 1 Peake  
NPC 270

---

*Lumley v Gye* (1853) 2 E&B 216

---

*DC Thomson & Co Ltd v Deakin*  
[1952] Ch 646

---

*Lonrho plc v Fayed* [1990] 2 QB 479

---

*Millar v Bassey* [1994] EMLR 44