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"*You can't always get what you want*":

inducing a breach of contract by inconsistent dealings

By Markus Esly

Allegations of breaches of contract are bread and butter in commercial disputes, but it is not only the party who breaches the contract who may be liable. Anyone who instigates, or 'induces', a breach of contract may also be on the hook for the damages caused.

In *Northamber PLC* v *Genee World Ltd and Others* [2024] EWCA Civ 428, the Court of Appeal has revisited the test for the tort of inducing a breach of contract. This tort is one of the economic torts recognised by English law. The Court of Appeal held that the trial judge, who had found the defendant not liable, had set the bar too high. The defendant was in fact liable - because it had had dealings with a counterparty that were inconsistent with a pre-existing contract between that counterparty and someone else. The defendant was well aware of the existence of that other agreement. It did not matter that the counterparty had already been habitually breaching that pre-existing contract and needed no further encouragement from the defendant.

This case is a useful reminder that even in the cut-and-thrust of commerce, it is important to tread carefully whenever one has notice of another contract that is inconsistent with the bargain that you are trying to strike.

England has (not) got talent

The origins of the tort of inducing breach of contract are traced back to the decision in *Lumley* v *Gye* (1853) 2 El & Bl 216. Johanna Jachmann-Wagner was a celebrated mezzo-soprano singer. She was the adopted daughter of Albert Wagner, the brother of (the) Richard Wagner. By the 1850s, Ms Jachmann-Wagner had achieved considerable fame across Europe. Rave reviews of her performances included one by a certain Benjamin Lumley:

> "*She appeared: tall, stately, self-possessed, clothed in glittering gilded mail, with her fine fair hair flung in masses upon her neck: a superb air that seemed to give full earnest of victory, and a step revealing innate majesty and grandeur in every movement ... She sang! The sonorous voice, which heralded the mission of the young warrior to his enemies, rang through the house as penetrating and awakening as the summons of a clarion.*"

Mr Lumley was a solicitor by training and an opera manager by profession. In 1852, he wanted to bring Ms Wagner to England, where she had yet to perform. He invited her to sing at Her Majesty's Theatre in London, a venue he was managing. No doubt to Mr Lumley's great delight, Ms Wagner accepted. However Ms Wagner's renown was such that when her upcoming residency became known, Frederick Gye, the manager of the Royal Opera House, quickly approached Albert Wagner, Ms Wagner's manager, to strike a deal to have her sing there instead. Albert Wagner, acting as Ms Wagner's agent, agreed to change the venue. When Ms Wagner cancelled her appearance at Her Majesty's Theatre, Mr Lumley put his legal training to good use. He sued Mr Gye for inducing Ms Wagner's breach of contract.

In a landmark decision, Erle J found that Mr Gye was liable. That liability was founded on the general principle that any person who procures another to commit a wrong is liable as an accessory:

> "*It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.*"

In *Lumley* v *Gye*, the Court effectively created a new tort to ensure that this principle applied to Mr Gye. This was needed because he was not a party to the contract which had been breached. The Court noted that it was plainly unlawful for Ms Wagner to break her contract, and so it was "… *a tortious act of the defendant maliciously to procure her to do so* …". As we will see, the present-day requirements of this tort no longer include what most people would call 'malice'. The focus is (usually) on an intention to secure a gain directly at the claimant's expense.

Back in 1853, Mr Lumley also sued Albert Wagner. As a result of disclosure in those proceedings, a private letter written by Wagner about the whole affair came to light. It caused quite a storm. Wagner had written that 'one only *could* go to England to get money'. This short sentence was taken as an insult to the whole English musical establishment of the time, including by one Henry Forthergill Chorley, a critic and prolific music gossip columnist. Most likely by way of retaliation and to defend England's standing as a cultural centre, he published this (one-star) critique of Ms Wagner's singing:

> "*Considered as a singer, the claims of Mademoiselle Wagner were very meagre. She must have had originally a fine mezzo soprano voice. She can never have learned how to produce, or how to use it. Whether as Romeo, or Tancredi, or Lucrezia Borgia, the insubordinate toughness of the organ could not be concealed. Though she dashed at every difficulty, with an intrepidity only to be found in German singers, none was, in very deed, mastered.*"

Ms Wagner herself left England amidst the litigation without ever appearing on any stage. She did return in 1856 to Her Majesty's theatre in London, belatedly honouring her initial commitment. Her performances were so well received that, it is reported, Queen Victoria exceptionally attended the theatre to hear her sing. Performers were usually expected to go to the Queen, not the other way around.

Northamber v _Genee_ - The facts

It was the same *Lumley* v *Gye* tort that the Court of Appeal revisited in *Northamber* v *Genee* in May of 2024. The case arose out of the breach of an exclusivity arrangement. The claimant, Northamber, was a reseller and distributor of audio-visual equipment. The first defendant, Genee, was the sole importer into the United Kingdom of displays produced by a Chinese company called Hitevision. Northamber and Genee signed a distribution agreement and an exclusivity agreement for these products. The intent was plain: Northamber was to be the sole source of Genee's imported products across the whole of the United Kingdom, subject only to four other named companies to which Genee was permitted to make supplies.

Soon enough, Northamber received reports of numerous other sellers receiving Hitevision displays directly from Genee. Northamber sought to hold Genee to the terms of the exclusivity agreement, but was met with defiance. Genee's director Mr Singh told Northamber that if Northamber were to seek to enforce the exclusivity agreement, he would simply wind Genee up and supply the displays through a new 'phoenix' company. Eventually, that was precisely what Mr Singh did - but not before he procured Genee to serve a purported termination notice of the exclusivity agreement. Northamber then commenced proceedings in the High Court against three defendants: Genee, Mr Singh personally, and a third entity, Interactive Educational Solutions ("**IES**"). IES turned out to be the new company that Mr Singh had said would rise from the ashes and continue selling the Hitevision displays throughout the United Kingdom. Mr Singh's wife was the sole director of IES / his accomplice.

It was against IES that Northamber sought to deploy the *Lumley* v *Gye* tort. Northamber alleged that IES had induced Genee to breach the exclusivity agreement, by ordering Hitevision products from Genee despite the existence of that agreement (of which IES had 'corporate knowledge' not least because Mr Singh had told his wife about it). At first instance, the judge found that Genee had breached the exclusivity agreement, having made significant sales of relevant products to other customers during the term. However, he rejected Northamber's claim against IES for having induced a breach by Genee of the exclusivity agreement. Northamber appealed, on the basis that the judge had erred in finding that there was no 'act of inducement' sufficient to make IES an accessory to the breach and thus liable in tort.

The essential elements of the tort

The Court of Appeal restated the five modern-day requirements for establishing the tort of A inducing a breach by B of a contract with C in their most recent formulation, namely that:

(i) B has to commit a breach of the contract with C;

(ii) A has to induce B to commit that breach by 'persuading, encouraging or assisting' B;

(iii) A needs to know of the contract, and also needs to know that their conduct will lead to the breach;

(iv) A must intend to induce the breach of contract either as an end to itself, or as the means to achieving some further end; and

(v) A must have no lawful justification for their conduct.

These five elements were set out in a decision of the Court of Session (Scotland), per Lord Hodge, concerning an analogous 'delict' in Scottish law, but they now also represent English law since the Court of Appeal approved the formulation in *Kawasaki Kisen Kaisha* v *James Kemball* [2021] EWCA Civ 33.

In *Northamber*, the judge at first instance had found on the evidence that four of these five elements were satisfied, but that there was no inducement. The only act of inducement that Northamber could point to had been the placing by IES of the orders themselves in full knowledge of the existence of the exclusivity agreement. The judge's conclusion was that by the time IES appeared on the scene and was placing these orders, Genee had already made up its mind to breach the exclusivity agreement, and had been doing so of its own volition for some time. He found that "*There is no evidence that, Genee having already breached the Exclusivity Agreement by supplying to other entities in the UK, in breach of the Exclusivity Agreement, needed any inducement or persuasion to supply IES*." The judge thus rejected the contention that a purchaser simply placing an order (even though the purchaser knew that if the order were fulfilled, that would be a breach of another contract) was sufficient to attract accessory liability. He explained that, in his view "*Any supplier receiving a purchase order, unless contractually bound to accept it (and there is no suggestion of that here) is free to accept it or reject it. Inducement or persuasion amounts to much more than simply giving Genee the opportunity to breach the Exclusivity Agreement, which, on the evidence is all that IES's orders did*."

A brief review of the development of economic torts in English law

On appeal, the position was therefore that IES had all the requisite intention and knowledge, but - according to the judge - had not taken sufficient positive action or steps to warrant the imposition of liability in tort by simply placing an order that was inconsistent with the exclusivity agreement. In considering the issue of whether such inconsistent dealings could amount to the necessary inducement, the Court of Appeal went back to first principles and reviewed the case law over the last 150 years.

For almost a hundred years following *Lumley* v *Gye*, inducing a breach of contract was a distinct tort under English law, existing side-by-side with another tort called 'causing loss by unlawful means' (of which more shortly). In 1953, the Court of Appeal in *D.C Thomson & Co Ltd* v *Deakin* [1952] Ch 646 changed the law. Inducing a breach of contract was treated as a subcategory of one single unitary tort of 'interfering with contractual relations'. This so-called unified theory was said to be an exception to the general principle that (per Lord Evershed):

> "*… if a man, acting lawfully and in all respects within his rights, causes, as a result of what he does, loss to another, that other has no remedy, though the loss he suffers is the necessary and inevitable consequence of the acts of the first person.*"

The unified theory, however, is no longer the law today. In 2007, the House of Lords reviewed the law in joint appeals reported as *OBG* v *Allan* / *Douglas* v *Hello!* [2007] UKHL 21. In one of the appeals, OK! Magazine had secured exclusive rights to photographs of the wedding of Michael Douglas and Catherine Zeta-Jones. A paparazzo snuck into the wedding disguised as a waiter and took surreptitious photographs. Hello! magazine then published those. Litigation ensued. Among the claims brought was an allegation by OK! that Hello! had caused it loss by unlawful means. Their Lordships concluded that the unified theory had caused some confusion since a distinction had to be drawn between accessory liability – inducing a breach of contract - and primary liability – causing loss by 'unlawful means'. Lord Hoffmann provided a revised definition of what that means (at 51):

> "*Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.*"

The House of Lords found that Hello! magazine had committed this tort. The precise ambit of causing loss by unlawful means still remains somewhat unclear, but what is clear is that it is a different tort to inducing a breach of contract. One reason why the House of Lords rejected the unified theory was that this approach had moved the focus away from the crucial basis for liability for inducing a breach of contract. As Lord Hoffmann explained at [36], the real question to be asked in relation to the *Lumley* v *Gye* tort 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? The court in Lumley v Gye made it clear that the principle upon which a person is liable for the act of another in breaking his contract is the same as that on which he is liable for the act of another in committing a tort.*"

The essence of the tort: there must be a breach of contract

A breach of contract is the essence of the cause of action. It is impossible to commit the tort without a breach. Their Lordships confirmed this in *OBG* v *Allan* (by the maxim 'no secondary liability without primary liability'), rejecting the contention that it was possible to commit a tort by deliberately and directly interfering with the mere performance of a contract but without causing any actual breach. This notion had previously had the support of both Lord Denning in 1969 (*Torquay Hotel Co Ltd* v *Cousins* [1969] 2 Ch. 106) and Lord Diplock in 1983 (*Merkur Island Shipping Corp* v *Laughton* [1983] 2 A.C. 570).

After *OBG* v *Allan*, interference with the performance of a contract might only constitute a tort if the interference was through unlawful means, and intentionally caused economic loss. In *Allen* v *Pollock* [2020] EWCA Civ 258, Lord Lewison stated that:

> "*It seems to me to be clear that in order for a person to be liable in tort for inducing a breach of contract, the contract in question must be a binding and enforceable contract.*"

A party does not therefore commit the tort of inducing a breach of contract where they make a better offer right before another deal is concluded, and that is so even if that offer is specifically made or pitched so as to scupper the other deal. Neither does a party commit the tort where the contract in question could have been terminated (and persuading someone to exercise a termination right under a contract is lawful), or where the contract was voidable (for instance, because of a misrepresentation or a mistake). A good example is the case of *Proform Sports Management* v *Proactive Sports Management* [2006] EWHC 2903 (Ch), which concerned a dispute over which a company could act as the exclusive agent and representative of, and had certain image rights for, Wayne Rooney, who as the Court remarked was "… *a footballing phenomenon who needs no introduction, even to this Judge*". The agreement in respect of which it was alleged that the tort of 'inducing a breach of contract' had been committed had been signed by Mr Rooney when he was a minor, and since it was voidable at Mr Rooney's election, procuring him to enter into a different agreement with another agency was not a tort.

The mental ingredient: knowledge, intention, and turning a blind eye

The tort also requires proof of intention. Lord Nicholls described this in *OBG* v *Allan* in the following terms (at 191):

> "*… The mental ingredient is an intention by the defendant to procure or persuade ('induce') the third party to break his contract with the claimant. The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough. 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. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. …*"

This mental ingredient confirms both that 'A needs to know of the contract, and also needs to know that their conduct will lead to the breach', and that 'A must intend to induce the breach of contract either as an end to itself, or as the means to achieving some further end'. In *Northamber*, the judge had found that both of these requirements were satisfied as against IES, but it is helpful to say a little more about them.

The defendant does not need to know the precise terms of the contract, but there has to be "… *sufficient knowledge of the terms to know that they were inducing a breach of contract*" as noted in *JT Stratford & Sons Ltd* v *Lindley* [1965] A.C. 269. In that case, the claimant was in the business of hiring out barges to others, or of taking such vessels in for repair. The defendants were trade union officials. They ordered the members of the trade union – most of the watermen working in London at the time – not to man any of the claimant's barges, or to take any vessels to the claimant's repair yards. The House of Lords held that it must have been obvious to the defendants that the claimant's business was conducted through contracts that provided for the timely delivery of barges on hire, and the timely repair of barges at the claimant's yard.

A defendant may also be liable where they have the means to find out if there is a contract in place, but choose to deliberately disregard this. In *OBG* v *Allan*, their Lordships put a gloss on this, holding that such blind-eye knowledge of contracts required a "*conscious decision not to inquire*" rather than a failure to make such inquiries, or to draw such inferences as a reasonable person would have drawn (per Lord Hoffmann at [41]). A defendant can avoid liability if they are able to prove that they considered whether there was a contract or not, and came to the wrong conclusion in good faith – even if that conclusion was "*muddle-headed and illogical*".

My lawyer told me to do it

Another instance where the requisite intention will not be found is where the defendant relied on legal advice. That situation arose in *Allen* v *Dodd & Co* [2020] EWCA Civ 258. Mr Pollock left his employment with Allen, but there were restrictive covenants in his contract of employment, including a non-solicitation clause, with a purported duration of 12 months. Dodd & Co sought to employ Mr Pollock almost immediately after he had terminated his contract. Dodd & Co knew of the restrictive covenants and sought legal advice on whether they were enforceable. The advice they received was in essence 'probably not'. That was good enough for Dodd & Co, who offered Mr Pollock the job. The advice later turned out to be wrong: Mr Pollock lost a case brought by his previous employer. The question was whether Dodd & Co had induced or procured a breach of contract by Mr Pollock. The judge thought not, since Dodd & Co had not turned a blind eye to the issue, but had gone to the trouble of seeking legal advice on which they relied. On appeal, Lewison LJ agreed, since:

> "*… people should be able to act on legal advice, responsibly sought, even if the advice turns out to be wrong. As everyone knows, lawyers rarely give unequivocal advice; and even if they do the client must appreciate that there is always a risk … that the advice will turn out to be wrong.*"

If the advice had been that it was merely arguable that the restrictive covenants were unenforceable then that might not have been enough to avoid liability, but the actual advice received had been that it was more probable than not that no breach would be committed, and that was good enough to avoid liability.

An end of itself, or a means to an end

The requirement of an intention that the breach be either an "*end of itself or a means to achieving some further end*" is the new formulation of the need for the defendant to have acted maliciously, as Erle J had said in *Lumley* v *Gye*. The first of these two alternatives is straightforward. If the defendant wants the contract to be breached, then they will be liable. If they intend to achieve some further end because of the breach, such as making a gain for themselves, then liability will also attach. It is not, however, enough that the breach of contract is just a foreseeable consequence of the defendant's actions. The decision in *Millar* v *Bassey* [1994] E.M.L.R. 44 CA illustrates this. Dame Shirley Bassey broke her contract with a record label since she changed her mind about making a particular album. The record label then had to cancel all its own contracts with the producer and the session musicians. The Court of Appeal in that case held that claims against Dame Shirley for procuring the breaches by the record label of those contracts could proceed, because it would have been obvious to her that other musicians would lose contracted work if she cancelled her recording. In *OBG* v *Allan*, Lord Hoffmann stated that this case was wrongly decided. He held that (at [43]):

> "*On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have*

been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at". … Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end."

Of course, it is no defence to say that the consequence of a breach was merely a foreseeable consequence and not intended, when that consequence is an essential part of what the defendant did intend (what Lord Hoffman called "*simply the other side of the same coin*"). Mr Gye could not have argued that Ms Wagner's failure to appear at Her Majesty's Theatre was merely a foreseeable consequence of his having engaged her to appear at the Royal Opera House, or that he did not 'intend' to injure the competition. His gain would have been their loss, and nothing more is required in such a situation. Beyond establishing intention in this manner, it is not necessary to prove malice or that the defendant acted out of spite.

What amounts to inducement?

This leaves the issue on which the Court of Appeal disagreed with the trial judge in *Northamber*: what amounts to inducement, and do inconsistent dealings suffice?

This issue arose in *British Motor Trade Association* v *Salvadori* [1949] Ch 556. In the immediate aftermath of the Second World War, new cars were in very short supply. To combat and prevent price inflation, the British Motor Trade Association asked that every member of the public who purchased a new car from one of its dealer members enter into a deed of covenant whereby the buyer undertook not to resell the car for a year. The defendants were would-be car dealers who had fallen afoul of the association. In light of how the market was regulated at the time, they found it virtually impossible to secure new cars for sale through authorised channels. Instead, they acquired their stock from persons who had only just bought these vehicles, but who (as the defendants well knew) had also promised not to resell within a year. The defendants then sold those as-good-as-new cars at a hefty mark-up. The British Motor Trade Association went to court to put a stop to this. Counsel for the defendants argued that the tort of inducing a breach of contract had not been committed, since a "*willing seller needs no inducement*" and the defendants had done nothing but agreed a price for the cars. The Court noted the importance of this argument, since if it had merit, it would frequently be necessary to ask which party made the first approach – was it the alleged tortfeasor, or was it the willing contract-breaker who needed "*no inducement*"?

Roxburgh J rejected this suggestion. He found that:

> "*… 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 ... The plaintiffs will succeed even if I have construed the word 'interference' too broadly, because 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.*"

Counsel for IES submitted that *British Motor Trade Association* v *Salvadori* had been wrongly decided, by pointing to a well-known decision concerning the sale of tape recorders - *CBS Songs Ltd* v *Amstrad Consumer Electronics plc* [1988] AC 1013. In that case, CBS and other music rightsholders claimed that Amstrad, by selling Hi-Fi systems with double-deck tape recorders 'facilitated' copyright breaches. The argument was that nobody could listen to two tapes at the same time, and Amstrad's high-speed dubbing technology was plainly aimed at enabling easy copying of commercial cassettes. Indeed, Amstrad's marketing material told customers that "… *you can even make a copy of your favourite cassette*." Everyone's 'favourite cassette' was unlikely to be a home recording but more likely the soundtrack of Dirty Dancing, one of 1988's best-selling albums. Nonetheless, the claim failed. IES's argument was that since Roxburgh J had suggested in the *Salvadori* case that taking steps to 'facilitate' the breach of covenant was enough, this could not be reconciled with Amstrad not being liable, since their tape recorders plainly also 'facilitated' infringements. However, as the Court of Appeal in *Northamber* noted, the Amstrad tape recorders could also be used for perfectly lawful purposes, and it was entirely up to the individual purchasers acting independently of the manufacturer whether they would unlawfully copy any tapes.

IES also argued that the *Salvadori* case had been implicitly overruled by the Court of Appeal's decision in *Kawasaki* v *Kemball*. In that case, Popplewell LJ had noted that conduct could not amount to inducement if its only consequence was to prevent the performance of the contract. There had to be "*persuasion, encouragement and assistance*" to break the contract. IES also relied on statements that there had to be 'causative participation' for there to be inducement, and that this required the defendant's conduct to have operated on the will of the contracting party:

> "*If A's conduct is not capable of influencing a choice by B whether or not to breach the contract, it is not capable of amounting to inducement; it cannot operate on the mind or will of B so as to qualify as causative participation as an accessory to his breach.*"

As the Court of Appeal in *Northamber* found, none of those statements were inconsistent with the decision in *Salvadori*. It was not possible to say that since Genee had already decided to breach the exclusivity agreement, the fact that IES then placed orders at the price that Genee was charging did not amount to inducement, or somehow only facilitated a breach of contract that was not enough to justify liability in tort. Each transaction in breach of the exclusivity agreement required IES to act as a willing purchaser, without which Genee could not have committed the breach. There was, therefore, a sufficient causal connection between IES's conduct and the breach that was the essence of the cause of action. The fact that Genee had already breached the exclusivity agreement with other willing purchasers aside from IES did not provide IES with a defence, since each breach had to be treated separately. In *Kawasaki* v *Kemball,* the Court of Appeal had explained that:

> "*… inconsistent dealings are not some form of inducement which are detached from the principles articulated in OBG v Allan. On the contrary, they are simply an example of conduct which may be capable of fulfilling those criteria because they may constitute a form of persuasion, encouragement or assistance.*"

Conclusion

The Court of Appeal's reasoning in *Northamber* shows that the 'inducement' required to make out the tort of inducing a breach of contract is not only '*persuasion, encouragement or assistance*'. There does not have to be any kind of egging on, or making the breach palatable or attractive, or indeed anything at all in addition to entering into a transaction with a (perfectly willing) counterparty that would, as a matter of fact, breach an existing contract. Provided that the party entering into such inconsistent dealings is aware of that existing contract, it may incur liability in tort. This is not like inducement or reliance in the context of misrepresentation: accessory liability in cases of inconsistent dealings arises because the accessory became a counterparty to the very transaction that causes the breach.