Greenhalgh leaves scope for uncertainty as to when the modified test of bona fides should be applied, as the proposed amendment in *Citco* was to remove pre-emption rights to facilitate the sale of the company to a third party, a matter in which the company as a commercial entity could be seen as having a ready interest. Although it is unclear when the modified test applies this is unlikely to prove troubling in practice and one should not lose sight of the important clarifications the case provides. If not perfectly clear, the law in this area should now be a little easier to apply.

RICHARD WILLIAMS

INTENTIONAL ECONOMIC TORTS IN THE HOUSE OF LORDS

WHEN *Hedley Byrne* v. *Heller* was decided in 1963, many commentators predicted that it would mark the demise of the intentional economic torts. After all, if a defendant could be liable in damages for negligently causing the claimant to make an unprofitable contract, was there any longer a need to agonise over the complex rules determining when defendants would be liable for intentionally causing economic loss by, for example, inducing a third party to breach a contract with the claimant or otherwise unlawfully disrupting the claimant's business? Those commentators probably also took into account the historical context in which the intentional economic torts developed, namely Victorian industrial-relations disputes in which the law of tort was used to control collective and trade union activity. Surely, it was argued, today's silicone-chip industrial disputes are entirely regulated by statute and the cumbersome, out-dated common-law machinery has run out of steam, especially since that tortious machinery is potentially "dangerous" too, liable (when misused) to stifle beneficial competition and suppress lawful industrial campaigns. However, as it turns out, the economic torts are not yet ready for the scrapheap and have been comprehensively overhauled, thanks to the decision of the House of Lords in *OBG Ltd.* v. *Allan (and two related appeals)* [2007] UKHL 21, [2007] 2 W.L.R. 920. There is still room for the law of tort to intervene when improper business tactics cause economic loss, though only in tightly limited circumstances and not by extending the already strained category of "neighbours" to cover rivals and competitors.

Before this House of Lords decision, the boundaries and principles of the various economic torts were muddled. Since *Lumley* v. *Gye* (1853) 111 E.R. 749, in which opera impresario Gye "poached" diva Johanna Wagner by persuading her to break her existing contract with

his rival Lumley and to sing for him instead, it has been settled law that it is tortious to cause economic loss by intentionally inducing a third party to breach an existing contract with the claimant. Of course what Gye did (charming Wagner and offering her a more profitable engagement) was *in itself* entirely lawful, indeed it was the stuff of a successful capitalist economy – what made it tortious was that it was done with the *intention* of procuring her breach of contract with Lumley, which breach caused loss to the latter. Where, however, the defendant does something *independently unlawful*, intending thereby to cause economic loss to the claimant (like threatening to beat up the claimant's potential customers so that they stay away), an entirely separate form of tortious liability is established. This is traditionally known as "intentionally interfering with business by unlawful means", which we will call the "unlawful means tort", confirmed in *Allen* v. *Flood* [1898] A.C. 1 (there the defendant was not liable for threatening a *lawful* strike so as to persuade the third party not to re-hire the claimants, something the third party was entirely free not to do and thus did not amount to a breach of contract). However, the law fell into confusion during the second half of the 20th century, when the courts tried to unify the two separate torts, by treating *Lumley* v. *Gye* as merely an example of the unlawful means tort (horribly described as a "*genus* tort"). This threatened to expand liability to encompass situations not falling properly within either tort, such as lawful conduct that interfered with performance of a contract but which did not induce a breach. This attempt at unity also caused confusion when the courts tried to work out what level of *intention* was necessary for liability. Should the test be targeting the claimant wanting to cause him harm or intending to cause a breach of contract without necessarily intending the resulting harm? Should recklessness as to whether harm was caused suffice? What of mere foreseeability of harm?

This muddle between these two different torts formed the background to the three appeals heard by the House of Lords, which arose in three very different, eminently 21st century, contexts. In *Mainstream Properties Ltd* v. *Young* ("*Mainstream*"), two employees of a property company, in breach of their employment contracts, diverted a development opportunity to another company which they ran. The defendant provided finance for this transaction; he knew of the employees' contractual duties but believed their assurances that the transaction would not amount to a breach. Their employer argued that he was liable for the tort of intentionally inducing breach of contract. In *OBG Ltd* v. *Allan* ("*OBG*"), the defendants were receivers purportedly appointed under a floating charge, which turned out to have been invalid. Acting in good faith, they took control of the

claimant company's assets. The claimant argued that this was not only a trespass to its land and a conversion of its chattels but also amounted to two intentional economic torts, namely the unlawful means tort and also the tort of conversion. In *Douglas and others* v. *Hello! Ltd* ("*Hello!*") the magazine OK! contracted for the exclusive right to publish photographs of the wedding of Michael Douglas and Catherine Zeta-Jones, at which all other photography was 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! argued that this amounted to the unlawful means tort and also to a breach of its right to confidentiality in photographs of the wedding.

The House of Lords took the opportunity to unravel the two main economic torts from the unfortunate unifying attempts of the late 20th century, since the differences between them were crucial. Four main differences were identified. First, the unlawful means tort involves primary wrongdoing whereas *Lumley* v. *Gye* is a tort of secondary or accessory liability, parasitic on a breach of contract between claimant and third party (or possibly breach of another legal obligation such as breach of statute, a question left open by Lord Nicholls); secondly, it follows that it is a pre-requisite for the unlawful means tort that the defendant used independently unlawful means, but this does not apply to *Lumley* v. *Gye* which may (and frequently does) involve conduct lawful in itself; thirdly the unlawful means tort does not depend on a *breach* of contract (or indeed the existence of any contractual relations) between claimant and third party, whereas for *Lumley* v. *Gye* a breach is essential. The fourth difference concerns the level of intention necessary for liability: for the unlawful means tort the defendant must have actually intended to cause damage to the claimant, whereas under *Lumley* v. *Gye* the defendant must have intended to induce the breach (although recklessly "turning a blind eye" would suffice too), but need not have further intended to cause damage. This means that a defendant is liable under *Lumley* v. *Gye* even if his only motive was to make a profit for himself, rather than wanting to cause loss to the claimant, much as one would imagine was impresario Gye's state of mind when he lured the diva to his theatre. So the House of Lords was unanimous in overruling a much criticised decision of the Court of Appeal *Millar* v. *Bassey* [1994] E.M.L.R. 44 involving that modern-day diva Shirley Bassey, who withdrew, in breach, from a recording contract, which in turn meant, foreseeably, that the record company repudiated the contracts of the freelance backing musicians. Even though it was certainly not Ms Bassey's intention to cause harm to those musicians, the Court of Appeal declined to strike out their claim against her.

Having uncoupled the two main economic torts, the House was able to dispose of the various appeals easily. The *Lumley* v. *Gye* claim in *Mainstream* failed, since the defendant did not know that the transaction involved a breach of the employee's contracts and so he certainly did not intend to procure a breach. In *OBG*, the tort of unlawful means failed, because the good faith actions of the defendant involved neither independently unlawful means nor an intention to cause loss. For the majority, the tort of conversion could not be established either, because conversion is a tort against tangible property that does not extend to choses in action. Lord Nicholls and Baroness Hale argued that the courts should extend the tort of conversion to cover intangible property, since it is already possible to convert cheques, share certificates and various other tangible representations of choses in action, but with respect the view of the majority is to be preferred, both for its cautious reluctance to countenance judicial legislation in a field comprehensively covered by statute and also because of the hugely unsettling effect it would have on transactions if conversion, a tort of strict liability, were to be extended in this way.

In *Hello!* the majority (Lords Nicholls and Walker dissenting) held that OK!'s claim for breach of confidence should succeed, despite the commercial nature of the photographic images being disclosed and the fact that they were hardly confidential in the sense of being secret. This meant that the claim for the tort of unlawful means was somewhat redundant, but in fact it harbours the remaining controversial question about the scope of that, and other, intentional economic torts. This is because, on this point, there was a significant difference of opinion between Lord Hoffmann (with whom the remaining Lords agreed) and Lord Nicholls as to what is meant by "unlawful means". For Lord Hoffmann, the concept is restricted, not just to acts that count as actionable torts but to actionable "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" (subject to "the qualification that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss"). Since the wrongdoing of Hello!'s secret photographer did not interfere with anyone's freedom to deal with OK!, the claim would not succeed. For Lord Nicholls, however, "unlawful means" is *much* broader, encompassing "common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence and so on".

Both views have something to commend them. Lord Nicholls' wide view has the simple attraction that "unlawful" is given its natural

meaning and also that liability does not turn on the rather random question of the precise form of wrongdoing chosen by the defendant to cause intentional harm, especially where that wrongdoing is serious enough to count as a crime. But Lord Hoffmann's approach is backed more closely by authority, plus if the defendant would not have been liable had he personally committed, for example, a breach of statutory duty because the statute properly construed does not support civil liability, it is hard to see why he should be liable in the three-party situations covered by the economic torts. In any event, the House of Lords may soon have the opportunity to consider the question in detail, in the related context of liability for the economic tort of "unlawful means conspiracy", when *Revenue and Customs Commissioners* v. *Total Network SL* [2007] EWCA Civ 39 goes on appeal. This case involved a complex "carousel fraud" in which goods were allegedly imported into the UK from the EU by the defendant, a Spanish company, sold from company to company in the UK and then exported back to the defendant, all in the space of one day. The fraud was committed by reclaiming input VAT from the claimant Commissioners, on production of the appropriate invoice documentation, while the UK company which should have paid the corresponding amount of VAT went quietly bust without paying it. The VAT legislation has statutory procedures for recovery of overpaid credits, but the Commissioners were unable to use them at the time of this fraud for technical reasons so sought to make the defendant liable in damages for the tort of "unlawful means conspiracy" instead. The problem with this claim was that the criminal offence committed by the defendant, the offence of common law "cheat" (preserved by section 32(1)(a) of the Theft Act 1968 in revenue cases) is not itself actionable in tort. The Court of Appeal unanimously thought that, in principle, this should not prevent the offence of cheat from counting as "unlawful means" for the purposes of an unlawful means conspiracy, but with great reluctance found that they were precluded by binding authority from reaching this conclusion. Leave to appeal to the House of Lords was given, so it is greatly to be hoped that their Lordships will have a further opportunity to decide the fundamentals of liability for the various economic torts that depend on what "unlawful means" means.

JANET O'SULLIVAN

CHANGING CONCEPTIONS OF COMPENSATION

COMPENSATION is becoming an increasingly nebulous concept. Historically, the courts have drawn a clear distinction between