

Clarifying the test for the tort of causing loss by unlawful means

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Secretary of State for Health and another v Servier Laboratories Ltd and others [2021] UKSC 24

Introduction

1. This article considers the recent Supreme Court decision concerning the economic tort of causing loss by unlawful means. In particular, the court considered whether a necessary element of the tort of causing loss by unlawful means is that the unlawful means affected the third party's freedom to deal with the claimant, which the court referred to as the "dealing requirement".

Background

2. The Defendants developed and manufactured a pharmaceutical product called perindopril which is a medicine used to treat cardiovascular diseases, including high blood pressure, and which was marketed under the trade name Coversyl (the "Drug"). The Defendants applied to the European Patent Office (the "EPO") for a patent for the Drug. This was granted by the EPO in 2004 and it had *inter alia* a UK designation.
3. A number of companies brought opposition proceedings in respect of the patent, but the patent was upheld.
4. The Defendants enforced the patent in the English courts, including by obtaining injunctions against other pharmaceutical companies. The Defendants also successfully resisted an application for summary judgment which was based on an allegation that the Patent was invalid.
5. However, the matter eventually came before Pumfrey J in the High Court who held that patent was invalid because it lacked novelty or, alternatively, because it was obvious. The

Defendants appealed to the Court of Appeal, which upheld the first instance decision. In 2009 the EPO revoked the patent.

6. The present proceedings did not relate to the validity of the patent, but to a somewhat novel argument by the Secretary of State for Health and the NHS (the “Claimants”) for the alleged losses which it suffered as a result of the Defendant’s actions in relation to the patent and subsequent litigation. In particular, the Claimants argued that by registering, defending and enforcing the patent the Defendants delayed other companies producing generic and cheaper versions of the Drug. The Claimants estimated that this had caused them to spend £200 million more on the Drug than it would have done on a cheaper alternative.
7. Arguably, this is not a common example of the tort of causing loss by unlawful means. However, the Claimants argued that the Defendants intentionally caused loss to the Claimants by their actions to the EPO and the UK courts (together the “Third Parties”). The Claimants said the Defendants’ actions amounted to deceit which was the unlawful means because the Defendants made representations about the Drug’s novelty and lack of obviousness which they knew were false or which they were reckless as to the truth of.
8. The Defendants made an application for the claim to be struck out on the basis that the Third Parties had not dealt with the claimant (which was common ground) and therefore the dealing requirement was not satisfied. The application came before Roth J who struck out the claim, finding that *OBG Ltd v Allan* [2007] UKHL 21 provided for a dealing requirement. The Claimants appealed to the Court of Appeal, which upheld Roth J’s decision.

The Decision

9. The Supreme Court had to resolve two issues: (i) does the ratio of *OBG v Allan* provide for a dealing requirement for the tort of causing loss by unlawful means; (ii) if so, should the court depart from *OBG v Allan*?

OBG v Allan

10. The Supreme Court carefully considered the leading judgment of Lord Hoffman in *OBG v Allan*, noting that the House of Lords had been presented with nearly 350 authorities and articles in reaching its decision on an area of law which commentators had considered to be in a “terrible mess”.

11. Given its significance, it is worth repeating the relevant paragraph of Lord Hoffman's judgment:

*“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 the third party and which is intended to cause a 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.**”¹*

12. The Supreme Court unanimously found that the second sentence formed part of Lord Hoffman's ratio and confirmed that the tort did include a dealing requirement. Accordingly, it was necessary for a claimant to prove that the third parties' freedom to deal with the claimant had been affected. Lord Hamblin gave a long list of reasons for this conclusion which included that this was consistent with the rest of Lord Hoffman's judgment and reflected the court's concerns about the need for the scope of the tort to be limited. Further, the other majority judgments in *OBG v Allan* reflected and endorsed the dealing requirement, confirming both that the other judges understood this to be part of Lord Hoffman's decision but also that they concurred that such an element was required.

Should OBG v Allan be departed from?

13. The Defendants argued that the dealing requirement was an undesirable and unnecessary element to the tort because it narrowly restricted claims. The Supreme Court had the ability to depart from the House of Lords decision, and the Defendants argued that it should do so.
14. The Supreme Court is understandably cautious about departing from its previous decisions. Lord Hamblin referred to the 1966 Practice Statement and his decision in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, in which he confirmed that it was important for precedent not to be undermined unless there were appropriate circumstances to do so. Such circumstances may include where a previous decision had led to results which were unjust or contrary to public policy. However, even where there are reasons to depart from the previous decision, the Supreme Court will still need to be satisfied that a departure is the safe and appropriate way to deal with the issue.
15. In the present case, the Claimants could not point to any examples of the decision in *OBG v Allan* causing injustice or real-world problems and therefore there was no reason for the

¹ At [51]

House of Lords' decision to be departed from. Further, the Supreme Court considered that the Claimants had not proposed any suitable alternative way for the law to be developed.

16. The Supreme Court found that *OBG v Allan* should not be departed from. The dealing requirement served a useful purpose in controlling the expansion of the tort of causing loss for unlawful means, which meant that it would not be appropriate to remove this element without considering what alternative controls could be implemented. Further, it was noted that *OBG v Allan* was a relatively recent decision. This was not a case, where policy considerations had changed since the earlier decision.

17. Accordingly, the Claimants' appeal was dismissed.

Conclusion

18. The Supreme Court's decision means that *OBG v Allan* remains good law and that it will be necessary for a third party's freedom to deal with the claimant to have been affected in order for a claim to be brought.

19. This appears to be a clear policy decision, intended to limit the scope of potential claims in relation to the already complex area of economic torts. Had the Claimants succeeded against the Defendants, this would have potentially opened up comparable claims by the other pharmaceutical companies (who had brought the opposition proceedings and the High Court claim) and could lead the way for many similar actions against other parties.

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