

OBG Ltd v Allan  
Douglas v Hello! Ltd (No 3)  
Mainstream Properties Ltd v Young  
[2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545 HL

### **Summary**

The House of Lords dealt with appeals in three cases in a single set of opinions. The appeals raised issues relating to: (1) the economic torts of ‘inducing a breach of contract’ and ‘the intentional infliction of harm using unlawful means’; (2) the tort of conversion; and (3) the wrong of breach of confidence.

### ***OBG Ltd v Allan***

In *OBG Ltd v Allan*, the defendants took control of the claimant company’s business because they mistakenly believed that they had been validly appointed as receivers. The trial judge concluded that when the defendants took control some of the contracts which the claimant company was a party to were worth substantially more than the amounts that the claimant company eventually received in settlement. Thus the claimant company was seeking compensation reflecting the difference in value (between the contracts when the defendants took control and the amounts received in settlement) on the basis that the defendants had committed the tort of wrongful interference with contractual relations, or the tort of conversion. The Court of Appeal held that the defendants had not committed either of these torts: the tort of wrongful interference with contractual relations required an intention to procure a *breach* of contract, which could not be shown on the facts, whilst the tort of conversion required interference with tangible personal property rather than with intangible contractual rights.

The House of Lords dismissed an appeal by the claimant company in *OBG Ltd v Allan*. Their Lordships confirmed that the Court of Appeal had been correct to hold that the defendants were not liable for any economic tort since their conduct did not induce any breach of contract, did not involve the use of unlawful means, and was not intended to cause loss to the claimant company. A majority of the House of Lords also held that the Court of Appeal had been correct to hold that the defendants were not liable for conversion, since this tort did not protect intangible personal property, such as contractual rights. Lord Nicholls and Baroness Hale dissented from the majority and stated that they would have been willing to extend the scope of the tort of conversion to cover taking charge of a claimant’s contractual rights.

### ***Douglas v Hello Ltd (No 3)***

In *Douglas v Hello! Ltd (No 3)*, the Hollywood stars Michael Douglas and Catherine Zeta-Jones sold the publisher of OK! magazine the exclusive right to publish photographs of their wedding. The couple also undertook to organize security to prevent anyone from taking unauthorised photographs at the event. Despite the security measures a paparazzi managed to take some unauthorised photographs, and

these were published in Hello! magazine (OK! magazine's great rival). The publisher of OK! claimed that it would have been able to sell far more copies of the editions of the magazine which contained the 'authorised' wedding photographs if Hello! had not published the unauthorised photographs. Consequently, the publisher of OK! sued the publisher (in England) of Hello!, claiming that it had committed the wrong of breach of confidence or an economic tort *in relation to* the publisher of OK!. The Court of Appeal, however, held that the publisher of Hello! had not committed any actionable wrong *in relation to* the publisher of OK!: the publisher of OK! could not found its claim on breach of confidence because *it* – the publisher of OK! magazine – did not have any right to confidentiality with regard to information contained in any photographs of the event which it had *not* been authorised to publish. Furthermore, the publisher of OK! could not establish the economic tort of interference with its trade by unlawful means because that tort required an intention to cause harm *to* the publisher of OK!, which could not be shown on the facts. (The Court of Appeal's judgment is noted elsewhere on this website.)

The House of Lords, by a majority, allowed the publisher of OK! magazine's appeal in *Douglas v Hello! Ltd (No 3)*.

Their Lordships unanimously agreed with the conclusion of the Court of Appeal that the publisher of Hello! had not committed the tort of interference with trade by unlawful means, though different Lords used different reasoning to reach this conclusion. Lord Hoffmann, for instance, held that the Court of Appeal was wrong to have concluded that the publisher of Hello! did not intend to harm the publisher of OK! – loss to the publisher of OK! was *the means by which* Senor Sanchez Junco (who was the controlling shareholder of Hello!'s Spanish holding company and made the decision to publish the unauthorised photographs) sought to achieve his end of preserving the circulation of Hello!; the claim for interference with trade by unlawful means instead ought to have been rejected because the unlawful means used had not interfered with the liberty of Michael Douglas and Catherine Zeta-Jones to perform their contract with OK!.

The appeal was allowed because a majority of their Lordships concluded that the publisher of Hello! had committed the wrong of breach of confidence in relation to the publisher of OK!. The majority's view, in contrast to that of the Court of Appeal, was that the publisher of OK! was entitled to the benefit of an obligation of confidence with regard to *any* photographs of the wedding. Moreover, this obligation was not rendered nugatory as soon as the authorised photographs were published in OK! magazine because that publication did not put *all* photographic information relating to the event into the public domain.

### ***Mainstream Properties Ltd v Young***

In *Mainstream Properties Ltd v Young*, the issue of interest involved the sixth defendant, who had provided the first and second defendants with the money that they needed to develop a particular property. In developing this property the first and second defendants broke their contracts with their employer, who was the claimant. Although the sixth defendant had realised that there was a risk that the first and second defendants might be acting in conflict with their contracts with the claimant, he was reassured by the first and second defendants who *falsely* told him that there was nothing to worry about because the claimant had turned down the opportunity to develop the property. The claimant sued the sixth defendant for inducing breach of

contract, alleging that he had induced the first and second defendants to break their contracts of employment. The Court of Appeal, however, held that the sixth defendant was not liable because this tort required an *intention* to procure a breach or an *intention* to interfere with the performance of a contract, neither of which could be shown on the facts because of the sixth defendant's mistaken belief that the claimant had turned down the opportunity to develop the property. (The Court of Appeal's judgment is noted elsewhere on this website.)

The House of Lords unanimously dismissed the claimant's appeal in *Mainstream Properties Ltd v Young*. Their Lordships held that the Court of Appeal had been correct to hold that the sixth defendant was not liable for inducing a breach of contract because he had never *intended* to cause a breach of the contract. His honest – but mistaken – belief that the claimant had already turned down the opportunity to develop the property was inconsistent with any intention to induce a breach of contract.

## Comments

In these comments we will not discuss the points relating to the tort of conversion or the wrong of breach of confidence.

(1) *The structure of the economic torts.* These cases provided the House of Lords with the opportunity to clarify the relationship between the economic tort we refer to as 'inducing breach of contract' and the economic tort we refer to as 'the intentional infliction of harm by unlawful means'. In *OBG v Allan* (hereafter *OBG*) this second tort is referred to by Lord Hoffmann, Baroness Hale and Lord Brown as 'the tort of causing loss by unlawful means', but by Lord Nicholls as 'interference with a trade or business by unlawful means or, more shortly, the tort of unlawful interference'. We prefer the name 'the intentional infliction of harm by unlawful means' because this name does not imply that the tort should only cover economic losses associated with 'trade or business' interests.

What the House of Lords decided was that 'inducing breach of contract' is a form of *secondary, accessory*, liability for the wrong of breach of contract. By contrast, what we will call the tort of 'the intentional infliction of harm by unlawful means' imposes *primary* liability for intentionally causing harm to a claimant by using 'unlawful means' to restrict the freedom of a third party to deal with that claimant. Importantly, the consequence of this is that if a defendant's behaviour has *interfered with performance of a contract, but has not brought about a breach of contract*, then he can only be liable if he has *used 'unlawful means'*. In other words, 'directly interfering with performance of a contract (without bringing about a breach)' is *not* tortious *unless* 'unlawful means' are used.

(2) *Inducing breach of contract.* Since the tort of 'inducing breach of contract' is a form of *secondary* liability for someone else's breach of contract, in order to commit the tort the defendant's behaviour must be linked to the breach of contract in such a way that it would be fair to treat him as responsible for the breach (alongside the party to the contract who breaches it). The most obvious ways in which a defendant is likely act which will make it fair to treat him as responsible are where he encourages or persuades a party to the contract to breach it.

A more contentious question is whether a defendant can play a sufficiently important role in bringing about a breach of contract so as to be secondarily liable merely by facilitating the breach – that is, merely by making available to the party the contract some opportunity or equipment (including, perhaps, money) that he needs in order to breach the contract.

Lord Hoffmann's speech states that the relevant principles are to be found in the decision of the House of Lords in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013. In this case the House of Lords held that Amstrad did not *induce* or *procure* people to make unlawful copies of recordings by selling hi-fi systems which allowed high speed copying of pre-recorded cassette tapes onto blank cassette tapes. In reaching this conclusion Lord Templeman (at 1058) cited the view that 'facilitating the doing of an act is obviously different from procuring the doing of the act' and stated that: 'Generally speaking, inducement, incitement or persuasion to infringe must be by a defendant to an individual infringer and must identifiably procure a particular infringement in order to make the defendant liable as a joint infringer.' But whilst these statements suggest that *many forms* of assistance will not be sufficient to 'inducing', they certainly do not rule out the possibility that a defendant may commit the tort where the assistance he provides is an important part of a *common enterprise* to bring about a breach of contract. For instance, if Trevor was a professional footballer who had a contract with Clive which required him not to wear any football-related products except those made by Clive, but Trevor had decided he wished to wear football boots made by David, and asked David to supply him with specially-made boots for use in a forthcoming match, then might it be appropriate to hold David liable if he supplied the boots knowing of Trevor's contract with Clive and intending to enable Trevor to break the contract at the forthcoming match?

Whilst the House of Lords did not provide a definitive answer to the question whether facilitating a breach can ever be sufficiently linked to the breach to make the person who facilitates *secondarily* liable, it provided *clearer* guidance on whether *preventing performance* of a contract could lead to liability. This point was addressed most clearly by Lord Nicholls, at [178]-[180], where he stated that there was 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, because in cases of prevention the defendant did not 'join with' the contracting party in the breaking of the contract but instead acted 'independently'. Thus Lord Nicholls concluded that 'it is confusing and misleading to treat prevention cases as part and parcel of the same tort as inducement cases.'

Lord Hoffmann did not make the same point *explicitly*. But such a point is consistent with his insistence that there can be no liability for inducing breach of contract unless there has been a breach of contract, because preventing performance will not always result in a breach. Moreover, in the subsequent case of *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303 the Court of Appeal decided that Lord Hoffmann had not intended to disagree with Lord Nicholls on this point, and confirmed that preventing performance could not amount to inducing a breach of contract. (Important note: *preventing* a party from performing a contract may still be tortious if 'unlawful means' are used, since in such circumstances it can amount to the tort of 'the intentional infliction of harm by unlawful means', which is discussed under the next sub-heading).

Two final points may be worth making here. First, it is not clear that Lord Nicholls, or the rest of the House of Lords, considered what the position *should* be where a defendant does not act ‘independently’ when preventing the contracting party from performing but acts at the request of the contracting party. For example, if Tanya was persuaded by David that she should seek to break her contract to sing for Clive, but fearing that she might be too weak-willed to stick to her intention to break the contract she agrees to David’s suggestion that he assist her by tying her to a chair on the evening she ought to perform, then if Tanya does indeed change her mind whilst tied to the chair, David will technically have prevented her from performing. But it is hard to see why David should avoid liability *here*, whilst being liable if Tanya had not changed her mind and remained *persuaded*.

Secondly, it should be noted that a defendant’s successful ‘threat to prevent performance’ unless the contracting party breaches the contract will count as *persuasion*, even if carrying out the threat would count as *prevention*. An oddity here flows from the fact that, as we will see in the next section, *prevention* is only actionable if ‘unlawful means’ are used. Thus a defendant’s successful threat to prevent performance *by lawful means* if the contracting party does not break the contract will count as *persuasion*, and *be actionable*, even if actually carrying out such a threat would not have been actionable!

(3) *The tort of intentional infliction of harm by unlawful means*. Three important issues relating to this tort were discussed by the House of Lords.

#### Unlawful means

Firstly, a majority of their Lordships held (with Lord Nicholls dissenting), that the ‘means’ used by the defendant will only count as ‘unlawful means’ for the purposes of the tort if they involve an *actionable civil wrong* to the third party, or would have involved an actionable wrong to the third party if the third party had suffered damage, or a threat of what would have been an actionable wrong to the third party if it had been carried out. The significance of this is that behaviour which the law classifies solely as *criminal*, and not as an actionable wrong to the third party, does not count as ‘unlawful means’ in order to constitute the tort.

Many students apparently find Lord Nicholls’s dissenting view on this point attractive. He was of the opinion that ‘unlawful means’ should be defined so as to embrace ‘all acts a defendant is not permitted to do, whether by the civil law or the criminal law’ (at [162]). He thought that this definition would fit better with the rationale underlying the tort, which he believed was to ‘curb clearly excessive conduct’ (at [153]). A useful example to consider might involve a defendant which opens a pizza delivery business in a particular town and decides to try to capture a large proportion of the market from an existing rival business, owned by the claimant, by letting it be known that its delivery drivers will also sell ‘soft’ drugs to those ordering pizza. Should such behaviour amount to a tort to the claimant, whilst offering free ice cream, fizzy drinks, or cuddly toys would not? Those who side with the majority tend to argue that the criminal laws which make it unlawful to supply drugs were not designed to regulate competition between pizza delivery businesses, or to define how far a business’s interest in retaining its regular customers should be protected against competition. To put the same point another way, the defendant’s behaviour is simply a *crime* rather than a private law wrong to the business he is competing with. For Lord Nicholls, however, such a situation might well involve ‘clearly excessive conduct’.

### Freedom of a third party

The second important issue decided by the House of Lords was that the unlawful means had to interfere with the freedom of a third party to deal with the claimant. It would not be sufficient for the unlawful means merely to reduce the value to the claimant of the relationship he had with a third party. For instance, in the case of *RCA Corp'n v Pollard* [1983] Ch 135 the claimant had the exclusive right to exploit records made by Elvis Presley and the defendant sold 'bootleg' recordings that had been made at concerts without the consent of Elvis. Doing this clearly reduced the value of the claimant's exclusive right, but did not interfere with the freedom of Elvis's estate to perform its contract with the claimant. Thus Lord Hoffmann stated that, *even if* this behavior amounted to 'unlawful means', and *even if* the defendant had used such means with the intention of causing loss to the claimant, he would still *not* have committed the tort of using unlawful means to cause loss in relation to the claimant.

### Intention to cause loss

In order to show that the defendant has committed the tort of using unlawful means to cause loss to another it must be shown that the defendant *intended* to cause loss to that other. In deciding what a defendant intends it is necessary to distinguish carefully between what is *part of* the defendant's end or means and what is a *consequence* of achieving that end or using those means. But, that said the House of Lords confirmed (at [134] (per Lord Hoffmann), [167] (per Lord Nicholls)) that an outcome will count as *part of* the defendant's end if it is 'simply the other side of the same coin' *and* the defendant knows that this is the case.

Thus in *Douglas v Hello! (No 3)* the trial judge found that the defendants had not intended to cause loss to the claimants on the basis of evidence from the controlling shareholder of *Hello!*'s Spanish holding company that his intention was only to avoid a loss of sales for *Hello!* and not to reduce sales of *OK!*. But Lord Hoffmann identified this as a situation where the loss to *OK!* was necessarily intended because it was simply the flipside of the preserved sales of *Hello!*, presumably because a substantial proportion of the preserved sales would be to purchasers who would otherwise have bought *OK!* instead (at [134]). Lord Hoffmann distinguished this situation from one where a customer suffered loss as a result of action directed against its supplier. If, for instance, a defendant used unlawful means to prevent trains from running with the intention of causing loss to a train operating company, although the defendant would probably know that some passengers would suffer loss as a result he would *not* be held to have intended to cause such losses because he could achieve his end – causing loss to the train operating company – even if all the passengers unexpectedly found cheaper and more convenient ways of travelling. In such a case any loss suffered by passengers would *not* be the flipside of the defendant's end. The situation would, of course, be different if one of the defendant's objectives was to inflict loss on the passengers *in order to* prompt them to put pressure on the train operating company.

(4) *Illustrative summary.* To illustrate the significance of the case it may be helpful to consider a hypothetical example. Imagine that Tuneworthy, a pop star, has a contract with a record company, C Ltd, to promote the album she has recorded for it. Dermot, an executive from a rival record company, offers Tuneworthy £10,000 if she will stop promoting the album and sign to the rival company for her next album. He adds that if she does not accept this offer then he will see to it that none of the major summer

festivals will invite her to perform. If Tuneworthy goes along with Dermot's proposal then will C Ltd have any remedy against him? Applying the decision of the House of Lords we can say that Dermot will only be liable to C Ltd for 'inducing a breach of contract' so far as Tuneworthy *broke a contract* – thus he may be liable for persuading her to stop promoting her current album if he knew of her contract and intended to cause it to be breached – but equally, that this tort will only cover persuading her to sign to the rival company for her next album if she was contractually obliged not to do this.

If Tuneworthy did not have a contractual obligation to record her next album for C Ltd then Dermot may still have committed the tort of 'interference with trade by unlawful means' in relation to C Ltd, but only if his threat with regard to summer festivals was a threat of an actionable civil wrong to Tuneworthy (for instance a threat to defame her), and only if he made this threat with the intention of causing harm to C Ltd, as opposed to harm to C Ltd being merely a foreseeable consequence of his scheme succeeding. If Dermot's threat was merely to prevent Tuneworthy from being invited to the festivals by using means that would not involve any civil wrong to her – for instance, offering the festival organizers other artistes at highly reduced rates – then he would not commit a tort to C Ltd even if his primary purpose was to cause loss to it.

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Customs & Excise Commissioners v Total Network SL  
[2008] UKHL 19, [2008] 2 WLR 711, [2008] 2 All ER 413 HL

## Summary

To understand this case it is helpful to understand some basic facts about VAT (value added tax). In outline, a business pays VAT on its purchases ('input tax') and charges VAT on its sales ('output tax'). If the VAT that the business has charged ('output tax') exceeds the VAT it has paid ('input tax') then it must pay this excess to the Revenue & Customs Commissioners. But if the VAT that the business has paid ('input tax') exceeds the VAT it has charged ('output tax') then this excess will be refunded to the business by the Commissioners.

One situation where a business is likely to qualify for a refund is where it pays input tax on a purchase and then *exports* whatever it has purchased to a company elsewhere in the European Union. This is because in certain circumstances such an export will be 'zero-rated', so no output tax will be charged. In such circumstances clearly input tax will exceed output tax, and a refund can be claimed. By contrast, a business which *imports* goods from elsewhere in the European Union will generally pay no input tax on its purchases, and if it then sells these within the United Kingdom, duly charging output tax, it will have charged output tax in excess of the input tax paid and will be liable to pay this excess to the Revenue & Customs Commissioners.

The *Total Network* case involved a species of scam known as 'carousel fraud'. The scam, in its simplest form, works by a UK business (B1) importing goods from a company (E) registered for VAT elsewhere in the European Union. B1 is not charged input tax on this transaction. B1 then sells the same goods to a second UK business (B2) charging VAT on the transaction. At this stage B1 will have paid no input tax but will have received output tax, and ought to pay the excess to the Commissioners. The scam continues, however, by B2 exporting the goods back to E. No output tax is charged on this transaction. Consequently, since B2 has paid input tax it is entitled to a refund from the Commissioners. If VAT was accounted for properly by all the participants then the Commissioners would be in the position of having paid a refund to B2 and received a balancing payment from B1. But if B1 disappears without paying the Commissioners then the end position will be that the Commissioners have paid a refund to B2 but received no balancing payment (from B1). The profits of 'carousel frauds' then, are the loss suffered by the Commissioners as a result of paying a refund and not receiving a balancing payment. The scam resembles a 'carousel' in that the goods start with E and eventually come back round to E. Indeed, if, as is common, all the transactions take place on the same day, then the goods in question are likely never to leave the custody of E at all.

The defendant in the *Total Network* case was a Spanish company which was alleged to have played the part of E in 13 'carousel frauds' between May and October 2002. The claim alleged that by playing the role of E the defendant company had committed the tort of *unlawful means conspiracy* in relation to the Commissioners. The House of Lords had to consider two objections to this claim. The first was that the Commissioners could not use a common law tort to recover compensation reflecting unpaid VAT or wrongly paid refunds. A common law tort claim was said to be precluded either because the Bill of Rights forbids the levying of taxes without statutory authority or because the statute which deals with VAT (and which provides mechanisms for obtaining unpaid tax and reclaiming refunds) excludes the possibility of other routes to redress. The second objection was that the defendant had not in any case committed the unlawful means conspiracy tort because conduct could only count as

‘unlawful means’ for the purposes of this tort if it could give rise to a civil action by the Commissioners against at least one of the conspirators. The Commissioners rejected both of these objections. They argued that neither the Bill of Rights nor the statute governing VAT precluded a claim for compensation against a tortfeasor whose wrong had caused a loss of tax revenue. Further, they did not accept the premise behind this second objection and contended that conduct by at least one of the conspirators which amounted to the common law crime of ‘cheating the public revenue’ would satisfy the requirement for ‘unlawful means’.

The Court of Appeal rejected the first objection in the form in which it was presented to them, but held that, regrettably, authority (*Powell v Boladz* [1998] Lloyd’s Rep Med 116, CA) compelled the acceptance of the second objection.

With regard to the first objection, the House of Lords held that the contemplated tort claim would not violate the Bill of Rights since the Commissioners were not seeking to levy a tax on the defendant but to gain redress for the loss caused by a fraudulent conspiracy in which the defendant had participated. A majority of their Lordships also concluded that the contemplated tort claim was not barred by the exclusivity of the statutory provisions, though Lord Hope and Lord Neuberger dissented from this conclusion.

With regard to the second objection, the House of Lords held that the tort of unlawful means conspiracy could be based on ‘unlawful means’ other than an actionable civil wrong by one of the conspirators. In paragraph [45] of his speech, Lord Hope stated that he would overrule *Powell v Boladz* [1998] Lloyd’s Rep Med 116, then continued: ‘I would also hold, in agreement with all your Lordships’ that criminal conduct at common law or by statute can constitute unlawful means in unlawful means conspiracy.’

## Comments

(1) *The two views of unlawful means conspiracy.* There are two competing views about the nature of unlawful means conspiracy.

One view, which might be called ‘*the accessory liability view*’ (or ‘*the secondary liability view*’), is that the function of the tort of unlawful means conspiracy is to make liable a defendant (A) who has agreed with others (C, etc) that an actionable civil wrong should be committed against B even if he, A, has not committed that wrong himself, but has ‘kept his hands clean’. Someone who adopted ‘*the accessory liability view*’ would naturally conclude that the unlawful means had to be an independently actionable civil wrong to the claimant (B) committed by at least one of the others (C, etc) – otherwise there would be no *primary* civil wrong for A to be an *accessory* to.

The second view, which might be called ‘*the free-standing tort view*’, identifies the tort of unlawful means conspiracy as a close relation of the tort of lawful means conspiracy, and draws force from the fact that this relation, lawful means conspiracy, is *clearly* a free-standing tort rather than a form of accessory liability. (To commit the tort of lawful means conspiracy it does *not* have to be proved that any of the conspirators have carried out acts which would in any case have been independently actionable by B. So it does *not* have to be shown that any of the conspirators have used means such as deceit, intimidation or acts of violence.) If lawful means conspiracy and unlawful means conspiracy are closely related torts then they might be argued to both match the pattern of requiring: (1) A to agree with others (C, etc) that action should be taken with the intention of causing loss to B; *and* (2) *an additional element*. In the tort of lawful means conspiracy the additional element required to establish a claim is absence of a ‘just cause or excuse for the action taken.’ From the perspective of the second view, then, ‘unlawful means’ might merely be an alternative additional element – the additional element required to establish a case of unlawful means

conspiracy as opposed to a case of lawful means conspiracy. If this is the role of ‘unlawful means’ – it is simply an additional element - there would be no *logical* reason why ‘unlawful means’ should be narrowly defined as requiring an independently actionable civil wrong. To put the point a different way, on this view ‘unlawful means’ is a shorthand for ‘*methods* which it ought to be a wrong to the claimant for conspirators to agree to use in order to harm the claimant’. If this is right then there is no *logical* reason for insisting that independently actionable civil wrongs are the only methods which it is wrongful for a *conspiracy* to use.

Looked at in these terms the decision in the *Total Network* case involved an authoritative validation of ‘*the free-standing tort view*’. For instance, Lord Walker described ‘*the accessory liability view*’ as “unsustainable” (at [103]) and Lord Neuberger recorded his “agreement with Lord Walker and Lord Mance that, for the reasons they give, the tort of unlawful means conspiracy is not a form of secondary liability” (at [225]).

(2) *Why does tort law treat groups more harshly than individuals?* The main argument which is regularly urged *in favour* of ‘*the accessory liability view*’ is that *this* view does *not* involve subjecting groups (‘conspiracies’) to more stringent restraints than individuals. It is currently the law that if an individual intentionally causes loss to another individual by committing a crime then this does not, in itself, constitute an actionable civil wrong giving rise to a liability to pay compensation. For instance, if A sets out to cause loss to B, a business rival, by supplying B’s star salesman, S, with copious quantities of illegal drugs on the evening before an important sales pitch (knowing that S was likely to consume the drugs and be less impressive at the next day’s pitch as a result) then it is the law (as recently confirmed by the House of Lords in *OBG Ltd v Allan* [2008] 1 AC 1) that A is *not liable* to B for any loss which this scheme causes. (The situation *might* be different if S had contracted with B that he would not consume drugs.) Given this, why should the outcome change if instead A and C, both rivals of B, agree that A will supply S with one type of illegal drug and C will supply him with another type?

In his speech Lord Walker suggests some ways in which one might attempt to argue that groups should be subject to more stringent restraints than individuals. For instance, one might argue that there are some scams, perhaps including ‘carousel fraud’, which a defendant is only likely to be able to perpetrate in combination with others; thus groups may be ‘more dangerous’ than individuals. Further, one might argue that conspiracies, by their nature, involve the conspirators pursuing *more than* just their own legitimate interests; they will always also be pursuing the interests of others. Related to this argument one might suggest that it is *easier* in practice for the courts to determine whether a conspiracy had been formed to pursue a *shared* and *legitimate* purpose than it is to determine what motivated a single individual to pursue a particular course of action. But whilst these arguments *may* be capable of bearing *some* weight it is difficult to conclude that they provide a cogent justification for imposing liability on all the members of a group even though none, as an individual, has committed any independently actionable civil wrong.

Indeed, rather than demanding a *contemporary justification* for subjecting groups (‘conspiracies’) to more stringent restraints than individuals, the House of Lords seems to have been content to rely primarily on a chain of *precedent-based* reasoning, which might be called ‘the argument from non-redundancy’.

The premise of the argument from non-redundancy is that if the ‘accessory liability view’ were correct then the tort of unlawful means conspiracy would be substantially redundant, or tautologous, since in such circumstances each conspirator could probably be held jointly liable *as an accessory* for whatever actionable civil wrong it was agreed that one (at least) of their number should commit. For example, if A and C had agreed that C would punch B, and C did so, then it is likely that A could be held jointly liable for the tort of

battery, and there would be no need for B to rely on the tort of unlawful means conspiracy against either conspirator.

The next stage in ‘the argument from non-redundancy’ is clearly to establish that there are reasons for believing that the tort of unlawful means conspiracy is *not* redundant. The reasons that the House of Lords invokes are predominantly *precedent*-based. In other words, the House of Lords relies on the fact that a series of cases of high authority have *stated* that a tort of unlawful means conspiracy *exists*. Unless these statements were misleading, and the tort of unlawful means conspiracy was actually redundant, then these statements provide some support for the conclusion that the tort of unlawful means conspiracy must be a ‘free-standing tort’ of broader scope than the ‘accessory liability view’ would imply.

Of course, we might have expected the House of Lords to *balance* the weight of ‘the argument from non-redundancy’ against the effect on the coherence of the law of ‘preserving’ a tort which subjects groups (‘conspiracies’) to more stringent restraints than individuals. The House of Lords does not do this. Instead it points to the fact that the undoubted *existence* of the related tort of lawful means conspiracy establishes that there is no absolute prohibition on subjecting groups (‘conspiracies’) to more stringent restraints than individuals. (We will return to the question of ‘coherence’ under the fourth sub-heading.)

(3) *What counts as ‘unlawful means’?* The reasoning discussed under the first sub-heading establishes that ‘unlawful means’, as a defining feature of the tort of unlawful means conspiracy, ought to be given a meaning *broader than* what would be implied by the discredited ‘*accessory liability view*’, that is, *broader than* ‘independently actionable civil wrongs’. But the reasoning does not explain *how much broader* the definition ought to be. The judgment of the House of Lords clearly establishes that *some* crimes can, in some circumstances, count as ‘unlawful means’. But how far is it possible to discern further guidance as to the breadth of the definition of ‘unlawful means’ from their Lordships’ opinions?

Lord Walker stated, at [95]: ‘In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allan* [2008] 1 AC 1, at [159] called ‘instrumentality’) of intentionally inflicting harm.’ And Lord Scott expressly referred (at [56]) to this paragraph in Lord Walker’s speech, explaining his conclusion. Similarly Lord Hope said (at [45]) that he would ‘hold, in agreement with all your Lordships, that criminal conduct at common law or by statute can constitute unlawful means in unlawful means conspiracy’.

Those comments *might* be thought to mean that all crimes, at common law or by statute, *will* constitute ‘unlawful means’. But there is room to doubt whether this was what their Lordships intended to hold. In the next paragraph of Lord Walker’s speech (at [96]), he stated that sometimes the issues relevant to whether a particular statutory duty imposes the sort of duty that can form the basis of a claim for the tort of breach of statutory duty will also be relevant in determining whether a statutory crime ought to count as ‘unlawful means’ within the tort of unlawful means conspiracy: ‘But the range of possible breaches of statutory duty, and the range of possible conspiracies, are both so wide and varied that it would be unwise to attempt to lay down any general rule.’ This statement clearly demonstrates that Lord Walker, at least, did *not* intend to hold that *all* crimes, at common law or by statute, *will* constitute ‘unlawful means’. Similarly, Lord Mance and Lord Neuberger both attached significance to the fact that the particular crime alleged “exists in its very nature to protect the revenue” (at [120] and [222]). Thus it must remain an open question whether defendants would be held to have committed the tort of unlawful means conspiracy in relation to B if they agreed to cause

harm to B through the ‘instrumentality’ of committing a crime which Parliament had created for reasons *other than to protect B’s interests*.

(4) ‘*Instrumentality*’. Under the previous heading we quoted the words of Lord Walker in which it was clearly implied that the tort would only be committed if the ‘unlawful means’ were ‘indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allan* [2008] 1 AC 1, at [159] called ‘instrumentality’) of intentionally inflicting harm’. Is it possible to explain what this requirement – that the ‘unlawful means’ must be ‘indeed the means’, the ‘instrumentality’ – involves?

Lord Walker stated (at [95]) that the outcome of the case of *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173 – where Shell was held not to have committed a tort even if it conspired to do acts which involved a breach of a sanctions order against Southern Rhodesia, a criminal offence, and thereby caused loss to Lonrho – could be explained by the fact that the breach of the sanctions order ‘was not the instrument for the intentional infliction of harm’. Later he notes (at [103]) that primary issue in the case was the absence of ‘an intention to injure’. But the earlier passage suggests that he believed that *even if Shell had intended to cause Lonrho loss* the breach would not have been ‘the instrument’ of that loss. What does this suggest that ‘unlawful means’ must be in order to count as ‘the instrument’ of harm suffered by a claimant?

One possible answer involves focusing on why breach of the sanctions order gave Shell the opportunity to gain at Lonrho’s expense; the gain was not a result of any crime being *directed at* Lonrho, but merely a consequence of Lonrho’s unwillingness to commit the same or similar criminal offences in order to keep competing on an equal footing. Thus the distinction might be between (a) committing a crime in order to gain a competitive advantage over the claimant (‘unlawful means’ *not* ‘the instrument’), and (b) committing a crime directed at the claimant. Applying this distinction, it would not be a tort to a claimant take-away restaurant for a group of rival take-away food restaurateurs to agree to try to gain a slice of the claimant’s business by instructing their delivery drivers to break speed limits in order to achieve faster delivery times, but it would be a tort for the group to try to gain a slice of the claimant’s business by instructing their delivery drivers to disrupt the claimant’s business by making hoax bomb threats or obstructing the claimants’ delivery drivers.

(If this understanding of the requirement of ‘instrumentality’ is correct then no doubt it will often overlap with the possible requirement, discussed under the previous sub-heading, that statutory crimes will only count as ‘unlawful means’ where one of the purposes of the statute is to protect the claimant’s interests.)

(5) *Distinguishing OBG v Allan* [2008] 1 AC 1. One reason why the decision of the House of Lords in the *Total Network* case might seem surprising is that in *OBG v Allan* [2008] 1 AC 1 the House of Lords had held, by a majority, that for the purposes of the tort of causing loss by unlawful means, the ‘unlawful means’ *did* have to amount to an independently actionable civil wrong (or something which would have been an actionable civil wrong if damage had been caused). In the *Total Network* case the principal explanation relied on by the House of Lords to justify *different* definitions of ‘unlawful means’ for the two torts is the idea that a narrower definition was appropriate for the tort of causing loss by unlawful means because this tort involves harming a claimant by using ‘unlawful means’ to *interfere with the liberty of a third party to deal with* the claimant. Thus the suggestion is that a claimant ought to be able to complain about a broader range of wrongs (including some crimes) being used by a group *directly* against his own interests (unlawful means conspiracy) than the range of wrongs that he can complain about being used by an individual against third parties such as his employees, suppliers or potential customers. Another way of making the same point is

that given that a claimant can complain about a group targeting his interests even if ‘unlawful means’ are *not* used (lawful means conspiracy) there’s no essential reason for insisting that a claimant cannot also complain about a group using a wider variety of ‘unlawful means’. Obviously the question whether this distinction is *palatable* is likely to turn on the view one has reached on the material discussed under the second sub-heading: *Is there a good reason for tort law to subject groups to more stringent restraints than individuals?*

The way in which *OBG* was distinguished leaves two significant questions unanswered, one of which the House of Lords in *Total Network* noticed, and the other of which it overlooked. The first question is whether it *should* sometimes be held to be a tort for an *individual* defendant to have committed a crime *directly* against a claimant (i.e. *not* through interfering with the liberty of a third party) as an ‘the instrument for the intentional infliction of harm’, usually economic harm, on that claimant. (The situations where this question would be of greatest practical interest would clearly be those where the claimant’s interest was not sufficiently protected by some other tort, hence they might usually involve economic harm.) For instance, if a defendant caused loss to a claimant who ran a café near a famous bird-watching reserve by unlawfully poisoning birds in the reserve and making it appear as if the claimant was responsible then should the claimant be able to sue the defendant for his economic loss? In the *Total Network* case some of their Lordships note (Lord Hope at [43], Lord Mance at [124], and Lord Neuberger at [223]) that Lord Hoffmann in the *OBG* case had identified such two-party cases as potentially raising ‘altogether different issues’ (*OBG*, at [61]), and they appear to understand Lord Hoffmann to have meant that *broader* liability might be appropriate in such two-party cases. But the question whether tort law *will* be extended to cover such two-party cases is left unanswered.

Oddly, some of the two-party cases that Lord Hoffmann seems to have had in mind were cases of two-party *intimidation*, which does not necessarily require *the crime* to have been directed against the claimant in order to be effective: e.g. D threatens C (a café proprietor who is known to be a bird lover) that he will unlawfully poison local birds unless the claimant stops trading on Sundays, and C surrenders to the threat: no crime to C has ever been threatened. Ought the claimant to be able to sue the defendant for any loss that he suffered as a result of closing on Sundays if the defendant was later identified? If so, then further thought may have to be given to the requirement that the ‘unlawful means’ must have been intended to protect the claimant’s interest (it would be difficult to argue that bird protection statutes exist to protect the economic interests of bird-loving café proprietors).

The second question left unanswered by the *Total Network* case is whether it is a tort for A and C to agree together to commit crimes (which are *not* actionable civil wrongs) *against B’s potential customers* with the intention of inflicting economic harm on B. In such a situation neither A nor C will have committed the individual tort of causing loss by the use of unlawful means (because *OBG* established that to commit that tort the means had to amount to actionable civil wrongs interfering with the liberty of third parties). And importantly, such a situation involves *both* conspiracy (thought by the House of Lords in *Total Network* to justify a broader approach to ‘unlawful means’) *and* targeting the claimant through third parties (thought to justify a narrower approach to ‘unlawful means’). On balance, we would argue that *if* the targeting of a claimant through interfering with the freedom of his employers, suppliers and potential customers *requires* a narrower definition of ‘unlawful means’ (*OBG*, as understood by the House of Lords in *Total Network*) then this should continue to be the case even when it is a conspiracy which is targeting the claimant in this way. But the House of Lords in *Total Network* does not notice the issue, so there is no clear evidence of how it would decide the point.

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