2 July 2021

PRESS SUMMARY

Secretary of State for Health and another (Appellants) v Servier Laboratories Ltd and others (Respondents)
[2021] UKSC 24
On appeal from [2019] EWCA Civ 1160

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Briggs, Lord Kitchin, Lord Sales, Lord Hamblen

INTRODUCTION

This appeal concerns the tort of causing loss by unlawful means. This is an economic tort which 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 and which is intended to cause loss to the claimant. The essential issue on the appeal is whether a necessary element of the unlawful means tort is that the unlawful means should have affected the third party's freedom to deal with the claimant - **"the dealing requirement"**.

BACKGROUND TO THE APPEAL

The respondents develop and manufacture a medicinal product named perindopril, which is used in the treatment of cardiovascular diseases including high blood pressure. In 2001, the European Patent Office (**"EPO"**) granted a patent for the alpha crystalline form of perindopril salt in 2004. The patent was upheld by the Opposition Division of the EPO in July 2006. The respondents defended and sought to enforce the UK designation of the patent in proceedings before the English courts, in particular by obtaining injunctions. The issue of the validity of the UK designation of the patent went to trial and, in July 2005, the High Court held that it was invalid as it lacked novelty or alternatively was obvious over another existing patent. That decision was upheld by the Court of Appeal in May 2008. In 2009, the EPO Technical Board of Appeal revoked the patent.

The appellants in these proceedings fund the cost of drugs dispensed by the NHS. They allege that in obtaining, defending and enforcing the patent, Servier, the third respondent, practised deceit on the EPO and/or the courts, with the intention of profiting at the expense of the appellants. In particular, it is alleged that representations were made as to the novelty and/or lack of obviousness of the product that Servier knew to be false, or that were made with reckless indifference as to their truth. As a result of the alleged deceit, the appellants contend that manufacturers of generic perindopril did not enter the market as early as they otherwise would have done. This would have driven down the price of perindopril and meant that the appellants had to pay higher prices. This alleged conduct is said to form the basis of an unlawful means tort claim, in which damages and interest in excess of £200m are sought.

On 2 August 2017, the High Court struck out the appellants' unlawful means tort claim. On 12 July 2019, the Court of Appeal dismissed the appellants' appeal. Both the High Court and the Court of Appeal held that the majority of the House of Lords in *OBG Ltd v Allan* [2008] 1 AC 1 concluded that the dealing requirement was a necessary element of the unlawful means tort. As it was common ground that neither the EPO nor the courts had dealt with the appellants, both the High Court and the Court of Appeal considered themselves to be bound by the decision in *OBG*. The appellants now appeal to the Supreme Court, contending that the dealing requirement should not be treated as forming part of the ratio of *OBG* and thus the courts below were wrong to consider themselves bound by it (**"issue 1"**).

Alternatively, they argue that the Supreme Court should depart from *OBG* and dispense with the dealing requirement (**"issue 2"**).

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Hamblen delivers the lead judgment. Lord Sales gives a short concurring judgment.

REASONS FOR THE JUDGMENT

The OGB decision

A central issue on this appeal is what was decided by the House of Lords in *OBG* and in particular in the leading speech of Lord Hoffmann **[24]**. Having considered the speeches in detail **[25-55]**, the Court makes general observations on the majority judgment on the unlawful means tort **[56]-[62]**. First, the general context to the decision is that it was seen by the House of Lords as an opportunity to clarify and to give *"coherent shape"* to the law of economic torts. Secondly, in carrying out this task, a central concern of the majority was *"to keep the tort within reasonable bounds"*. This was partly to reduce the scope of the tort, but also to reflect the policy consideration that this is an area of economic activity the regulation of which should largely be left to Parliament. Thirdly, Lord Hoffmann considered that the best way to keep the tort within reasonable bounds was by giving a narrow meaning to unlawful means. Fourthly, the restrictive policy approach towards economic torts is reflected not only in the majority's decision as to the elements of the unlawful means tort, but also in its decision on inducing breach of contract and on conversion.

Issue 1 - Is the dealing requirement part of the ratio of OBG?

The Supreme Court agrees with the conclusions of the courts below that the dealing requirement is part of the ratio of *OBG* for a number of reasons **[63]-[74]**. First, it is consistent with Lord Hoffmann's explanation of the rationale of the unlawful means tort, which is to preserve a person's liberty to deal with others. Secondly, it is clear from the wording and structure of paragraphs 47 to 51 of Lord Hoffmann's speech that he regarded the dealing requirement as an essential element of the tort. Thirdly, Lord Hoffmann explains and justifies the dealing requirement through his analysis of a number of key authorities, all of which he explains by reference to there being no dealings between the claimant and the third party. Fourthly, the dealing requirement is consistent with the authorities in which liability for the unlawful means tort has been established, which all involved dealings. Fifthly, the dealing requirement is consistent with the concern that the tort be kept within reasonable bounds. Sixthly, it is apparent that the other members of the majority understood Lord Hoffmann's definition of the tort to include a dealing requirement and endorsed it on that basis. Seventhly, *OBG* has been understood to impose a dealing requirement by the courts both in this country and elsewhere in the Commonwealth, such as New Zealand, Singapore, Australia and Canada.

Issue 2 - Should OBG be departed from?

The appellants contend that the dealing requirement is an undesirable and unnecessary addition to the essential elements of the unlawful means tort **[75]-[77]**. It is said to be undesirable because it narrowly restricts the interest protected by the tort to the claimant's economic interest in the third party's freedom to deal or trade with the claimant. It is said to be unnecessary because the other elements of the tort are adequate both to explain the existing authorities and to keep the tort within reasonable bounds. The appellants advance three alternative approaches as to how the tort could be *"refashioned"* **[78]-[81]**.

A fundamental difficulty for the appellants is that they need to show that this is an appropriate case for the Supreme Court to depart from *OBG* in accordance with the 1966 Practice Statement [1996] 1 WLR 1234. Whilst the appellants can point to some academic criticism of the decisions in *OBG*, they have not provided any real life examples of it causing difficulties, creating uncertainty or impeding the development of the law **[82]-[86]**. The appellants contend that the facts of the present case illustrate how the dealing requirement operates in an arbitrary and unprincipled manner by excluding public authorities as potential claimants. This does not, however, address the lack of connection between the lies allegedly told by the respondents and the appellants (or their property) or the risk of creating indeterminate liability if it is extended to claimants, such as public authorities, who have no dealings with

the third party. The appellants are not therefore able to point to any injustice which calls for remedy by invocation of the 1996 Practice Statement **[91]**.

As to their proposed alternatives, the appellants have not shown that these formulations of the tort offer a safe and appropriate way of developing the law **[91]-[99]**. The appellants' first alternative, which involves leaving the law as stated in *OBG* but without a dealing requirement, would dispense with the control mechanism which the House of Lords considered to be both necessary and desirable. The dealing requirement performs the valuable function of delineating the degree of connection which is required between the unlawful means used and the damage suffered. This is particularly important where a tort permits recovery for pure economic loss and by persons other than the immediate victim of the wrongful act. The dealing requirement also minimises the danger of there being indeterminate liability to a wide range of claimants **[92]-[95]**. The appellants' second alternative involves adopting the alternative formulation of the unlawful means proposed by Lord Sales and Professor Davies in their 2018 LQR article. As the appellants have not challenged the test of intention in *OBG*, this is not an appropriate case in which to consider the possibility of adopting the Sales/Davies reformulation. Insofar as the appellants argue that only part of the Sales/Davies approach should be adopted, this is incoherent and unsustainable, as the reformulation ought to be considered in its entirety, not on a pick and choose basis **[96]-[98]**. In his concurring judgment, Lord Sales agrees with this analysis **[101]-[103]**. The appellants' third alternative, which is based on a decision of the Canadian Supreme Court, is a more extreme version of the appellants' first alternative. As the first alternative is rejected, as it should be, this third alternative must equally be rejected **[99]**.

The appeal must accordingly be dismissed. In summary, the dealing requirement is part of the ratio of *OBG* and no good or sufficient reason has been shown why the Court should depart from the relatively recent decision of the House of Lords in *OBG* in accordance with the 1966 Practice Statement **[100]**.

References in square brackets are to paragraphs in the judgment