



Hello! case says goodbye to confusion in economic torts *House of Lords clarifies scope of economic tort*

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The economic torts, including inducing breach of contract, unlawful interference with economic interests, conspiracy and breach of confidence, play an important role in curtailing certain kinds of inappropriate behaviour by competitors. It is equally important, however, to constrain these torts to their proper boundaries; otherwise they will interfere with vigorous but fair rivalry among competitors.

The House of Lords recently restated the basis for – and curtailed the scope of – the torts of inducing breach of contract and unlawful interference in a decision covering three cases. In the same decision, however, the Lords expanded the reach of the tort of breach of confidence to cover a situation where a newspaper paid for the exclusive right to print photos of a celebrity wedding.¹

The House of Lords has clarified that:

- There can be no liability for inducing breach of contract unless the defendant knows that it is inducing a breach of contract. Honest belief that there is no breach of contract will excuse the defendant.
- There can be no liability for unlawful interference with another's business or economic interests unless the defendant committed an unlawful act.
- There is no in-between tort of preventing or interfering with the performance of a contract, where the means are not unlawful.

This decision is likely to influence the development of these torts throughout the common law world, including Canada.

The three cases

Mainstream Properties Ltd v Young involved two employees who appropriated a business opportunity belonging to their employer. They diverted the purchase of development land to a joint venture they created. The issue was whether an investor in the joint venture who believed that the employees were not acting in breach of their obligations to their former employer was liable for interference with contractual relations. The trial judge found that the investor was not liable and the Court of Appeal upheld this finding.

In *OBG Limited v Allan*, receivers (Allan) took control of a company (OBG Limited) and its assets under what turned out to be an invalid floating charge. The company sued for interference with contractual relations, conversion, and other torts. The trial judge held the receivers liable for interference with contractual relations but not conversion. The Court of Appeal overturned the trial judge's decision on interference with contractual relations.

In *Douglas v. Hello! Limited*, *Hello!* magazine published photos of the wedding of Hollywood celebrities Michael Douglas and Catherine Zeta-Jones that it knew were surreptitiously taken by a freelance photographer posing as a waiter or guest. Another magazine, *OK!* had paid the celebrities for the exclusive right to take photos of the wedding. *OK!* sued *Hello!* for breach of confidence and the tort of causing loss by unlawful means. The trial

¹ *OBG Limited v Allan*; *Douglas v. Hello! Limited*; *Mainstream Properties Ltd v Young*, [2007] UKHL 21

judge held *Hello!* liable for breach of confidence but the Court of Appeal reversed his decision.

The House of Lords heard the three cases together and issued one set of reasons for all three.

The torts of inducing breach of contract and unlawful interference

Each of the five Lords who sat on the appeal wrote reasons. Piecing together the points on which they agreed, and those on which they differed, is no simple task.² One point, however, on which the panel was unanimous was in distinguishing sharply between the tort of inducing breach of contract and the tort of unlawful interference.

Inducing breach of contract

The tort of inducing breach of contract is made out where a person induces another to breach a contract. The contract breaker is liable for breach of contract. The person who induced the breach of contract is also liable. The liability of the person who induced the breach is secondary, or supplemental, to that of the contract breaker. Liability for inducing breach of contract is thus a species of accessory liability.³

Importantly, liability for inducing breach of contract requires that the person who induced the breach of contract have actual knowledge of the contract and intend to procure a breach of it. It is not enough that this person ought reasonably to have been aware of the contract: "Negligent interference is not actionable".⁴

Unlawful interference

The tort of unlawful interference consists of intentionally damaging another persons business by unlawful means. Both the unlawful means and intention elements are key.

² Baroness Hale regretted this fact, writing: "Indeed, there would be much to be said for our adopting the practice of other supreme courts in having a single majority opinion to which all have contributed and all can subscribe without further qualification or explanation. There would be less grist to the advocates' and academics' mills, but future litigants might thank us for that" (at ¶303).

³ Lord Nicholls at ¶172-173;

⁴ Lord Nicholls at ¶191, Lord Hoffman at ¶39.

The Lords disagreed on the scope of the unlawful means element. Lord Hoffman, writing for the majority on this point, restricted the concept to acts that are: (i) against a *third party*, (ii) actionable by that party (or would be, if it suffered loss), and (iii) interfere with the freedom of the third party to deal with the plaintiff. The requirement that the conduct must be actionable by the third party serves to exclude breaches of statute for which there is no civil cause of action.⁵

Lord Nicholls, in the minority, advocated a wider definition of the unlawful means element. Unlawful means, he held, includes any conduct that is unlawful, whether under civil or criminal law, and whether directed at a third party or the plaintiff. However, he also held that the tort would not apply to breaches of statute, notably intellectual property, whether the statute provides for a civil cause of action or not.⁶

Lord Hoffman and Lord Nicholls were in basic agreement about the intention element. For the tort of unlawful interference, the defendant must intend to cause loss to the plaintiff. Lord Hoffman noted, however, that "One intends to cause loss even though it is the means by which one achieved the end of enriching oneself".⁷ It is not enough, however, that loss to the plaintiff merely be foreseeable.

Lord Nicholls agreed, insisting that the defendant must *intend* to injure the *plaintiff*, although the defendant can intend such injury as a means to an end, for instance, advancing the defendant's economic interests.

Control mechanisms

In commenting on the differences between Lord Hoffman's and Lord Nicholls' approaches, Lord Walker pointed to the different "control mechanisms" each used to constrain the tort of unlawful interference and prevent it from getting out of hand. There is general agreement, for example, that a delivery business whose drivers speed and run red lights cannot be sued by a

⁵ Lord Hoffman at ¶49, 51.

⁶ Lord Nicholls at ¶157-158.

⁷ Lord Hoffman at ¶62.

competitor for unlawful interference. The question is why.

Lord Hoffman's control mechanism relies on restricting the tort to cases where the defendant interferes with a third party's right to deal with the plaintiff. Clearly, the competing delivery business could not sue as speeding and running lights does not prevent customers from dealing with other delivery services.

Lord Walker identified the concept of instrumentality as the control mechanism applied by Lord Nicholls. Lord Nicholls did explain that the tort provides a remedy in three party situations, where the plaintiff is harmed through the *instrumentality* of a third party.⁸ Lord Nicholls provided no explanation of what this means. Moreover, he also doubted that the tort should be confined to three party situations, but might apply to two party situations (that is, where the defendant harms the plaintiff directly).⁹ Instrumentality would not work as a control mechanism in two party situations.

A close reading of Lord Nicholls reasons suggests that he uses the intention element as his control mechanism. That is, in the delivery example, the requisite intention to injure the plaintiff is not present: "The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression".¹⁰

Lord Walker expressed hesitation in choosing between these two approaches, suggesting that neither is likely to be the last word on the subject. He suggested that:

The control mechanism must be found, it seems to me, in the nature of the disruption caused, as between the third party and the claimant, by the defendant's wrong (and not in the closeness of the causal connection between the defendant's wrong and the claimant's loss).¹¹

⁸ Lord Nicholls at ¶159.

⁹ Lord Nicholls at ¶161.

¹⁰ Lord Nicholls at ¶160.

¹¹ Lord Walker at ¶269.

Unified theory rejected

In a 1962 case called *DC Thomson & Co. Ltd. v. Deakin*,¹² the English Court of Appeal adopted a unified theory of the torts of inducing breach of contract and unlawful interference. Under this theory, inducing breach of contract was seen as a species of unlawful interference.

Lord Hoffman rejected this unified theory on both theoretical and practical grounds. The theoretical basis for his rejection arises from the fact that the tort of inducing breach of contract is a kind of accessory liability, while the tort of unlawful interference involves primary liability. Contractual rights are a kind of property that the law protects not only by imposing primary liability on a contract breaker, but also accessory liability on anyone who procures a breach of contract. By contrast, the tort of unlawful interference does not protect any particular interest.¹³

The practical reason for his rejection is that the unified theory causes confusion. It involves relying on a distinction between direct and indirect interference. Direct interference was said to be unlawful, whereas indirect interference required unlawful means to be unlawful. This distinction conceals the real question, which is: "did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?"¹⁴ Lord Nicholls agreed that the distinction between direct and indirect interference is unhelpful.

No in-between tort interference with contractual relations

Lord Hoffman and Lord Nicholls agreed that there is no in-between tort interference with contractual relations, or of *preventing performance* of a contract by *lawful* means. Although they did not expressly link this in-between tort to the unified theory, this in-between tort seems to be one of the results of the unified theory.

¹² [1952] Ch 646 (CA).

¹³ Lord Hoffman at ¶32.

¹⁴ Lord Hoffman at ¶36.

The in-between tort comes from the famous case of *Torquay Hotel Co. Ltd. v. Cousins*.¹⁵ A union involved in a trade dispute at one hotel, Torbay Hotel, picketed another hotel, Imperial Hotel, because it was angry with comments made by the Imperial's managers. It declared the Imperial Hotel "black", and even phoned Esso to say that it would stop deliveries of fuel oil to the hotel. In the result, the hotel could not obtain fuel oil from Esso. The hotel's contract with Esso contained a *force majeure* clause that was triggered by labour disputes. The union had thus prevented performance of the contract, but had not caused a breach of contract. The union was acting unlawfully, Lord Denning held, as there was not a trade dispute between it and the Imperial Hotel such that the union could benefit from protection from liability afforded by labour laws.

Lord Denning did not rely on this finding of unlawfulness, however, as he extended the reach of the tort to cover direct interference with performance of a contract even if the means used were lawful and the interference did not give rise to a breach of contract.

Lord Nicholls expressly overruled Lord Denning on this point. He stated:

This extension of the *Lumley v Gye* tort [inducing breach of contract] must be going too far. To hold a defendant liable where the intentional harm is inflicted by lawful means runs counter to the limit on liability long established in English law. So long as this general limit is maintained in respect of other forms of interference with a claimant's business, and Lord Denning did not suggest this should be changed, the extension in liability proposed by him and seemingly approved by Lord Diplock is irrational.

Mainstream and OBG not liable

Both the *Mainstream* and *OBG* cases became easy to dispose of because of the sharp distinction drawn between the two torts.

In *Mainstream*, the trial judge found that the investor did not intend to procure a breach of

contract. The evidence showed that he believed that the employees were not acting in breach of their obligations to their former employer. As a result, the investor was not liable.

In *OBG*, the receivers acted in good faith, although their appointment turned out to be invalid. They had admitted liability for trespass to land and conversion of chattels. The issue was whether they were liable for interfering with *OBG's* contractual rights. They were not, the Lords held, as they were guilty neither of unlawful means nor of intention to cause loss. Nor were the receivers liable for inducing breach of contract. They did not induce *OBG* to breach contracts; they believed they were entitled to act on behalf of *OBG*.

Hello! liable for breach of confidence only

Hello! magazine also escaped liability for unlawful interference. While *Hello!* had the requisite intention to cause loss, Lord Hoffman held, it did not interfere by unlawful means with the actions of Michael Douglas and Catherine Zeta-Jones.

Lord Hoffman, again speaking for the majority, found *Hello!* liable for breach of confidence. The extension of the tort of breach of confidence to cover this situation is itself noteworthy. The wedding was attended by many people and it was always intended that photographs would be published in the media.

Lord Hoffman agreed with the trial judge that the three conditions required for breach of confidence were met. First, photographs of the wedding were confidential information because they were not generally available. Second, information was imparted in circumstances importing an obligation of confidence: wedding guests were prohibited from taking pictures. Third, this confidential information was misused by *Hello!*

OK! was able to recover from *Hello!* because it had paid £1 million for the benefit of this obligation of confidence. Lord Hoffman said:

The point of which one should never lose sight is that *OK!* had paid £1m for the benefit of the obligation of confidence imposed on all those present at the wedding in respect of any photographs of the wedding. That was quite clear. Unless there is some conceptual or policy

¹⁵ [1969] 2 Ch 106.

reason why they should not have the benefit of that obligation, I cannot see why they were not entitled to enforce it. And in my opinion there are no such reasons. Provided that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward.¹⁶

Inducing breach of contract and unlawful interference in Canada

The opinions delivered by the House of Lords in these three cases constitute the most significant judicial pronouncement on the scope of economic torts in quite some time. They will inevitably resound across the common law world, including Canada.

That being said, Canadian courts have avoided the principal error that the House of Lords corrected in this case. In the UK, the torts of inducing breach of contract and unlawful interference were, for a time, merged. In Canada, this merger never occurred, although some cases describe unlawful interference with economic relations as a genus tort.¹⁷ Indeed, the Ontario Court of Appeal has confirmed in two recent cases that unlawful conduct is an essential element of the tort of unlawful interference.¹⁸

The scope of the unlawful act element is wider in Canada than in the UK after *Mainstream*. In *Reach MD*, the Ontario Court of Appeal held that unlawful acts included any act that the defendant is not at liberty to commit, not just breaches of law or statute. The court adopted Lord Denning's formulation of this requirement from *Torquay Hotel*. In *Reach MD*, the unlawful act consisted of a trade association issuing a ruling that it had no jurisdiction to make under the internal policies governing the trade association.

¹⁶ At ¶117.

¹⁷ See for instance *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 OR (3d) 229 (Ont Gen Div) at ¶54. Even in this case, the distinction between the two torts was maintained.

¹⁸ See *Drouillard v. Cogeco Cable Canada Inc.*, [2007] OJ No 1664 (CA); *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 OR (3d) 30 (CA); *Cable company liable for inducing breach of contract*, [link to http://www.agolaw.com/reslibrary_article.asp?article=cable20070514].

Interestingly, the *Reach MD* case would likely fit within the paradigm identified by Lord Hoffman. In *Reach MD*, a pharmaceutical manufacturers' trade association told its members they could not advertise in the calendar produced by the plaintiff, Reach MD Inc. In so doing the association interfered with the ability of third parties to deal with Reach MD. Although the Court of Appeal does not discuss the point, given that trade associations are based on contract, it is at least arguable that by exceeding its jurisdiction, the trade association breached its contract with its members, who could therefore have sued the association for a declaration, if not damages.

So far as the intention element is concerned, the law in Canada is very close to that adopted by the House of Lords. In *Reach MD*, the Ontario Court of Appeal held that the defendant must intend to injure the plaintiff, but this intention does not need to be the defendant's predominant purpose. It is enough that the defendant's unlawful act is in some measure directed against the plaintiff, even if the defendant's predominant purpose was to advance its own interests.

Canadian courts have not grappled with the control mechanism to prevent the tort of unlawful interference from getting out of hand to the same extent as UK courts.¹⁹ It is unlikely that Canadian courts would adopt the control mechanism proposed by Lord Hoffman, that is, restricting liability to cases where the unlawful act interferes with the ability of a third party to do business with the plaintiff. Rather, Canadian courts are more likely to rely on the requirement that the defendant have an intention that is in some way directed at the plaintiff.

A problem raised by the *Torquay Hotel* case remains. In that case, the union was clearly aware that there was some contract between the Imperial Hotel and Esso for the delivery of fuel oil, and it clearly intended to cause a breach of that contract, in the sense of preventing performance of it. On Lord Nicholl's analysis, the union would not have committed the tort of inducing breach of contract because the *force majeure* clause excused Esso

¹⁹ Indeed, even as recently as 1998, in *Sagaz*, the tort was described as an emergent tort.

from performance in the event of a labour dispute. The union cannot have been aware of this clause. While in the more typical fact pattern where this tort arises (such as a departing employee case), it is clearly sensible to make liability depend on the precise terms of the contract and whether there is a breach, it would seem an unsatisfactory in *Torquay Hotel* to exempt the union from liability because of the *force majeure* clause. The answer may, however, lie in the fact that the union's actions were unlawful in themselves, and may have, for instance, constituted the tort of intimidation.²⁰

Finally, the reasoning of the House of Lords could have an impact on a tort not considered in that case, the predominant purpose branch of civil conspiracy. In both Canada and the UK, conspiracy has two branches. The branch most frequently encountered is unlawful act conspiracy, where two or more people agree to carry out some unlawful act that injures another. Less frequently encountered is the predominant purpose branch, where two or more people agree to carry out some *lawful* act but have the predominant purpose of injuring another.²¹ The difficulty with this branch of the tort is that an act that would be lawful if carried out by one person becomes unlawful simply because another is involved. This existence of this branch is quite simply inconsistent with the House of Lords' insistence in *Mainstream* that no liability should exist unless the defendant crosses the Rubicon to commit an unlawful act.

Why do these torts matter?

The torts of inducing breach of contract and unlawful interference form part of common law regulation of competition in Canada and elsewhere in the common law world. These torts impose certain restrictions on what competitors can do in competing with one another. However, because competitors are supposed to compete vigorously and to try to cause "injury" to one another by gaining market share at each others' expense, these torts must be very closely circumscribed. For that reason, the theoretical basis of these torts and the limits courts place on their scope are extremely important.

Lord Nicholls adverted to this issue, stating:

English courts have long recognised they are not best equipped to regulate competitive practices at large. Parliament is better placed to decide what interests need protection and by what means. Fry LJ said that 'to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the powers of the courts': *Mogul Steamship Co Ltd v McGregor* (1889) 23 QBD 598, 625-626. Since then Parliament has intervened on many occasions.

This is why, taken collectively, economic torts prohibit only a narrow range of behaviour – and why they should not be allowed to get out of hand.



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²⁰ *The Court of Appeal held that the union's actions were unlawful but made no finding on intimidation in Torquay Hotel.*

²¹ *Canada: see Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452 (S.C.C.); UK: see Lonrho plc v Fayed, [1992] 1 AC 448 (HL).*