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The Supreme Court's Latest Grapple with Economic Torts: Causing Loss by Unlawful Means

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Introduction

In *Secretary of State for Health and another v Servier Laboratories Ltd and others*,[1] the Supreme Court recently considered the scope of the economic tort of 'causing loss by unlawful means' (the "**unlawful means tort**"), ultimately finding in the defendants' favour.

Historically, the unlawful means tort has been characterised by significant uncertainty and disagreement, at least until the seminal case of *OBG v Allan*[2] ("**OBG**"). Whilst the abstract nature of the tort invariably leads to rather dense judicial commentary, *Servier* offers: (i) a welcome clarification as to the relevant test that claimants will have to satisfy when bringing an action under the tort; and (ii) a reminder to parties exercising potentially unlawful means that their actions may not only accrue liability from the direct recipient of their actions, but possibly third parties suffering economic loss as a result.

The original claimant group in the present case comprised various NHS bodies that have since been abolished. The claim was therefore assumed by the Secretary of State for Health as successor in title to it (for convenience, we refer to the claimant as the "**NHS**"). The defendants in the proceedings, Servier Laboratories Ltd and others ("**Servier**"), develop and manufacture pharmaceutical drugs, including perindopril erbumine, a medicinal product used in the treatment of cardiovascular diseases (the "**Product**").

The background to the proceedings is set out in further detail below. However, in summary, the NHS alleged that Servier had made false representations to the European Patent Office (the "**EPO**"), and subsequently the English Courts, as to the novelty of the Product, so as to procure the European registration of a patent, which it later sought to enforce in England through injunctions against other pharmaceutical companies. Following a later challenge, the patent was held to be invalid and was revoked by the EPO. The NHS argued that the patent, and its subsequent enforcement by Servier, had discouraged and/or prevented effective competition for the Product in the U.K. market, as a result of which it had suffered economic loss in having to pay higher prices to purchase the Product from Servier than it might otherwise have done in a competitive market. Put in shorter terms, the NHS alleged that Servier's deceit (the alleged unlawful means) on the EPO and/or the English Courts (as third parties) had the consequential effect of causing it economic loss.

The key point on appeal to the Supreme Court was whether a necessary element of the unlawful means tort is that the unlawful means should have affected the relevant third parties' freedom to deal with the claimant (referred to as the 'dealing requirement'). That is to say, on the basis of the

decision in *OBG*, the NHS had to demonstrate that Servier's alleged deceit on the EPO/English courts (as the third parties), adversely affected the ability of the NHS to operate/engage with those third parties. As we shall discuss, this 'dealing requirement' has been held by the English Courts to be an essential element of the unlawful means tort, so as not to "*cast the net of legal liability too widely*".

Causing loss by unlawful means: the jurisprudence

The so-called "economic torts" were the subject of detailed consideration by the House of Lords in *OBG*. In *OBG*, Lord Brown remarked that the "*whole area of economic tort has been plagued by uncertainty for far too long. Your Lordships now have the opportunity to give it a coherent shape*". It was an opportunity that the House of Lords took on with rigour. Lord Hoffman, who gave the leading judgment, determined that there was no "*unified theory*" of the economic torts, but rather they fell into two principal categories (as had been recognised in the 1898 case of *Allen v Flood*[3]): (i) the unlawful means tort; and (ii) procuring/inducing a breach of contract.[4]

Lord Hoffman summarised the essence of the unlawful means tort in *OBG* as: "*(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant*".

In order to make out a claim for the unlawful means tort, it was held that the following three elements had to be satisfied:

1. **Unlawful means**: first, the claimant must show that the defendant employed unlawful means against a third party, which act would be independently actionable by that third party as against the defendant. There is, however, an exception to this first element, in that even if the third party itself suffered no loss but the unlawful act would otherwise have been actionable, that would be sufficient. Importantly, the requirement is that the action can be brought independently, which has the effect of excluding criminal conduct, which must be actioned through relevant authorities (e.g. the Police). This last point has been the subject of significant judicial disagreement, which may well be the subject of future cases.

2. **Intention to cause loss**: second, the claimant must show that, by its unlawful means, the defendant unlawfully acted upon the third party with the intention that such interference would cause loss, irrespective of who would suffer that loss. This second element of the tort is also referred to as the 'instrumentality requirement' (i.e. that the damage to the claimant is caused through the defendant's unlawful act on the third party).

3. **Dealing**: third, the claimant must show that the defendant's interference affected the third party's freedom to deal with the claimant. A helpful illustration of this requirement can be found in *RCA Corporation v Pollard*,[5] where the defendant was selling bootleg Elvis Presley records without a licence from the relevant third party and owner of the rights (Elvis Presley's estate). As such, the estate had an independently actionable claim against the defendant under statute. However, while the claimant, RCA, held an exclusive license to exploit the Elvis Presley rights, this did not give rise to a cause of action against Pollard. It was determined that Pollard's actions did not prevent the Elvis estate (as the third party) from dealing with RCA, with the result that the unlawful means tort could not be established.

A useful retrospective application of the above three-part test can be found in the 18th century case of *Tarleton v McGawley*,[6] one of the cases cited by Lord Hoffman in *OBG*. The master of a ship called the Othello fired his cannon off the coast of West Africa in the direction of a canoe containing various products for trade, as a means of intimidating the canoe as it approached a rival British trading ship. In that case: (i) the master of the Othello exercised unlawful means in the tort of intimidation[7] by

firing his cannon at the canoe, which action would have been independently actionable by the canoe owner; (ii) the master intended for the canoe to turn back to shore and thereby cause loss to the rival British ship of trade in order to benefit the Othello's own trading pursuits; and (iii) the interference had the direct effect of inhibiting the canoe owner's ability to deal with the rival British ship.

Background to the present case

In 2001, Servier applied to the EPO in order to patent the Product, which patent was granted in 2004 with, among others, a U.K. designation (the "**Patent**"). In 2006, the Patent survived opposition proceedings commenced by 10 companies. Thereafter, Servier sought to enforce the U.K. designation of the Patent, including by obtaining injunctions in the English Courts prohibiting rival pharmaceutical companies from manufacturing and selling the Product. One such rival company applied for summary judgment against Servier on the grounds that the Product lacked any novelty, such that the Patent should be invalidated. In 2005, the High Court held that the Patent was invalid as it lacked novelty or alternatively was obvious over another existing patent. This decision was upheld by the Court of Appeal and, in 2009, the Patent was revoked by the EPO.

The NHS brought proceedings against Servier on the basis of the unlawful means tort. It alleged that Servier had deceived the EPO and the English Courts in obtaining, defending, and enforcing the Patent, which, in turn, had caused the NHS loss. At paragraph 93 of the Supreme Court's judgment, Lord Hamblen summarised the chain of events as follows:

1. Servier deceived the EPO/High Court;

2. this had the consequence of persuading the EPO/High Court to grant the Patent/injunctions;

3. this had the further consequence of persuading or compelling generic manufacturers not to enter the market in respect of the Product;

4. this had the further consequence of preventing a competitive process from arising, which would have eventually resulted in lower prices; and

5. this had the further consequence of causing the NHS to pay too much for the Product, resulting in a damages claim (including interest) in excess of £200 million against Servier.

However, it was accepted that there were never any dealings between the NHS and either the EPO or the English Courts in respect of the Product. Accordingly, the third limb of the *OBG* test (the 'dealing requirement') could not be satisfied because Servier's actions, irrespective of whether they were unlawful and intended to cause loss, had not prevented the EPO and/or the High Court from dealing with the NHS.

As a result, the NHS's unlawful means tort claim was struck out by the High Court, with the Court of Appeal rejecting the NHS's appeal. Both Courts held that the majority of the House of Lords in *OBG* concluded that the 'dealing requirement' was a necessary element of the unlawful means tort.

The NHS appealed to the Supreme Court, alleging that the 'dealing requirement' did not form part of the ratio of *OBG* and therefore the lower courts were wrong to consider themselves bound by it. Accordingly, the Supreme Court was required to address the following two questions: (i) was the 'dealing requirement' part of the binding ratio in *OBG*?; and (ii) if so, should the Supreme Court nevertheless depart from *OBG* and dispense with the 'dealing requirement'?

The first issue on appeal

The Supreme Court was definitively of the view that the dealing requirement was part of the ratio in *OBG*, for the following principal reasons:

1. Lord Hoffman had considered the dealing requirement to be part of the origins of the unlawful means tort, particularly applying the case of *Quinn v Leatham*.[8] The dealing requirement was consistent with the authorities in which liability for the unlawful means tort had been established.

2. At paragraph 51 of *OBG*, Lord Hoffman expressly stated the essence of the unlawful means tort, which Lord Hamblen in *Servier* considered to be "*plainly definitional*" in nature: "*Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his* ***freedom to deal*** *with the claimant*" (our own emphasis added).

3. The dealing requirement reflects Lord Hoffman's concern that the tort must be controlled and kept within "*reasonable bounds*", and therefore narrowed to the extent possible and desirable. It would not be desirable from a policy perspective to facilitate a wide-reaching tort that could be seized upon by an indeterminate amount of actors.

4. The other members of the majority in *OBG* all understood Lord Hoffman's definition of the tort to include the dealing requirement and they endorsed it. Indeed, Lord Walker confirmed this aspect of the tort to fill the role of the necessary control mechanism keeping the tort within "*reasonable bounds*".

5. *OBG* has been understood by both the English court and other Commonwealth courts to include a dealing requirement.

The second issue on appeal

The NHS contended that, irrespective of whether the dealing requirement was part of the *OBG* ratio, it was undesirable and arbitrary to restrict the interests protected by the tort through imposing the dealing requirement.

In order for the Supreme Court to be convinced that the present case was an appropriate one from which to depart from the *OBG* precedent, the NHS had to invoke the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (the "1966 Practice Statement"). Lord Hamblen recently summarised the principles from the 1966 Practice Statement in *Henderson v Dorset Healthcare University NHS Foundation Trust*.[9] He had observed that the court will be "*very circumspect before accepting an invitation to invoke the 1966 Practice Statement*", which would generally only be appropriate where judicial precedent was "*generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy*".

The NHS argued that it would result in an injustice if it was precluded from bringing a claim based on the unlawful means tort simply because it had not dealt with the third party that had been used by the defendant as a vehicle to damage the NHS's economic interests. On the NHS's case, the other elements of the tort, in particular the second element (instrumentality), were sufficient control mechanisms.

The Supreme Court rejected the NHS's position on the following principal grounds:

1. First, at a basic level, the Supreme Court noted that while the NHS had pointed to some academic criticism of the decision in *OBG*, it had not provided any real life examples of that decision causing difficulties, creating uncertainty or impeding the development of the law.

2. Second, the instrumentality requirement (i.e. that the damage be caused to the claimant as a result of the defendant's unlawful acts perpetrated on the third party) was deemed by the Supreme Court to be itself "*too weak a factor*" to perform the vital "*controlling mechanism*" that limits the scope of the tort. If the dealing requirement were removed, there could be issues of remoteness where the damage suffered is very far removed from the unlawful act (as demonstrated by the five steps in the present case from Servier's alleged deception through to the NHS paying more for the Product due to a lack of competition, as set out above). As the Supreme Court put it: "*the dealing requirement performs the valuable function of delineating the degree of connection which is required between the unlawful means used and the damage suffered*".

3. Thirdly, the House of Lords in *OBG* specifically rejected a narrow test of intention: rather than requiring intention to harm the specific claimant, the defendant need only have intended harm as a means to an end, irrespective of who the harm was suffered by. The 'dealing requirement' performs a vital counterbalance, without which the wide test of intention could give rise to indeterminate liability to a wide range of claimants, which in this case could include: other health authorities, generic competitors, insurers, foreign health authorities and any individuals who had simply bought the Product.

Accordingly, the Court remained of the view that the dealing requirement performed an essential controlling function, and there was no basis upon which the NHS could properly invoke the 1966 Practice Statement in order for the Court to depart from the precedent set in OBG.

Further comment

Following on from the clarification provided by the Supreme Court in *Kawasaki Kisen Kaisha Ltd v James Kemball Limited*[10] concerning the tort of procuring a breach of contract (see our article on this here), the *Servier* case provides helpful confirmation of the criteria that a claimant must satisfy in order to make out a claim for causing loss by unlawful means. The Supreme Court has made clear that the 'dealing requirement' is an essential element of the unlawful means tort, particularly as it acts as a control mechanism aimed at ensuring that the tort is kept within reasonable bounds. Accordingly, a claimant must show that the defendant's interference has affected a third party's freedom to deal with it.

However, this case does not necessarily spell the end of the judicial debate, as two key points remain unsettled.

First, the present case involved the tort of deceit, being a civil cause of action that would have been independently actionable by the EPO and/or the English High Court against Servier. However, a point that remains open for debate is whether 'unlawful means' should be extended beyond the arena of civil liability, so as to include criminal and other wrongs that cannot be actioned independently. Lord Sales remarked that this is an issue that still requires resolution, in particular noting that 'unlawful means' in the separate tort of 'conspiracy to injure using unlawful means' encompasses a wider meaning, which includes not just 'civil' wrongs, but also criminal ones.

A second point of possible future judicial wrangling, is the correct test for 'intention'. In the present case, the NHS was only able to plead the wider *Sorrell v Smith*[11] intention (i.e. an intention to cause loss as a means to an end, and not to specifically injure the claimant) meaning that the Supreme Court was not required to consider whether a departure from this settled approach was necessary.

Whether the appropriate test for intention will itself need further consideration by the Supreme Court in future cases remains to be seen.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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[1] [2021] UKSC 24 (on appeal from [2019] EWCA Civ 1160).

[2] [2008] 1 AC 1.

[3] [1898] AC 1.

[4] 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.

[5] [1983] Ch 135.

[6] [1790]1 Peake NPC 270.

[7] This tort was confirmed in the case of *Rookes v Barnard* [1964] AC 1129. As noted above, Lord Hoffman sought to subsume intimidation into the unlawful means tort, but it is generally still understood to be separate.

[8] [1901] AC 495, 535.

[9] [2020] UKSC 43.

[10] [2021] EWCA Civ. 33.

[11] [1925] AC 700.