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U.K. Court of Appeal Considers Position on Inducing a Breach of Contract

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The Court of Appeal has recently handed down judgment in *Kawasaki Kisen Kaisha Ltd v James Kemball Limited*[1] ("***Kawasaki v JKL***"), an interesting decision on the "economic" tort of inducing a breach of contract.

The so-called "economic torts" have been present in the common law since the Victorian era: the tort of inducing a breach of contract was first established by the well-known case of *Lumley v Gye*[2] as long ago as 1853 and subsequently re-stated as part of a unitary tort of "interfering with contractual relations" in *D.C. Thomson & Co Ltd v Deakin*[3] in 1952.

However, conventional thinking in relation to this area of jurisprudence was radically shifted in the seminal decision of *OBG v Allan*[4] in 2008, in which the House of Lords made clear that economic torts were to be correctly conceived of as two separate causes of action: (i) causing loss by unlawful means; and (ii) inducing breach of contract. Nevertheless, there has remained a question mark for practitioners and commentators alike as to whether any of the additional economic torts described in prior authorities survived the categorisation of the economic torts into the two causes of action described in *OBG v Allan*.

One such additional economic tort was that of "inconsistent dealings". Inconsistent dealings may be described as a third party to a contract causing a contracting party to behave inconsistently with the terms of their contract, perhaps by offering an alternative arrangement, such that it is impossible to fulfil both sets of obligations. In *Kawasaki v JKL*, it is the Court of Appeal's comments on *inconsistent dealings* that are particularly notable.

In short, previous authority had suggested that inconsistent dealings could provide a distinct basis for establishing liability, separate to inducing a breach of contract, but the Court of Appeal held that these authorities did not survive the House of Lords decision in *OBG v Allan*. The Court made it clear that conduct described as inconsistent dealing may form one example of the tort of inducing breach of contract, but will not do so if it does not also have the character of 'causative participation' required for accessory liability that is the essential agreement of the tort of inducing a breach of contract.

As such, unless the alleged tortfeasor has (i) encouraged, persuaded or assisted the contract-breaker in breaching their contract, and (ii) had the necessary intention to cause a breach of contract (rather than the breach merely being a foreseeable consequence of its actions) the tort of inducing breach of contract will not be available to the innocent contractual party.

Background

Kawasaki Kisen Kaisha ("**Kawasaki**") was the head of a group of companies that owned and operated a fleet of ships, including a container liner service. In late 2016, it was announced that Kawasaki would merge its container liner business with those of two other Japanese operators, via a new joint venture structure (the "**JV**"). As a result, Kawasaki ceased to operate its own container liner business from April 2018 onwards.

The cessation of Kawasaki's own container liner business had an adverse impact on the claimant, James Kemball Limited ("**JKL**"), which was a road haulier of containers between ports within the U.K. JKL held contracts with K-Euro, a subsidiary of Kawasaki, under which K-Euro was obliged to offer JKL a certain number of haulage jobs over three years (the "**Haulage Contract**"). As a result of Kawasaki ceasing to operate its own container liner business, K-Euro was unable to offer JKL the haulage jobs it had promised under the Haulage Contract.

JKL brought proceedings against K-Euro for breach of contract in relation to this failure. In addition, JKL brought a tortious claim against Kawasaki, alleging that it induced K-Euro's breach of contract. JKL also pleaded a claim in conspiracy against Kawasaki, but this was subsequently abandoned.

JKL required permission to serve its pleading on Kawasaki out of the jurisdiction, which Kawasaki argued the court should decline to grant because the claim of inducing breach of contract did not have a real prospect of success.

At first instance, Teare J considered that this question should be resolved in JKL's favour; the pleading was just about sufficient to cover its tortious claim against Kawasaki. The relevant conduct, which was said to constitute inducing or procuring a breach of contract, was *"encouragement";* in addition*,* given the connection between Kawasaki and K-Euro (as parent and indirect subsidiary, with some common senior management), the alleged inference of encouragement was not 'fanciful' (see further below). The judge did not consider it necessary to deal with JKL's alternative submission that the conclusion of the JV amounted to an inconsistent dealing. However, he did observe that such a submission appeared to be in conflict with the clear statements made in *OBG v Allan* that, where the defendant merely prevents a contracting party from carrying out his contractual obligations (so long as the preventative means used were independently lawful), such action is insufficient to establish an action for inducing a breach of contract.

The issues on appeal

Kawasaki's application for permission to appeal Teare J's decision to the Court of Appeal was granted. In light of the arguments that had been advanced in Kawasaki's skeleton argument for permission to appeal, JKL sought permission to amend its Particulars of Claim to put forward an arguable claim. A draft of those amendments was presented to the Court of Appeal.

Kawasaki argued that permission to amend the Particulars of Claim should be refused because even JKL's amended case had no real prospect of success in establishing any of the three key ingredients of the tort of inducing a breach of contract: (i) inducement; (ii) intention; and (iii) causation.

It was common ground that, on an application for permission to serve out of the jurisdiction, the claimant needed to establish a serious issue to be tried; meaning a case with a real (as opposed to a fanciful) prospect of success. The same test was also applicable when considering the application to amend JKL's statement of case. In this context, the Court of Appeal noted the general principles that:

1. it is not enough that a claim is merely arguable, it must carry some degree of conviction;

2. the pleading must be coherent and properly particularised; and

3. the pleading must be supported by evidence that establishes a factual basis which meets the merits test; that is, there must be evidential material which establishes a sufficiently arguable case that the allegations are correct.

It was with these principles in mind that the Court considered whether JKL's claim for inducing breach of contract raised a serious issue to be tried.

The tort of inducing breach of contract

As stated above, the leading modern authority on the tort is *OBG v Allan*, in which the House of Lords rejected the unified theory of *economic torts*, and separated the distinct torts of inducing breach of contract and causing injury by unlawful means.

The House of Lords held that the tort of inducing breach of contract is committed where *"B and C are contracting parties and A, knowing of the terms of their contract and without lawful justification, induces B to break that contract"*. The Court went on to identify five key ingredients of the tort:

1. **Breach**: there must be a breach of contract by "B";
2. **Inducement**: "A" must induce "B" to break his contract with "C" by persuading, encouraging or assisting him to do so;
3. **Knowledge**: "A" must know of the contract and know its conduct will have that effect;
4. **Intention**: "A" must intend to procure the breach of contract either as an end in itself or as the means by which it achieves some further end; and
5. **Justification**: If "A" has a lawful justification for inducing "B" to break his contract with "C", that may provide a defence against liability.

In the present case, the second and fourth ingredients, "inducement" and "intention", were in issue.

Inducement

The House of Lords in *OBG v Allan* regarded it as fundamental that liability for inducement was an accessory liability:

> *"A commits a tort and attracts liability to C because he does something which joins in with the conduct of B in a way which makes him an accessory to the breaking of the contract by B."*

In order to attract accessory liability, the acts of encouragement, threat or persuasion must have a sufficient causal connection with the breach by the contracting party. This is to be distinguished from conduct that merely facilitates the breach, which is not sufficient to attract accessory liability.

As the House of Lords put it in *OBG v Allan*:

> *"There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations… [i]n prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases, the defendant acts independently of the contracting party. The defendant's liability is stand-alone. Consistently with this, tortious liability does not arise in prevention cases unless… the preventative means used were independently unlawful*."[5]

From this, the Court of Appeal concluded that conduct by A cannot qualify as inducement if it constitutes no more than preventing B from performing his contract with C. There must be some conduct by A amounting to persuasion, encouragement or assistance of B to break the contract with C. Further, the participation by A in B's breach must have a sufficient causal connection with the breach to attract accessory liability. If the conduct in question is not capable of influencing B's choice of whether or not to breach the contract, it is not capable of amounting to inducement.

In the present case, JKL suggested that Kawasaki encouraged or persuaded K-Euro to breach the Haulage Contract, but the Court considered that there was no evidential basis for such assertion. On the facts, K-Euro simply had no choice in the matter; nothing which Kawasaki said or did was capable of operating on the mind or will of K-Euro. Conversely, Kawasaki had no reason to indulge in any encouragement or persuasion. The breach of the Haulage Contract by K-Euro was simply a consequence of Kawasaki freely acting in its own commercial interest. Such breach was an inevitable consequence of the JV, and did not result from tortious conduct on the behalf of Kawasaki.

The Court then considered JKL's alternative argument that Kawasaki was engaged in inconsistent dealings (in establishing and operating the JV). It was JKL's position that, if its case on inducing breach of contract had no real prospect of success, it had a second argument that Kawasaki had dealt inconsistently with the terms of the Haulage Contract, and this argument had a real prospect of success. The Court concluded that this argument faced two insurmountable difficulties. First, inconsistent dealings are not a separate cause of action from inducing breach of contract; inconsistent dealings are simply an example of conduct which is capable of amounting to inducing breach of contract if the conduct in question fulfils the criteria set out in *OBG v Allan* in that such inconsistent dealings might constitute persuasion, encouragement or assistance. As such, JKL's argument based on inconsistent dealings would fail for the same reasons as its argument based on encouragement: Kawasaki's conduct was not capable of operating on the mind and will of K-Euro as K-Euro had no choice in relation to the establishment of the JV.

The second difficulty with JKL's inconsistent dealing argument was that there were no "dealings". The complaint was that Kawasaki had provided no business to K-Euro, but it was under no legal or other obligation to do so. A mere failure to act, when there is no obligation to do so, cannot constitute an "inconsistent dealing" so as to attract accessory liability. Lawful inactivity is not conduct which can properly be described as participation in a breach of contract.

Intention

The Court of Appeal noted that the mental element of the tort requires that there must be an intention for the breach of contract to act as the means to an end, rather than simply the foreseen consequence of the tortious conduct. As the House of Lords stated in *OBG v Allan*:

> *"The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences… people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves… [o]n the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended."*[6]

Or, to put it another way:

> *"A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to a contracting party which persuades the latter to default on his contractual obligations. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. He owes no duty of care to the victim of the breach of contract. Negligent interference is not actionable."*[7]

On the facts, the breach of the Haulage Contract was obviously not a means to an end being pursued by Kawasaki by setting up the JV. JKL was one of many haulage operators in various jurisdictions who would be affected by the new arrangements, and the JV was evidently driven, from Kawasaki's perspective, by the commercial and economic benefits of such a restructuring of its business. The resultant breach by K-Euro of the Haulage Contract was merely a foreseen consequence. On the evidence, the Haulage Contract simply did not form part of the picture when establishing the JV. As a result, the Court held that JKL failed to meet the necessary merits threshold for the ingredient of intention.

The Court of Appeal therefore allowed Kawasaki's appeal and set aside the order granting permission to serve the claim on Kawasaki out of the jurisdiction. Accordingly, JKL was unable to pursue its claim in inducing breach of contract against Kawasaki, and was limited to its claim against K-Euro for breach of contract.

Comment

This decision is particularly interesting because it puts to bed any speculation that there may be another basis (such as an economic tort of inconsistent dealing) to bring a claim other than the two heads of claim set out in *OBG v Allan* namely*:* (i) inducing breach of contract; and (ii) causing loss by unlawful means.[8] This speculation had arisen from the fact that prior authorities had suggested that inconsistent dealing would provide a distinct basis for liability, separate from inducing breach of contract.

However, it is now clear that these authorities did not survive the re-statement of the economic torts in *OBG v Allan*. The Court has made clear that conduct described as inconsistent dealing will not automatically give rise to any liability. It may constitute the tort of inducing breach of contract, but it will only do so if it also has the character of causative participation required for accessory liability articulated in *OBG v Allan*; that is, it must be intended to influence the contract-breaker's choice to breach to contract, in order to secure some form of gain. Accordingly, what this case tells us is that where a claim for an economic tort is contemplated, it should be brought within the existing causes of action.

The case also reminds us that if a party contracts with a subsidiary entity, the chances of successfully claiming against its parent for the consequences of a breach of contract by the subsidiary are low. Unless the parent company both encouraged, persuaded or assisted the subsidiary to breach its contract and had the necessary intention to cause the breach (rather than it merely being a foreseeable consequence of its actions), the tort of inducing a breach of contract will not provide a remedy.

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[1] [2021] EWCA Civ. 33.

[2] (1853) 2 E & B 216.

[3] [1952] Ch. 646.

[4] [2008] 1 AC 1.

[5] Per Lord Nicholls at para. [178].

[6] Per Lord Hoffman at para. [42]–[43].

[7] Per Lord Nicholls at para. [191].

[8] We note that, in *OBG v Allan*, Lord Hoffman conceived of the economic torts of "intimidation" and "conspiracy" as part of the tort of "causing loss by unlawful means" but not all commentators have embraced this categorisation and therefore maintain that there are four economic torts.