Judgments - OBG Limited and others (Appellants) v. Allan and others (Respondents)Douglas and another and others (Appellants) v. Hello! Limited and others (Respondents)Mainstream Properties Limited (Appellants) v. Young and others and another (Respondents)

HOUSE OF LORDS

SESSION 2006-07
[2007] UKHL 21
on appeal from:[2005] EWCA Civ 106
[2005] EWCA Civ 595, [2005] EWCA Civ 861

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

OBG Limited and others (Appellants) v. Allan and others (Respondents)
Douglas and another and others (Appellants) v. Hello! Limited and others (Respondents)
Mainstream Properties Limited (Appellants) v. Young and others and another (Respondents)

Appellate Committee
Lord Hoffmann
Lord Nicholls of Birkenhead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
OBG Ltd and others v. Allan and others
John Randall QC
Alistair Wyvill
Marc Brown
(Instructed by Hammonds)
Douglas and another and others v. Hello! Ltd
Richard Millett QC
Richard Slowe
Paul Stanley
(Instructed by S J Berwin LLP)
Mainstream Properties Ltd v Young and others and another

Respondents:
OBG v. Allan
Gregory Mitchell QC
Paul Greenwood
(Instructed by Reynolds Porter Chamberlain LLP)
Douglas and another and others v. Hello! Ltd
James Price QC
Giles Fernando
(Instructed by M Law)
Mainstream Properties Ltd v. Young and others and another
Gordon Pollock QC
Barry Isaacs

John Randall QC
John de Waal
(Instructed by The Smith Partnership)

(Instructed by Leigh Davis)

Hearing dates:
13, 14, 15, 16, 20, 21, 22, 23, 27 and 28 November 2006

ON

WEDNESDAY 2 MAY 2007

HOUSE OF LORDS
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE
OBG Limited and others (Appellants) v. Allan and others (Respondents)
Douglas and another and others (Appellants) v. Hello! Limited and others (Respondents)
Mainstream Properties Limited (Appellants) v. Young and others and another (Respondents)
[2007] UKHL 21

LORD HOFFMANN

My Lords,

The three appeals

1. These three appeals are principally concerned with claims in tort for economic loss caused by intentional acts

(a) In *OBG Ltd v Allan* [2005] QB 762 the defendants were receivers purportedly appointed under a floating charge which is admitted to have been invalid. Acting in good faith, they took control of the claimant company's assets and undertaking. The claimant says that this was not only a trespass to its land and a conversion of its chattels but also the tort of unlawful interference with its contractual relations. It claims that the defendants are liable in damages for the value of the assets and undertaking, including the value of the contractual claims, as at the date of their appointment. Alternatively, it says the defendants are liable for the same damages in conversion.

(b) In *Douglas v Hello! Ltd* the magazine *OK!* [2006] QB 125 contracted for the exclusive right to publish photographs of a celebrity wedding at which all other photography would be forbidden. The rival magazine *Hello!* published photographs which it knew to have been surreptitiously taken by an unauthorised photographer pretending to be a waiter or guest. OK! says that this was interference by unlawful means with its contractual or business relations or a breach of its equitable right to confidentiality in photographic images of the wedding.

(c) In *Mainstream Properties Ltd v Young* [2005] IRLR 964 two employees of a property company, in breach of their contracts, diverted a development opportunity to a joint venture in which they were interested. The defendant, knowing of their duties but wrongly thinking that they would not be in breach, facilitated the acquisition by providing finance. The company says that he is

liable for the tort of wrongfully inducing breach of contract.

2. It will therefore be seen that the claimants in these three appeals rely upon at least five different wrongs, or alleged wrongs, which they say provide them with causes of action for economic loss: inducing breach of contract (*Mainstream*), causing loss by unlawful means (*Hello!*) interference with contractual relations (*OBG*); breach of confidence (*Hello!*) and conversion (*OBG*). I shall put aside the last two until I come to deal with the facts of the cases in which they arise. But I propose to start with some general observations on the first three torts.

Inducing breach of contract

3. Liability for inducing breach of contract was established by the famous case of *Lumley v Gye* (1853) 2 E & B 216. The court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. As Erle J put it (at p 232):

> "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."

4. For a court in 1853, the difficulty about applying this principle to procuring a breach of contract was that the appropriate action for the wrong committed by the contracting party lay in contract but no such action would lie against the procurer. Only a party to the contract could be sued for breach of contract. The answer, said the court, was to allow the procurer to be sued in tort, by an action on the case. There was a precedent for this mixing and matching of the forms of action in the old action on the case for enticing away someone else's servant: see Gareth Jones "Per Quod Servitium Amisit" (1958) 74 LQR 39. Some lawyers regarded that action as a quaint anomaly, but the court in *Lumley v Gye* treated it as a remedy of general application.

5. The forms of action no longer trouble us. But the important point to bear in mind about *Lumley v Gye* is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong. Wightman J made this clear when he said (at p 238):

> "It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so…"

Causing loss by unlawful means

6. The tort of causing loss by unlawful means has a different history. It starts with cases like *Garret v Taylor* (1620) Cro Jac 567, in which the defendant was

held liable because he drove away customers of Headington Quarry by threatening them with mayhem and vexatious suits. Likewise, in *Tarleton v M'Gawley* (1790) 1 Peake NPC 270 Lord Kenyon held the master of the *Othello*, anchored off the coast of West Africa, liable in tort for depriving a rival British ship of trade by the expedient of using his cannon to drive away a canoe which was approaching from the shore. In such cases, there is no other wrong for which the defendant is liable as accessory. Although the immediate cause of the loss is the decision of the potential customer or trader to submit to the threat and not buy stones or sell palm oil, he thereby commits no wrong. The defendant's liability is primary, for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others.

7. These old cases were examined at some length by the House of Lords in *Allen v Flood* [1898] AC 1 and their general principle approved. Because they all involved the use of unlawful threats to intimidate potential customers, *Salmond* 1st ed (1907) classified them under the heading of "Intimidation" and the existence of a tort of this name was confirmed by the House of Lords in *Rookes v Barnard* [1964] AC 1129. But an interference with the liberty of others by unlawful means does not require threats. If, for example, the master of the *Othello* in *Tarleton v M'Gawley* had deprived the plaintiff of trade by simply sinking the approaching vessel with its cargo of palm oil, it is unlikely that Lord Kenyon would have regarded this as making any difference. Salmond's tort of intimidation is therefore only one variant of a broader tort, usually called for short "causing loss by unlawful means", which was recognised by Lord Reid in *J T Stratford & Son Ltd v Lindley* [1965] AC 269, 324:

   > "the respondent's action [in calling a strike] made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed."

8. The tort of causing loss by unlawful means differs from the *Lumley v Gye* principle, as originally formulated, in at least four respects. First, unlawful means is a tort of primary liability, not requiring a wrongful act by anyone else, while *Lumley v Gye* created accessory liability, dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means requires the use of means which are unlawful under some other rule ("independently unlawful") whereas liability under *Lumley v Gye* 2 E & B 216 requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person: for the relevant principles see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 and *Unilever v Chefaro* [1994] FSR 135. Thirdly, liability for unlawful means does not depend upon the existence of contractual relations.

It is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the claimant's economic expectations. If the African canoeists had been delivering palm oil under a concluded contract of which notice had been given to the master of the *Othello*, Lord Kenyon would no doubt have considered that an a fortiori reason for granting relief but not as making a difference of principle. Under *Lumley v Gye*, on the other hand, the breach of contract is of the essence. If there is no primary liability, there can be no accessory liability. Fourthly, although both are described as torts of intention (the pleader in *Lumley v Gye* used the word 'maliciously', but the court construed this as meaning only that the defendant intended to procure a breach of contract), the *results* which the defendant must have intended are different. In unlawful means the defendant must have intended to cause damage to the claimant (although usually this will be, as in *Tarleton v M'Gawley* 1 Peake NPC 270, a means of enhancing his own economic position). Because damage to economic expectations is sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under *Lumley v Gye*, on the other hand, an intention to cause a breach of contract is both necessary and sufficient. Necessary, because this is essential for liability as accessory to the breach. Sufficient, because the fact that the defendant did not intend to cause damage, or even thought that the breach of contract would make the claimant better off, is irrelevant. In *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 the miners' union said that their intention in calling a strike (inducing miners to break their contracts of employment) was, OPEC-like, to restrict production of coal and thereby raise its price. So far from wishing to cause the mine owners loss, they intended to make both owners and miners better off. The House of Lords said that this made no difference. It was sufficient that the union intended the employment contracts to be broken. It was no defence, as Lord Macnaghten put it (at p 246), that "if the masters had only known their own interest they would have welcomed the interference of the federation".

Allen v Flood: the torts kept separate

9. The Law Lords who formed the majority in *Allen v Flood* [1898] AC 1 showed a clear recognition that *Lumley v Gye* 2 E & B 216 and causing loss by unlawful means are separate torts, each with its own conditions for liability. The difficulty for the plaintiffs in *Allen v Flood* was that, although the jury found that the defendants had acted "maliciously" in procuring the shipyard not to employ them, the defendants had neither used unlawful means nor procured any breach of contract. In the Court of Appeal the plaintiffs had argued successfully that the essence of *Lumley v Gye* was that the defendant had acted maliciously. A breach of contract was not essential. But the majority in

the House of Lords said that liability had been as accessory to the breach of contract. Lord Watson quoted from the judgments in the Court of Queen's Bench and said (at p 106) that they embodied "an intelligible and a salutary principle":

> "He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong he has procured." (p 107)

10. Likewise Lord Herschell said (at p 123) that he was satisfied that —

> "the procuring [of] what was described as an unlawful act - namely, a breach of contract, was regarded as the gist of the action."

11. Lord Macnaghten reserved his opinion on whether *Lumley v Gye* had been rightly decided but there can be no doubt about what principle he thought it laid down (see pp 151-152):

> "[W]here the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights…the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point."

12. When the case was argued before the House of Lords (see Lord Herschell at p. 132), the weight of the plaintiffs' argument was shifted to the *Garret v Taylor* Cro Jac 567 and *Tarleton v M'Gawley* 1 Peake NPC 270 line of authority, which were said to support the proposition that any unjustified interference with trade or employment was actionable. But the majority said that it was essential to liability in those cases that the defendant had injured the plaintiff by using unlawful means against a third party. Lord Watson (at p. 104) described them as "cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means." Lord Herschell said (at p 137):

> "In all of them the act complained of was in its nature wrongful; violence, menaces of violence, false statements."

13. Thus the facts of *Allen v Flood* did not fall within *Lumley v Gye* because no breach of contract or other unlawful act had been procured and did not fall within the unlawful means tort because no unlawful means had been used. The majority did not accept that there was any other basis for liability. In particular, the fact that the defendant deliberately caused damage "maliciously" in the sense of having a bad or improper motive was rejected as a ground for imposing liability. As Lord Watson (whose, views, said Lord Macnaghten in *Quinn v Leathem* [1901] AC 495, 509 "represent the views of the majority better far than any other single judgment delivered in the case")

summed up at p 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."

(Like Lord Macnaghten in *Quinn v Leathem* (at p 510), I think that the reference to *Lumley v Gye* in support of the second cause of action is a slip - "a rare occurrence in a judgment of Lord Watson's" - because it obviously applies to the first cause of action).

14. Some writers regret the failure of English law to accept bad motive as a ground for liability, as it is in the United States and Germany: see for example Dyson Heydon, *Economic Torts* 2nd ed (1978) p 28. But I agree with Tony Weir's opinion, forcibly expressed in his Clarendon Law Lectures on *Economic Torts* (OUP 1997) that we are better off without it. It seems to have created a good deal of uncertainty in the countries which have adopted such a principle. Furthermore, the rarity of actions for conspiracy (in which a bad motive can, exceptionally, found liability) suggests that it would not have made much practical difference.

Quinn v Leathem: the seeds of confusion

15. *Quinn v Leathem* [1901] AC 495 is nowadays regarded as a case on lawful means conspiracy, which established that an improper motive can anomalously found a cause of action which, under the principle in *Allen v Flood*, would not lie against an individual. But this was by no means clear at the time and the case contains some discussion of both *Lumley v Gye* and causing loss by unlawful means. Lord Macnaghten, in a well-known passage (at p. 510), considered the basis of *Lumley v Gye*:

> "I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention - that was not, I think, the gist of the action - but on the ground that a violation of a legal right committed knowingly is a cause of action, and 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."

16. I rather doubt whether Lord Macnaghten's view of what *Lumley v Gye* decided had altered since his opinion in *Allen v Flood* three years earlier. But

the *Quinn v Leathem* formulation is open to the construction that there can be liability for "interfering" with contractual relations without being accessory to any breach of contract. Of course if this is done by unlawful means with the intention of causing damage, it will fall within the unlawful means tort. But Lord Macnaghten made no mention of unlawful means and in any case, under that tort, interference with contractual relations is not a necessary part of the cause of action. Any intentionally inflicted damage will do. The dictum was therefore capable of giving rise to confusion.

17. Lord Lindley went even further and said, at p 535, that the *Lumley v Gye* tort was an example of causing loss by unlawful means:

> "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, or 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."

18. There are two objections to this analysis. First, it reflects neither the reasoning of the court in *Lumley v Gye* nor the analysis of the case in *Allen v Flood*. Secondly, to say that the defendant in *Lumley v Gye* did a wrongful act is circular. It was only wrongful because the court in *Lumley v Gye* said that inducing a breach of contract was tortious. It is circular then to say that it was tortious because it involved a wrongful act.

19. One reason, I think, why it seemed to Lord Lindley and others that *Lumley v Gye* and the unlawful means tort were illustrations of the same principle was that quite often, particularly in cases of torts committed in the course of commercial competition or industrial disputes, both could be regarded as unlawful ways of carrying on the competition or the dispute. That was how it appeared to Bowen LJ in *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598, 614:

> "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence: *Tarleton v. M'Gawley* 1 Peake NPC 270; the obstruction of actors on the stage by preconcerted hissing: *Clifford v. Brandon* 2 Camp 358; *Gregory v. Brunswick* 6 Man & G 205; the disturbance of wild fowl in decoys by the firing of guns: *Carrington v. Taylor* 1 East 571, and *Keeble v. Hickeringill* 11 East 574n; the impeding or threatening servants or

workmen: *Garret v. Taylor* Cro Jac 567; the inducing persons under personal contracts to break their contracts: *Bowen v. Hall* 6 QBD 333; *Lumley v. Gye* 2 E & B 216; all are instances of such forbidden acts."

20. These are, it is true, all instances of unlawful ways of causing economic damage. But that does not mean (and I do not think that Bowen LJ meant) that there is a single principle which makes them all unlawful. Disturbing the wild fowl may have been unlawful because it constituted a nuisance (compare *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468); the people who hissed in the theatre may have been liable for malicious *Quinn v Leathem* conspiracy; *Lumley v Gye* was accessory liability and *Tarleton v. M'Gawley* was true primary unlawful means liability.
21. Furthermore, 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. The areas of liability under the two torts may be intersecting circles which cover common ground. This often happened in 20th century industrial disputes, where, for example, a union would use unlawful means (inducing members to break their contracts of employment) to put pressure upon the employer to break his contract with someone else who was the union's real target. Leaving aside statutory defences, this would make the union liable both under *Lumley v Gye* as accessory to the employer's breach of contract and for causing loss to the target by unlawful means. That does not make *Lumley v Gye* and unlawful means the same tort. But the close proximity of the circumstances in which they could be committed, particularly in industrial disputes, may explain why they were often thought to be manifestations of the same principle.

Muddle: GWK Ltd v Dunlop Rubber Co Ltd

22. Muddle set in with the influential case of *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376. The GWK company made motor cars and the ARM company made tyres. GWK contracted to fit all their new cars with ARM tyres and to show them with ARM tyres at trade exhibitions. On the night before a motor show in Glasgow, Dunlop employees removed the ARM tyres from two GWK cars on the exhibition and substituted Dunlop tyres. The evidence showed that Dunlop knew of ARM's contractual right to have their tyres displayed.
23. Lord Hewart CJ held Dunlop liable. He referred to the dicta of Lords Macnaghten and Lindley in *Quinn v Leathem* [1901] AC 495, which I have already cited, and said, at p 377:

"In [my] opinion the defendants…knowingly committed a violation of

the ARM company's legal rights by interfering, without any justification whatever, with the contractual relations existing between them and the GWK company and [I think] that the defendants so interfered with the intention of damaging the ARM company and that the company [has] been thereby damnified."

24. The case is a good example of intentionally causing loss by unlawful means. There was a finding of an intention to damage the ARM company (as a means of advancing the interests of the Dunlop company, but more of that later) and although there is no express reference to unlawful means in the passage I have cited, it is implied both by the reference to Lord Lindley's statement of principle and the separate finding of trespass to the goods of the GWK company.

25. Lord Hewart, however, made no reference to the tort of causing loss by unlawful means, possibly because the only form in which it was then recognised in the text books was Salmond's tort of intimidation. *GWK Ltd v Dunlop Rubber Co Ltd* was clearly not a case of intimidation. Dunlop had not threatened anyone but had achieved its ends more directly by a trespass against the property of the GWK company. It had nevertheless interfered with the freedom of the ARM company to fit its vehicles with tyres in accordance with its agreement with GWK. Nowadays we would not regard the fact that this was achieved by direct action rather than threats as making any difference: in both cases, intended loss is caused by unlawful means used against a third party. But Lord Hewart looked for a different pigeon hole and the way he formulated his reasons ("committed a violation of the ARM company's legal rights by interfering…with the contractual relations existing between them and the GWK company") shows that he found it in Lord Lindley's extended definition of the *Lumley v Gye* tort. As Sir Jeremy Lever QC pointed out in an elegant essay written nearly 50 years ago, before *Rookes v. Barnard* and *Stratford v. Lindley*, this analysis is unsatisfactory because it "ignores the importance of the means employed and over-emphasises the interest of the victim which is affected": see *Means, Motives and Interests in the Law of Torts*, in *Oxford Essays in Jurisprudence* (ed Guest (1961) at p 53).

Adoption of the unified theory: DC Thomson & Co Ltd v Deakin

26. The law was analysed in great depth by the Court of Appeal in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646, in which argument by eminent counsel extended over nine days. The judgment of Jenkins LJ in particular has directed the course of the law ever since. He fully adopted the theory, originating with Lord Lindley in *Quinn v Leathem* and supported (possibly unintentionally) by Lord Macnaghten's dictum in the same case, that the principle of *Lumley v Gye* extended to all interference with contractual relations by unlawful means. "Direct persuasion or procurement or inducement applied by the third party to

the contract breaker" was "regarded as a wrongful act in itself" and constituted the "primary form" of the tort: see p 694. But other forms of interference with contracts by unlawful means, such as *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 ("a striking example") came within the same tort. From the dicta of Lord Macnaghten and Lord Lindley in *Quinn v Leathem* Jenkins LJ (at p 693) deduced two propositions:

> "First…there may…be an actionable interference with contractual rights where other means of interference than persuasion or procurement or inducement, in the sense of influence of one kind or another brought to bear on the mind of the contract breaker to cause him to break his contract, are used by the interferer; but, secondly, that (apart from conspiracy to injure, which, as I have said, is not in question so far as this motion is concerned) acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach."

27. The unified theory thus treated procuring breach of contract, the old *Lumley v Gye* tort, as one species of a more general tort of actionable interference with contractual rights.

28. My Lords, I think that one reason why the Court of Appeal in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 adopted the unified theory was that there was an inadequate appreciation at that time of the scope, possibly even the existence, of the tort of causing loss by unlawful means. The reasoning of the Court of Appeal proceeded on the footing that no such tort existed. On that assumption, there was clearly a compelling case for creating a cause of action to cover cases in which the defendant used unlawful means to cause damage by interfering with the performance of a contract without any voluntary or even compelled participation on the part of the contracting party. As Evershed MR put it (at pp 677-678):

> "It was suggested in the course of argument by Sir Frank Soskice and by Mr. Lindner, that the tort must still be properly confined to such direct intervention, that is, to cases where the intervener or persuader uses by personal intervention persuasion on the mind of one of the parties to the contract so as to procure that party to break it. I am unable to agree that any such limitation is logical, rational or part of our law. In such cases where the intervener (if I may call him such) does so directly act upon the mind of a party to the contract as to cause him to break it, the result is, for practical purposes, as though in substance he, the intervener, is breaking the contract, although he in not a party to it…At

any rate, it is clear that, when there is such a direct intervention by the intervener, the intervention itself is thereby considered wrongful. I cannot think that the result is any different if the intervener, instead of so acting upon the mind of the contracting party himself, by some other act, tortious in itself, prevents the contracting party from performing the bargain. A simple case is where the intervener, for example, physically detains the contracting party so that the contracting party is rendered unable by the detention to perform the contract."

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. 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*.
30. My Lords, I do not wish to exaggerate the difficulties which have arisen from the adoption of the unified theory. To some extent it is a matter of nomenclature. If, as Jenkins LJ made clear, liability outside the primary form of the tort requires the use of unlawful means, does it matter whether the tort is classified as causing loss by unlawful means or an extension of *Lumley v Gye*? In most cases, the question of taxonomy will make no difference. It is not easy to point to cases which were wrongly decided because the court had adopted the unified theory rather than the two-tort analysis of *Allen v Flood.*
31. Is there something to be said in principle for a unified theory? Tony Weir, in the Clarendon Law Lectures to which I have referred, makes a bravura case for one. Not, it is true, the version adopted in *DC Thomson v Deakin*, which he thinks paid too much attention to the contractual nature of the claimant's rights. Weir would prefer *Lumley v Gye* to be swallowed up by the tort of intentionally causing loss by unlawful means, treating the "seduction" of the contracting party as a species of unlawful means and not distinguishing between interference with contractual rights and damage to economic expectations. The example of what Lord Atkin achieved for negligence in *Donogue v Stevenson* [1932] AC 562 always beckons (see Weir at p. 25). But this too is a form of seduction which may lure writers onto the rocks.
32. In my opinion the principle of accessory liability for breach of contract, the first of Lord Watson's principles of liability for the act of another in *Allen v Flood*, cannot be subsumed in the tort of causing loss by unlawful means (the second of Lord Watson's principles in *Allen v Flood*) simply by classifying

"seduction" as unlawful means. That only adds a pejorative description to a circular argument: see paragraph 18 above. To induce a breach of contract is unlawful means when the breach is used to cause loss to a third party, as in *Stratford v Lindley* [1965] AC 269, but it makes no sense to say that the breach of contract itself has been caused by unlawful means. Philip Sales and Daniel Stilitz, in their illuminating article "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411-437, make it clear at p. 433 that *Lumley v Gye* was "founded on a different principle of liability than the intentional harm tort". It treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so. In this respect it is quite distinct from the unlawful means principle, which is concerned only with intention and wrongfulness and is indifferent as to the nature of the interest which is damaged. I therefore do not think that the two causes of action can be brought within a unified theory and agree with Professor Peter Cane (*Mens Rea in Tort Law* (2000) 20 Oxford JLS 533, 552, that —

> "The search for 'general principles of liability' based on types of conduct is at best a waste of time and at worst a potential source of serious confusion; and the broader the principle, the more is this so. Tort law is a complex interaction between protected interests, sanctioned conduct, and sanctions; and although there *are* what might be called 'principles of tort liability', by and large, they are not very 'general'. More importantly, they cannot be stated solely in terms of the sorts of conduct which will attract tort liability. Each principle must refer, as well, to some interest protected by tort law and some sanction provided by tort law."

33. That said, I would not expect your Lordships to reject the unified theory adopted in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 unless it had serious practical disadvantages. After all, in *Merkur Island Shipping Corpn v Laughton* [1983] 2 AC 570, 607, Lord Diplock said that for 30 years the judgment of Jenkins LJ had been regarded as authoritative and that no benefit was gained by "raking over once again the previous decisions", as I must confess to have done. But I do think that it has been a source of confusion in more than one respect and that it would therefore be better to abandon it and return to the two torts identified by Lord Watson in *Allen v Flood* [1898] AC 1. To these problems created by the unified theory I now turn.

Direct and indirect interference

34. The distinction between the original *Lumley v Gye* tort and its extension in *DC Thomson & Co Ltd v Deakin* has been described in later cases as a distinction between "direct" and "indirect" interference. The latter species requires the

use of independently unlawful means while the former requires no more than inducement or persuasion. But the use of these terms seems to me to distract attention from the true questions which have to be asked in each case. For example, in *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762 the Federation of Retail Newsagents resolved to boycott the Daily Mirror for a week to put pressure on the publishers to allow its members higher margins. The Federation advised their members to stop buying the paper from wholesalers. The publishers claimed an injunction on the ground that the Federation was procuring a breach of the wholesalers' running contracts with the publishers to take a given number of copies each day. Counsel for the Federation (see the judgment of Lord Denning MR at p 781) said that it was a case of indirect inducement because the Federation "did not exert directly any pressure or inducement on the wholesalers: but at most they only did it indirectly by recommending the retailers to give stop orders." Lord Denning said that it did not matter whether one procured a breach of contract "by direct approach to the one who breaks his contract or by indirect influence through others". There seems to me much sense in this observation, although whether it leads to the conclusion that the defendant should be liable in both cases or neither is another matter.

35. In *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138-139, Lord Denning changed his mind. He said that there was a distinction between "direct persuasion", which was "unlawful in itself", and bringing about a breach by indirect methods, which had to involve independently unlawful means. On reconsideration of the *Daily Mirror* case he thought the Federation had "interfered directly by getting the retailers as their agents to approach the wholesalers."

36. This treats the distinction as turning simply upon whether there was communication, directly or through an agent, between the defendant and the contract-breaker. But, like Lord Denning in the *Daily Mirror* case, I cannot see why this should make a difference. If that is what the distinction between "direct" and "indirect" means, it conceals the real question which has to be asked in relation to *Lumley v Gye*: 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. It follows, as I have said, that the relevant principles are to be found in cases such as *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 and *Unilever v Chefaro* [1994] FSR 135. By the test laid down in these cases, the Federation could not

have incurred any liability. They were not encouraging or assisting the wholesalers in breaking their contracts. They were simply advising their members to exercise their own freedom to buy whatever newspapers they liked. The wholesalers had no right to the co-operation of the retailers in enabling them to perform their contracts. Liability could not depend upon the accident of whether the Federation had communicated (directly or through an intermediary) with the wholesalers. The distinction between direct and indirect interference was therefore irrelevant and misleading.

37. The distinction between direct and indirect interference has the further disadvantage that it suggests that the "primary form" of the *Lumley v Gye* tort and the extension of the tort are mutually exclusive. Interference cannot be both direct and indirect. But, as I have said earlier, there is no reason why the same act should not create both accessory liability for procuring a breach of contract and primary liability for causing loss by unlawful means.

38. In my opinion, therefore, the distinction between direct and indirect interference is unsatisfactory and it is time for the unnatural union between the *Lumley v Gye* tort and the tort of causing loss by unlawful means to be dissolved. They should be restored to the independence which they enjoyed at the time of *Allen v Flood*. I shall therefore proceed to discuss separately the essential elements of each.

Inducing breach of contract: elements of the Lumley v Gye *tort.*

39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal McKinnon LJ observed tartly ([1938] 4 All ER 504, 513) that in accepting this evidence the judge had "vindicated [his] honesty…at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.

40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, union

officials threatened a building contractor with a strike unless he terminated a sub-contract for the supply of labour. The defendants obviously knew that there was a contract - they wanted it terminated - but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said (at pp; 700-701)

> "Even if they did not know the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."

41. This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact (see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469). It is not the same as negligence or even gross negligence: in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract. He negligently made the wrong inquiry, but that is an altogether different state of mind.
42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 intended to advance the interests of the Dunlop company.
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". In my opinion the majority of the Court of Appeal

was wrong to have allowed the action in *Millar v Bassey* [1994] EMLR 44 to proceed. 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.

44. Finally, what counts as a breach of contract? In *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138 Lord Denning said that there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach. This dictum was approved by Lord Diplock in *Merkur Island Shipping Corporation* [1983] 2 AC 570, 607-608. One could therefore have liability for interference with contractual relations even though the contracting party committed no breach. But these remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations have been treated as coming within the *Lumley v Gye* tort (like *Dimbleby & Sons v National Union of Journalists* [1984] 1 WLR 67 and 427) are really cases of causing loss by unlawful means.

Causing loss by unlawful means: elements of the tort

45. The most important question concerning this tort is what should count as unlawful means. It will be recalled that in *Allen v Flood* [1898] AC 1, 96, Lord Watson described the tort thus—

> "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…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.

46. The rationale of the tort was described by Lord Lindley in *Quinn v Leathem* [1901] AC 495, 534-535:

> "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 suffer 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."

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. The old cases of interference with potential customers by threats of unlawful acts clearly fell within this description. So, for the reasons I have given, did *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376. Recent cases in which the tort has been discussed have also concerned wrongful threats or actions against employers with the intention of causing loss to an employee (as in *Rookes v Barnard* [1964] AC 1129) or another employer (as in *J T Stratford & Son Ltd v Lindley* [1965] AC 269). In the former case, the defendants conspired to threaten the employer that unless the employee was dismissed, there would be an unlawful strike. In the latter, the union committed the *Lumley v Gye* tort of inducing breaches of the contracts of the employees of barge hirers to prevent them from hiring the plaintiff's barges.
48. In *Stratford*, at pp 329-330, Viscount Radcliffe expressed some disquiet about using the question of whether the actual or threatened strike was or would have been in breach of contract as the touchstone of whether the union or its officers were liable for causing loss by secondary action. These remarks were made in the context of industrial relations, where the use of secondary action has since been comprehensively regulated by statute. In principle, the cases establish that intentionally causing someone loss by interfering with the liberty of action of a third party in breach of a contract with him is unlawful.
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. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss. Likewise, in *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 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. In this respect, procuring the actions of a third party by fraud (*dolus*) is obviously very similar to procuring them by intimidation (*metus*).

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.

52. Thus in *RCA Corporation v Pollard* [1983] Ch 135 the plaintiff had the exclusive right to exploit records made by Elvis Presley. The defendant was selling bootleg records made at Elvis Presley concerts without his consent. This was an infringement of section 1 of the Dramatic and Musical Performers' Protection Act 1958, which made bootlegging a criminal offence and, being enacted for the protection of performers, would have given Elvis Presley a cause of action: see Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 187). The Court of Appeal held that the infringement of the Act did not give RCA a cause of action. The defendant was not interfering with the liberty of the Presley estate to perform the exclusive recording contract which, as Oliver LJ noted (at p 149) was "no more than an undertaking that he will not give consent to a recording by anyone else." Nor did it prevent the Presley

estate from doing any other act affecting the plaintiffs. The bootlegger's conduct, said Oliver LJ (at p 153):

> "merely potentially reduces the profits which [the plaintiffs] make as the result of the performance by Mr Presley's executors of their contractual obligations."

53. It is true that there was no allegation that the defendant intended to cause loss to the plaintiff, although, given that the defendant was selling records in competition with the plaintiff, such an allegation would have been easy to make. But I do not think that it would have made any difference. The wrongful act did not interfere with the estate's liberty of action in relation to the plaintiff.
54. Likewise in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, one of the claimants was the exclusive licensee of a registered design. The defendant sold articles alleged to infringe the design right. The registered owner had a statutory right to sue for infringement. But the question was whether the licensee could sue. In the case of some intellectual property rights, an exclusive licensee has a statutory right of action: see, for example, section 67(1) of the Patents Act 1977. But the exclusive licensee of a registered design has no such right. So the licensee claimed that the defendant was intentionally causing him loss by the unlawful means of infringing the rights of the registered owner. Jacob J rejected the claim on the principle of *RCA v Pollard*. The defendant was doing nothing which affected the relations between the owner and licensee. The exclusive licence meant that the licensee was entitled to exploit the design and that the owner contracted not to authorise anyone else to do so. As Jacob J said, at p 798, para 33:

> "It is true that the exploitation of the licence may not have been so successful commercially by reason of the infringement, but the contractual relations and their performance remain completely unaffected."

55. *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 was an attempt to found a cause of action simply on the fact that the conduct alleged to have caused loss was contrary to law. The defendant's conduct was alleged to be a criminal offence but not actionable by anyone. In this respect it was unlike *RCA v Pollard* and *Isaac Oren v Red Box Toy Factory Ltd*, in which it could at least be said that the conduct was a wrong against someone in contractual relations with the claimant. Lonrho owned and operated a refinery in Rhodesia supplied by a pipeline from the port of Beira. When Rhodesia declared independence in 1965, the UK imposed sanctions which made it unlawful for anyone to supply the country with oil. As a result, the refinery and pipeline stood idle until the independence regime came to an end. Lonrho alleged that Shell had

prolonged the regime by unlawfully supplying Rhodesia with oil through other routes and thereby caused it loss. The House of Lords decided that the alleged illegality gave rise to no cause of action on which Lonrho could rely. Again, there was no allegation that Shell had intended to cause loss to Lonrho, but I cannot see how that would have made any difference. Shell did not interfere with any third party's dealings with Lonrho and even if it had done so, its acts were not wrongful in the sense of being actionable by such third party.

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. As Jacob J said in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, 800:

> "the right to sue under intellectual property rights created and governed by statute [is] inherently governed by the statute concerned. Parliament in various intellectual property statutes has, in some cases, created a right to sue and in others not. In the case of the 1988 Act it expressly re-conferred the right on a copyright exclusive licensee, conferred the right on an exclusive licensee under the new form of property called an unregistered design right (see section 234) but did not create an independent right to sue on a registered design exclusive licensee. It is not for the courts to invent that which Parliament did not create."

57. Likewise, as it seems to me, in a case like *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law.

58. It is not, I think, sufficient to say that there must be a causal connection between the wrongful nature of the conduct and the loss which has been caused. If a trader secures a competitive advantage over another trader by marketing a product which infringes someone else's patent, there is a causal relationship between the wrongful act and the loss which the rival has

suffered. But there is surely no doubt that such conduct is actionable only by the patentee.

59. Sales and Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411-437, 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 ("any act that the defendant is not at liberty to commit") should be sufficient. In their opinion, a requirement of a specific intention to "target" the claimant should keep the tort within reasonable bounds. Tony Weir in the Clarendon Law Lectures "Economic Torts" is of much the same opinion. But other writers consider that it would be arbitrary and illogical to make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant: see Roderick Bagshaw's review of Weir in (1998) 18 Oxford JLS 729-739 at p. 732. I agree.

60. I do not think that the width of the concept of "unlawful means" can be counteracted by insisting upon a highly specific intention, which "targets" the plaintiff. That, as it seems to me, places too much of a strain on the concept of intention. In cases in which there is obviously no reason why a claimant should be entitled to rely on the infringement of a third party's rights, courts are driven to refusing relief on the basis of an artificially narrow meaning of intention which causes trouble in later cases in which the defendant really has used unlawful means. This, as I shall in due course explain, is what may have happened in the *Hello!* case.

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.

62. Finally, there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On

the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.

63. The master of the *Othello* in *Tarleton v M'Gawley* may have had nothing against the other trader. If he had gone off to make his fortune in other waters, he would have wished him well. He simply wanted a monopoly of the local trade for himself. But he nevertheless intended to cause him loss. This, I think, is all that Woolf LJ was intending to say in a passage in *Lonrho plc v Fayed* [1990] 2 QB 479, 494 which has proved controversial:

> "Albeit that he may have no desire to bring about that consequence in order to achieve what he regards as his ultimate ends, from the point of view of the plaintiff, whatever the motive of the defendant, the damage which he suffers will be the same."

64. On the other hand, I think that Henry J was right in *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3 when he decided a strike by civil servants in the Ministry of Agriculture in support of a pay claim was not intended to cause damage to an abattoir which was unable to obtain the certificates necessary for exporting meat and claiming subsidies. The damage to the abattoir was neither the purpose of the strike nor the means of achieving that purpose, which was to put pressure on the government.

Back to the three appeals

65. My Lords, after this somewhat lengthy clearing of the ground I can come to the three appeals before the House. In arriving at these statements of general principle, I have derived great assistance from many who have written on the subject in addition to those whom I have specifically cited and in particular, if what I have said does anything to clarify what has been described as an extremely obscure branch of the law, much is owing to Hazel Carty's book *An Analysis of the Economic Torts* (2001).

Mainstream Properties Ltd v Young

66. I shall start with the *Mainstream* case, because it is the easiest and provides a useful stepping stone to the other two. Mainstream was a development company owned and controlled by Mr Moriarty. He engaged Mr Young as a working director and Mr Broad as a manager and left the business to them. In 2000 they diverted the purchase of development land at Findern in Derbyshire to a joint venture consisting of themselves and the respondent Mr De Winter, who financed the project. Judge Norris QC, in a detailed and lucid judgment, found that this was a breach of their contractual and fiduciary duties to obtain the property for Mainstream.

67. There is no challenge to these findings but the question in this appeal is whether Mr De Winter is liable in tort for inducing Mr Young and Mr Broad to break their contracts. The cause of action is therefore the original *Lumley v*

Gye tort, based on accessory liability. The judge found that Mr Young and Mr Broad could not have acquired the property without Mr De Winter's financial assistance. His participation was therefore causative. He also knew that they were employed by Mainstream and that there was an obvious potential conflict between their duties to Mainstream and their participation in the joint venture. But the judge found that Mr De Winter was a cautious man who had raised the question of conflict of interest with Mr Young and Mr Broad and had received an assurance that there was no conflict because Mainstream had been offered the site but refused it. This was untrue but Mr Winter genuinely believed it. He had been given a similar (and more truthful) assurance concerning another project which Mr Young and Mr Broad had brought to him in the previous year and that, said the judge, "was now proceeding smoothly without objection".

68. On these findings of fact the judge found that Mr Winter did not intend to procure a breach of the contracts of employment or otherwise interfere with their performance. The claim against him was therefore dismissed. This finding was upheld by the Court of Appeal (Sedley and Arden LJJ and Aikens J).

69. In my opinion this case comes squarely within *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479. On the finding of the judge, Mr De Winter honestly believed that assisting Mr Young and Mr Broad with the joint venture would not involve them in the commission of breaches of contract. Nor can Mr De Winter to be said to have been indifferent to whether there was a breach of contract or not, as in *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, or made a conscious decision not to inquire in case he discovered a disagreeable truth. He therefore did not intend to cause a breach of contract and the conditions for accessory liability under the *Lumley v Gye* tort are not satisfied. Nor is there any question of his having caused loss by unlawful means. He neither intended to cause loss to Mainstream nor used any unlawful means.

70. Your Lordships were referred by Mr Randall QC, who appeared for Mainstream, to a number of authorities. But they concerned different questions and none of them cast any doubt upon the proposition that one cannot be liable for inducing a breach of contract unless one intended to cause a breach. For example, in *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 the union undoubtedly intended to cause a breach of the workmen's contracts of service. But they claimed to be entitled to do so because the employer had not adhered to a collective agreement. The Court of Appeal rejected this defence but the case has nothing to do with the requirements of knowledge and intention. In *Greig v Insole* [1978] 1 WLR 302 the International Cricket Conference knew that the cricketers were contracted

to play for Mr Kerry Packer's company but put pressure upon them to withdraw, indifferent as to whether this would cause breaches of contract or not. As Slade J observed, the case fell within the principle of *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691. This case clearly does not. The other cases cited by Mr Randall were similarly concerned with indifference, conscious decision not to inquire or different torts.

71. Finally, Mr Randall said that even if the judge's findings exonerated Mr De Winter from the charge of inducing a breach of the obligation of good faith which required Mr Young and Mr Broad to make the Findern property available to Mainstream, it did not provide any answer to a claim that he had induced a breach of their obligation to give their full time and attention to Mainstream's business. Mr De Winter did not say he had inquired into whether they had asked Mr Moriarty for permission to participate in the joint venture; the evidence was that they had not asked and that if they had, permission would not have been given.

72. This is a point which appeared for the first time in supplemental submissions to the Court of Appeal. The Court of Appeal did not deal with it. There had been no suggestion at the trial that Mainstream was making a separate claim for loss of the services of Mr Young and Mr Broad while they were working for the joint venture. Nothing was put to Mr De Winter about whether he thought they were free to do so. No attempt was made to assess what might have been the damage flowing from such a breach. In my opinion it is not open to Mainstream now to reformulate its case in this way. I would dismiss the Mainstream appeal.

OBG Ltd v Allan

73. OBG Ltd and OBG (Plant and Transport Hire) Ltd (which I shall refer to together as OBG as if they were one company, which for practical purposes they were) carried on business laying and maintaining underground pipes. OBG's main customer was North West Water Ltd ("NWW"), with whom it had a profitable running contract in Civil Engineers Conditions of Contract form for laying and maintaining water pipes, under which it was paid monthly against Engineer's certificates. There were also other customers. OBG employed a specialist sub-contractor called Raymond Centriline Ltd ("Centriline") to line pipes with mortar mix or epoxy resin.

74. In the spring of 1992 OBG had the misfortune to fall out with NWW, which took the view that recent work had been substandard and that it had been overcharged. There was an investigation as a result of which the Engineer "decertified" substantial past payments. NWW set off the decertified sums against money due on current certificates and withheld further orders. The result was that OBG's cash flow dried up and it became insolvent in the sense of being unable to pay its debts as they fell due.

75. OBG attempted to obtain financial support from Centriline, which had an interest in its future not only as a sub-contractor but also as a creditor to the tune of over £1m. In the course of these negotiations Centriline took an assignment from Royal Bank of Scotland of an all-monies debenture secured by the floating charge over OBG's assets and undertaking. The negotiations fell through and on 9 June 1992 Centriline appointed the defendants, Mr Allan and Mr Stevenson, as administrative receivers under the floating charge.
76. Unfortunately OBG had owed nothing to the bank and no secured debt was assigned with the debenture. Centriline was advised by its solicitors that it could tack its own unsecured debt onto the empty debenture. This advice is admitted to have been wrong; indeed, negligent. Centriline was therefore not entitled to appoint receivers. But it and the receivers believed in good faith that the appointment was valid.
77. The receivers went into possession of the premises and chattels owned by OBG and took control of its affairs. NWW elected to treat the insolvency of OBG as an event of default and terminated its contracts. The receivers arranged for the completion of the contracts with other customers. There followed lengthy negotiations with NWW, with the receivers claiming that OBG was owed money under the contracts and NWW asserting cross-claims. Eventually, in November 1993, the receivers agreed in principle to accept £400,000 in full and final settlement.
78. By this time it was clear that OBG was challenging the validity of the appointment of the receivers. The company had gone into creditors' voluntary liquidation on 19 June 1992, ten days after the appointment of the receivers. The liquidator had taken advice on the validity of the appointment. NWW was reluctant to conclude a settlement with the receivers unless the liquidator also became a party. On 19 October 1995 OBG, acting by the liquidator, issued these proceedings, claiming a declaration that the appointment had been invalid and damages. On 15 August 1997 the settlement with NWW was finally executed, with the liquidator concurring.
79. Judge Maddocks QC tried the case in stages. After hearing argument on the validity of the appointment, he made a declaration on 31 January 2001 that it had been invalid. There is no challenge to this ruling. He adjourned the question of what damages, if any, OBG could in consequence claim.
80. There followed some interlocutory hearings and pleadings in which OBG was asked to state the basis on which it made its claim. This was put in various ways, but I need not concern myself with the claims that it would have survived to become profitable or that its assets would have been realised more advantageously in administration, because the judge found on the facts that neither of these things would have happened. Insolvent liquidation was

inevitable.

81. OBG's case, as it emerged, was that by taking control of OBG's assets and undertaking on 9 June 1992, the receivers became liable in damages for their value on that date. Liability was alleged to be strict. The cause of action giving rise to this liability was, as to the land and chattels, trespass and conversion, and as to the contractual claims, wrongful interference with contractual relations. The defendants admitted liability for trespass to the land and conversion of the chattels, but denied that they had unlawfully interfered with the contractual rights. OBG's alternative case was that the receivers had converted the entire assets and undertaking, including the contractual claims. The answer of the receivers was that conversion is a tort against chattels and not against contractual claims.
82. The judge dealt with the case on the basis that if he found that either of these causes of action was well-founded, he was concerned only to value the company's assets and undertaking on 9 June 1992 and then to give credit for the sums for which the receivers had accounted to the liquidator. The rest was damages. He assessed this figure at £1,854,000, most of which was attributable to the difference between the value which he put on the claims against NWW as at 9 June 1992 and the £400,000 for which the company had agreed to settle them five years later.
83. There was no allegation that the receivers had been negligent. Nor was it regarded as necessary to ask whether the assumption of control by the receivers had caused the disparity between the value at that date and the amount subsequently realised - whether, for example, the value of the assets had fallen for a reason which had nothing to do with who was in control of them. The receivers were alleged to be strictly liable, on one basis or the other, for the value of the assets on the day they were appointed. Nothing that happened after that date, or would have happened if they had not been appointed, was regarded as relevant.
84. The judge found that OBG had a cause of action for interference with contractual relations. He referred to Lord Macnaghten's dictum in *Quinn v Leathem* [1901] AC 495 and *Greig v Insole* [1978] 1 WLR 302. It was true that the receivers had not interfered with performance of the contracts, still less caused them to be breached. They had conducted negotiations in the bona fide belief that they were entitled to act on behalf of OBG. But, he said, "that factor serves only to create the interference more directly." He rejected the alternative claim for conversion of contractual rights.
85. The Court of Appeal (Peter Gibson, Mance and Carnwath LJJ) unanimously upheld the judge's rejection of the conversion claim but by a majority (Mance LJ dissenting) allowed the appeal against the finding of wrongful interference

with contractual rights. OBG pursued both causes of action in the appeal to your Lordships' House and I shall deal with them in turn.

Interference with contractual relations

86. The present case amply illustrates the dangers of a broad reading of Lord Macnaghten's reference to "interference" in *Lumley v Gye* and the promiscuous application of cases on accessory liability (such as *Greig v Insole* [1978] 1 WLR 302) to a case which, on any view, can only be a case of primary liability. There are only two possible causes of action: procuring a breach of contract in a way which creates accessory liability under *Lumley v Gye* or causing loss by unlawful means. It is, I think, plain and obvious that the requirements for liability under neither of these torts were satisfied. There was no breach or non-performance of any contract and therefore no wrong to which accessory liability could attach. And the receivers neither employed unlawful means nor intended to cause OBG any loss.

87. I must, however, advert to the grounds upon which Mance LJ dissented on this point. He said, at para 86, that a "central question" was —

> "whether the tort of interference in the execution of a contract is capable of covering the situation of an unauthorised agent, who takes over the handling of a contract with a view to its performance by settlement of mutual contractual rights and obligations but with the result that the 'principal' suffers a loss which he would not otherwise have suffered. The generality of the phrase 'interference in the execution of a contract' has so far only been held to extend to the 'procurement of a breach' or the 'prevention' or 'hindrance' of 'performance'. The tort is not, however, limited to protecting contractual interests, and it must in my view extend to some situations where a person's pre-existing legal position is adversely affected in a more general manner than falls directly within any of the latter phrases."

88. I would first observe that there was no finding that as a *result* of the unauthorized taking over of the handling of the contracts by the receivers, OBG suffered a loss which it would not otherwise have suffered. As the claim was formulated by OBG, this question of causation was treated as irrelevant. The judge simply held the receivers liable for the value of the contracts on 9 June 1992.

89. Secondly, if there had been an investigation of this question, it is doubtful whether a causal connection between the assumption of control and the putative loss could have been established. Mance LJ suggested that the acts of the receivers might have been binding upon OBG, and thereby committed it to a disadvantageous settlement, by virtue of section 232 of the Insolvency Act 1986:

> "The acts of an individual as administrator, administrative receiver, liquidator or provisional liquidator of a company are valid notwithstanding any defect in his appointment, nomination or qualifications."

90. For my part, I rather doubt, as the judge did, whether this section would have applied to the administrative receivers in this case. In *Morris v Kanssen* [1946] AC 460, 471 this House considered the effect of a similar provision relating to the acts of directors, which was then contained in section 143 of the Companies Act 1929. Lord Simonds said:

> "There is, as it appears to me, a vital distinction between (*a.*) an appointment in which there is a defect or, in other words, a defective appointment, and (*b.*) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority."

91. In this case there was no colour of authority for the appointment of the receivers. Although it is unnecessary to express a concluded view, I think that it follows from *Morris v Kanssen* that section 232 would have had no application. If it had, it would have operated for the benefit of the receivers as well as anyone who dealt with them. There is nothing in its language to suggest that its application is in any way restricted. (One may compare the explicit language of many other provisions for the protection of outside parties, such as section 14(6) of the Insolvency Act 1986.)

92. That does not mean that a contract made by a person dealing in good faith with someone purporting to be a receiver, as in this case, can be repudiated by the company. As Lord Simonds went on to point out in *Morris v Kanssen* [1946] AC 460, such a person can rely on the principle of ostensible authority which in company law goes under the name of the rule in *Royal British Bank v Turquand* (1856) 6 E & B 327. In this case, however, it was unnecessary to invoke either that rule or section 232, because NWW refused to rely upon the

ostensible authority of the receivers. They insisted upon the liquidator joining in the settlement. The liquidator was at liberty to refuse, but he did so. In order to establish a causal connection between the conduct of negotiations by the receivers and a loss which the company would not otherwise have suffered, it would be necessary to show that those negotiations somehow prejudiced the position of the company in a way which the liquidator could not repair by insisting that the deal be renegotiated.

93. Be all that as it may, the question remains as to whether there is a tort of the breadth contemplated by Mance LJ, by which a purported agent can be strictly liable for causing the principal loss by making him liable, by virtue of ostensible authority, under a disadvantageous contract. In my opinion, there is not the slightest authority for such a tort. It may be that, in some of the examples of unauthorized agency postulated by Mance LJ, there will be an implied contract which makes him liable for exceeding his actual authority, just as the agent gives an implied warranty of authority to the third party with whom he deals. But there is, in my opinion, no such liability outside contract. Mance LJ says (at [2005] QB 762, 789, para 90) "the tort protects from interference legal interests beyond the merely contractual". If that is a reference to the tort of causing loss by unlawful means, then so it does. But it requires unlawful means and an intention to cause loss, neither of which were present in this case.

Conversion

94. The case in conversion was unanimously rejected by all the judges who heard the *OBG* case and it might therefore be sufficient to say that I agree with them. But the claim was given considerable prominence in argument, with a good deal of reference to North American authorities, and I shall therefore deal with it at greater length.

95. Everyone agrees that conversion is historically a tort against a person's interest in a chattel, being derived from the action for trover, which included a fictitious allegation that the plaintiff had lost the chattel and that the defendant had found it. Secondly, and consistently with its ancient origin, conversion is a tort of strict liability. Anyone who converts a chattel, that is to say, does an act inconsistent with the rights of the owner, however innocent he may be, is liable for the loss caused which, if the chattel has not been recovered by the owner, will usually be the value of the goods. *Fowler v Hollins* (1872) LR 7 QB 616 was a claim for conversion of bales of cotton bought in good faith through a broker in Liverpool. The purchasers were nevertheless held strictly liable. Cleasby J said robustly, at p 639, that:

> "the liability under it is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them

at their peril."

96. Advising the House of Lords on appeal from this decision, Blackburn J was more sympathetic. He said *(Hollins v Fowler* (1875) LR 7 HL 757, 765) that the result was hard on the innocent purchasers but added:

> "If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law."

97. Parliament has responded with legislation such as the Factors Act 1889, section 4 of the Cheques Act 1957 (which protects a collecting bank against liability for conversion of a cheque to which its customer had no title) and section 234(3) of the Insolvency Act, which, in the absence of negligence, protects an administrative receiver who "seizes or disposes of any property which is not property of the company" against liability. But there are no such protective provisions in relation to anything other than chattels. Why not? Obviously because Parliament thought them to be unnecessary. It would never have occurred to Parliament that strict liability for conversion could exist for anything other than chattels. The whole of the statutory modification of the law of conversion has been on the assumption that it applies only to chattels. There has been no discussion of the question of whether an extension of conversion to choses in action would require a corresponding or even greater degree of protection for people acting in good faith.

98. Mr Randall, who appeared for OBG, drew attention to paragraphs 829 and 830 of the Report of the Review Committee on Insolvency Law and Practice (the Cork Committee) (1982) Cmnd 8558, which endorsed a recommendation of the Jenkins Committee that the court should be given power to relieve an invalidly appointed receiver from liability for acts which would have been lawful if the appointment had been valid. Parliament has not given effect to this recommendation. He suggested that this omission should be regarded as somehow justifying a drastic *extension* of the liability of such receivers for conversion. The fallacy in this reasoning does not need to be underlined.

99. By contrast with the approving attitude of Cleasby J to the protection of rights of property in chattels, it is a commonplace that the law has always been very wary of imposing any kind of liability for purely economic loss. The economic torts which I have discussed at length are highly restricted in their application by the requirement of an intention to procure a breach of contract or to cause loss by unlawful means. Even liability for causing economic loss by negligence is very limited. Against this background, I suggest to your Lordships that it would be an extraordinary step suddenly to extend the old tort of conversion to impose strict liability for pure economic loss on receivers who were appointed and acted in good faith. Furthermore, the effects of such a

change in the law would of course not stop there. *Hunter v Canary Wharf Ltd* [1997] AC 655, 694 contains a warning from Lord Goff of Chieveley (and other of their Lordships) against making fundamental changes to the law of tort in order to provide remedies which, if they are to exist at all, are properly the function of other parts of the law.

100. As to authority for such a change, it hardly needs to be said that in English law there is none. I need go no further than Halsbury's Laws of England, 4th ed reissue (1999) vol 45(2), para 547, which says "The subject matter of conversion or trover must be specific personal property, whether goods or chattels." The Law Revision Committee was invited, in 1967, to consider "whether any changes are desirable in the law relating to conversion and detinue." In its 18th Report in 1971 (Cmnd 4774) the Committee treated them both as confined to wrongful interference with chattels. They made various recommendations for changes in the law but none for the extension of conversion to intangible choses in action. On the contrary, the Torts (Interference with Goods) Act 1977, which was passed as a result of their recommendations, defined "wrongful interference with goods" to include "conversion of goods" (section 1) and defined "goods" in section 14(1) to include "all chattels personal other than things in action and money."

101. Mr Randall relied upon authorities in Canada and the United States. I can find no discussion in the Canadian cases of whether a claim for conversion can be made in respect of a chose in action. These cases are analysed by Peter Gibson LJ in his judgment in the Court of Appeal ([2005] QB at pp. 777-778) and I do not think that I should lengthen this judgment by adding to his comments. For the reasons which he gives, I derive no assistance from them. There are certainly cases in the United States which support Mr Randall's submission and which form part of the profligate extension of tort law which has occurred in that country. Perhaps the most remarkable is the decision of the Federal Court of Appeals (9th Circuit) in *Kremen v Online Classifieds Inc* (2003) 337 F 3rd 1024, in which it was held that a publicly-funded company which provided gratuitous registration of internet domain names could be liable in conversion, on a footing of strict liability, for transferring a registered name to a third party, having acted in good faith on the authority of a forged letter. The court held that the domain name was intangible property which could be converted in the same way as a chattel and that the registration company could be liable for its value. I have no difficulty with the proposition that a domain name may be intangible property, like a copyright or trade mark, but the notion that a registrar of such property can be strictly liable for the common law tort of conversion is, I think, foreign to English law.

102. The American cases make a good deal of the line of authority, which

in England goes back to the beginning of the 19th century or earlier, by which a person who misappropriates a document which constitutes or evidences title to a debt can be liable in conversion for the face value of the document. Surely, it was said, in such cases the action is in substance for conversion of the debt, a chose in action, and if that is right, then why not have conversion of any chose in action?

103. But the document cases have been recognised to be an anomaly created by the judges to solve a particular problem, namely that a person who wrongfully secures payment of money due to another cannot be sued by the true creditor for money had and

SOURCE - http://www.bailii.org/uk/cases/UKHL/2007/21.html