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Legal Update

Unlawful Means Conspiracy & Knowledge of Unlawfulness: Continued Chaos

This article considers whether a claimant must prove knowledge of the fact of unlawfulness on a defendant's part, in order to establish an unlawful means conspiracy. It discusses two divergent first instance decisions handed down in February and May of this year (Stobart Group v Tinkler and The Racing Partnership Ltd v Done Brothers), each of which follows a different line of Court of Appeal authority on the point. It addresses how this set-to goes to the very heart of the tort of unlawful means conspiracy, and the potential implications for litigants seeking to bring claims in the economic torts.

Introduction

One might be forgiven for thinking that the recent Supreme Court decision in *JSC BTA Bank v Khrapunov* [2018] UKSC 19, following on from the House of Lords decision in *Revenue and Customs Commrs v Total Network SL* [2008] 1 AC 1174, laid to rest all remaining central uncertainties as to how the tort of unlawful means conspiracy operates in practice.

Two decisions handed down this year make clear that the opposite is true. Issues as fundamental as the constituent elements of the tort remain unresolved, with potentially wide-ranging ramifications for anyone litigating in this area.

Knowledge of Unlawfulness

The controversy forming the focus of this article has persisted for some time. It is the vexed question of whether, in order for an alleged conspirator to be affixed with liability for an unlawful means conspiracy, he/she must possess knowledge, not only of the facts which make the means employed unlawful, but also of the very fact that those means were unlawful.

The distinction is potentially very important. Proving that a defendant had knowledge of the essential actions employed in a conspiracy - the facts which constitute the relevant unlawful means - is one thing. Going further and proving that a defendant was conscious of the legal characterisation of those means as unlawful is quite another.

In many cases it may be very difficult to second guess a defendant who blithely asserts that "*I thought what I did was fine in the eyes of the law, m'lud*". The legally untrained, or those who have been wrongly advised that their contemplated actions would leave them untouchable by the law, may very well be able to adopt such a position with an authentically straight face, irrespective of how viciously they pursued their own economic interests.

If it truly is the law that a claimant in an unlawful means conspiracy must show that the defendant knew that the facts constituting the unlawful means were unlawful, that is undoubtedly a significant constraint on the breadth of this tort's embrace. It is one which will make many a potential claimant stop and think very hard about whether an otherwise promising claim should be run at all.

More fundamentally, it requires a recalibration of the basic elements of the tort of unlawful means conspiracy. In countless cases, judges have recited the formulation of the constituent elements of the tort, summarised in *Kuwait Oil Tanker v Al Bader* [2000] 2 All E.R. (Comm) 271 (at 108), as authoritative. In short, those elements are:

(1) An agreement, or "combination", between a given defendant and one or more others;

(2) An intention to injure the claimant;

(3) Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant; and

(4) Loss to the claimant suffered as a consequence of those acts.

If a claimant must also prove that a defendant knew of the fact that the unlawful acts carried out pursuant to the combination (limb 3 above), then those elements need to be reformulated as follows:

(1) An agreement, or "combination", between a given defendant and one or more others;

(2) An intention to injure the claimant;

(3) Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;

(4) Knowledge on defendant's part that unlawful acts were unlawful; and

(5) Loss to the claimant suffered as a consequence of those acts.

Stobart Group v Tinkler [2019] EWHC 258 (Comm)

The proposition that an essential element of the tort had been overlooked in *Kuwait Oil Tanker* and cases following it was one of the reasons why HHJ Russen QC rejected the contention that a claimant must prove knowledge of unlawfulness on the defendant's part in *Stobart Group v Tinkler*, a decision handed down in February of this year.

In that decision, HHJ Russen QC addressed the divergent lines of authority on this point and arrived at a clear and fully reasoned position on the issue.

Ignorance is no defence: The British Industrial Plastics Authorities

In *British Industrial Plastics Ltd v Ferguson* [1938] 4 All E.R. 504, the Court of Appeal considered both the tort of inducing a breach of contract and the tort of unlawful means conspiracy. The tort of inducing a breach of contract requires proof that a defendant knew that its acts would bring about a breach of contract. It therefore requires proof of knowledge on the defendant's part of one specific breed of unlawfulness: breach of contract.

Of course, in any case where the sole unlawful means relied upon for a conspiracy claim is the tort of procuring a breach of contract, proof of ignorance of unlawfulness in the form of breach will represent a complete defence to the claim for procuring a breach. The knock-on effect of that will be to negate the presence of unlawful means for the purposes of the conspiracy claim. However, the reasoning of one judge in *British Industrial Plastics*, Finlay LJ, went further. He held:

"The essence of conspiracy is the co-operation of the minds of the conspirators in pursuance of the unlawful design. A person could never be liable for conspiracy, either in a civil or in a criminal court, if he had no knowledge that the design was unlawful…"

That decision was, in its effect, then approved in likely *obiter* comments of the Court of Appeal in *Meretz Investments NV v ACP Ltd* [2008] Ch. 244. A host of first instance decisions, addressed in *Stobart Group v Tinkler*, have since followed this line of authority, including the decision of Zacaroli J in *Brent LBC v Davies* [2018] EWHC 2214 (Ch).

Ignorance is Bliss: The Belmont Finance Authorities

In between *British Industrial Plastics Ltd* and *Meretz Investments NV* came the Court of Appeal's decision in *Belmont Finance Corp v Williams Furniture Ltd (No. 2)* [1980] 1 All ER 393. In *Belmont Finance* Buckley LJ held, by analogy with criminal claims in conspiracy, that if a defendant holds knowledge of the facts which render a transaction unlawful, then ignorance of the law (or in that case, positive advice that the transaction was lawful), will afford that defendant no excuse to a claim in unlawful means conspiracy. *British Industrial Plastics* was not cited in *Belmont Finance*, but *Belmont Finance* has also been followed in subsequent first instance authorities, also addressed in *Stobart Group.*

Stobart Group: Essential Reasons

Setting aside for the most part the jurisprudential wranglings as to what judges in previous authorities may have meant or considered, the substantive or policy considerations which swayed HHJ Russen QC in following *Belmont Finance* can be summarised as follows:

- To add knowledge of unlawfulness as an element of an unlawful means conspiracy detracts from the fundamental point that the reason why it is unlawful to engage in such a conspiracy lies in the fact of the conspiracy, with the requisite intent to injure. Such a conspiracy is reprehensible in any context (para 555).

- Even lawyers may not agree amongst themselves that the impugned "unlawful means" were in fact unlawful. The scope for a sustainable debate as to what was or was not unlawful may afford a defendant with a defence, to the effect that it cannot be taken to have known that the court will later decide that some of the relevant acts were "unlawful" (paras 555 & 556).

- To add knowledge of unlawfulness to the requirement of the intention to harm raises a whole host of unanswered questions such as (para 555):

    - the standard of knowledge (or suspicion) required;
    - the scope for reliance upon patently unrealistic (and possibly self-serving) legal advice; and
    - if the question of knowledge really goes to a "defence", the legal burden of proof.

- Although the relevant unlawfulness might be more obvious and indisputable in some cases, so that even those with no appetite for legal research or legal advice may have difficulty in feigning ignorance of it, it would be very odd to require that legal principles be put to alleged conspirators, during their cross-examination, in order to establish their familiarity with them (para 556).

- If it is right that a claimant must prove knowledge of unlawfulness on the defendant's part, then the elements of the tort as summarised in *Kuwait Oil Tanker* need to be reformulated. In that regard, it is telling that the Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 (No. 14) [2018] UKSC 19 in addressing the concept of "unlawful means" did not appear to introduce a further requirement of knowledge (or, perhaps, suspicion or belief) of unlawfulness on a defendant's part (para 558).

- The justification for relieving a defendant from liability for damage by reference to his honest but mistaken view of the law, when all other boxes in respect of the components for liability are ticked against him and any ill-founded belief of a legal right to justify the harm does not affect the presence of a proven intention to injure, is not at all obvious. Such a position sits ill with Lord Lindley's words in *Quinn v Leathem* [1901] AC 495 (at 537): *"[T]he intention to injure the plaintiff negatives all excuses."* (para 568)

- It is enough to show that a defendant had sufficient knowledge that acts which were unlawful were to be carried out so as to implicate him in liability for them. The essence of the counter-argument is that the sting of an allegation of conspiracy should only attach to those who have a realisation of the impropriety of their behaviour. Realistically viewed, when coupled with an intention to injure the claimant, knowledge of the facts which constitute the unlawful means should enable a defendant to harbour an appreciation of its own impropriety, regardless of any knowledge or suspicion they may have about the characterisation of the relevant acts in law (para 573).

The Racing Partnership Ltd v Done Brothers [2019] EWHC 1156 (Ch)

The Racing Partnership Ltd v Done Brothers was handed down in May of this year. In that decision, Zacaroli J (having followed the *British Industrial Plastics* line of authorities in *Brent LBC v Davies,* as considered by HHJ Russen QC in *Stobart Group*) played the ball firmly back over the net.

He considered essentially the same authorities as were considered by HHJ Russen QC in *Stobart Group,* and scrutinised the careful decision in *Stobart Group* itself. But he stuck to his guns and made clear his continued view that the law as expressed in *British Industrial Plastics* and *Meretz* was correct.

In *The Racing Partnership,* Zacaroli J found first for the claimant in another cause of action, namely breach of confidence. Against that background he observed that his findings on the separate claim in conspiracy were *"likely to be academic"*. Nonetheless, a separate claim in unlawful means conspiracy was advanced and argued before him, and he determined it fully by dismissing it. It is therefore a stretch to characterise his decision on the conspiracy claim as mere *obiter dicta.*

The Racing Partnership: Essential Reasons

Zacaroli J took care to limit the manner in which he expressed his conclusions to the material unlawful means relied upon before him, and so confined himself to stating that *"I conclude that a person's liability under the tort of unlawful means conspiracy, where the unlawful means consist of breach of confidence, depends upon that person knowing that (or turning a blind eye to whether) the claimant's rights of confidence were infringed."*

Nonetheless, the route by which he reached that conclusion involved a relatively wholesale divergence from HHJ Russen QC's reasoning in *Stobart Group,* and a clear preference for the *British Industrial Plastics* line of authorities over the *Belmont Finance* line. On a realistic view of the decision, it therefore cannot sit compatibly with *Stobart Group.*

Not only did the court in *The Racing Partnership* hold that a defendant must possess knowledge of the unlawfulness of the relevant means used in the conspiracy, it also held that a claimant necessarily bears the burden of proving that knowledge on a defendant's part. It follows that if *The Racing Partnership* accurately states the law, proof of a defendant's knowledge of unlawfulness necessarily represents a constituent element of the tort of unlawful means conspiracy. Unsurprisingly, the judgment is careful to characterise *Kuwait Oil* as authority for the proposition that a claim in unlawful means conspiracy involves "*at least*" the four elements set out in *Kuwait Oil*.

The principal substantive or policy considerations which influenced the court in *The Racing Partnership* to follow *British Industrial Plastics*, and to reject the analysis in *Stobart Group* can be summarised as follows:

- The common law in this area is concerned only with enforcing basic standards of civilised behaviour. Whilst it may be correct that a person who conspires to perform criminal acts should be liable even if he or she did not know that the acts were unlawful, where the unlawful conduct consists of infringing a claimant's private law rights, then it is consistent with enforcing basic standards of civilised behaviour that a person is liable for conspiring to injure through such unlawful means only if he or she knows that the claimant's rights are being infringed (para 277). As recognised by the Supreme Court in *JSC BTA Bank v Khrapunov*, "*the successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy*". To find a person liable, where that person knows that a (non-predominant) purpose of the combination is to injure the claimant but honestly believes, for example, that on its true construction

the contract between the claimant and one of the conspirators does not prohibit the relevant action, would risk trespassing on legitimate competitive business practices (paras 282 & 283).

- Whilst it is correct that it is the fact of combination that lies at the heart of the tort of conspiracy, it overstates the position to state that conspiracy is "*reprehensible in any context*". What sets conspiracy apart is the focus on intent – an intent knowingly to effect harm using unlawful means (paras 282 - 284).

- There is no dispute that a claimant will have to establish knowledge of the facts which go to make up the unlawful means in a conspiracy claim; it is an overly fine distinction to require proof of such facts, but not to also require proof of knowledge that those facts constitute unlawfulness (para 279).

- As to the problem identified by HHJ Russen QC of the standard of knowledge (or suspicion) required; it is well established that either actual or blind-eye knowledge will suffice in this area (para 286).

- As to the risk identified by HHJ Russen QC of reliance upon patently unrealistic (and possibly self-serving) legal advice; the reality is that if the advice is self-serving then it is likely that the defendant will in any event have sufficient blind-eye knowledge to impose liability.

Discussion

As HHJ Russen QC fairly observed in *Stobart Group,* the positions on either side of the debate in this area are sustainable. There is something to be said for each point of view. If one were to favour the approach taken in *Stobart Group*, three additional observations could be made.

First (and a matter which seems to have been addressed in neither recent decision) is the fact that the relevant "unlawfulness" in an unlawful means conspiracy may be a relatively rarefied concept, idiosyncratic to the economic torts. After the decision of the House of Lords in *Total Network,* it seems clear that the category of relevant "unlawful means" in an unlawful means conspiracy is wider than in the tort of unlawful interference. However, and by the same token, it is at least as wide as in that tort (see *20th Century Fox v Harris* [2014] EWHC 1568 (Ch), at 157). Under the tort of unlawful interference (and so also in unlawful means conspiracy), "unlawfulness" can be established where the relevant acts directed against a claimant by a defendant are such that all necessary elements of a cause of action are established, save for the element of loss. In usual circumstances, however, a cause of action which is incomplete for want of loss would not amount to unlawfulness at all.

This is of particular significance in conspiracies, where acts unlawful in this idiosyncratic sense are directed by party A against party C, so as to cause injury to Party B. The point this gives rise to is that party A may be unlikely to have any conception that it has acted "unlawfully" vis-à-vis party C, in circumstances in which party A's acts have caused party C no actual loss. Thus, on an extreme view, the approach adopted in *The Racing Partnership* could see a defendant escape liability in every such scenario.

The second observation relates to the understandable concern in *The Racing Partnership* that to find a person liable, where that person knows that a (non-predominant) purpose of the combination is to injure the claimant but honestly believes that his or her acts are legally permissible, risks impermissible trespass on legitimate competitive business practices.

One answer to this could be to say that the law already provides a check or balance in this regard. The relevant "brake" is founded in the fact that a claimant must show that he or she was specifically targeted by a defendant's unlawful acts, before the necessary intention for the tort can be established. To expand on this point: it oversimplifies the law in this area to state that an intention to injure a claimant can be proven in an unlawful means conspiracy, merely by demonstrating that injury to the claimant is the inevitable flipside of the defendant's pursuit of its own economic interests. Some support for that position may previously have been drawn from *OBG v Allan,* in which Lord Hoffmann suggested that it required too much of a claimant to demand that he or she show that a defendant harboured a highly specific intention to 'target' him or her by the use of unlawful means.

However, it is now relatively clear from both *Total Network* and *Khrapunov* that, in the context of unlawful means conspiracy, such targeting of the claimant is exactly what the law requires of a defendant, even where the claimant's

case is presented on the basis that injury to it is the inevitable flipside of the defendant's pursuit of its own economic interests.

In reality, the existence of a requirement to show genuine targeting of the claimant provides the court with an ample lever so as to prevent legitimate competitive business practices from being wrongly characterised in law as unduly savage, which was the essential policy concern troubling the court in *The Racing Partnership.*

The final observation is that it could be said with some force that the law as found in *British Industrial Plastics* and *Meretz* elides the law of unlawful means conspiracy with the law of procuring a breach of contract in an unprincipled and unjustifiable way.

It is no part of the tort of procuring a breach of contract to demonstrate that a defendant intended to cause harm to the claimant. All that must be established is that the defendant knowingly intended to bring about a breach of contract. Importing a requirement that a defendant had knowledge of that particular breed of unlawfulness in the tort of procuring breach is readily comprehensible. It is by nature a narrow tort and, of all the infinite varieties of unlawfulness, a breach of contract is that upon which a businessman is most likely to have a ready grasp.

The same does not go for unlawful means conspiracy, which concerns a myriad of potential breeds of unlawfulness, some of which a businessman may understand, others of which he may not. Why in this context should a claimant have to establish both (i) a targeted intention to injure by unlawful means and (ii) knowledge of unlawfulness, when he or she or only has to establish the latter in the tort of procuring a breach of contract?

All of those matters stated, the more "black letter" analysis of the authorities adopted by Zacaroli J in *The Racing Partnership* (and which has not been discussed in this article) is difficult to dismiss lightly.

Conclusion

Claims in unlawful means conspiracy have been on the significant rise in the last decade. It is surprising that a question as fundamental as the basic constituent elements of the tort should remain at large in 2019, but that is undoubtedly the state of the present law. Whichever side one favours in the legitimate debate as to whether the law should require knowledge of unlawfulness on a defendant's part before he or she should be affixed with liability for this tort, all those advising in this area would surely agree on one thing. The sooner this question is authoritatively resolved at higher level, the better.

About the Author

Matthew Bradley specialises in commercial and commercial chancery litigation and arbitration, including fraud and conspiracy claims. He is ranked by the legal directories as a leading junior in the fields of commercial disputes, company and product liability law, among other areas. He acted for the successful claimant in the economic torts and conspiracy case of *Palmer Birch v Lloyd & Anr* [2018] 4 WLR. 164.