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Conspiracy theories: unlawful means conspiracy and the problem of private rights

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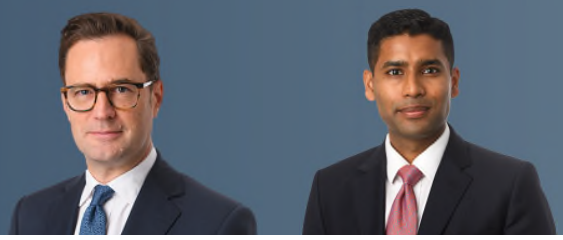

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Over the last two decades the scope of the economic torts has been considered in a variety of business contexts and the tort of conspiracy to injure by unlawful means is no exception. Liability may arise where two or more persons combine and take unlawful action with the intention of causing damage to a claimant who incurs the intended damage. Difficult questions about the state of mind of those involved have often arisen. But in the years since the decision in *The Racing Partnership Limited v Sports Information Services* [2020] EWCA Civ 1300, those participating in competitive deals, where gain could be said to come at the expense of another, may find themselves alleged to have participated in a tortious conspiracy despite believing their activities to be lawful.

This article examines the current state of the law, where difficulties have arisen, and the need for the limits of the tort to be explored further in order to address uncertainties that remain.

INTRODUCTION

If asked, most people would say that a *conspirator* is someone involved in some form of secret and nefarious agreement or plan with others. A pact of secrecy perhaps; or an agreement to do something unlawful, or to cause harm.

In normal circumstances, professionals in the banking and financial services sector might not give undue thought to whether their commercial dealings might later be said to be conspiracies. Their aims are not nefarious. Parties do not normally intend injury to others and may even conduct due diligence or obtain warranties to satisfy themselves that their transactions are not unlawful.

As we know, the common law imposes liability where a claimant proves it has suffered loss as a result of unlawful action taken pursuant to an agreement or combination to cause injury by unlawful means (*Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 (*Kuwait Oil Tanker*), per Nourse LJ at [108]). Liability likewise arises where the predominant aim of a conspiracy is the deliberate infliction of harm.

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But this is a competitive sector in which gains are often made at the expense of others. What if parties engage in financial transactions without knowing that what they are doing may later be said to have infringed the private rights of third parties, who allege that this necessarily resulted in loss?

The courts have long reassured that a high degree of blameworthiness is called for. After all, the purpose of the common law in this area is to enforce standards of civilised behaviour in competition. The economic torts, of which conspiracy is one, form an exception to the general rule that there is no duty in tort to avoid causing purely economic loss (*JSC BTA Bank v Ablyazov (No.14)* [2018] UKSC 19: per Lord Sumption, at [6]). Intentional harm of another's business is not itself tortious, and the common law seeks to encourage and protect competition (*OBG Ltd v Allan* [2007] UKHL 21 (*OBG*), per Lord Nicholls at [142] and [166]).

But could the tort of conspiracy now be said to trespass upon what should really be regarded as legitimate competition in finance? Writing in JIBFL a decade ago, Henry Warwick KC submitted that it was in the uncertainties as to the requirements for knowledge and intention to injure, that difficulties lie: (2016) 9 JIBFL 514.

In this, the decision of a majority of the Court of Appeal in 2020 in *The Racing Partnership Limited v Sports Information Services* [2020] EWCA Civ 1300 (*Racing Partnership*) forms a well-known waypoint. Though the court was divided on the matter, a majority found that it was unnecessary for a defendant to know that the acts it conspired to use were unlawful for liability to arise.

The court reassured that lacking such knowledge may amount to a defence. The majority noted it unlikely, or rare, that what the law might ordinarily regard as procuring breach of contract could be refashioned as a conspiracy, side-stepping the need for knowledge of the breach.

But given that the requirement for intention may be satisfied by an intended gain necessarily resulting in a loss to a claimant, the decision has, in the five years since, cast at least some doubt over a what may be a wide range of commercial activity that most would accept to be blameless.

ECONOMIC TORTS

Put broadly, the economic torts are causes of action in which liability is imposed upon a defendant by reason of conduct that causes injury to the claimant's economic interests. The "genus" includes unlawful means conspiracy, procuring breach of contract, unlawful interference, causing loss by unlawful means, intimidation and lawful means conspiracy. Forms of accessory liability can widen the circumstances in which losses may be recovered from a broader class of those involved.

In 2008, the House of Lords put to bed the suggestion that these torts have a single unified legal theory: *OBG* at [20]. But in practice, similar facts result in allegations of liability on multiple bases; these are often pleaded together. It is not uncommon for a claim of unlawful means conspiracy to be brought alongside procuring breach of contract (or other private right) and they merit comparison.

Unlawful means conspiracy is a tort of primary liability where two or more persons combine and take unlawful action with the intention of causing damage to a claimant who incurs the intended damage. Procuring breach of contract, in contrast, is a form of secondary liability that attaches to the actor who procures a party to a contract to breach that contract.

Unlawful means for the purposes of the former tort may include infringements of private rights, such as breaches of contract. It is therefore worth considering the extent to which the courts might have opened the door to liability in the tort of conspiracy in circumstances where the very same conduct would not historically have been regarded as actionable.

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WHAT MUST BE KNOWN

For procuring a breach of contract, the defendant must have been aware of the existence of the contractual rights said to be breached: *British Industrial Plastics Ltd v Ferguson* [1940] 1 ALL E.R. 479 (*British Industrial Plastics*) at 483. It is an essential ingredient of the tort, though blind-eye knowledge by reason of a failure to inquire into the fact of a contract's existence, or its terms amounts, may suffice: *OBG* at [41]. The evidence at trial must establish at the very least a "shadowy" case as to the existence of a contract, or its terms for such knowledge to be inferred: *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] ICR 612 (CA) at 621.

However, for the purposes of unlawful means conspiracy, defendants must know all the relevant facts that would render conduct unlawful: *Belmont Finance Corp v Williams Furniture (No.2)* [1980] 1 All E.R. 393 CA (*Belmont Finance*). In *Racing Partnership*, the court resolved a conflict of prior authority by holding that knowledge of the unlawfulness itself (as opposed to the facts rendering conduct unlawful) is not required for liability to arise. In this, the majority was satisfied that *Belmont Finance* was not decided *per incuriam* and that it was entitled in any event to follow it: Arnold LJ at [130] and [133], and Philips LJ at [171]).

The full court in *Belmont Finance* relied upon a prior criminal case, *Kamara v DPP* [1974] AC 104 (*Kamara*). In it the House of Lords held (at 119) that where co-conspirators "sincerely believed in a factual state of affairs which, if true, would have made their actions legal" that would amount to a defence. *Kamara* concerned a criminal conspiracy to trespass upon diplomatic premises, but the House was in "no doubt" (at 119-120) that:

- it is essential for a defendant to know of the facts that would render the contemplated conduct illegal (*R v Churchill* (No.2) [1967] 2 A.C. 224); but that
- while a mistake of law is not a good defence, a sincere belief in a factual state of affairs which if true would have been lawful is a good answer to any charge of conspiracy.

In a civil context, Arnold LJ observed in *Racing Partnership* that there was intrinsic merit in the suggestion that it should be a defence for the defendant to prove that he believed the means used to be lawful. On its face this appears to go beyond what was said in *Kamara*, but it may have found some support in judicial reasoning (with respect to procuring breach of contract) in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 (*Meretz*) at [124] and [127], and *Digicel (St Lucia) Ltd v Cable & Wireless* [2010] EWHC 774 (Ch) (*Digicel*) at [106]. But it was also suggested, *obiter*, that a positive belief (that the means used were lawful) should be required, not merely giving the matter no thought: *Racing Partnership*, per Arnold LJ, at [145].

It follows from the foregoing that in a range of commercially competitive situations, the question of what parties to financial transactions knew or believed sits at the dividing line between normal commerce and participation in a tortious conspiracy. This distinction has yet to be authoritatively explored and gives rise to real difficulties in practice.

It is not presently a neat dividing line at all. Though at least one member of the majority in *Racing Partnership* had in mind that the outcome might be thought harsh, following *Belmont Finance* at least, a supportive legal opinion, or contractual warranty, may not be exculpatory were a mistaken belief as to the law to be regarded as insufficient for a defence. This would appear to punish the diligent.

Further, lack of knowledge of the existence of a private right at all also eludes clear categorisation. It was accepted by Zacaroli J (as he was then) in his trial judgment in *Racing Partnership* ([2020] Ch 289, at [273(ii)]) that a distinction is to be drawn between knowledge of a particular term in a contract to which the defendant was not a party, being a "factual state of affairs", and the term's meaning, which is a legal question. This reasoning was not considered on appeal.

In the more recent decision *Your Lawyers Limited v Capital Interchange Limited & Therium Capital*

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Management Limited [2024] EWHC 287 (Ch) (*Your Lawyers*), the court, faced with this difficulty, declined to enter (reverse) summary judgment in a claim in conspiracy in which the defendant had no knowledge of the existence of the contract term said to have been breached. Conduct in breach of the term in question was the unlawful means it was said that the defendants conspired to use. Though the matter was to be considered by the Court of Appeal the claim was discontinued following settlement.

The line is further blurred by the suggestion that arises from *obiter* remarks in *Racing Partnership* referred to above that a defence would require a positive belief rather than a lack of awareness or giving no thought to the matter. Again, it is not clear how much this helps the conscientious. Conducting due diligence may reveal the existence of asserted rights, but should a party be deprived of a defence where that right is doubtful, or contested?

WHAT MUST BE INTENDED

Here again the torts of procuring breach of contract and unlawful means conspiracy differ in their application. For the former, it must be shown that the defendant intended to procure the breach of contract. Whereas to establish liability for conspiracy to injure by unlawful means defendants must have acted with an intention to cause loss to the claimant. This need not be their predominant purpose: *Lonrho Plc v Fayed [1992] 1 AC 448* at 468 and *Kuwait Oil Tanker* at [118]. The requirement may also be satisfied where a defendant intends to make a gain that will necessarily cause injury to the claimant and, knowing this, goes ahead regardless (*OBG* at [62]). This has been applied to the tort of unlawful means conspiracy: (inter alia) *Meretz* at [146] and *Digicel* at Annex 1 [84].

Foreseeability that loss may arise is insufficient to infer intent to injure the claimant (*OBG* at [62]); the defendant must intend to injure the claimant and lesser states of mind do not suffice because (as noted above) a "high degree of blameworthiness is called for" (*OBG*, per Lord Nicholls at [166]).

In two appeals arising in a competition law context this has been reaffirmed. In *W H Newson Holding Ltd & Ors v IMI plc* [2014] Bus L.R. 156 at [35] and [40], it was found that an inference that the defendant intended to injure the claimant by pursuing a course of conduct for their own gain, can only be made out "where the proved facts exclude every other inference". It cannot be met where "the defendant is not even sure that the claimant will suffer loss at all": *Emerald Supplies Ltd & Ors v British Airways plc (No 1)* [2016] Bus L.R. 145 (*Emerald Supplies*), at [152]; thus, it must be "a zero sum game" (*Emerald Supplies* at [169]).

But in many contexts, loss and gain may be characterised as sufficiently connected even if only at the interlocutory stages of a case. This makes it harder to dispose of unmeritorious claims. In *Your Lawyers*, it was considered at least arguable that intention could be made out on the basis that providing finance to a competitor resulted in an alleged loss of comparative competitive advantage.

The problem compounds where those involved are unaware of the legal wrong said to have been the unlawful means of injury or acted in the genuine but mistaken belief that their actions were lawful. In those circumstances there might be little to restrain allegations of liability being made beyond the need for awareness that making a gain would be at a competitor's expense.

CONCLUSION

The boundaries of the tort remain opaque in these respects, and firms and practitioners alike would no doubt welcome clarification. In the view of these authors, a tension may be said to exist between the areas where uncertainties remain and the judicial reasoning of the House of Lords and the Supreme Court that stresses the importance of the need to protect and encourage competition.

Further consideration of the limits of the tort, and as to the relevance of knowledge and defences it may

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give rise to in particular, is needed at appellate level to ensure that the tort remains, for claimants and defendants alike, the common law's robust answer to infringements of the "basic standards of civilised behaviour" in economic competition.

ABOUT THE AUTHORS

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Henry Warwick KC is a specialist in group litigation and other forms of collective redress, as well as associated costs and litigation funding matters. He is recommended as a Leading Silk by legal directories for Group Actions, Commercial Dispute Resolution and for Banking and Financial Services. He has acted or advised in a variety of group actions and other multi-party proceedings, including in *Bates v Post Office Limited*, and in disputes concerning the carriage and funding of such claims.
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Vishnu is developing a broad practice across all of Chambers' main areas, with a particular focus on commercial litigation and group actions. He is currently instructed in respect of the Lampard Inquiry and the Covid-19 Inquiry. He has also assisted in various parts of different Equal Pay litigations, the DPF claim, a proposed environmental-waste nuisance group action, as well as the Post-Office Inquiry.
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