Neutral Citation Number: [2019] EWCA Civ 1160

Case No: A3/2017/3331

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Roth J
[2017] EWHC 2006 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE McCOMBE

- -

Between :

THE SECRETARY OF STATE FOR HEALTH (1)
NHS BUSINESS SERVICES AUTHORITY (2)

Appellants

- and -

SERVIER LABORATORIES LIMITED (1)
SERVIER RESEARCH AND DEVELOPMENT LIMITED (2)
LES LABORATOIRES SERVIER SAS (3)
SERVIER SAS (4)

Respondents

- -
- -

Jonathan Crow QC and **David Drake** (instructed by **Peters and Peters Solicitors LLP**) for the **Appellants**
Kelyn Bacon QC and **Daniel Piccinin** (instructed by **Sidley Austin LLP**) for the **Respondents**

Hearing dates : 11 & 12 June 2019

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Approved Judgment
(Revised for typographical errors, 12 March 2020)

Sir Terence Etherton MR, Lord Justice Longmore and Lord Justice McCombe :

Introduction

1. This is an appeal against paragraph 1 of the order dated 19 July 2017 of Roth J, by which he struck out the claim of the appellant, the Secretary of State for Health and the NHS Business Services Authority (together "the NHS"), that the third respondent is liable for interfering with the NHS's economic interests by unlawful means. For convenience, we make no distinction in this judgment between the third respondent and the other respondents (together "Servier").

2. The factual essence of the claim is that Servier, by practising deceit on the European Patent Office ("EPO") and the English courts, succeeded in obtaining a patent for a pharmaceutical drug and, by an interlocutory injunction, succeeded in delaying the introduction into the UK of a cheaper generic version of the drug, causing the NHS to pay higher prices than would otherwise have been the case. The claim, in law, is for the tort of causing loss by unlawful means ("the unlawful means tort").

3. The correctness of the decision of Roth J turns on the question of law whether an unlawful means tort claim can succeed if the wrongful act of the defendant against a third party public authority does not interfere with the liberty of the public authority to deal with the claimant. Although hotly disputed by Servier, and yet to be determined at the trial, the allegation of deceit is to be assumed to be true for the purposes of determining the question of law on the strike out application.

Factual background

4. Perindopril is a prescription-only ACE (Angiotensin-Converting Enzyme) inhibitor used in the treatment of hypertension and cardiac insufficiency. Since 1990 it has been sold by Servier in the UK under the brand name "Coversyl".

5. Following an application in 2001, Servier was granted a patent by the EPO in 2004 for the alpha crystalline form of the perindopril salt. The patent was then opposed by ten opponents in October-November 2006. The Opposition Division of the EPO decided to maintain the patent for reasons given in a decision of September 2006.

6. In August 2006 Servier obtained an interim injunction against Apotex, a supplier of generic perindopril, restraining it from selling the generic version in the UK.

7. In July 2007 the UK designation of the patent was held to be invalid by Pumfrey J since it lacked novelty, or alternatively was obvious over another existing patent ([2007] EWHC 1538 (Pat)). That decision was upheld in the Court of Appeal in May 2008 ([2008] EWCA Civ 445). In 2009 the EPO Technical Board of Appeal revoked the European patent.

The proceedings

8. In 2011 the NHS commenced proceedings against Servier for damages and interest in excess of £220 million for breaches of competition law and for the unlawful means tort. The unlawful means tort claim is based on the allegation that Servier obtained the patent from the EPO and defended the patent in both the EPO and the English courts on the basis of representations about the novelty of the alpha salt of

perindopril, which Servier knew to be false or were made by Servier with reckless indifference to their truth.

9. The NHS alleges that, because of the wrongful actions of Servier, manufacturers of generic medicines did not enter the market as early as they would otherwise have chosen to do, which would have driven down the price of perindopril, and so the NHS paid too much for its supplies of Servier's product.

10. Servier applied to have the unlawful interference claim struck out because, even assuming that the NHS's factual allegations are true, there was no interference with either the EPO's or the English court's freedom to deal with the NHS, and so an essential element of the tort was missing.

OBG

11. Much of the argument before Roth J and on this appeal has turned on the application of *OBG Ltd v Allan* [2007] UKHL 721, [2008] 1 AC 1, to the alleged facts in the present case. In *OBG* the House of Lords, among other things, considered in considerable detail the history and constituent elements of the unlawful means tort.

12. Three appeals were heard together by the House of Lords, only one of which, *Douglas v Hello! Ltd (No. 3*) involved the unlawful means tort. In that case the claimants were Michael Douglas, Catherine Zeta-Jones and OK! magazine ("OK!"), to which Mr Douglas and Ms Zeta-Jones had granted exclusive rights to publish approved photographs of their wedding. The defendant magazine, Hello! Ltd ("Hello!"), published photographs taken by a surreptitious, unapproved freelance photographer. OK! brought claims against Hello! for beach of confidence and for the unlawful means tort.

13. Lindsay J held Hello! liable for breach of a duty of confidence owed to OK!. He held that photographs taken at the wedding had the necessary quality of confidentiality and that their publication by Hello! had caused loss to OK!. As to whether the images were of a kind to import an obligation of confidence, everyone attending the wedding had been asked not to take or share photographs, and everyone knew that the reason for that request was that OK! had paid for the exclusive rights to publish the photographs. An obligation to keep the information confidential was therefore owed both to OK! and to the Douglases.

14. Lindsay J dismissed the unlawful means claim on the basis that Hello! did not have the necessary intention to cause loss to OK!. He accepted Hello's evidence that they had merely intended to publish an article in their magazine that was of interest to their readers, without intending thereby to damage OK!'s business.

15. The Court of Appeal reversed Lindsay J's decision on breach of confidence on the basis that the obligation attached only to the photographs approved by the Douglases, not to any other photographs that might be taken at the wedding. The Court of Appeal agreed with Lindsay J on the unlawful means tort claim.

16. The House of Lords preferred the reasoning of Lindsay J on confidentiality and rejected the Court of Appeal's analysis as uncommercial. On that basis OK! was entitled to sue Hello! directly for its breach of the duty of confidence owed to OK!.

17. Accordingly, in the event, it was not necessary for the House of Lords to reach a dispositive decision on the unlawful means tort, which it was necessary to deploy as an alternative claim if Hello!'s duty of confidence was owed only to the Douglases, the unlawful means being the breach of that duty of confidentiality to the Douglases, thereby causing loss to OK!. All the members of the appellate committee made it clear, however, that the appeal on that alternative way of putting OK!'s case would have failed. All of them, other than Lord Nicholls, held that it would have failed because breach of that duty of confidentiality did not interfere with the liberty of the Douglases to deal with OK!.

18. Although, as we have said, the House of Lords considered the unlawful means tort and its history in considerable detail, it is sufficient at this stage to mention only the following passages in the leading speech of Lord Hoffmann in order to provide a context for the judgment of Roth J and this appeal. Other passages will be considered in our substantive Discussion section below in the context of the arguments advanced before us by each side.

> "47. The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant. …"
>
> "49. 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. …"
>
> "50. *Lonrho plc v Fayed* [1990] 2 QB 479 was arguably within the same principle as the *National Phonograph Co* case. The plaintiff said that the defendant had intentionally caused it loss by making fraudulent statements to the directors of the company which owned Harrods, and to the Secretary of State for Trade and Industry, which induced the directors to accept his bid for Harrods and the Secretary of State not to refer the bid to the Monopolies Commission. The defendant was thereby able to gain control of Harrods to the detriment of the plaintiff, who wanted to buy it instead. In the Court of Appeal, Dillon LJ, at p 489, referred to the *National Phonograph* case as authority for rejecting an argument that the means used to cause loss to the plaintiff could not be unlawful because neither the directors nor the Secretary of State had suffered any loss. That seems to me correct. The allegations were of fraudulent representations made to third parties, which would have been actionable by them if they had suffered loss, but which were intended to induce the third parties to act in a way which caused loss to the plaintiff. The Court of Appeal therefore refused to strike out the claim as unarguable and their decision was upheld by the House of Lords: see [1992] 1 AC 448."

"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."

"56. Your Lordships were not referred to any authority in which the tort of causing loss by unlawful means has been extended beyond the description given by Lord Watson in *Allen v Flood* [1898] AC 1, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535. Nor do I think it should be. The common law has traditionally been reluctant to become involved in devising rules of fair competition, as is vividly illustrated by *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so. …"

"61. I would only add one footnote to this discussion of unlawful means. In defining the tort of causing loss by unlawful means as a tort which requires interference with the actions of a third party in relation to the plaintiff, I do not intend to say anything about the question of whether a claimant who has been compelled by unlawful intimidation to act to his own detriment, can sue for his loss. Such a case of "two party intimidation" raises altogether different issues."

"129. In view of my conclusion that "OK!" was entitled to sue for breach of an obligation of confidentiality to itself, it is a little artificial to discuss the alternative claim on the footing that the obligation was owed solely to the Douglases. I would have considerable difficulty in reconciling such a hypothetical claim with *RCA Corpn v Pollard* [1983] Ch 135 and *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785. Neither Mr Thorpe nor "Hello!" did anything to interfere with the liberty of the Douglases to deal with "OK!" or perform their obligations under their contract. All they did was to make "OK!'s" contractual rights less profitable than they would otherwise have been.

"136. I would therefore have held that "Hello!" had the necessary intention to cause loss but not that they interfered by unlawful means with the actions of the Douglases."

Roth J's judgment

19. The Judge handed down an impressive, clear and carefully reasoned reserved judgment on 2 August 2017, striking out the unlawful means tort claim. In his judgment he reviewed at length the arguments of the parties and the speeches in the House of Lords in *OBG*. At the heart of his reasoning was his conclusion (at [34]) that *OBG* makes clear that the unlawful means tort comprises three elements: (a) the use of unlawful means towards a third party, (b) which is actionable by the third party, or would be if he suffered loss, and (c) an intention to injure the claimant; that the ratio of Lord Hoffmann's determination of the elements of the tort is in [51] of his speech; and that the whole approach of Lord Hoffmann and the express opinions of Lord Walker, Baroness Hale and Lord Brown emphasised the need to confine the tort within careful limits, and support the view that the unlawful means must affect the third party's freedom to deal with the claimant. He concluded that the unlawful means tort was, therefore, bound to fail.

Grounds of appeal

20. There are three grounds of appeal.

21. Ground 1: The Judge's decision is wrong as a matter of law, in proceeding on the basis that it is part of the ratio of *OBG* that, for the purpose of the unlawful means tort, the unlawful means must invariably interfere with a third party's freedom to deal with the claimant.

22. Ground 2: The ratio of *OBG* (so far as relevant) goes no further than requiring, for the purposes of the unlawful means tort, that the unlawful means must interfere with the actions of a third party in which the claimant has an economic interest.

23. Ground 3: *OBG* does not preclude a claim based on the unlawful means tort in circumstances such as the present, where the defendant practises deceit on a public authority intended to induce, and inducing, the public authority to act so as to cause loss to the claimant.

Discussion

The NHS's case

24. The NHS's fundamental proposition is that the unlawful means tort is not limited to cases in which the wrongful conduct of the defendant affects dealings between the third party and the claimant. In the NHS's skeleton argument for the appeal the NHS's case was that it can extend to a particular type of non-dealing case, namely where the defendant's wrongful act, as in the present case, is directed against a public authority even though there are not and will not be any dealings between the public authority and the claimant. In his oral submissions Mr Jonathan Crow QC, for the NHS, made clear that the NHS's refined case is that the unlawful means tort can extend to any type of non-dealing case which satisfies the requirements specified in the first sentence of [47] of Lord Hoffmann's speech in *OBG*.

25. Very broadly, the structure of Mr Crow's oral submissions, was that (1) there is no authority contrary to the NHS's fundamental proposition just described, as explained

by Mr Crow; (2) *Lonrho v Fayed* [1990] 2 QB 479 (CA) and [1992] 1 AC 448 (HL) supports it, and the other cases prior to *OBG* are not inconsistent with it; (3) *OBG* also supports it; (4) if *OBG* is contrary to it, *OBG* is not binding precedent in relation to the present case since *Douglas v Hello! Ltd (No. 3)* was a "dealing" case and it did not, in particular, address deceit on a public authority of the kind under consideration in the present case and was under consideration in *Lonrho*; (5) if we are left in any doubt about the NHS's fundamental proposition, the strike out application should be dismissed and the claim should proceed to trial.

What did OBG decide?

26. Mr Crow's analysis of *OBG* may be summarised quite briefly as follows. First, he submitted that Lord Hoffmann (at [50]) approved *Lonrho*, and clearly indicated that it fell within the description of the tort by the House of Lords in *Allen v Flood* [1898] AC 1 and *Quinn v Leathem* [1901] AC 495 by describing the rationale of the of the tort at [56] as being "designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour". Mr Crow submitted that *Lonrho* is authority which supports the NHS's case that the unlawful means tort extends to an unlawful act against a third party, intending to cause loss to the claimant, irrespective of whether it affects any dealings between the third party and the claimant. He submitted that there is nothing in *OBG* to suggest that *Lonrho* was being overruled.

27. Secondly, Mr Crow said that the core reasoning of Lord Hoffmann is to be found in the first sentence of [47].

28. Thirdly, he submitted that the Servier has misinterpreted [51] in Lord Hoffmann's speech, the second sentence of which – "[the tort] 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" - is the linchpin of Servier's case in relation to the tort. Mr Crow said that there are three ways of approaching the second sentence of [51] of in the speech of Lord Hoffmann in *OBG*: (1) it is a description of the way in which the [47(a)] test is satisfied in some or possibly all dealing cases; or (2) if it is a free standing requirement additional to what is specified in [47(a)], it only applies to some or possibly all dealing cases but was not making a statement as to what is required in all cases of causing loss by unlawful means; or (3) if it is a free standing requirement additional to what is specified in [47a], and was intended to apply to all cases, it is nevertheless not a binding precedent in relation to the present case, and similar cases involving deceit on a public authority, which, unlike *OBG*, is not a dealing case.

29. In support of the first of those arguments, Mr Crow said that all of the authorities cited by Lord Hoffmann (other than *Lonrho*) were "dealing" cases. He said that that the word "therefore" in the first sentence shows that Lord Hoffmann was seeking to do no more than endorsing his observations on the cases previously cited, including *Lonrho*.

30. In support of the second of those arguments about the proper approach to the second sentence of [51], Mr Crow submitted that, if it is a free standing requirement additional to what is specified in [47(a)], it only applies to some or possibly all dealing cases but is not a statement as to what is required in all cases of causing loss by unlawful means. He reinforced that submission by observing that the sentence is

sandwiched between the general statement of principle in [47] and the equally general description of the tort in [61] as "a tort which requires interference with the actions of a third party in relation to the plaintiff".

31. Mr Crow submitted that the second sentence in [51] is no more than an explanation of the cases mentioned in the immediately succeeding paragraphs, namely *RCA Corporation v Pollard* and *Isaac Oren v Red Box Toy Factory Ltd*. Those were both cases where a bootlegger's activities, although actionable by the owner of the intellectual property rights in question, were held not to be actionable by a contractual licensee entitled to exploit those rights, even if the licensee's profits were reduced by the unlawful activities. That is because, as Mr Crow explained, the commercial relations between the intellectual property owner and the claimant were unaffected.

32. Skilfully and attractively as those submissions were made by Mr Crow, we do not accept them. We consider it is clear that the second sentence of [51] of Lord Hoffmann's speech was intended to lay down an essential ingredient of the unlawful means tort in all cases. In the first place, that is the natural reading of [51]. Secondly, that is consistent with Lord Hoffmann's summary of the earlier case law, which he addressed at the very outset of his analysis of the tort.

33. Lord Hoffmann said (at [6]) that the history of the tort starts with cases like *Garret v Taylor*, (1620) Cro Jac 567 and *Tarleton v M'Gawley* (1794) Peake 270, and that the defendant's liability is "primary, for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others". In those cases that interference caused the potential customer or trader to submit to the defendant's threats and consequently not to buy the plaintiff's stones in *Garret* or to sell the plaintiff's ship palm oil in *Tarleton*.

34. Lord Hoffmann said (in [7]) that those old cases were examined at some length by the House of Lords in *Allen v Flood* [1898] AC 1 and their general principle approved. Disagreeing with the analysis of those cases in *Salmond on Torts* 12th ed (1907) under the heading of "Intimidation", Lord Hoffmann said that "interference with the liberty of others by unlawful means does not require threats."

35. In his commentary on *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 Lord Hoffmann said (at [29]):

> "The Court of Appeal thought that the only way to give a remedy in such cases was by an extension of *Lumley v Gye* along the lines proposed by Lord Lindley [in *Quinn v Leathem*]. Today one can see that an alternative analysis was available: that the person who physically detained the contracting party would indeed incur liability, but not accessory liability under the principle in *Lumley v Gye*. It would be primary liability for intentionally causing loss by unlawfully interfering with the liberty of a third party, under the principle derived from *Garret v Taylor* … and *Tarleton v M'Gawley* …"

36. Lord Hoffmann said (at [46]) that the rationale of the tort was described by Lord Lindley in *Quinn v Leathem* [1901] AC 495, and quoted Lord Lindley's speech at 534- 535, which included the following passages:

> "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with the liberty to deal with him affects him. … But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified… the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done".

37. Thirdly, the reason that Lord Hoffmann concluded that OK!'s unlawful means tort claim was unsustainable was because neither the freelance photographer nor Hello! did anything to interfere with the liberty of the Douglases to deal with OK! or to perform their obligations under their contract with OK! and any other outcome could not be reconciled with *RCA Corporation v Pollard* and *Isaac Oren v Red Box Toy Factory Ltd*: see [129] and [136].

38. Fourthly, Lord Hoffmann was concerned to restrict the ambit and reach of the unlawful means tort by limiting the width of the concept of "unlawful means". For that reason he disagreed (at [59] – [60]) with the approach of Philip Sales and Daniel Stilitz in their article "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411-437. In that article they take a very wide view of what can count as unlawful means, arguing that any action which involves a civil wrong against another person or breach of a criminal statute should be sufficient and that a requirement of a specific intention to "target" the claimant should keep the tort within reasonable bounds.

39. Fifthly, we do not consider that *Lonrho* bears the weight that Mr Crow wishes to place on it and, in particular, that it is pre-*OBG* authority that the unlawful means tort extends to cases where the defendant has not caused any interference in the dealings between the third party and the claimant. We do not agree that Lord Hoffmann approved it as such authority. Mr Crow relied heavily on *Lonrho* on the footing that it was the only "non-dealing" case before the decision of the House of Lords in *OBG* and, analogous to the present appeal, concerned alleged fraud by the defendants on the holder of a public office in order to procure a result detrimental to the business of the plaintiff. It is therefore necessary to address it in some detail. The facts of the case were summarised by Lord Hoffmann at [50], which we have quoted at [18] above.

40. Mr Crow relied particularly on the following statement in the judgment of Ralph Gibson LJ in the Court of Appeal (at 492D):

> "For my part I do not accept that fraudulent misrepresentations used to a public official in the circumstances alleged in this case cease to be unlawful means for the purposes of the tort of unlawful interference with business because there is no identifiable financial loss caused in addition to the fact that a public official has been caused to do by the fraud what otherwise he would not have done, or not to do what otherwise he would have done."

41. Mr Crow emphasised that in the House of Lords Lord Bridge, with whom the other members of the appellate committee agreed, stated (at 470E) that it was for the reasons given in the judgments of the Court of Appeal, in addition to other reasons, that he concluded that it would be inappropriate to strike out the statement of claim.

42. There are several reasons why, contrary to Mr Crow's submission, we do not consider that *Lonrho* is pre-*OBG* authority that the tort of causing loss by unlawful means extends to cases where there is no interference with the liberty of the third party to deal with the claimant, whether that is because the third party is a public body carrying out a "non-dealing" function or for any other reason. Critically, that question was not addressed at all in the judgments of Dillon LJ or Ralph Gibson LJ. The disputed points of law about the ambit of the tort that were in issue in the Court of Appeal concerned two issues: whether (1) an essential element of the tort is that there must be a predominant intention to injure the plaintiffs (there being no such allegation by the defendants in that case) and (2) the unlawful means used against the third party has to be a complete cause of action including the sustaining of identifiable loss by the third party (which was not satisfied on the facts as it was not said that any financial loss was suffered by the Secretary of State).

43. It was that latter question which was being addressed by Ralph Gibson LJ (at 492D) in the passage quoted in [40] above, as is apparent from the following words which precede that quotation:

> "It was also contended that the unlawful means used to the Secretary of State must be itself demonstrably actionable as a complete cause; and that in this case that is not pleaded as an alleged fact, because it is not said that there was any financial loss suffered by the Secretary of State."

44. That was the proposition that Ralph Gibson LJ rejected. He was not addressing a question of principle about whether the tort could apply in the absence of interference with dealings between the third party and the claimant.

45. Only Woolf LJ addressed that issue. Having said that he agreed with both the other judgments and the order proposed, he said (at 493E) that he wished to make clear that he nevertheless had two reservations about the claim. One of those (at 493G) was that:

> "it is not suggested that the misrepresentations caused the Secretary of State to take any action or to desist from any action as against Lonrho. Instead it is alleged that the Secretary of State was influenced not to take action against the Fayeds".

46. Accordingly, the only view expressed in the Court of Appeal in *Lonrho* about an "interference with liberty to deal" ingredient of the unlawful means tort was a recognition that it was or might be an essential requirement.

47. Moreover, the Court of Appeal and the House of Lords in *Lonrho* considered that the statement of claim should not be struck out precisely because the parameters of the tort had not then been finally established. As Dillon LJ said (at 489H), the existence of the tort was recognised but the detailed limits of it had to be refined, and it was

right and essential that this should be done on the actual facts as they emerged at trial rather than on a set of hypotheses, more or less wide, in very comprehensive pleadings. Ralph Gibson LJ (at 492E) said that the tort was a comparatively new tort, of which the precise boundaries had to be established from case to case. In the House of Lords Lord Templeman, with whom Lord Brandon, Lord Goff and Lord Jauncey agreed, said (at 471) that he apprehended that the ambit and ingredients of the tort might thereafter require further analysis and reconsideration by the courts. That was precisely the exercise carried out subsequently by the House of Lords in *OBG*.

48. Returning to *OBG*, we consider, in any event, that it is an incorrect characterisation of Lord Hoffmann's speech to suggest that he was expressing any general approval of everything that was said by the Court of Appeal in *Lonrho*. His comments on that case (at [50]) were addressing the issue, and using *Lonrho* as an illustration of the principle, stated by Lord Hoffmann at [49], that acts against a third party count as unlawful means only if they are actionable by that third party but with the qualification 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. It was in that specific context that he referred, first, to *National Phonograph*, and then to *Lonrho*. In relation to the former, he said that the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment: the fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. Lord Hoffmann said (at [50]) that *Lonrho* "was arguably within the same principle as the *National Phonograph Co* case". Lord Hoffmann's only analysis of *Lonrho* was to say that Dillon LJ seemed to him to have been correct in referring to *National Phonograph* as authority for rejecting an argument that the means used to cause loss to the plaintiff could not be unlawful because neither the directors nor the Secretary of State had suffered any loss. Lord Hoffman continued:

> "the allegations were of fraudulent representations made to third parties, which would have been actionable by them if they had suffered loss, but which were intended to induce third parties to act in a way which caused loss to the plaintiff. The Court of Appeal therefore refused to strike out the claim as an unarguable and their decision was upheld by the House of Lords".

49. It is to be noted that, in any event, even those observations of Lord Hoffmann comparing *Lonrho* with *National Phonograph* were tentative, introduced as they were with the word "arguably".

50. Finally, on the proper interpretation and significance of the second sentence of [51] in Lord Hoffmann's speech in *OBG*, it is clear that Lord Walker, Baroness Hale and Lord Brown all understood Lord Hoffmann to be advocating an essential "interference with liberty to deal" ingredient of the unlawful means tort, and that it was that which distinguished his analysis of the tort from that of Lord Nicholls. They all expressly endorsed it in preferring Lord Hoffmann's analysis to that of Lord Nicholls.

51. Lord Walker said (at [266]): "Lord Hoffmann sees the rationale of the unlawful means tort as encapsulated in Lord Lindley's reference (in *Quinn v Leatham*) to

interference with "a person's liberty or right to deal with others."" He added (at [270]):

> "I do not, for my part, see Lord Hoffmann's proposed test as a narrow or rigid one. On the contrary, that test (set out in para 51 of his opinion) of whether the defendant's wrong interferes with the freedom of a third party to deal with the claimant, if taken out of context, might be regarded as so flexible as to be of limited utility. But in practice it does not lack context. The authorities demonstrate its application in relation to a wide variety of economic relationships."

52. Baroness Hale said (at [302]) that she agreed with the conclusions and reasoning of Lord Hoffmann on what should count as unlawful means, and (at [303]) that any perceived inconsistency between what she said and what he said on that issue was to be resolved in favour of what Lord Hoffmann said. At [306] she said that the common thread underlying both the *Lumley v Gye* and the unlawful means torts is:

> "striking through a third party who might otherwise be doing business with your target, whether by buying his goods, hiring his barges or working with him or whatever. … The common law need do no more than draw the lines that it might be expected to draw: procuring an actionable wrong between the third party and the target or committing an actionable (in the sense explained by Lord Hoffmann …) wrong against the third party inhibiting his freedom to trade with the target."

53. Lord Brown said (at [319]) that he accepted both "the reasoning and conclusions" of Lord Hoffmann on "the precise nature and ambit of the economic tort of causing loss by unlawful means". He described (in [320]) the tort as arising "where the defendant, generally to advance his own purposes, intentionally injures the claimant's economic interests by unlawfully interfering with a third party's freedom to deal with him."

The pre-OBG cases

54. Mr Crow submitted that there were no cases decided before *OBG* which supported an "interference with liberty to deal" ingredient as an essential element of the unlawful means tort. He referred us to *Allen v Flood*, *Quinn v Leathem*, *National Phonograph*, *G.W.K Limited v Dunlop Rubber Company Limited* (1926) 42 TLR 376, *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3, and *Lonrho*.

55. When considering those cases, it is necessary to bear in mind, as Lord Hoffmann observed in *OBG*, that in some of them there was a lack of clarity about the distinction between, on the one hand, the unlawful means tort, and, on the other hand, the *Lumley v Gye* (1853) 2 E&E 216 tort of inducing a breach of contract. For present purposes, however, that confusion does not matter because both involved an interference with the dealings between the plaintiff and a third party. As Lord Hoffmann observed in *OBG* (at [21]), there is no reason why the same facts should not give rise to both accessory liability under *Lumley v Gye* and primary liability for using unlawful means:

> "If A, intending to cause loss to B, threatens C with assault unless he breaks his contract with B, he is liable as accessory to C's breach of contract under *Lumley v Gye* and he commits the tort of causing loss to B by unlawful means".

56. In *Allen v Flood* the Glengall Iron Company employed shipwrights to carry out repairs to the woodwork of a ship. The shipwrights were liable to be dismissed at any time. The company also employed a number of ironworkers to maintain the ship. The ironworkers' trade union objected to the employment of the shipwrights on the grounds that they had previously also worked as ironworkers, and it was the union's policy to prevent shipwrights from undertaking ironwork. The union threatened that all the ironworkers would stop working unless the shipwrights were discharged. The company agreed to the demand, dismissed the shipwrights, and refused ever to employ them again. The shipwrights brought a claim against delegates of the trade union alleging that they had maliciously induced the employer to discharge them. The House of Lords, reversing the Court of Appeal, held that the claim must fail since the delegates had not committed any unlawful act or violated any right of the shipwrights, and it was not sufficient to ground a claim that the delegates' motives were malicious.

57. Mr Crow referred us to a number of passages in the nine speeches in the House of Lords which, he submitted, clearly demonstrated that, at that stage, it was not thought that an interference with the liberty of the third party to deal with the claimant was an essential element of the tort. To take one example, Lord Watson, who was one of the majority, summarised the cause of action as follows (at 96):

> "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye*, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."

58. The entire focus of the case was on the issue whether the jury was entitled to hold the defendant liable in damages on the basis of its three findings that: (1) the defendant had maliciously induced the company to discharge the plaintiffs from their employment; (2) the defendant maliciously induced the company not to engage the plaintiffs; and (3) damage to the extent of £20 was suffered by each of the plaintiffs in consequence: see Lord Davey at 169. At the heart of the debate was the significance of the finding of malice, which (as Lord Davey said at 170) was used in the popular sense of intending to do a mischief to the plaintiffs; and, in particular, whether the defendant's malice or motive was sufficient to give rise to a cause of action by the plaintiffs even though the defendant had not committed any unlawful act against the company and had not procured any unlawful act of the company against the plaintiffs. The question of whether the cause of action required an interference with the liberty

of the company to deal with the plaintiffs was never an issue, as the conduct of the defendant plainly did so and was intended to do so.

59. In *Quinn v Leathem* the plaintiff brought an action alleging wrongful interference with his business by five members of a trade union of fleshers. The members had threatened a butcher with disruption to his long-standing trade if he did not cease buying meat from the claimant, a flesher who was not a member of the trade union. The butcher complied with their demand and the claimant suffered loss. The court held that the defendants were liable for their conspiracy to injure the claimants by procuring the butcher's breach of contract.

60. The House of Lords distinguished *Allen v Flood* on the ground (as pithily described by Lord Shand at 514) that, in that case, the purpose of the defendant was to promote his own trade interest, which it was held he was entitled to do, whereas in *Quinn v Leathem* the purpose of the defendants was to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests. Mr Crow laid particular emphasis on the following general statement of principle by Lord Lindley (at 535), with which, Mr Crow observed, none of the other members of the House of Lords disagreed:

> "If the above reasoning is correct, *Lumley v Gye* was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

61. Reading the speeches as a whole, however, it is clear that *Quinn v Leathem* is good authority in support of Roth J's conclusion in the present case and that an "interference with liberty to deal" ingredient is an essential element of the unlawful means tort. The passage in the speech of Lord Lindley (at 535) on which Mr Crow particularly relied is introduced with a reference to the "above reasoning". In that earlier reasoning (at 534-535) Lord Lindley considered what were the rights of the plaintiff. He described them as follows, so far as relevant:

> "He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately

> affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified - the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

62. The following further passages in the speech of Lord Lindley (at 536-7 and 539) make the same point about that liberty of the plaintiff to deal with others and their liberty to deal with him:

> "The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff - not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage."

> "The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed - no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him …"

63. In *National Phonograph* the plaintiff was a manufacturer of, and dealer in, phonographic equipment. It sold its goods through factors on the understanding that the goods would only be sold on to retailers who undertook not to sell them below a price prescribed by agreement or to sell them to persons on its "suspended list". The defendant was a company that also dealt in phonographic equipment. Through a third party authorised by the defendant to make fraudulent misrepresentations, the defendant acquired a number of the claimant's phonographs from both the plaintiff's factors and retailers and sold them in its stores, as a result of which the plaintiff suffered loss. The court dismissed the claim against the retailer but allowed the claim for an injunction against further procurement of the equipment and damages on the

basis that, by deceiving the plaintiff's factors in order to acquire the equipment, the defendant had wrongfully interfered with the contractual relations between the plaintiff and the factor.

64. Mr Crow described this case as one in which a claim for causing loss by unlawful means succeeded even though there was no interference with the third party's dealings with the plaintiff. He relied on the finding of Buckley LJ (at 360) and Kennedy LJ (at 368) that, on the proper interpretation of the contract between the plaintiff and the factors, there had been no breach of contract by the factors because they had acted innocently and honestly.

65. Contrary to that submission of Mr Crow, *National Phonograph* plainly was a case in which the conduct of the defendant interfered with the dealings of a third party, the factors, with the plaintiff. As Buckley LJ observed (at 360), the defendants knowingly, and for their own ends, induced the factor to sell to them "contrary to the duty which the factor owed to the plaintiffs". The defendants were liable because, as Buckley LJ said (at 361), the defendants "interfered with the contractual relations subsisting between the plaintiffs and the factors, and there was no sufficient justification for such interference." Kennedy LJ said (at 368) that there had been "in a sense, a sale contrary to the terms and intention of the factor's agreement". The fact that there was an implied term in the factor's agreement that the factor would not be liable for breach of contract in the event of an innocent and honest failure by the factor to comply with the terms of the contract did not mean that the conduct of the defendant did not interfere with the liberty of the factor and the plaintiff to engage in, and regulate, dealings between them.

66. In *G.W.K. Limited v Dunlop Rubber Company Limited* (1926) 42 TLR 376 the second claimant, Associated Rubber Manufacturers ("ARM"), had entered into an agreement with the first claimant, GWK, to supply tyres to it at a discount on the understanding that the tyres would be fitted to GWK's cars whenever exhibited and sold with those cars. GWK exhibited two cars duly fitted with the second claimant's tyres but the night before the show the defendant substituted its own tyres onto the car. The question was whether ARM had any cause of action against the defendant. Lord Hewart CJ held that ARM was entitled to judgment on the ground that Dunlop had knowingly interfered with the contractual relations between GWK and ARM.

67. Lord Hewart referred to *Quinn v Leathem* and *National Phonograph* for the relevant law and its proper application. Mr Crow drew our attention to the fact that it was part of the passage in the speech of Lord Lindley quoted in [36] above to which Lord Hewart referred. This does not assist the NHS as the full passage quoted in [36] and [61] above shows. It is also to be noted that the other passage in *Quinn v Leathem* cited by Lord Hewart was the statement of Lord Macnaghten (at 510) that "it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference". As the short report recorded of Lord Hewart's judgment:

> "In his opinion the defendants had knowingly committed a violation of the A.R.M. Company's legal rights by interfering, without any justification whatsoever, with the contractual relations existing between them and the GWK Company".

68. Lord Hoffmann criticised that analysis as an attempt to pigeonhole the case in an extended definition of the *Lumley v Gye* tort but, for present purposes, that does not matter. It is a classic example of "interference with liberty to deal", and that was the way in which Lord Hoffmann in *OBG* (at [25]) thought it ought properly to be classified.

69. *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3 concerned a strike by "Fatstock Officers", who were based in private abattoirs and were employed by the Meat and Livestock Commission to facilitate the payment of subsidies under the EEC Common Agricultural Policy. A dispute arose as to pay, and the Fatstock Officers' union resolved to hold a series of strikes, the effect of which would have been to shut down meat production and export in the affected abattoirs. The plaintiff companies sought an injunction against the union preventing it from interfering with their trade. The claim failed because the Commission was not required to maintain a strike-free system, and so it was not arguable that the defendant had committed an unlawful act - unlawful inducement of the Commission to breach its statutory duties - required for the unlawful means tort. Nor was there an arguable case that the defendants had intended to injure the plaintiffs.

70. Mr Crow relied on paragraph 28 of the judgment of Henry J, in which reference was made to *Stratford v Lindley* (1965) AC 269 and *Merkur Island Shipping Corp v Laughton* [1983 IRLR 218, to neither of which were we referred on the hearing of the appeal. Henry J then continued by saying that the basic ingredients of the tort of interference with the plaintiffs' trade or business by unlawful means were common ground: first, that there should be interference with the plaintiffs' trade or business; secondly, that that should be the unlawful means; thirdly, that that should be with the intention to injure the plaintiffs; and, fourthly, that the action should in fact injure him. Mr Crow relies on the fact that Henry J did not include as a necessary ingredient that there must be an interference with the liberty of dealing between the third party and the plaintiff.

71. We cannot see that the NHS's appeal is advanced by that paragraph of Henry J's judgment. In the first place, it appears that Henry J was merely setting out what the parties themselves had agreed to be the relevant law. Secondly, there was no issue in the case as to whether the conduct of the defendant interfered with the dealings between the Commission and the plaintiffs. It was precisely that interference which caused harm to the plaintiffs and gave rise to the action. Thirdly, Henry J did not refer to *Quinn v Leathem*, which was then the leading authority on the unlawful means tort.

72. Accordingly, the pre-*OBG* cases do not undermine our conclusion that the second sentence of [51] of Lord Hoffman's speech in *OGB* makes interference with the liberty of the third party to deal with the claimant an essential ingredient of the unlawful means tort, and the majority of the other members of the appellate committee agreed with him on that point.

Policy considerations

73. During the course of the oral hearing of the appeal, and in the skeleton arguments, various policy arguments were advanced to us in support of and in opposition to the legal stance taken by each side. It was said, for example, that there is a powerful policy argument that the common law should be able to provide a remedy to persons

who have suffered loss, and were intended to suffer loss, by deliberate deceit of a public body, including the courts themselves, irrespective of whether any there has been any interference with dealings between the public body and those who have suffered loss. It might be said that such a policy argument is of particular force where, as in the present case on the assumed facts, it is the public itself which has suffered, in the form of higher prices paid for a drug than would otherwise have been the case and those higher prices are funded by taxes paid by the public.

74. On the other hand, as we have said, Mr Crow specifically disavowed any special category of public authority victims of the unlawful means tort to which different legal principles should apply. No doubt that is because there is not the slightest hint in the case law of any such special category of third parties.

75. Furthermore, it is clear that an overarching concern of the House of Lords in *OBG* was, as Lord Brown said (at [320]) "to confine [the tort] to manageable and readily comprehensible limits". The House of Lords was concerned to limit and provide certainty as to the ambit and reach of the unlawful means tort, and in particular the number and categories of persons who could claim to have the benefit of the tort, possibly as a result of the same wrongful act of the defendant against the third party. In the present case, for example, as Ms Kelyn Bacon QC, for Servier, observed, on the NHS's approach a question might arise whether the persons claiming the benefit of the tort are confined just to the present claimants or might extend to health insurers and private patients. The whole area of debate between the majority and Lord Nicholls on the unlawful means tort was as to the appropriate way to confine the tort within reasonable bounds. Lord Hoffmann's approach (as he said at [135]), approved by the majority, was to do so by restricting the concept of unlawful means rather than, as Lord Nicholls advocated, by narrowing the concept of intention.

76. Another point made by Ms Bacon was that, in expanding the unlawful means tort as the NHS advocates, there is a danger, in a case like the present, of undermining the strict requirements of the tort of malicious prosecution that the relevant proceedings (here, the proceedings by Servier for an interlocutory injunction) must have been commenced without reasonable and probable cause and with malice: *Willers v Joyce* [2016] UKSC 43, [2018] AC 779. That is a relevant consideration irrespective of the fact that, in the present case, the NHS was not the defendant to any proceedings instituted by Servier. Similarly, there are policy dangers in expanding what would be in some factual situations (such as that in the present case) a judicially created and potentially wide-ranging competition law - an area of the law currently marked by carefully crafted competition statutes and regulations which provide business with certainty.

77. Finally, so far as concerns the NHS's losses in the present case as a result of the interim injunction granted in the Patents Court to Servier against Apotex in August 2006, it was open to the NHS to apply to the Court for Servier to be required to give the NHS an undertaking to pay damages which the NHS might suffer as a result of the interim injunction. Such a procedure had first been suggested by Jacob J in *R (Primecrown) v Medicines Control Agency* [1999] RPC 705 at 708-709. By 2006 the practice of the Patents Court, when an application for an interim injunction in respect of a pharmaceutical product was sought, was to require the patentee to give notice to the Department of Health in case it wished to seek such an undertaking: *SmithKline Beecham plc v Apotex Europe* Ltd [2006] EWCA Civ 658, [2007] Ch. 71 at [76]-[77].

This practice was formalised in all cases in October 2006 by paragraph 5.1A, now 5.2, of Practice Direction 25A, which requires the court, when making an order for an injunction, to consider whether to require an undertaking by the applicant to pay any damages to any person who may suffer loss as a consequence of the order. The 2019 Patents Court Guide para. 10.1 draws attention to paragraph 5.2 of PD25A and states that, when a person seeks an interim injunction which would affect dealings in a pharmaceutical product or medical device purchased by the NHS, the court will consider whether the applicant should give an undertaking in favour of the NHS. The Guide requires the applicant to notify the Department of Health by email of the application when it is made and any order made following the application as soon as practicable. There was no reference to those procedures in the skeleton arguments or oral submissions on this appeal.

78. In view of our conclusions that the second sentence of [51] of Lord Hoffman's speech in *OBG* imposes an essential ingredient of the unlawful means tort and, for the reasons we give below, *OBG* is in that respect a precedent binding on us, it has not been necessary for us to factor into our decision the competing policy arguments which were advanced before us.

OBG as a precedent

79. Mr Crow submitted that, even if the second sentence of [51] in Lord Hoffmann's speech was intended to make interference with liberty of the third party to deal with the claimant an essential ingredient of the unlawful means tort and the majority endorsed that principle, *OBG* is not binding as a precedent in that respect. He said that it was not necessary to the determination of the issue in the case. He referred in that context to the observations of Lloyd LJ about the principle of precedent in *Frozen Value Ltd v Heron* [2012] EWCA Civ 473, [2013] QB 47. The precise facts of that case, which concerned the "competent landlord" provisions of the Landlord and Tenant Act 1954 applicable to the renewal of business tenancies, are not important. The relevant matter that was in issue was whether general statements by the Court of Appeal in the earlier case of *Artemiou v Procopiou* [1966] 1 QB 878, which on their face extended to the situation in issue in *Frozen Value*, were binding as a precedent, even though the factual situation was different. Mr Crow relied particularly on the following statements of Lloyd LJ, with whom Jackson LJ agreed on this issue:

> "117. It is often said that identifying the ratio decidendi of a case depends on ascertaining the material facts of the particular case. Earl of Halsbury LC uttered words of caution in *Quinn v Leathem* [1901] AC 495, 506 which have been much quoted in this context, for example, in *Cross & Harris, Precedent in English Law*, 4th ed (1991), p 43:
>
> > "Now, before discussing the case of *Allen v Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the

> whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

> 118. A L Goodhart expounded the importance for these purposes of determining what were the material facts on which the judge based his conclusion in his essay, "Determining the Ratio Decidendi of a Case", which can be found in his collection, *Essays in Jurisprudence and the Common Law* (1931). That essay gave rise to much debate among academic writers which is usefully discussed in *Cross & Harris, Precedent in English Law*, 4th ed, pp 63–71 and also in *Duxbury, The Nature and Authority of Precedent* (2008), pp 80–87.

> 119. One contribution to the debate which seems to me to be particularly valuable is A W B Simpson's essay, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent", in *Oxford Essays in Jurisprudence* (first series), ed A G Guest (1961), p 148. Professor Simpson (as he later became) focused on the importance of limits on the powers of courts to establish a binding rule of law by virtue of the doctrine of precedent, and on the need, for that purpose, for a criterion of relevance. On this theme he said, at pp 165–166:

> > "When the courts handle precedents they do not treat the formulations of law in earlier cases as exhaustive formulations but as formulations which were sufficiently exhaustive in the context in which they were made, and sufficiently precisely framed. It is not that a judge by convention should state a rule as narrowly as he can when he delivers judgment, but rather that he is not expected to state a rule with the completeness of a statutory draftsman, and thus it is always open to later courts to introduce exceptions which he did not mention—either because such exceptions did not occur to him, or because he deliberately abstained from stating an exception which, as matter of fact, he would have stated and acted upon if the facts of the case before him had been different from what they were."

> 120. That seems to me to be a sound approach consistent with what courts have often said, for example, about not construing a previous judgment as if it were a statutory text, as well as with the emphasis given by (among other judges) the Earl of Halsbury LC to the relevance of the particular facts of a case."

80. Lloyd LJ said (at [116]) that he was unwilling to decide that the *Artemiou* case was a binding precedent "on a point which was not argued in that case, which did not arise on the facts of the case, and which was not referred to in the judgments as being even potentially relevant". He said (at [121]) that the unqualified terms of the judgment of Sir Richard Scott V-C should not be read as ruling on the point, since to take it as deciding the point which did not arise on the facts and was not argued would give the

decision a wider effect than was intended or than was appropriate in the light of observations such as those of the Earl of Halsbury LC and Professor Simpson which Lloyd LJ had quoted.

81. Contrary to Mr Crow's submission, we consider that *OBG* is a binding precedent on the question whether it is an essential ingredient of the unlawful means tort that the defendant's wrongful conduct against the third party interfered with the liberty of the third party to deal with the claimant. The NHS's skeleton argument and Mr Crow in his oral submissions sought to distinguish the factual basis of the present appeal from *Douglas v Hello!* and the cases to which Lord Hoffmann referred in *OBG*, other than *Lonrho*, by characterising them as "dealing" cases. That might have made some sense when the NHS was seeking to carve out "public authorities" (however that expression is defined) as a special category of third party victims. As we have said, however, that categorisation was abandoned by Mr Crow in his oral submissions.

82. There is simply no indication of any kind in *OBG*, in which Lord Hoffmann took the rationale for the tort from the judgment of Lord Lindley in *Quinn v Leathem*, that there is a distinction between so-called "dealing" cases and other cases in this context. The only relevant difference is between those cases where the defendant's wrongful conduct against the third party has interfered with the liberty of the third party to deal with the claimant and those cases where it has not. That is the significance of the exclusive licence cases, such as *RCA Corporation v Pollard* and *Isaac Oren v Red Box Toy Factory*.

83. In the House of Lords OK! argued that Hello! was liable to it for damages for breach of a duty of confidence owed by Hello! to OK! or, if not, Hello! was liable to OK! for the tort of unlawful interference, the unlawful act being publication of the unauthorised photographs in breach of a duty of confidence to the Douglases. Both ways of putting OK!'s case were argued and the speeches address both of them. In the event, the House of Lords held in favour of OK! on the basis of breach of a direct duty of confidence owed by Hello! to OK!, and so a decision on the alternative basis did not strictly arise. As we have already said, all the members of the appellate committee made it clear, however, that the alternative claim would have failed, the reasoning of the majority being that neither the freelance photographer nor Hello! did anything to interfere with the liberty of the Douglases to deal with OK! or perform their obligations under the contract with OK!, the situation being analogous to those in the exclusive licence cases of *RCA Corporation v Pollard* and *Isaac Oren v Red Box Toy Factory*: see Lord Hoffmann at [129] and [136], Lord Walker at [297]–[298], Baroness Hale at [303].

84. Moreover, it is clear that, notwithstanding Lord Walker's observation at [269] that neither the views of Lord Hoffmann nor those of Lord Nicholls were likely to be the last word on the subject, the majority of the members of the appellate committee were intending to provide a comprehensive analysis of the unlawful means tort. Lord Hoffmann undertook a painstaking and detailed analysis of the relevant case law from the beginning of the history of the tort, explaining how confusion had arisen obscuring the difference between the separate torts of causing loss by unlawful means, on the one hand, and the *Lumley v Gye* tort of procuring a breach of contract by a third party, on the other hand, and examining the problems created by the so-called "unified theory" of treating procuring breach of contract as one species of a more general tort of actionable interference with contractual rights.

85. Lord Nicholls put the point in the following way:

> "139. Counsel's submissions were wide-ranging. In particular the House is called upon to consider the ingredients of the tort of interference with a business by unlawful means and the tort of inducing breach of contract. These are much vexed subjects. Nearly 350 reported decisions and academic writings were placed before the House. There are many areas of uncertainty. Judicial observations are not always consistent, and academic consensus is noticeably absent. In the words of one commentator, the law is in a "terrible mess". So the House faces a daunting task.…
>
> 140. I shall consider first the ingredients of the relevant economic torts."

86. Lord Brown said (at [320]) that:

> "This whole area of economic tort has been plagued by uncertainty for far too long. Your Lordships now have the opportunity to give it a coherent shape. This surely is an opportunity to be taken."

87. Accordingly, unlike the situation in *Frozen Value*, the essential ingredients of the unlawful means tort, including specifically the need for the claimant to show that the defendant's conduct interfered with the liberty of the third party to conduct dealings with the claimant, and their application to the facts were the subject of argument in *OBG* and were the subject of both analysis and conclusion in the speeches in the House of Lords even though the need for a dispositive decision did not, in the event, arise.

Post-OBG cases

88. In the course of oral submissions we were referred to some cases subsequent to *OBG* in which the significance of Lord Hoffmann's ingredient of interference with liberty to deal was considered. One was an *ex tempore* decision of HHJ Purle QC, sitting as a judge of the High Court, on a contested application to continue a freezing order and to discharge a search order in *NHS Luton Clinical Commissioning Group v Amanah Health Limited* [2014] EWHC 2943 (QB), which Mr Crow relied upon as in favour of his submissions even though the judge said (at [12]) that Lord Hoffmann had held at [51] of *OBG* that the essential requirements of the tort of interference by unlawful means involved interfering with the liberty of a third party to deal with the victim.

89. Another was the decision of HHJ Waksman QC, sitting in the London Mercantile Court, in *Elite Property Holdings Limited v Barclays Bank plc* [2017] EWHC 2030 (QB) (which subsequently went to the Court of Appeal after the claimant had abandoned its claim in respect of the unlawful means tort), which Mr Crow acknowledged is against the NHS's position on this appeal.

90. Another case was *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024, [2016] Bus LR 145, which concerned a competition law "follow on" damages

claim based on the decision of the European Commission that certain airlines, including British Airways ("BA"), had operated an unlawful cartel contrary to article 101 of the Treaty on the Functioning of the European Union. One of the claims in the proceedings was that BA was liable in damages to the claimants for the unlawful means tort. The Court of Appeal allowed BA's appeal against the first instance judge's refusal to strike out that claim. The Court of Appeal held (at [128]), on the basis of Lord Hoffmann's speech in *OBG*, that, in order to constitute relevant unlawful means, the unlawful acts must affect the freedom of the third party to deal with the claimant and that reflected the rationale for the tort as explained by Lord Lindley in *Quinn v Leathem*. The Court of Appeal held that the unlawful means tort claim should be struck out on a different point, namely the lack of the necessary intention on the part of the defendants.

91. Reference was also made to the decision of the Supreme Court of Canada in *A.I. Enterprises Ltd v Bram Enterprises Ltd* [2014] 1 RCS 177. Although much of the focus in that case appears to have been on whether, for the purposes of the tort, unlawful means should be restricted to acts that would give rise to civil liability to the third party or would do so if the third party suffered loss from them, there was a wide ranging discussion of the tort. What is relevant, for the purposes of this appeal, is that the Supreme Court expressly acknowledged (at [87]) that Lord Hoffmann in *OBG* had prescribed that it is a requirement of the tort that the unlawful means must interfere with the third party's freedom to deal with the claimant. The Supreme Court decided that it would not itself adopt such a requirement in Canadian jurisprudence.

92. None of those cases is a precedent which binds us or which leads us to change the analysis we have set out above. In general, they support our analysis but we do not rely on any of them.

Conclusion

93. For all the above reasons the NHS's unlawful means tort claim was correctly struck out by Roth J in the present case. It was correctly struck out because *OBG* is a binding precedent that such a claim cannot succeed in the absence of interference with the dealings of the English Courts and the EPO with the NHS. Such interference is not and cannot be alleged.

94. We would have come to the same conclusion on the striking out of the claim even if *OBG* was not a binding precedent. The majority of the members of the appellate committee in *OBG* intended to specify interference with liberty to deal as an essential ingredient of the tort in a comprehensive analysis of the unlawful means tort and applied that reasoning to the facts of *Douglas v Hello! Ltd*. Mr Crow accepted that a trial in the present case would not throw up any new facts which might have relevance to the success of the cause of action. There is, therefore, no point in allowing the claim to proceed to a full trial as, unless there is a change of mind on the part of the Supreme Court, *OBG* shows that the claim would ultimately be bound to fail at the highest level.