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It's a Conspiracy! Or is it? The Difficulty With the Economic Torts as 'Alternative' Causes of Action for Competition Law Damages Actions in UK Courts

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ABSTRACT

- Damages actions brought in UK courts under either EU or UK competition law generally invoke breach of statutory duty as the cause of action.
- Attempts have been made by claimants in recent years, however, to use the economic torts of conspiracy by unlawful means and unlawful interference as alternative causes of action.
- While theoretically these torts are – in certain cases – valid causes of action for competition law damages actions, in practice they are more difficult to invoke than breach of statutory duty.
- Ultimately, for policy reasons, it is unlikely that such torts will be allowed to constitute valid causes of action in competition cases where an action for breach of statutory duty is not available.

INTRODUCTION

The cause of action upon which damages actions brought in the UK courts under either EU or UK competition law are generally founded, is breach of statutory duty¹. In two cases from recent years, however – both follow-on actions brought against parties held under regulatory decisions to have partaken in illegal cartels – an attempt has been made to invoke the torts of conspiracy by unlawful means and/or unlawful interference, as causes of action. This article asks why a claimant might attempt to found an action in unlawful means conspiracy or unlawful interference, in addition to, or as an alternative to, an action for breach of statutory duty, when bringing a damages action against a cartel. With regard to both unlawful means conspiracy and unlawful interference, it will be noted that the dual requirements of showing the necessary intent and establishing the unlawful means, result in these torts being considerably more complicated to invoke as a cause of action than breach of statutory duty in a competition law damages action. It will be suggested that unlawful interference is particularly tricky to successfully invoke because of the additional requirement of having to demonstrate interference with the freedom of a third party to deal with the claimant and because “unlawful means” are defined more narrowly for the purposes of this tort than is the case for unlawful means conspiracy. It will be concluded, however, that even if either of these torts could in theory be used as a cause of action in a competition law damages action, it is precisely the cases in which they would be attractive to a claimant i.e. those where an action for breach of statutory duty is unavailable, that the use of either tort will come up against insurmountable obstacles. Crucially, it is doubtful that under English law, the breach of the law of a foreign country could constitute “unlawful means” for the purposes of either unlawful means conspiracy or unlawful interference. Finally, the implications of the recent referendum held in the UK on EU membership for the topic of this article will be briefly considered.

BREACH OF STATUTORY DUTY

The principal cause of action used under English law, for damages actions brought under either UK or EU competition law, is generally breach of statutory duty,² with the statute in question either being the Competition Act 1998 or the European Communities Act 1972.^{3 4}

¹ While this is the case for all the UK jurisdictions, this article focuses upon the position under English tort law.

² *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130.

³ See R Whish and D Bailey, *Competition Law* (7th edn, 2012) 309.

⁴ On breach of statutory duty generally see *inter alia*: S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, 2013) 294-310; C Witting, *Street on Torts* (14th edn, 2015) 498-517; W Peel & J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, 2014) 207-229; and M Jones *et al* (eds), *Clerk & Lindsell on Torts* (21st edn, 2014) 609-655.

Two of the key issues which have commonly arisen with regard to the tort of breach of statutory duty generally, are first, whether the statute that has been breached was intended to create a right in damages in the event of a breach and secondly, if so, to which class of persons is such an action available, if indeed there is a limitation upon who has a right of action.⁵ So to bring an action for damages based upon a breach of statute, a claimant must demonstrate that the statute in question was intended to create a right in damages – and that furthermore, such a right is available to either a particular class of persons of which he or she is a member, or in favour of the public generally.⁶

The courts have tended to be quite restrictive in recognising rights to damages using these criteria, indeed Deakin *et al* suggest that: “...the action for breach of statute has declined to the point where the courts scarcely recognise the possibility of an Act or regulation creating a new private action unless it does so explicitly”.⁷ That being the case, the relatively unquestioning way in which breach of statutory duty has been recognised as a ground of action for damages actions in the UK courts under either UK or EU competition law, arguably represents something of an anomaly in terms of the application of this particular tort.

Beyond this general observation, however, perhaps the most curious aspect of this widespread ‘acceptance’ over time of breach of statutory duty as the appropriate cause of action for damages actions under EU competition law, is the more specific one that the case of *Garden Cottage Foods Ltd v Milk Marketing Board*⁸ – which has repeatedly been cited as the authority that breach of statutory duty is the appropriate cause of action – actually concerned an application for injunctive relief rather than damages, with the application having been refused **on the assumption** that an action for damages would be available.⁹ Specifically, it is Lord Diplock’s comment that “[a] breach of the duty imposed by article 86 not to abuse a dominant position in the Common Market or in a substantial part of it can thus be categorised in English law as a breach of statutory duty that is

⁵ Frequently this will not be immediately obvious in which case it may be a question of looking at parliamentary intent (Peel and Goudkamp, *ibid* 209). Additionally, the damage sued for must be a type of damage which the statute was designed to protect against (see Deakin *et al*, *ibid* 307; *Gorris v. Scott* [1874] LR 9 Ex 125). The leading case on whom, if anyone, a breach of statute creates a right of action in favour of is that of *Cutler v Wandsworth Stadium* [1949] AC 398.

⁶ See *Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)* [1982] AC 173; and *Morrison Sports Ltd v Scottish Power UK plc* [2010] UKSC 37, [2010] 1 WLR 1934.

⁷ Deakin *et al.*, (n 4) 298.

⁸ (n 2)

⁹ For this reason doubt did remain for quite some time as to whether the case could correctly be cited as authority for the existence of a right to damages. See M Hoskins, ‘Garden Cottage revisited: the availability of damages in the national courts for breaches of the EEC competition rules’ (1992) 13 *European Competition Law Review* 6, 257-265; and R Whish ‘The enforcement of EC competition law in the domestic courts of Member States’ (1994) 15 *European Competition Law Review* 2, 60-67.

imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty”¹⁰ that has repeatedly been cited as authority for the proposition that a breach of EU competition law (in that case Article 86 EC (now 102 TFEU)) represents a breach of statutory duty.

It might also be suggested that with regard to the above-mentioned requirements of the tort of breach of statutory duty, it is difficult to identify any firm parliamentary intent under the piece of legislation which incorporates what are now Articles 101 and 102 TFEU into UK law – the European Communities Act 1972 – that breach of either provision should give rise to an action in tort. It would, furthermore, surely be bordering on absurd to suggest that Parliament intended under the 1972 Act that a breach of **any** provision of EU law should give rise to an action in tort.

Nonetheless, the fact is that breach of statutory duty has for many years now, been virtually taken as read by UK courts as constituting a perfectly sound, and indeed the ‘normal’ cause of action for damages actions under either UK or EU competition law. Furthermore, there has been no suggestion that the right to raise an action in respect of a breach of either Articles 101 or 102 TFEU or the Chapter I or II prohibitions of the Competition Act 1998, is limited in any way to a specific class of persons. On the contrary, section 47A of the Competition Act 1998, simply provides that damages actions can be brought by “...a person who has suffered loss or damage...”.¹¹ Any limitation of the right to raise an action for damages under EU competition law would also be completely at odds with the jurisprudence of the European Court of Justice which famously declared in the case of *Manfredi*¹² that: “...any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC”.¹³

The upshot of all of this, is that although parties seeking to bring damages actions in respect of breaches of Articles 101 or 102 TFEU or the UK Competition Act in UK courts, may face various obstacles, somewhat ironically perhaps, the difficulty most commonly associated with the tort of breach of statutory duty – proving that the statute in question is designed to create a right of action and furthermore one that is available to the claimant – will in all likelihood not be one of them.

¹⁰ (n 2) 141.

¹¹ Section 47A(2)

¹² Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461.

¹³ *Ibid* [61].

Breach of statutory duty: strict liability

One feature of the tort of breach of statutory duty is that it could probably be characterised as a strict liability tort.¹⁴ This is in the sense that it is the breach of the statute in question rather than either the mental state of the party which has breached the statute or any fault on the part of that party that potentially gives rise to an action, albeit that the standard of conduct required under specific pieces of legislation may vary considerably. If it is assumed that most private competition law actions are based upon an alleged breach of statutory duty, it flows from this, that in general terms, there will be no requirement for a claimant to prove fault or intent on the part of the defendant in order to bring a successful action. Indeed Hoskins, writing many years ago, suggested that for this reason, one of the problems with treating breach of statutory duty as the appropriate cause of action for competition law damages claims, was that “...the test for causation where a breach of statutory duty has occurred is very unsophisticated” and that consequently “a very real problem in relation to the recovery of competition damages is the danger that a right to such damage would give rise to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’.”¹⁵

Intention may, of course, still be very useful to a claimant from an evidential point of view. It may, for example, be considerably easier for a claimant, who can prove that a defendant knowingly entered into an illegal price-fixing agreement, to show that such defendant breached Article 101 TFEU, than to prove that an agreement without an overtly anticompetitive object, entered into by a defendant, had an anticompetitive effect and consequently breached either Article 101 or 102 TFEU. Nonetheless, showing that a party has breached Articles 101 or 102 TFEU will generally be sufficient in terms of establishing the tortious conduct required for breach of statutory duty, regardless of intent.¹⁶

That being the case, is there any place in competition law litigation for torts in respect of which intent is a key characteristic, namely the torts of conspiracy by unlawful means and unlawful interference?

¹⁴ Deakin *et al.*, (n 4) for example, state that “...the action for breach of statutory duty is closer to strict liability than to liability for negligence” (296). The authors also discuss the vexed question of whether breach of statutory duty should, under English law – contrary to the generally accepted position – be treated as part of the law of negligence i.e. statutory negligence (294-299).

¹⁵ Hoskins (n 9) 260. He went on to suggest that from a causal perspective the tort of unlawful interference might actually be a more appropriate tort in which to ground an action for damages under EU competition law.

¹⁶ For an argument that actions in tort based on competition law infringements **should** be treated as intentional wrongs, see: C Banfi, ‘Defining the competition torts as intentional wrongs’ (2011) 70 *Cambridge Law Journal* 83. See also Whish (n 9), who, writing many years ago, pointed out that “... a dominant undertaking may abuse its position without intention or even recklessness” and that “[i]t is not obvious that an action for breach of statutory duty should lie in these circumstances, since it could render dominant undertakings liable to actions for damages on a very strict basis” (64).

THE ECONOMIC TORTS

Why bring an action for an economic tort?

Given that there is no requirement to show intent for the tort of breach of statutory duty to be invoked, an obvious question one might ask is why would one seek to bring an action for unlawful means conspiracy or unlawful interference – torts that do have a requirement to show intent – instead of, or in addition to, an action for breach of statutory duty? The court posed this question in the recent case of *British Airways & others v Emerald Supplies Limited & others*.¹⁷ This case concerned an action brought by 565 companies involved in freight shipping, against British Airways, in respect of an alleged price-fixing cartel among providers of air cargo services, said to have operated between 1999 and 2007.¹⁸ In virtually all cases, the claimants were indirect purchasers who had not dealt with BA or the other airlines directly, but had instead contracted with freight forwarders who had in turn contracted directly with the airlines.¹⁹ As well as bringing a claim against BA for breach of statutory duty, the claimants also made claims for the torts of interference with the claimants' business by unlawful means and conspiracy to injure by unlawful means.²⁰

The court gave two main reasons why the claimants had brought claims under these two economic torts, in addition to the claim for breach of statutory duty. First, the claim for breach of statutory duty in respect of the alleged breach of EU/EEA law would, naturally, not cover conduct which fell outside the jurisdiction of EU/EEA law. Many of the flights by the alleged cartel airlines neither originated in, nor had as their destination, an EU/EEA Member State.²¹ Secondly, although the cartel had allegedly operated since 1997, EU/EEA competition law did not regulate some of the airline routes between the EU/EEA and third countries concerned until 2004.²²

In short, then, an obvious situation in which a party may seek to bring a claim for one or more of the economic torts in connection with a cartel infringement, is when EU competition law – and consequently breach

¹⁷ [2015] EWCA Civ 1024.

¹⁸ Ibid [2].

¹⁹ Ibid [2].

²⁰ Ibid [3].

²¹ Ibid [120].

²² Ibid [120]. Consequently, this case could only partially be designated as a 'follow-on' action in that some of the anticompetitive conduct alleged went beyond what had been found under the Commission's infringement decision.

of statutory duty via the European Communities Act 1972 – would not cover the geographical or temporal scope of the ‘infringement’.

Can ‘unlawful means’ conspiracy constitute a cause of action for a damages action in respect of a ‘competition law’ infringement?

The tort of conspiracy – which must by its very nature involve at least two people²³ – is divided into two categories: conspiracy to injure, commonly known as “lawful means conspiracy” – and “unlawful means conspiracy”. As the names would suggest, the key difference between the two is that in the latter case, the means used to injure must be unlawful – independently of the conspiracy itself.²⁴ There is, however, also another important difference between the two forms of conspiracy in terms of the nature of the intent requirement. In broad terms, whereas in the case of conspiracy to injure by lawful means the primary motive of the conspirators requires to be to damage the claimant,²⁵ this is not so in cases of conspiracy by unlawful means.²⁶ It is for this reason that it is the unlawful means variety that will be more likely to come into consideration with regard to cases concerning cartel infringements, as typically cartelists will be primarily concerned with enriching themselves rather than harming a particular party or parties, even if harm to that party or parties is highly likely.

Intent

Prior to the above-mentioned *Emerald Supplies* case, the tort of unlawful means conspiracy came up in the Court of Appeal case of *WH Newson Holding Ltd v IMI Plc*²⁷ albeit that the Court was concerned not with the circumstances in which such an action was available generally, but rather, whether the tort of conspiracy provided a potential cause of action in terms of section 47A of the Competition Act 1998 for an action brought in the Competition Appeal Tribunal and if so, whether an action for conspiracy was available on the facts of the case.

²³ See *Crofter Hand Woven Harris Tweed Company Ltd and Others v Veitch and Another* [1942] AC 435.

²⁴ *Kuwait Oil Tanker v Al-Bader* [2000] 2 All ER (Comm) 271; *Lonrho Plc v Fayed* [1992] 1 AC 448. See Deakin *et al.*, (n 4) 492.

²⁵ *Quinn v Leathem* [1901] AC 495.

²⁶ *Lonrho Ltd Plc v Fayed* [1992] 1 AC 448. See also *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi VE Paarlama AS* [2009] EWHC 1276 (Ch). See Peel & Goudkamp (n 4) 595.

²⁷ [2013] EWCA Civ 1377.

The case concerned a follow-on damages action by a purchaser of copper plumbing tubes (Newson) against a supplier (IMI Group) who had been held to be a member of a cartel in terms of a European Commission infringement decision²⁸ under which the supplier in question had been fined €44.98 million for its part in the cartel. The proceedings brought by the claimant under section 47A contained one claim based on breach of statutory duty and two claims based on unlawful means conspiracy. The High Court had been asked to consider whether the claims of conspiracy were admissible in the context of a section 47A ‘follow-on’ action and had held that only one of the two claims for conspiracy was in fact admissible.²⁹

On appeal, while the Court of Appeal accepted the proposition that there was nothing, in principle, preventing a claim for conspiracy in proceedings brought under section 47A, the Court held that the High Court had erred in allowing one of the two claims for conspiracy on the facts of the case. Specifically, Arden LJ disagreed with Roth J’s reading of the Commission Decision. Whereas “intent to injure” was an “essential ingredient” of the tort of conspiracy, the Commission Decision, while holding that in participating in the cartel IMI intended to distort competition, did not – contrary to the judgment of Roth J – establish the requisite intent to injure.³⁰

Arden LJ noted that Roth J’s refusal to strike out one of the conspiracy claims was based upon the view that because the Commission Decision established IMI’s intention to enter into the cartel, the necessary intent to conspire could be inferred, because participation in the cartel would inevitably mean injury being caused to purchasers of products from IMI group³¹.

In coming to her decision, Arden LJ considered³² a passage – which Roth J had also considered – from the House of Lords case of *OBG Ltd v Allan*,³³ a case which concerned the tort of unlawful interference.³⁴ While this passage acknowledged that intention to harm could either be an end in itself, for example, resulting from a grudge or, more commonly, as a means to an end (intentionally harming a claimant’s business to protect or promote one’s own economic interests),³⁵ the defendant’s conduct in relation to the loss required to be deliberate. In particular:

²⁸ Commission Decision of 3 September 2004 (Case COMP/E-1/38.069 – Copper Plumbing Tubes), *OJ*, 2006, L 192/21.

²⁹ *WH Newson Holding Ltd v IMI Plc* [2012] EWHC 3680 (Ch).

³⁰ (n 27) [3].

³¹ *Ibid* [16].

³² *Ibid* [35].

³³ [2007] UKHL 21, [2008] 1 AC 1.

³⁴ It appears to be established that the meaning of ‘intention’ is the same for the torts of unlawful means conspiracy and unlawful interference (see *Douglas v Hello! Ltd (No. 6)* [2005] EWCA Civ 595 [155]).

³⁵ (n 33) [164].

“The defendant must *intend* to injure the *claimant*. This intent must be a cause of the defendant’s conduct in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, 360”.³⁶

Whereas the High Court had inferred intent to injure from the fact that IMI had intended to benefit their own business interest,³⁷ in the view of Arden LJ, the two did not necessarily follow.³⁸ In particular, Arden LJ noted that:

“IMI group may have absolutely no intent as regards Newson group. They may have expected Newson group to pass the price increase on. It may well be that all purchasers of copper tubes would have been in the same position, so that they were able to pass the extra prices on”.³⁹

In the above-mentioned *Emerald Supplies* case the claimant companies sought to argue that the pronouncements of Arden LJ in *Newson* on the issue of intent should be construed as *obiter*, on the basis that the regulator whose decision the case was founded upon had not made any finding on intent.⁴⁰ This was rejected by the Court, however, which considered itself bound by the *Newson* ruling⁴¹ adding that in any case it agreed with the opinion of Arden LJ.⁴² The Court then proceeded to apply a similarly stringent interpretation of the concept of intent in the claim before it. Whereas the claimants argued that British Airways intended the alleged illegal overcharge to be passed on by its direct purchasers (the freight forwarders) to the claimants (the shippers) or alternatively that BA intended to injure both the freight forwarders and the shippers but not those further down the chain,⁴³ the Court was unconvinced, holding that:

“It is not known whether anyone from the alleged class...will in fact suffer at all. BA is not seeking to gain at their expense, even if it is foreseeable that this is in fact what may happen”.⁴⁴

This was absolutely key, on the basis that the court had already noted that:

³⁶ Ibid [166].

³⁷ (n 27) [38].

³⁸ Ibid [39].

³⁹ Ibid [39].

⁴⁰ (n 17) [150].

⁴¹ Ibid [151] - [152].

⁴² Ibid [152].

⁴³ Ibid [162] – [163].

⁴⁴ Ibid [169].

“Lord Nicholls made it plain in *OBG* that the intent to injure the particular claimant must be the cause of the defendant’s conduct. An intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant’s conduct if the defendant is not even sure that the claimant will suffer loss at all”.⁴⁵

The key point that can be derived from the cases of *Newson* and *Emerald Supplies*, with regard to the tort of conspiracy to injure by unlawful means, is that the fact of entering into a cartel in the knowledge that injury is likely to result to **others** – potentially of which the claimant may be one – is not sufficient to establish intent to injure the **claimant** within the meaning of unlawful means conspiracy, or unlawful interference.

On the meaning of intent, however, it is also worth noting that in both *Newson*⁴⁶ and *Emerald Supplies*, the Courts quoted the following further pronouncement of Lord Nicholls from *OBG Ltd v Allan*:

“I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant’s gain and the claimant’s loss are, to the defendant’s knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort”.⁴⁷

It is easy to see why these words were quoted in both cases, because they do represent an important caveat to the narrow meaning applied to the concept of intent for the purposes of unlawful interference and unlawful means conspiracy. The crucial implication of Lord Nicholls’ pronouncement for the purposes of damages actions against cartelists, is that it would appear to leave the door open for the intent requirement to be satisfied in certain cartel cases. In particular, in a scenario where a price-fixing cartelist sold a product or service directly to end-consumers, loss to the end-consumers (claimants) would surely be, to use Lord Nicholls’ words, “...the obverse side of the coin from gain to the defendant”.

⁴⁵ Ibid [167].

⁴⁶ Ibid [35].

⁴⁷ (n 33) [167], citing *Sorrell v Smith* [1925] AC 700 [742] (Lord Sumner). Although it should be pointed out that the exact meaning of intent in the context of unlawful means conspiracy is not without ambiguity. Witting (n 4) for example, submits that “...there is no escaping the fact that the meaning of ‘intention’ in this context is elusive” (400).

The ‘unlawful means’

In the tort of conspiracy to injure by unlawful means, even where the intention requirement is satisfied there may be significant doubt as to what constitutes “unlawful means”.

In *Total Networks SL v HMRC*,⁴⁸ a case concerning VAT ‘carousel’ fraud, the House of Lords considered the question of whether an action for unlawful means conspiracy, requires the existence of a separate action in tort against at least one of the conspirators in respect of the “unlawful means”.⁴⁹ The issue here, was that although the appellant company was guilty of criminal conduct, it did not appear that an action in tort was available to the respondents against the appellant in respect of the loss suffered by the respondents due to the criminal conduct, independently of the appellant’s role as a conspirator. The Court held that there did not require to be an independent action in tort for an action for conspiracy to be available to the appellant.⁵⁰ Importantly, however, the “unlawful act” considered in *Total Networks* was a criminal offence rather than a tort. The issue of what would happen if the “unlawful”, non-actionable act of the defendant was just a tort rather than a crime came up in the High Court case of *Digicel (St Lucia) Ltd v Cable & Wireless Plc*.⁵¹ The High Court in that case took the view that the House of Lords in *Total Networks* had left this particular question open and that in terms of existing authority “...non-actionable breaches of a non-criminal statute are not “unlawful acts” for the purposes of the tort of conspiracy to injure by unlawful means”.⁵²

Even taking account of the conclusion reached in *Digicel* however, issues still may arise as to when an “unlawful act” is deemed to be actionable. In the aforementioned *Emerald Supplies* case, in its discussion of the tort of interfering with business by unlawful means, the court noted that the claimant shippers alleged that the unlawful means included the breach of various competition laws of non-EU jurisdictions and that: “[e]ven if they are actionable by the third party...there is an issue as to whether the claimants can rely as unlawful means upon actionable wrongs which are only unlawful under foreign law”.⁵³ Due to the striking out of the economic tort

⁴⁸ [2008] UKHL 19, [2008] 1 AC 1174.

⁴⁹ *Ibid* [1].

⁵⁰ McBride and Bagshaw (N McBride and R Bagshaw, *Tort Law* (5th edn, 2015)) take the view that following this decision, the torts of unlawful means conspiracy and unintentionally causing loss through unlawful means “...should from now on develop along their own lines” (710).

⁵¹ [2010] EWHC 774 (Ch).

⁵² *Ibid* annex I [63].

⁵³ (n 17) [127].

claims through lack of intent, this issue did not actually come up for determination, however it is easy to see how it could arise.

So as to whether a damages claim in respect of the tort of “unlawful means” conspiracy could be brought successfully against a cartel or cartels, as the law stands, theoretically at least, there is no reason why not. Equally, however, the very situation in which a claim for unlawful means conspiracy would be of interest to a claimant – i.e. where a claim for breach of statutory duty is not available due to the geographic or temporal scope of the infringement – is where a claim for conspiracy might come up against significant obstacles in terms of establishing the “unlawful means”.

Unlawful interference (interfering with business by unlawful means)

As mentioned above, in the case of *Emerald Supplies*, as well as considering a claim for conspiracy by unlawful means, the court was also asked to consider a claim for unlawful interference.

The essential elements of this particular tort were summed up by Lord Hoffmann in *OBG v Allan* as: “(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”.⁵⁴ The key feature of unlawful interference is therefore that the harm is effected upon the claimant by way of interference with a third party rather than directly upon the claimant – albeit that in exceptional cases two party interference is possible. For this reason, there will usually require to be three parties involved for the tort of unlawful interference to apply.⁵⁵ Beyond this, there is a requirement that the interference inhibits the freedom of the third party to deal with the claimant.⁵⁶ While the meaning ascribed to intent in the case of unlawful interference is the same as for unlawful means conspiracy,⁵⁷ an important difference between the application of the two torts comes in terms of the meaning applied to “unlawful means”. Whereas in the above-mentioned case of *Total Networks*⁵⁸ the House of Lords held that there did not *per se* require to be an independent action in tort against the defendant available for an action for unlawful means conspiracy to be available to a claimant, in *OBG v Allan*, the House of Lords had held that for an action for unlawful interference to be available, an independent action against the relevant party in tort by the relevant third party **did** require to

⁵⁴ (n 33) [47].

⁵⁵ Witting (n 4) 393.

⁵⁶ *OBG v Allan* (n 33) [51] (Lord Hoffmann); *RCA Corporation v Pollard* [1983] Ch 135; *Oren v Red Box Toy Factory Ltd* [1999] FSR 785.

⁵⁷ See n 34.

⁵⁸ (n 48).

be available. The only caveat to this was that if the act in question would have been actionable by the third party but for the fact that no loss had actually been suffered, this would still constitute unlawful means.⁵⁹

In the *Emerald Supplies* case, it will be recalled that the claimant companies – who were all shippers of air freight – had not contracted directly with British Airways but had rather contracted with freight-forwarders who, in turn, had contracted with British Airways.⁶⁰ It was for this reason that the possibility of a claim for (three party) unlawful interference arose, the allegation being that in its dealings with the freight-forwarders, British Airways had unlawfully interfered with the business of the claimants. In the event, the claims for unlawful interference were struck out for the same reason as the claim for unlawful means conspiracy, that is, that the requisite intention to injure the claimants could not be inferred. For this reason, the Court did not actually require to address the issue of whether the unlawful means cited by the claimants constituted “unlawful means” or whether the requirement that the alleged unlawful conduct inhibited the freedom of the third party to deal with the claimant was met. Interestingly though, with regard to the latter issue, Lord Justice Elias did comment that “we are very doubtful whether action which simply increases the price at which freight services can be acquired by the claimants can be said to affect the freedom of freight forwarders to deal with the shippers”,⁶¹ albeit that he did acknowledge that on this subject “...it would be wrong to express any concluded view”.⁶²

In terms of whether unlawful interference could – in the right circumstances – constitute a cause of action for a cartel damages action notwithstanding the decision in *Emerald Supplies*, while in theory it would appear to remain a possibility, for the reasons outlined here, such a claim is likely to come up against significant hurdles over and above what is required for unlawful means conspiracy. The more narrow meaning applied to “unlawful means” and the additional requirement of demonstrating that the alleged unlawful conduct has inhibited the freedom of the third party to deal with the claimant means that in practice this will be even more challenging to invoke as a cause of action than unlawful means conspiracy. Even if these obstacles could be overcome, however, perhaps the biggest issue is the problem mentioned above of whether breach of a foreign law can constitute “unlawful means” for the purposes of the economic torts.

⁵⁹ *OBG v Allan* (n 33) [49] (Lord Hoffmann); *National Phonographic Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335.

⁶⁰ (n 17) [113].

⁶¹ *Ibid* [129].

⁶² *Ibid* [129].

Can breach of a foreign law constitute “unlawful means”?

It is this question of whether a breach of a foreign competition law could constitute unlawful means for the purposes of the economic torts and unlawful means conspiracy in particular that is perhaps the main question to arise from *Emerald Supplies*. Lord Justice Elias seemed to acknowledge that this was at least a possibility when stating that “...there is an issue whether foreign wrongs can be unlawful means for the purposes of these torts. But if they can, it would mean that the common law could provide remedies for breach of competition laws which those laws themselves had chosen not to confer”.⁶³

Laws which constitute an actionable tort under foreign legal systems

The general rule as to when a wrong committed abroad can give rise to an action under English law, is set out in *Phillips v Eyre*.⁶⁴ There it was held that first, “...the wrong must be of such a character that it would have been actionable if committed in England”⁶⁵ and secondly, “...the act must not have been justifiable by the law of the place where it was done”.⁶⁶ The issue with which we are concerned here, though, is different. It is not so much about when an action can be brought in tort under English law, notwithstanding that the conduct which was tortious – in the eyes of English law – was committed abroad, but whether a tort which is actionable under a foreign legal system can constitute “unlawful means” under English law for the purposes of the economic torts.

An interesting point to note in this connection, is that with regard to the tort of breach of statutory duty, there does not appear to be any suggestion that a breach of a foreign statute can constitute a “statute” for the purposes of this tort. For example, the issue of “parliamentary intent”, would appear to be generally understood as referring to the intent of the UK parliament (or one of the devolved legislatures). Bearing this in mind, an obvious question one might ask with regard to breaches of foreign law which are actionable in the country of the breach, is why such a breach might constitute “unlawful means” for the purposes of unlawful means conspiracy (or unlawful interference) but not an actionable breach of statute for the purposes of breach of statutory duty? One might of course argue that the two torts (i.e. breach of statutory duty and unlawful means conspiracy) should be treated as completely separate beasts. One could point out, in support of such a proposition, the fact that one of

⁶³ Ibid [132].

⁶⁴ (1870-71) LR 6 QB 1.

⁶⁵ Ibid 28-29 citing *Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham (The Halley)* (1867-69) LR 2 PC 193.

⁶⁶ Ibid 29.

the two branches of conspiracy – namely lawful means conspiracy – requires no unlawful means at all and that breach of statutory duty should therefore not represent any sort of point of reference for ascertaining unlawful means under unlawful means conspiracy. It is submitted that such an analysis would miss the point, however. Leaving aside the issue of breach of a criminal statute as a potential source of unlawful means and concentrating solely on tortious conduct, it is submitted that there is no logical basis for treating a breach of a foreign statute – actionable under the legal system of the country in question – as “unlawful means” for the purposes of the economic torts but not as an actionable breach of (a non-criminal) statute for the purposes of the tort of breach of statutory duty. On the contrary, leaving the foreign element to one side momentarily, it can be argued that under English law as it stands, a non-actionable breach of statute cannot constitute “unlawful means” for the purposes of the economic torts and that the ascertainment of actionable tortious conduct for the purposes of unlawful means conspiracy is no different than is the case for breach of statutory duty when it comes to breaches of statute at least. It is true that the actionable tort constituting the “unlawful means” for the purposes of unlawful means conspiracy could be something other than a breach of a statute, but equally, virtually by definition one could not envisage a breach of a statute which is not actionable as a breach of statutory duty constituting unlawful means for the purposes of unlawful means conspiracy. It is worth noting in this regard that in *Total Networks* Lord Walker stated that “...I would accept that the sort of considerations relevant to determining whether a breach of statutory duty is actionable in a civil suit (*Cutler v Wandsworth Stadium Ltd* [1949] AC 398) may well overlap, or even occasionally coincide with, the issue of unlawful means in the tort of conspiracy”.⁶⁷ While he did add the caveat that “...the range of possible breaches of statutory duty, and the range of possible conspiracies, are both so wide and varied that it would be unwise to attempt to lay down any general rule”,⁶⁸ this was said in the context of holding that criminal conduct could constitute unlawful means for the purposes of unlawful means conspiracy.

Laws which constitute crimes under foreign legal systems

While it is established following *Total Networks* that the breach of a criminal law can potentially constitute unlawful means for the purposes of unlawful means conspiracy (but not unlawful interference), it was also made clear that not all breaches of criminal law constitute such unlawful means.⁶⁹ In terms of how or where

⁶⁷ (n 48) [96].

⁶⁸ *Ibid* [96].

⁶⁹ *Ibid* [119] (Lord Mance).

the line is drawn, there is not much to go on.⁷⁰ That being the case, it is difficult enough to assess precisely what form of criminal conduct will constitute unlawful means for the purposes of unlawful means conspiracy, let alone whether a breach of a foreign criminal law could constitute such unlawful means. It is likely, however, that first and foremost for policy reasons, a breach of a foreign law – whether tortious or criminal – will not be allowed to constitute unlawful means for the purposes of unlawful means conspiracy.

Policy arguments

Beyond the legal arguments discussed above, there are wider policy reasons why the committing of either an actionable tort or a criminal offence under a foreign legal system is unlikely to be considered as unlawful means for the purposes of the tort of unlawful means conspiracy. First, there is the very fact that the breach is of a *foreign* law and to allow an action to be founded in tort under English law on such a basis would effectively amount to a back-door exercise of extra-territorial jurisdiction. Secondly and perhaps most crucially though, there is the question of why, from a policy point of view, should an action be available under an economic tort in respect of something which is quite deliberately intended to be excluded from the ambit of breach of statutory duty? This was touched upon in an *obiter* comment by Lord Justice Elias in *Emerald Supplies*, who suggested that to allow the economic tort claims in that case would “...extend the effect of competition law and upset the balance which the draftsman had thought appropriate when framing the rules for unfair competition”.⁷¹ He also quoted⁷² the statement of Jacob J from the case of *Oren v Red Box Toy Factory Limited*,⁷³ who, referring to intellectual property rights held that “...it is not for the courts to invent that which Parliament did not create”.⁷⁴

IMPLICATIONS OF BREXIT

Following the outcome of the referendum held in the UK on 23 June 2016, whereby a majority of voters came out in favour of the UK leaving the EU, the future relationship between UK law and EU competition law is

⁷⁰ H Carty, *An analysis of the economic torts* (2nd edn, 2010) 135-136.

⁷¹ (n 17) [174].

⁷² *Ibid* [174].

⁷³ *OBG v Allan* (n 56).

⁷⁴ *Ibid* [42] (Jacob J).

shrouded in uncertainty. Taking account of the terms of Article 50 TEU which sets out the (likely) procedure to be adopted for a Member State to leave the EU, at the time of writing it will be over 2 years at the earliest before the UK leaves the EU and if the UK does proceed to leave the Union, it is simply not possible to say at this stage what the future political and legal relationship of the UK and the EU will look like going forward. One possibility would be for the UK – notwithstanding a formal exit from the EU – to effectively remain subject to EU competition law as currently happens with states such as Norway and Iceland which are members of the European Free Trade Area. Whatever does unfold, this article has concerned itself with the *status quo* whereby the UK is fully subject to EU competition law.

CONCLUSION

This article has sought to consider whether the economic torts of unlawful means conspiracy and unlawful interference, could provide possible alternatives to the tort of breach of statutory duty as a cause of action for damages actions against members of illegal cartels. It was noted that a claimant might turn to these economic torts as potential causes of action in the event that the geographic or temporal scope of the infringement was not covered by UK or EU competition law and therefore breach of statutory duty was not available as a cause of action. While, following the decisions of the Court of Appeal in *Emerald Supplies* and *WH Newson*, the successful use of such torts as a cause of action does remain a theoretical possibility, in practice a claimant is likely to face a number of difficulties. Ironically, the basis upon which the attempts to use these torts failed in both *Newson* and *Emerald Supplies* – the lack of the requisite intent – is a hurdle that *could* be overcome in cases where injury to a specific party was the inevitable consequence of the illegal conduct. Other hurdles are likely to prove insurmountable, however. First, it is doubtful that as a matter of law, a breach of a foreign competition law – whether an actionable tort or a crime under the legal system in question – could constitute unlawful means for the purposes of unlawful means conspiracy. Secondly, on policy grounds, it is likely that the courts will be reluctant to allow the economic torts to provide a cause of action where an action for breach of statutory duty is not available as there is no evidence that the economic torts are intended to be used in such a way as some sort of Plan B option for claimants in competition law cases.