

ECONOMIC TORTS:

INDUCING BREACH OF CONTRACT:

Problem Question:

- In July 2008, Sonny Bill Williams left the Canterbury Bulldogs mid-season to join the French club of Toulon. SBW had signed a five-year contract with the Bulldogs in 2007. The Bulldogs brought proceedings against SBW for breach of contract. They also brought proceedings against Toulon and against Khoder Nasser, SBW's manager, for inducing SBW's breach of contract. Assume that, in June 2008, Toulon approached SBW and offered to double his salary if he came to play for the club. Did Toulon induce SBW to breach his contract?
- Bulldogs as the Plaintiff and SBW who breached his contract by leaving the bulldogs before his contract was up. Toulon induced SBW to breach his contract. Whether the Bulldogs can bring a claim against Toulon?
- **Assuming there is no precedent, how would you approach this question as a matter of first principles?**
 1. The D was not a party to the contract, so it should not be held liable for SBW's breach. A breach of contract claim against SBW already provides the Bulldogs with a right to damages.
 2. Sanctity of contract - double protection (third party/SBW might not have any money)
 3. The D's conduct is blameworthy because it participated in the breach of contract (cf accessories in crimes).
 4. Avoid interference with free market/competition (but what about fair play?)

Precedent:

"a person who knowingly procures a servant to leave his master's service committed a wrong"

1. Applying the rule because of factual similarities

A rugby contract, like a contract between a master and servant, is a contract for services.

2. Distinguishing the rule by reference to the facts

A rugby contract is not the same as a contract between master and servant

3. Determining the scope of the rule by reference to its underlying principles

Precedent stands for a broader principle of secondary liability, which also applies here (ie. If I help or convince someone to commit a wrong, I am liable).

4. Determining the scope of the rule by reference to the consequences of its application

Precedent should be narrowly construed - avoid interference with free market

5. Overruling/declining to follow the precedent

The case was a response to historical conditions (labour shortage); or it assumed that servants existed as property

The whole rationale isn't transferable here - they used to consider servants as property but now that is Ludacris.

Lumley v Gye:

- Summary in OBG at [169] in Lord Nichols judgment

- Well known opera singer. She had a contract with Lumley to perform exclusively at a certain theatre. Mr Gye owned a competing theatre. He convinced her to break her contract and perform for him and his theatre instead.
- There is no basis for distinguishing these cases - the contract for master and servant is the same as services. Thus here, there was a service for contracting of opera and thus the rule should apply.

Three types of intervention:

1. Inducing breach of contract
2. Causing loss by unlawful means
3. Unlawful means conspiracy

OBG v Allan:

- HOL case - leading on inducing breach of contract
- Picked up where Lumley v Gye left of.
- Only case we need to use for "Inducing breach of contract"
- Consolidated proceeding - three different cases; put into one proceeding and HOL heard together.
- The case relevant to inducing breach of contract was:

Mainstream Properties Ltd v Young:

1. **FACTS:** Mainstream - property developer. Two employees their job was to go and find properties to invest in. Instead of giving the properties to Mainstream, they set up a joint venture for this guy called De Wiuter and they're going to develop this property. They breached their employment contract with Mainstream. Now the claim

by Mainstream against De Wiuter - you are liable for inducing this breach of contract bc you gave money to this joint venture.

- Five judgements - leading judgements are Lord Nichols and Lord Hoffman's

2. ELEMENTS of the tort: D knowingly and intentionally induces a third party to breach his contract with the plaintiff:

- a. There must have been a **breach** by the third party of P's contractual rights: at [44] per Lord Hoffmann.

The one thing - it operates on the basis of secondary liability. This cant happen without primary liability which in this case is breach of contract.

- b. The defendant must have actually **induced** the breach of contract (causation): at [36] per Lord Hoffmann; at [191] per Lord Nicholls; at [67]

[36] did the D acts of encouragement, threat, persuasion and so forth have a sufficient casual connection with the breach by the contracting party to attract accessory liability?

- Principle of secondary/accessory liability: **Lumley**

- c. The defendant must have **known** that his or her conduct would induce the breach: at [39] per Lord Hoffmann; at [192] per Lord Nicholls; at [69].

Turning a blind eye: at [41] per Lord Hoffmann.

It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact

is in many cases treated as equivalent to knowledge of that fact.

[39] to be liable for inducing breach of contract you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must realise that it will have this effect. Nor does it matter that you ought reasonably to have done so.

- Honest belief: **British Industrial Plastics v Ferguson [1940] 1 All ER 479**

d. The defendant must have **intended** to procure the breach of contract: at [42]-[43] per Lord Hoffmann; at [191] per Lord Nicholls

Breach = end in itself, means to an end; ≠ foreseeable consequence

Millar v Bassey [1994] EMLR 44

Recording studio hired musicians to assist her. *** There wasn't intention to breach the contract. It wasn't an end in itself nor a means to another end. What is not enough for intention - if it is a merely foreseeable consequence

3. **UNDERLYING RATIONAL/principles:** at [32], [36] per Lord Hoffmann; at [172], [191] per Lord Nicholls
- Principle of secondary/accessory liability: **Lumley**
 - Protection of contractual rights

DID TOULON INDUCE SBW TO BREACH HIS CONTRACT?

Post-Lecture Exercise:

Advise the Bulldogs whether, based on OBG, Toulon is liable for inducing SBW to breach his contract. Draft a brief opinion that identifies the issues, sets out the relevant law and applies the law to the facts.

Ways to dispute liability:

- Offer of employment wasn't actually inducement
- Further they didn't actually intend to procure breach of contract

CAUSING LOSS BY UNLAWFUL MEANS:

Problem Question (from the 2016 Torts exam):

Kate lives in an apartment complex in the centre of Dunedin, with her baby daughter Rose. They moved into the complex a couple of months ago, after Kate decided to leave her husband. The complex is very modern and attracts young professionals. Kate is the only resident in the building with a young child. Kate comes to your law firm for advice because she has been having problems with her neighbour Axel, a twenty-something real estate agent who lives upstairs from her.

...

What is worse, after Kate's conversation with Axel, Axel started harassing her nanny, Karla, who used to take care of Rose while Kate goes to work. Kate is a self-employed insurance salesperson. Every morning when Karla turned up at the apartment to look after Rose, Axel would be loitering in front of the building, making sleazy remarks to Karla and spitting at her. Soon Karla quit her job as a nanny, which meant that Kate could no longer go to work. Kate lost a significant amount of income as a result. Although she has now found a replacement for Karla, she is worried that Axel will keep up his shocking behaviour and drive away the new nanny, too. Would Kate have a good claim against Axel under one of the economic torts, in relation to Axel's behaviour towards Karla?

- Inducing breach of contract not helpful here - there was no breach of contract

I Tarleton v M'Gawley (1794) Peake 270

- British trading ship = Othello. On the coast of West Africa, people wanting to trade with them. The Master of Othello didn't want to trade with the plaintiff, he wanted to trade with those in the middle instead. He got his cannon out and fired at the people in the middle (canoe). Threatening. The plaintiff wasn't happy about that and brought proceeding against the defendant. The court said yes there is liability here.
- Unlawful act against a third party.
- This is not secondary liability - no third party who commits an unlawful act
- The plaintiff has action even though the original unlawful act was against the third party
- D is potentially liable twice

II OBG v Allan (HL) = Douglas v Hello! Ltd (No 3)

- [46], [47]
- Two people got married and they sold the rights to public photographs of their weddings to the magazine "OK". On wedding day unauthorised photography snuck photography and gave them to "Hello" - a competing magazine.
- Lord Hoffman's judgement most relevant here.

1. Elements of the tort: at [47] per Lord Hoffmann

- a. A wrongful interference with the actions of a third party in which the claimant has an economic interest
The meaning of "unlawful means": at [49]-[51]

- "in my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss.
 - Requires an interference with the third parties freedom in a way which is intended to cause loss to the plaintiff - [51] OBG
- b. An intention thereby to cause loss to the claimant: at [62]-[64], see also at [42]-[43] Ends, means and consequences [62] In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither desired...

2. Underlying rationale/principles: at [46], [56]-[57]

- a. Protecting a person's liberty to deal with others: indirect infliction of harm
- b. Enforcing "basic standards of civilised behaviour in economic competition, between traders or between employers and labour": at [56]
 - Thus Axel shouldn't be liable?
- c. Role of Parliament
 - We don't want the courts tortifying criminal law

3. Examples

- a. **Rookes v Barnard [1964] AC 1129 (HL):** Ds, members of a union, threatened employer that there would be an unlawful strike unless P, an employee who did not wish to join the union, was dismissed.
- b. **J T Stratford & Son Ltd v Lindley [1965] AC 269 (HL):** D, union, induced employees of barge hirers to breach their employment contracts, and thereby prevented the barge hirers from hiring P's barges.
- c. **RCA Corp v Pollard [1983] Ch 135 (CA):** D infringed rights of Elvis Presley estate by selling bootleg records, but did not interfere with the liberty of the estate to perform its obligations under exclusive recording contract with P.
- d. **Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants [1987] IRLR 3:** Ds, civil servants in the Ministry of Agriculture, went on an unlawful strike in support of a pay claim, but they did not intend to cause damage to P, an abattoir whose business relied on the Ministry's services.
 - MOA was third party.
 - Independently, unlawful act, preventing the ministry from dealing with the abattoir. However, we don't have an intention to cause loss to the plaintiff.

III **Inducing breach of contract vs causing loss by unlawful means: at [8]**

1. Primary vs secondary liability
2. Independently unlawful means vs participation in the breach of contract
3. Damage in any form vs breach of contract

4. Intention to cause damage to the claimant vs intention to cause a breach of contract

IV **Lord Nicholls on unlawful means (minority)**

1. "Unlawful means" comprises all acts which a person is not permitted to do: at [155], [162]
2. Rationale: curbing clearly excessive conduct – at [153]
3. Relief in a two-party situation? At [161]

UNLAWFUL MEANS CONSPIRACY: THE LAW

I **Lawful means conspiracy/conspiracy to injure**

P suffers loss as a result of Ds' conspiracy to do acts which, although lawful in themselves, have the sole or predominant purpose of injuring P:

Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435 (HL):

- Crofter was a producer of tweed cloth. One of several producers of such cloth. Trade Union (D) representing employees of producers for tweed cloth on the island. Crofter set out to undercut price of tweed. One way was to import the yarn used to make the tweed. Rather than using locally produced, it was imported which was cheaper. The employees represented by the Trade Union thought it was going to ruin the industry. SO they got together with people working at the port - the Dockers to put an Embargo on the imported yarn so when it arrives at the port the Dockers refuse to handle it so Crofter never gets the yarn to use. This embargo was lawful. However, the plaintiff argued that the Trade Union should be liable for the loss caused to the Plaintiff on the basis that the

Dockers and the Trade Union together had engaged in a conspiracy to cause loss.

- HOL said in principle there can be liability in such a case.
- **Reason:** the unlawfulness resides in the conspiracy thus its so terrible it can bring liability. As soon as you add another person - conspiracy. Doing it by yourself is fine.

1. **Restrictive requirement** of intention to injure: predominant purpose
 - Here, embargo was not tortious because the predominant purpose of the conspirators was to protect their own interests.
2. **Rationale:** "It is in the fact of the conspiracy that the unlawfulness resides" (Lord Wright at 462)

II **Unlawful means conspiracy**

- Doesn't require a dominant intention to cause like - does require some unlawful means. P suffers loss as a result of Ds' conspiracy to injure P by unlawful means:

Revenue and Customs Comrs v Total Network [2008] UKHL 19, [2008] 1 AC 1174:

- Revenue was the plaintiff, and total was the defendant - company incorporated in Spain with a bank account in the UK, was alleged to have participated in 13 "carousel frauds".
- The issue before the court, in the unlawful means conspiracy tort - can it include a criminally unlawful act or does it have to be civilly actionable against one of the parties.

1. **Issue:** whether "unlawful means" should be actionable in tort against at least one of the conspirators.

2. **Unlawful means**

- a. Unlawful means need not be tortious but can include criminal conduct: at [44]-[45] per Lord Hope, [56] per Lord Scott, [93]-[95] per Lord Walker, [120] per Lord Mance, [221] per Lord Neuberger
 - The unlawful means here were directed at the plaintiff, there weren't just incidental.
- b. Means are "directed" at P/not merely "incidental": at [43]-[44] per Lord Hope, [93]-[95] per Lord Walker, [119]-[120] per Lord Mance, [223]-[224] per Lord Neuberger
- c. Offence exists for the protection of the victim (the revenue): at [124] per Lord Mance, [222] & [224] per Lord Neuberger

3. **Intention** to harm the claimant (by using unlawful means): at [56] per Lord Scott, [100] per Lord Walker, [120] per Lord Mance, [221] per Lord Neuberger

- Intent to harm need not be the predominant purpose of the conspiracy
- [100] intentional harm tort (unlawful means tort)

4. **Underlying rationale/principles**

- a. Unlawfulness resides in the fact of the conspiracy: at [44] per Lord Hope, [56] per Lord Scott, [100] per Lord Walker, [123]-[124] per Lord Mance, [221]-[222] per Lord Neuberger

- Contrast unlawful means tort, where claimant has been “intentionally struck at through others” (at [44] per Lord Hope, [99] per Lord Walker, [124] per Lord Mance, [223] per Lord Neuberger
- b. “The man in the street”: at [90] & [94] per Lord Walker
- c. Conspirators as joint tortfeasors: at [94] per Lord Walker, [226] per Lord Neuberger

5. **Result:** Claim should not be struck out

TRESPASS TO LAND:

Problem Question:

- Tom wants to know whether his neighbour, Mark, committed trespass when he did the following acts:
 - a. Planting a hedge that is intruding on Tom’s property;
 - Direct intrusion on Tom’s land = trespass, if land planted on his own property, any interference that occurs is consequential.
 - b. Flying a drone over Tom’s house;
 - Tom would have to show there was an interference of the ordinary use of enjoyment of his land and distinguish the facts of **Bernstein**.
 - We should be adopting the same ownership approach as the airspace - the Scottish courts do this.
 - Can you really own the airspace? - in US conceive the airspace a public highway.
 - c. Knocking on Tom’s door and taking a photo of him (without his consent) for the next neighbourhood newsletter.
 - Apply SC approach

I Trespass to land: Overview

“A trespass occurs when there is an unjustified intrusion by one party upon land which is in the possession of another”: **Bocardo** at [6].

- Doesn’t require any damage or harm, beyond intrusion

- Intrusion is enough for liability
- Trespass cares about possession and property
- **Entick v Carrington**

1. Function

“[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all”: *Entick v Carrington* (1765) 95 ER 807 at 817.

2. Elements of trespass to land

- a. **Voluntary act**
- b. **“Physical act done ... directly on to the plaintiff’s land”:**
Southport Corporation v Esso Petroleum Co Ltd at 195, cf nuisance
 - Oil carrier - oil ending up on foreshore was trespass
 - No there wasn’t a trespass because we didn’t have a physical act done directly onto the plaintiff’s land - it was just a consequential interference.
- c. **Exclusive possession of land**

II What constitutes an “intrusion ... upon land”?

1. Bernstein of Leigh (Baron) v Skyview & General Ltd

- a. Plane flying over the plaintiff’s land many hundreds of feet above the ground
- b. Distinguished **Kelsen** (sign projecting over P’s property): at 486. Griffiths J was willing to accept, as a sound and practical rule, that

any incursion in to air space at a height which may interfere with the ordinary user of land was a trespass. But he said that wholly different considerations arise when considering the passage of aircraft at a height which in no way affects the user of the land.

- c. Criticism of *maxim usque ad coelum* (at 487); balancing exercise (at 488)(488): "Balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgement best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public."
- d. Outcome: on the facts of this case, even if contrary to my view the defendant's aircraft committed a trespass at common law in flying over the plaintiff's land, the plaintiff is prevented from bringing any action in respect of that trespass by terms of section 40(1) of the Civil Aviation Act 1949. Thus, wasn't trespass.

2. **Bocado SA v Star Energy UK Onshore Ltd**

- a. Wells entering the substrata below the plaintiff's land at a diagonal angle
- b. Issue: Does Bocado's title to land extend down to the strata below the surface through which the wells pass?
- c. The brocard *usque ad coelum* is an imperfect guide: at [14], [19], [26].

- the idea that a landowner owns land that stretches down to the centre of the earth and upwards indefinitely is no longer tenable.

- SC rejected the argument that the balancing exercise applied to the substratum
 - Does his title to land extend down to this level of surface?
- c. The brocard *usque ad coelum* is an imperfect guide: at [14], [19], [26] - brocard = centre of earth to the heavens.
 - d. Distinguished airspace cases. Here, question is one about ownership: at [26].
 - Scotland doesn't use the balancing approach
 - Clearly rejecting the balancing approach - as long as something can be touched, this idea of ownership will be useful to determine trespass.
 - e. Owner of the surface is owner of the strata beneath it: stopping point = absurdity. Here, strata could be "touched or worked": at [26]-[27].
- there is no question of the strata below the land becoming a public highway.
- As a general rule, anything that can be touched or worked must be taken to belong to someone. Thus, the owner of the surface is the owner of the strata beneath it unless there has been alienation of it by a conveyance, at common law or by statute to someone else.

3. **Civil Aviation Act 1990, s 97(2) and (3); Property Law Act 2007, ss 319-320**

- Does also provide specific for the use of drones - including recreational drones
- You need to contain the properties consent before you fly the drone over their land

III Defences: *express or implied licence*

1. Entry on land with consent (licence) is not trespass

- When does a plaintiff give implied license to the D to come onto their land?

2. Licence implied by law: *Tararo v R*

Undercover officer entered onto his land to purchase cannabis from him. Mr T sold him some. The police didn't have a warrant to do this. As a result, he was charged for selling cannabis. The police who filmed the transaction wanted to release a photo. Inadmissible because obtained by result of trespass. However, the police said no we had an implied license to do this.

- Issue: Did the officer's implied licence to go onto the premises extend to the covert filming of the transaction?
- Problems with the quasi-contractual approach to implied licence: at [11].
 - Can we impute an intention to the property owner that the D be allowed to come onto the land.
 - J Tipping didn't like concept of implied consent as artificial for purposes of law enforcements. No offender would ever give consent for police to come onto land.
- "Reasonable purpose" inquiry: at [14].

- Members of the public, including police officers, may go to the door of private premises in order to make inquiry in an occupier of ray reasonable purpose. But they cannot invoke the license to do anything that by law requires a warrant.

d. Policy reasons: at [15]-[16].

- *The licence is appropriate in order to reflect the reasonable requirements of society. It would be quite unsatisfactory, as a matter of both social and legal policy, to hold that someone going onto the premises of another in the contemplated circumstances was a trespasser. The rigidity of the law of trespass requires modification in order to accommodate the ordinary interaction of citizens. It is a strength of the common law that it can adjust itself to the contemporary needs of society.*

e. The reasonable purpose inquiry applied to photography: at [17]-[24]. The officers purpose, when invoking the licence afforded to him by law, was to avail himself of the proffered opportunity to purchase cannabis as part of his undercover duties. This was a perfectly reasonable purpose. There was no advance denial of the license and no termination during its exercise. Thus the evidence was no improperly obtained.

3. Denial or termination of implied licence: *Tararo* at [12]-[13]

- If you put a sign on your property saying "no police allowed" - no police officer would be allowed to come onto your land.

IV Civil remedies: injunction or damages (nominal or compensatory)

- Injunction to stop the person trespassing
- Damages = compensatory where trespass has caused some damage
- Damages = nominal to recognise right has been infringed.

INTERFERENCE WITH THE RIGHT TO THE USE OR ENJOYMENT OF LAND - NUISANCE:

Problem Question

A flat located near Arana College in Dunedin has chosen the chant '**** Arana' as its Wi-Fi username. Students at Arana have taken offence at this. The name pops up on their electronic devices every time they are searching for a wireless network. Is the name an interference with the students' right to the use or enjoyment of land? Assume that the students have exclusive possession of their rooms at Arana.

- Do we have an emanation here?
- Easy for plaintiffs to hide the wifi name so they don't have to look at it
- Is freedom of expression an irrelevant consideration?

I What is private nuisance?

1. Context

- a. Private nuisance: cf trespass, negligence, and *Rylands v Fletcher*
- b. Statutory nuisance: already dealt with by statute
- c. Public nuisance: we are not covering this but it might come up
- d. Criminal nuisance: a crime against public welfare

2. Elements of private nuisance

- a. Interference with P's right to the use or enjoyment of land (harm) (e.g. noise, smells etc.)

- Nuisance does require a kind of harm - what type?
 - By way of interference with use and enjoyment of land
 - Can include intangible interferences as well as consequential interferences.
- b. Substantial and unreasonable interference (Lecture 2)
 - c. Basis of liability (Lectures 3 and 4) - on what basis do we hold the defendant liable.

II An interference with the right to the use or enjoyment of land: *Hunter v Canary Wharf Ltd* - leading authority

- Involved two separate actions - plaintiffs were unhappy because the defendants building a tower which was 200m high which interfered with TV reception. Second was plaintiffs living near a construction site building a new road - a lot of dust. Both brought claims in nuisance. Gave rise to two issues:
 - *Whether interference with television reception capable of constituting an actionable nuisance and whether it is necessary to have an interest in property to claim in private nuisance and if so what interest in property will satisfy this requirement (684).*
 - Can those people (wives, children) - do they have a right to sue in nuisance.

TWO ISSUES:

1. **Right to sue in private nuisance; interference with television signals**