Expansion of Unlawful Means in Conspiracy

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27 October 2022

The Supreme Court recently granted permission to appeal in *Racing Partnership v Done Bros.* For now, the Court of Appeal decision appears to have widened greatly the tort of unlawful means conspiracy. The CA decision establishes that for unlawful means conspiracy the unlawful means can be (a) a breach of contract (b) even where the contract is with a third party rather than the claimant, and the breach is not actionable by the claimant, and (c) even if the breach is completely irrelevant to the claimant and its business.

Only a few facts are relevant:

- Racing Partnership had a contract with the owners of racecourses, allowing Racing Partnership to collect pre-race betting odds from on-course bookmakers (i.e. bookmakers who were physically present at the racecourses) and supply those odds, for a fee, to off-course betting shops which used them as a basis for their own odds;
- SIS, and related companies, ran high street betting shops, and therefore needed information on which to base their betting odds, but wished to avoid paying fees to Racing Partnership;
- instead of obtaining odds from Racing Partnership, SIS obtained them betting websites;
- according to the betting websites' terms and conditions, SIS's commercial use of the websites' odds, and its supplying of the odds to related companies, was a breach of contract.
- Racing Partnership made claims against SIS and its related companies, including a claim for unlawful means conspiracy.

The trial was heard by Zacaroli J. He held that for a civil wrong, such as a breach of contract with a third party not actionable by the claimant, to be capable of constituting the unlawful means in unlawful means conspiracy the wrong must at least be "the instrumentality" by which the claimant is harmed. If the breach of contract is merely incidental to the harming of the claimant that is not enough. To illustrate the distinction, Zacaroli J cited examples of wrongs against third parties being merely incidental to the harming of claimants: the infringement of a patent owned by a third party, from Lord Nicholls in *OBG v Allan*; and the sanctions case of *Lonrho v Shell* (cited by Lord Walker in Total Network). In the case of a patent, the statutory scheme is that remedial relief is available to patentees and exclusive licensees, but not others. In *Lonrho*, it was claimed that Shell and BP had breached sanctions, which prolonged the period during which Lonrho could not use its pipeline. The breaches were not the instrument for inflicting harm and would therefore not qualify as unlawful means for conspiracy. Zacaroli J noted that these examples involved statutory rights and obligations, and said that the same reasoning applies to breach of contract.

Zacaroli J said he could not see how breach of the website's terms and conditions could be described as "the instrumentality" of the harm caused to the claimants, or "directed at the claimants", the two phrases appearing to be intended to have the same or similar meanings. The *unlawfulness*, i.e. the breach of contract, was directly solely at the betting websites. So far as Racing Partnership was concerned, the breach of the websites' terms and conditions was neither here nor there. After all, the websites could have sold the relevant information to SIS, and if they had done so Racing Partnership could have had no complaint.

The Court of Appeal disagreed. According to Arnold LJ, "instrumentality" is different from the question of whether statute has impliedly excluded a remedy in unlawful means conspiracy. Further, discussions of "instrumentality" in the case law tend to conflate two different questions: intention and causation. An important part of the Court of Appeal's reasoning is that the requirement of "instrumentality" is about causation; it is not about intention. The requirement of causation means that the unlawful means must have caused loss to the claimant, rather than being merely the occasion for such loss being sustained. As for the requirement of intention, it is satisfied if the defendant intends to advance its own economic interests at the expense of the claimant's.

Arnold LJ interpreted Zacaroli J's requirement that the unlawful act be "directed at the claimant" as being a third requirement, additional to intention and causation. Arnold LJ described it as a requirement that the unlawful act must be (a) unlawful "as against" the claimant, or at least as against a class of persons of which the claimant is a member, and therefore (b) independently actionable at the suit of the claimant. According to Arnold LJ, since it is not a requirement of unlawful means conspiracy that the unlawful act should be actionable at the suit of a third party, neither can it be necessary that it be independently actionable at the suit of the claimant. According to Arnold LJ, therefore, this third requirement, that the unlawful act be directed at the claimant, does not exist.

Arnold LJ, with whom Phillips LJ agreed, went on to hold that SIS's breach of the betting websites' terms and conditions caused loss to Racing Partnership, and was not merely the occasion for that loss. The contrast between the unlawful act causing the loss and being merely the occasion for the loss indicates that the relevant degree of connection is effective, rather than merely "but for", causation.

There might be difficulty in treating "instrumentality" as solely about causation, and in ignoring whether the unlawful act is (in some sense) directed at the claimant. On this approach, issues of unlawfulness and causation are entirely separate and sequential. Before the issue of causation is reached, the issue of unlawfulness is dealt with once and for all, by a simple finding that breach of contract is sufficient. The enquiry then moves on to causation, and looks for a standard connection, amounting to effective causation, between the act constituting breach of contract and the loss suffered by the claimant. It is as though the element of combination between defendants, i.e. the conspiracy, allows the claimant to be treated as if it were owed the benefit of the obligation which has been breached.

What this approach does *not* require is any connection between the unlawfulness of the unlawful act and the claimant' loss, or (in other words) that that the unlawful act is directed at the claimant. Without any such connection, or directing of the act against the claimant, it is inevitable that the contract may be with a third party rather than the claimant, that the breach need not be actionable by the claimant, and that the breach might be completely irrelevant to the claimant and its business. The requirement of intention is satisfied if the defendant intends to advance its own economic interests at the expense of the claimant's. On the other hand, if all that matters is whether the act which constitutes the breach is the cause, i.e. the effective cause of the loss, it might be doubted whether Arnold and Phillips LJJ reached the correct answer on effective cause.

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John is first and foremost an advocate, with experience in arbitrations and courts in England and Wales (up to and including the UK Supreme Court), Singapore, Hong Kong, the Middle East, and the Caribbean. He is particularly known for his cross-examinations of witnesses, and has carried out successful cross-examinations of a Head of State, an Attorney General, heads of government departments, senior diplomats, oligarchs, underwriters, derivatives traders, fraudsters, and schoolchildren. John has also successfully cross-examined some of the leading experts in fields of biological science, chemistry, engineering, fire investigation, management, medicine, meteorology, seamanship and navigation, naval architecture, underwriting, business valuation, accountancy, and foreign laws.

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