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CHAMBERS

'It takes two to tango'

Disposals in breach of contractual rights – don't forget the tort

The scenario

A landowner X covenants with Y in an option or a right of pre-emption not to dispose of the lease or land without consent, or without complying with particular conditions (e.g. a deed of covenant from the disponee). The option or right is not protected at the Land Registry. In breach of covenant, X then disposes of the land to an unconnected third party, T, at a proper price agreed after a period of arms length negotiations.

T knows about Y's rights, and that X cannot make a disposal without breaching those rights, but considers that it will not be bound by Y's rights, and is content to leave X to deal with any claim by Y.

Other than under the insolvency legislation, can the court unravel the disposal?

The background

It is natural, perhaps, that when considering claims against third parties, property lawyers tend to concentrate on property rights, and on remedies to enforce property rights. Subject to any registration requirements, property rights may be binding or enforced against third parties; and we know that this is not usually the case for contractual rights.

But what happens if there is a failure to protect those property rights – or an inability to do so, as in the case of other rights such as licences?

If Y is able to act before a disposal is made, then Y may be able to obtain an injunction to stop it happening (as in Sefton v Tophams Ltd [1965] Ch 1140). But what if it is too late?

If T is connected with X (e.g. if T and X are related companies), then other claims and remedies, not considered here, may also arise. But what if there is no such connection?

While property rights and remedies may well be relevant in these cases, any review of potential claims should not ignore other possibilities; and those possibilities should include the various economic torts.

Depending on the circumstances, some form of conspiracy claim might exist – unlawful means conspiracy or conspiracy to injure – or there might be a claim for the tort of unlawful interference (also known as causing loss by unlawful means). Those would all require an intention or predominant purpose on X's part to cause damage to Y, which is unlikely to be the case in our scenario, but one other tort has also been used in this type of situation: the tort of inducing (or procuring) a breach of contract. That will be the subject of the discussion below.

If such a tort has been committed, then several cases at first instance say that the court would have the power to unravel the disposal.

Inducing breach of contract

In simple terms, it is a tort knowingly to procure a party to a contract to break that contract, to the damage of other party to it, without justification. The tort sometimes takes its name from an early decision: Lumley v Gye (1853) 2 E&B 216. Its elements were reviewed authoritatively by the House of Lords in OBG v Allen [2007] UKHL 21, esp. at [3]-[5], [36], [39]-[44], and [168]-[193].

Elements of the tort

- Breach of contract by X
- Causative participation in the breach by T
- T knows about the contract
- T intends to cause the breach
- T's actions are not justified

Breach and participation

The tort is a form of accessory liability, involving the defendant joining with the contracting party in the act of breach. This was put in several ways in OBG v Allen:

- For Lord Hoffmann, "*liability … requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person*" (at [8]); and the question was, "*did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?*" (at [36]). When referring to "*the relevant principles*" in the latter paragraph, he also mentioned "*encouraging or assisting*" the breach.

- For Lord Nicholls, it had to involve "*causative participation in the breach*" (at [191]). "*In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory*" (Lord Nicholls at [178]).

Knowledge and intention

The interfering party must know about the contract and intend to cause a breach of it, the breach being an end in itself or a means to an end: Lord Hoffmann at [39]-[43]. If a breach is merely a foreseeable consequence, that is not enough, but: "*If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach*".

Although the defendant must realise that the act it is inducing will be a breach, knowledge can include reckless indifference.

As Lord Nicholls put it at [191]-[192]:

> "*The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. … Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If a defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence brought about.*"

One result of this is that (Lord Nicholls at [202]):

> *"An honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract. … It matters not that his belief is mistaken in law. Nor does it matter that his belief is muddle-headed and illogical, as was the position in British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479."*

In line with that last passage, where T receives legal advice that a disposal would not be a breach of contract by X, and both believes and relies on that advice, then T may well not have the necessary intention (see Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303) or knowledge (see Allen v Dodd & Co Ltd [2020] EWCA Civ 258).

Justification

A defence of justification is available in principle, but has not proved easy to establish.

Our scenario

In the sort of scenario set out at the beginning, there will often be two key areas of debate:

1) Was there any 'causative participation'? Has T done anything to 'procure' or 'participate' in X's breach of contract?

Whether there was any relevant causative procurement or participation will depend on whether T did acts which had the necessary causative effect. In some cases – e.g. threats or positive acts attempting to persuade or encourage – relevant acts by T may be readily identifiable, but in our scenario the facts will not usually be that clear.

2) Did T do so with the necessary intention?

Intention depends first of all on knowledge.

In our scenario T knows about Y's rights and that the disposal will be a breach, so we do not need to delve into the cases on the degree of knowledge that is needed. In other cases, that will be necessary.

If T has the necessary knowledge, the next question is whether, in the light of this, T's relevant acts were done with the intention of causing the breach. If X made the disposal because of threats by made T, or as a result of T's active encouragement or persuasion, then the court is likely to conclude that T had the necessary intention; but again, in our scenario the facts will not usually be that clear.

What if all that T did was engage in arms length negotiations with X, leading to an agreed disposal by X to T (with or without a prior contract)?

The disposal to T is inconsistent with X's obligation to Y; but X may have been a willing, even eager, seller to T. Indeed, it may have been X who actively put the property on the market, and who was at all stages pushing for a deal with T.

This raises some important questions:

- The disposal by X to T is itself a breach of contract, and T's participation is necessary to achieve that, so T is at least assisting X's breach. Is that enough?
- Can simply entering into an 'inconsistent transaction' amount, without more, to 'causative participation' by T in X's breach of contract?
- In negotiating and entering into such a transaction, does T intend to procure or participate in a breach?
- Does it matter whether the negotiations were initiated by X or by T?

Inconsistent transactions before OBG – is there a claim in tort?

Before turning to property cases, there are three earlier cases that need to be considered. The first two were cases of inconsistent transactions. The third sought to set out the legal principles, and became the leading case before OBG v Allen.

In British Motor Trade Association v Salvadori [1949] Ch 556, the plaintiff represented all British car manufacturers and dealers, at a time when there was a shortage of new cars. As a matter of policy, every member of the public who bought a new car was required to enter into a deed of covenant with the plaintiff and the dealer that s/he would not re-sell it within a period of twelve months. The aim was described in evidence as being:

> "*to ensure that those who were genuinely in need of a motor-car or motor vehicle obtained it at the manufacturers' list price, and that the retail prices of motor-cars were not inflated, which would have resulted in cars going only to those persons with the greatest amount of cash in their pockets .... It would be beyond human endurance to expect dealers to sell at a narrow margin when they saw their customers immediately obtain the price of three times that amount within a few minutes of sale.*"

By a range of "*devious means*", the defendants obtained new cars which they shortly afterwards re-sold for far more than the original prices. Their usual plan of operation was apparently to buy the cars from original buyers who had themselves signed a covenant and bought the car only a very short time before. Many of these buyers were the defendants' agents. The defendants thought they could get away with this because the covenant was merely a personal covenant between the plaintiff/dealer and the original buyer.

Roxburgh J held that the defendants were liable in tort, and he awarded damages and an injunction restraining future wrongful activity. In passages that may be relevant to our scenario, he said this (pp.563-564 and 565-566):

> *"I have already said enough about the defendants and their activities to show that if they interfere knowingly with contractual relations they have no justification for doing so, but [counsel for the defendant] contends that it is no tort merely to make a price with a man who is offering a car for sale in breach of covenant because a willing seller needs no inducement. The importance of the point is obvious, because if it is well founded the question whether a tort has been committed will depend on whether the buyer or the seller speaks the first word, and as the buyer and the seller may both be hostile to the plaintiffs for obvious reasons, the plaintiffs are likely to be met with unchallengeable evidence that the seller took the initiative.*
>
> *"… in my judgment, any active step taken by a defendant having knowledge of the covenant by which he facilitates a breach of that covenant is enough. If this be so, a defendant by agreeing to*

buy, paying for and taking delivery of a motor-car known by him to be on offer in breach of covenant, takes active steps by which he facilitates a breach of covenant.

"… even if a further element of inducement must be present, that further element can be found. The covenantor who offers a car for sale is not unconditionally ready to break his covenant but only if the price offered is high enough and, accordingly, a defendant who offers such a price induces the seller to take the final step towards breaking his covenant by making his willingness to sell unconditional."

On the other side of the line is Batts Combe Quarry Ltd v Ford [1943] Ch 51. A father had sold a quarry and entered into a restrictive covenant preventing him from being involved in another quarry in the area. He later provided a large capital sum to his sons, to be used by them to buy another quarry and as working capital to run it. The Court of Appeal held that the father was in breach of his covenant, but they agreed with the trial judge that, "*Mere acceptance by [the sons] of a proffered bounty given in breach of contract cannot … be said to be in any sense a procuring of a breach of contract*" (see [1942] 2 All ER 639 at 640).

Those cases might represent two factual extremes as regards both the levels of participation and intention: a deliberate scheme to avoid contractual obligations on the one hand, and the mere acceptance of a father's bounty on the other.

The possibility of an inconsistent transaction being enough (without other persuasion) was confirmed by the Court of Appeal in DC Thomson & Co Ltd v Deakin [1952] 1 Ch 646 at 694, where Jenkins LJ explained that:

"… the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example British Industrial Plastics Ltd v Ferguson, where the necessary knowledge was held not to have been brought home to the third party; and British Motor Trade Association v Salvadori."

Our scenario

Taken at face value, Salvadori would seem to support a claim by Y against T. It might be argued that this case should be applied with caution given the very clear facts, but DC Thomson suggests not. If that is still the law, then by entering into the transaction, T may well have committed a tort.

Pre- OBG property cases – undoing the transaction

There are three well-known examples of this tort being deployed in property transaction cases before OBG v Allen. Their significance is that in each of them, an injunction was granted against both X and T requiring the 'undoing' of the wrongful transaction.

All are first instance decisions; and none of them involved detailed consideration of the tort.

> If a tort is committed, the court has the power to grant a mandatory injunction to undo the transaction

In Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd [1974] QB 142, K owned a garage. It entered into a petrol tie, obliging it to buy petrol from Esso. It also covenanted to procure a deed of adherence from any successor before completing a transfer or allowing a successor to carry on the business. A company, IH, bought the shares in K, and procured K to transfer the land to IM, another subsidiary of IH. Bridge J held that:

> *"… it is an almost irresistible inference that from the start [IH] … were not only well aware of the terms of the [Esso tie] but also went into this transaction for the purpose of defeating that tie if they were able."*

On this basis, Bridge J granted interim injunctions. These included injunctions against both IH and IM, ordering IM to reconvey the land to K, and restraining IH from hindering or interfering with re-transfer.

In Hemingway Securities Ltd v Dunraven Ltd [1995] 1 EGLR 61, a lessee covenanted not to assign or sub-let etc. without consent, and that it would obtain a direct deed of covenant from the assignee etc. beforehand. The lessee granted an underlease without consent and without a direct deed of covenant. The underlessee knew, when it entered into the underlease, that a breach of the main lease was taking place. Jacob J granted the landlord an interim mandatory injunction requiring the immediate surrender of the underlease. This was granted against the underlessee as well, one ground for doing so being that it was a plain case of inducing or aiding a breach of contract. Applying Esso, he decided it was *"appropriate that a mandatory injunction undoing the consequences of inducing the breach of contract by the underlessee should be granted"*.

Similarly, in Crestfort Ltd v Tesco Stores Ltd [2005] 3 EGLR 25, a tenant granted an underlease without having obtained the landlord's consent, and on terms that differed from those of the lease. Both aspects involved breaches of covenant. Lightman J granted a final mandatory injunction requiring the underlessee to surrender the underlease, on the ground that the underlessee had committed the tort of wrongful interference with a contract by agreeing to accept, and accepting, the underlease. The decision was apparently a close call on the evidence

(see [66]), but the judge decided that the underlessee knew of the breach, and knowingly and intentionally induced or procured the breach by the tenant.

Each of those cases involved a disposal by X that was inconsistent with its covenant with Y. In Esso, there was a clear connection between X and T (and the parent company), but that was not so in the other cases; and neither in Hemingway nor in Crestfort were there clear findings of any other acts of inducement (although in Hemingway the judge thought the elements of an unlawful means conspiracy had also been made out).

Would those cases be decided the same way on liability now?

Inconsistent transactions after OBG – are the older cases still good law?

Several commentators suggest that, in the light of OBG v Allen, what Jenkins LJ said in Deakin is now in doubt. These include the editors of Clerk & Lindsell (22nd edition, paras.24-42 to 24-44) and of 'Civil Fraud' (paras.3-038 to 3-039). The latter refer to comments in two later cases::

- Toulson LJ in Meretz, emphasising the requirement for T's conduct to have operated on the will of X.
- Lord Malcolm in a Scottish case – Calor Gas Ltd v Express Fuels (Scotland) Ltd [2008] CSOH 13 – saying that "*a positive act of inducement or procurement is essential to the wrong*".

Commentators also disagree about what the law *should* be. At the heart of the disagreement is whether T should be liable if it did no more than assist or facilitate X's breach. The courts have shown themselves generally to be reluctant to hold that 'mere facilitation', as opposed to active encouragement or persuasion, is enough to make someone liable in tort. The balance of academic opinion is probably against liability for 'mere' assistance or facilitation. More generally, Lewison LJ has also commented very recently (in Allen v Dodd & Co Ltd (above)) that, "*The recent tide of authority has, in my judgment, been to restrict rather than to expand the scope of the economic torts*".

But if the law is no longer as it was before OBG v Allen, then practising lawyers may struggle to know where to draw the line between lawful and unlawful behaviour on T's part.

Y might be disheartened by this, but perhaps it should not be. None of the speeches in OBG v Allen addresses this issue directly, and it may be wrong to draw too much from Meretz or Calor Gas. Even in OBG v Allen, after commenting that causative participation was not enough, Lord Nicholls continued by saying:

> "*A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to a contracting party which persuades the latter to default on his contractual obligations.*" (emphasis supplied)

This might suggest that Lord Nicholls saw scope for an offer of an inconsistent transaction to be causative participation, at least where it "persuades" X to enter into the transaction.

Similarly, in another Scottish case – Global Resources Group v Mackay [2008] CSOH 148 – after referring to OBG v Allen and Calor Gas, Lord Hodge (now the Deputy President of the Supreme Court) added:

> *"It is clear from [Salvadori] … that the tort … is not confined to circumstances where A has to persuade B to break his contract but can also be committed where A has dealings with B which A already knows are inconsistent with the contract between B and C. In either event A induces or assists B to do something … which involves B breaking his contract with C."*

The Mir Steel decisions – the latest word

The latest word on this in England and Wales is only at High Court level.

In two decisions in the same case – Lictor Anstalt v Mir Steel UK Ltd [2011] EWHC 3310 (Ch) at [33]-[53] (esp.[49]-[52]) and [2014] EWHC 3316 (Ch) at [246] and [257] – David Richards J (on a summary judgment application) and Asplin J (at trial) both held that nothing in OBG v Allen casts doubt on the correctness of Roxburgh J's conclusions in Salvadori; and David Richards J considered that the passage quoted above from DC Thomson was still good law.

In this case, the company committing the breach (the equivalent of X in our scenario) was in administration. X had acquired a chattel from Y over which Y had retained rights, but which had become part of X's land. The administrators put X's business and assets up for sale, and received several offers. One company, Q, made alternative offers, the lower offer (which was accepted) being on the basis that "clean title" was not provided to the (former) chattel, and that Q would accept the risk of a claim by Y. As part of the agreed deal with Q, the administrators incorporated a company (the equivalent of T in our scenario) as a wholly owned subsidiary of X. On the same day, T agreed to acquire the business and assets of X and did so. Three days later, the administrators sold T to Q. The sale of the former chattel to T was a breach of X's contract with Y. T argued that in doing no more than entering into the purchase it was merely facilitating the breach by X and not procuring it. Asplin J rejected this (at [257]-[258]):

> *"T knew that the transaction … and the subsequent Transfer would breach the [agreement between X and Y]. In my judgment, that is intentional causative participation. Q and T intended to purchase X's assets … That end was achieved by getting X to … do the very thing it had to T's knowledge promised not to do under the [agreement]. T intended those steps or means to its end of purchasing the assets. All the parties were aware of the content of the [agreement]. Accordingly, in my judgment, T intended to procure the breach of [that agreement]. … It follows that I cannot accept … that T's involvement should be characterised as mere facilitation as opposed to procuration."* *
>
> (*party names substituted)

Despite being questioned by some commentators, these cases represent the latest judicial word on our scenario, and may give Y some encouragement.

Where does this leave Y's claim?

In light of the debate, we now need a definitive ruling at appellate level. In the meantime, perhaps the most that can be said is this:

- If T did nothing, in substance, even to assist X to breach its contract with Y, other than to accept a transfer, then (as in Batts Combe Quarry) T might not be liable; but that will not be the case in most commercial situations.

- If T's conduct involved active steps, with X's obligations to Y in mind, which had a material impact in persuading X to enter into the transaction, then T is likely to be liable.

- If T did no more than engage in straightforward, arm's length commercial negotiations with X, and then enter into the disposal, T may nevertheless be liable; but the court might now need to look at all of the circumstances more carefully in order to decide whether T's conduct involved sufficient participation and causation to justify imposing liability.

- It is no objection in principle that the negotiations were initiated by X rather than T – Salvadori, Mir Steel, and Wolff v Trinity Logistics USA Inc [2018] EWCA Civ 2765 – but that will be a part of the factual context to be considered.

What about Y's failure to protect its rights by registration?

On the current law, this does not give T a defence.

Some have tried to argue that it would be contrary to the land registration regime to allow a claim in tort for interference with a right which could have been registered but was not, with the result that it is not binding on T as a property right.

Others have tried to argue that, as T has acquired the land free from Y's rights as a matter of property law, T has a defence of justification.

Except where T already has a right which is qual or superior to X's contract with Y when T acquires the land (as in Meretz and Edwin Hill & Partners v First national Finance Corp plc [1989] 1 WLR 225), neither argument has yet succeeded. One or both were argued and rejected in Esso, Smith v Morrison [1974] 1 WLR 659, Mir Steel [2014] (esp. at [280]-[282] (justification) and [283]-[295] (land registration)).

What about Y's remedy?

If T *has* committed a tort, then Esso, Hemingway and Crestfort confirm that the court has the power to order T to transfer the land back to X.

Whether the court can be persuaded to do so, rather than leave Y to a claim in damages, will depend on the circumstances.

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March 2020

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