BREACH OF TRUST

Breach of trust: Time for a new law?

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James Brown and Mark Pawlowski consider whether a new tort of inducing a breach of trust would be a welcome development in English law

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> ***The recognition of a new tort of inducing a breach of trust would have the advantage of allowing the claimant to pursue a third party where their wrongdoing consists solely of threats or persuasion falling short of actual participation in the commission of a breach of trust.***

Although there already exists a modern tort of inducing a breach of contract which has its origins dating back to the celebrated case of *Lumley v Gye* [1853], this does not currently extend to imposing liability in the case of an inducement of a breach of trust. It is generally thought that the doctrines of equity provide adequate remedies in this respect: see, *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990], at 481, per Slade LJ. Interestingly, however, there is already some judicial support that the tort will apply to a breach of the duty of fidelity owed by a fiduciary: see, for example, *Boulting v ACTAT* [1963] at 627 and *Prudential Assurance Co Ltd v Lorenz* [1971]. Several leading textbooks, notably, *Clerk and Lindsell on Torts*, (21st ed), Chapter 24, at para 31, have also expressed a degree of sympathy for the development of the law of tort so as to incorporate inducing a breach of a fiduciary duty as a new cause of action. Some academic commentators, notably Crane, writing in 1996, have also favoured the existence of the tort: see, P Crane, *Tort Law and Economic Interests* (2nd ed, 1996), at pp294-295.

The tort of inducing a breach of contract

Any such new tort would inevitably have similar characteristics to the existing tort of inducing a breach of contract. In the leading case of *Lumley*, the claimant employed Johanna Wagner as an opera singer. The defendant, aware of this contract, knowingly induced her to refuse to perform it. He was held liable for what has become known as the tort of wrongful interference with contractual rights. Subsequently, in *Bowen v Hall* [1881], an expert bricklayer was induced to leave his employer's service by a rival firm. The majority of the Court of Appeal took the view that *Lumley* had been correctly decided on the wide ground of knowing violation of contractual rights.

The tort has the advantage of providing the claimant with an additional cause of action against the third party inducing the breach of contract. Thus, where X induces A to breach a contract between A and B, B not only has a right of action against A for breach of contact but also a claim against X for knowingly inducing the breach. This additional liability is

usually justified on the basis that the remedies against A will often be inadequate.

In *OBG Ltd v Allan* [2007], the House of Lords took the opportunity to redefine the conceptual basis of the tort in *Lumley* as a form of accessory liability. In other words, the inducement, which is essential in establishing the tort, is not treated as a primary wrong in itself, but rather as a secondary form of wrongdoing dependent on the defendant's involvement with the contracting party's primary wrong for breach of contract. The question, therefore, is whether the defendant's acts of positive encouragement or active persuasion had a sufficient causal connection with the breach to attract tortious liability.

Moreover, actual knowledge of the terms of the contract is not essential – it is enough that the defendant had the means of knowledge which they deliberately disregarded: *Emerald Construction Co Ltd v Lowthian* [1966] at 700-701. Thus, the defendant will be liable if they deliberately turn a blind eye to the facts that would reveal the presence of a breach – they cannot escape liability if they consciously avoid enquiring into a case in order to avoid an inconvenient truth. Mere negligence, on the other hand, is not sufficient to give rise to liability: *British Industrial Plastics v Ferguson* [1940].

Dishonest assistance in a breach of trust

Where a trustee commits a breach of trust, they will, of course, be personally liable to compensate the clamant for any loss suffered as a result of the breach. Their liability is a primary liability. However, equity will also hold a third party liable if they have dishonestly assisted the trustee in committing a breach of trust. This secondary liability (which applies equally to breach of fiduciary duties) is based on the premise that beneficiaries can expect third parties to refrain from intentionally interfering with the duties of trustees. In the words of Lord Nicholls in the leading case of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] at 387:

> *There is here a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale [of accessory liability] is the same.*

The basis, however, of accessory liability is dishonesty and liability arises even where the trustee has acted honestly in breach of trust. Dishonesty, in this context, means not acting as an honest person would in the circumstances. This is primarily an objective standard, although the court, when determining whether a person was acting honestly, will look at all the circumstances known to that third party at the relevant time. In doing so, it will have regard to the personal attributes of the third party, such as their experience and intelligence and the reasons why they acted as they did. Dishonesty, therefore, includes participating in a transaction knowing it involves a misapplication of trust assets, and deliberately closing one's eyes or ears, or not asking questions, for fear of learning something which one would rather not know, and then proceeding regardless. Mere negligence or carelessness, on the other hand, is not dishonesty. The objective test of dishonesty established in *Tan* was subsequently approved by the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] and by the Court of Appeal in *Abou-Rahmah v Abacha* [2006].

A third party who acts as an accessory to a breach of trust will generally only be subject to a personal liability to account to the trust for the loss suffered in consequence of the breach of trust. Since they will not normally have received any trust property (as in recipient liability which is restitution-based), the beneficiaries will not have any proprietary remedy (in tracing) to recover trust assets in their possession or control. The remedy, therefore, is equitable compensation. In *Fyffes Group Ltd v Templeman* [2000], for example, the defendant had bribed an employee of the claimant company to enter into a contract with the defendant on favourable terms for the defendant. It was held that the defendant was liable for dishonestly assisting the employee's breach of fiduciary duty. The claimant's loss was the difference between the terms as agreed and the terms that would have been agreed had the employee not been bribed.

Another significant feature of accessory liability is that the accessory is regarded as jointly and severally liable with the trustee (or fiduciary) for any loss caused to the trust: *Ultraframe (UK) Ltd v Fielding* [2007] and *Novoship (UK) Ltd v Nikitin* [2014]. In effect, the claimant can recover from the accessory for *all* losses suffered as a result of the breach of trust and not just those caused by the accessory's assistance. However, where a profit has arisen from the breach, the accessory is only liable for their own share of the profit, not that of the trustee. It is noteworthy also, in this regard, that liability for the tort of inducing a breach of contract does not involve joint and several liability.

Should there be a new tort of inducing a breach of trust?

Current authority

In *Metall und Rohstoff*, referred to earlier, Slade LJ had occasion to remark, in relation to an argument that there was a tort of procuring a breach of trust, at 481:

> *The principles of the law of trusts, in particular those expounded by Lord Selbourne L. in Barnes v. Addy (1874) LR 9 Ch App 244, are quite sufficient to deal with those persons who incite a breach of trust or wrongfully meddle with trust assets or interfere with the relationship of trustee and beneficiary. We know of no authority supporting the existence of the alleged tort and can see no sufficient justification for the introduction of a new tort of this nature.*

These observations were, however, doubted by Lord Templeman in *Lonrho plc v Fayed* [1992] at 471, in the following terms:

> *I agree… that some of the observations of Slade LJ in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc… were not in accordance with previous authorities. Without encouraging the continuation or initiation of litigation by the present or any future disputants, I apprehend that the ambit and ingredients of torts of conspiracy and unlawful interference may hereafter require further analysis and reconsideration by the courts.*

In *Crawley Borough Council v Ure* [1996], the point was raised again where the claimant council granted the defendant and his wife a joint periodic tenancy of a flat, terminable by four weeks' notice. The wife subsequently left the flat and applied to the claimant for accommodation as a homeless person. Since, however, her interest in the flat disqualified her from being homeless, the claimant advised her that she should terminate the tenancy by serving on the claimant notice of her intention to quit. She did so, on a form provided by the council, without informing the defendant. The defendant refused to leave the property and the claimant sought a possession order against him. One of the arguments raised on behalf of the defendant was that, despite what was said by Slade LJ in *Metall und Rohstoff*, the claimant was guilty of the tort of procuring a breach of trust by accepting a notice to quit served by the defendant's wife and suing the defendant for possession. Glidewell LJ, who gave the leading judgment, preferred not to express any opinion as to whether Slade LJ was correct in rejecting the existence of the tort and left open the question as to whether his remarks had been made *per incuriam*: ibid, at 25. Some support, however, for the recognition of the tort can be found in the judgment of Hoffmann LJ in *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1993], at 150:

> *Although Lumley v Gye usually appears under the rubric 'procuring breach of contract' or the like, the principle was formulated in wider terms. Erie J said, 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…' There are thus three elements to the tort: (1) a right in the plaintiff (2) violated by an actionable wrong (3) procured by the defendant. Since [Lumley], there has been an extension of at least the first and third of these elements in the tort. First, the rights capable of being violated have been held to include rights conferred by statute… and fiduciary obligations imposed in equity, such as a company director's duty of fidelity to the company… or an agent's duty of confidence…*

As things stand at the moment, however, the tort of inducing a breach of trust has not been expressly acknowledged by the English courts.

Comparison with accessory liability

It is apparent that a third party will only be liable in equity as an accessory if they, in fact, dishonestly assisted in the commission of a breach of trust or breach of fiduciary duty. In *Brinks Ltd v Abu-Saleh (No 3)* [1996], Rimer J characterised such conduct as participation in the breach by performing positive acts of actual assistance. Subsequent case law, however, has suggested that this approach may be too narrow and that a person may be liable as an accessory whenever their conduct passively facilitates the commission of a breach of trust provided that it was dishonest. Thus, in *Adelaide Partnerships Ltd v Danison* [2011], it was enough that the proceeds of a fraudulent investment scheme were paid into the account on which the third party was signatory. The availability of the account was obviously very helpful in the setting up of the fraudulent scheme: see also, *Al Khudairi v Abbey Brokers Ltd* [2010] (making available a bank account through which moneys were paid).

But what if the third party does not actually assist in the breach of trust in the sense of actively (or passively) *participating* in its commission, but instead engages in mere acts of

encouragement, threats or persuasion so as to induce the trustee to commit a breach of trust? In this type of scenario, it is arguable that accessory liability has no application unless the requirement of 'assistance' has a wide meaning so as to include acts of inducement or encouragement. Thus, a third party may be said to have induced the breach if they caused the breach to occur, for example, by instigating the breach by the trustee. Alternatively, a third party may arguably be taken to have encouraged the breach where they suggested that the trustee should act in breach of trust. In *Tan*, at 392, Lord Nicholls appears to have adopted the wider view that 'a liability in equity to make good resulting loss attaches to a person who dishonestly *procures* or assists in a breach of trust or fiduciary obligation' (emphasis added). Moreover, at 384, his Lordship gave the following example:

> *Take a case where a dishonest solicitor persuades a trustee to apply trust property in a way the trustee honestly believes is permissible but which the solicitor knows full well is a clear breach of trust. The solicitor deliberately conceals this from the trustee. In consequence, the beneficiaries suffer a substantial loss. It cannot be right that in such a case the accessory liability principle would be inapplicable because of the innocence of the trustee. In ordinary parlance, the beneficiaries have been defrauded by the solicitor. If there is to be an accessory liability principle at all, whereby in appropriate circumstances beneficiaries may have direct recourse against a third party, the principle must surely be applicable in such a case, just as much as in a case where both the trustee and the third party have been dishonest.*

The significance, however, of this example lies not so much in identifying what acts constitute assistance for the purpose of establishing the equitable wrong, but rather in highlighting the difficulties associated with the earlier formulation set out by Lord Selbourne LC in *Barnes v Addy* [1874] at 251-252: that accessory liability requires the trustee's original breach of trust to be fraudulent and dishonest. It is noteworthy that, in *Twinsectra Ltd v Yardley* [2002], none of their Lordships referred to accessory liability as extending to acts of procurement or persuasion. On the contrary, Lord Millett specifically refers to accessory liability as not being 'limited to those who assist him in the original breach' but as extending 'to everyone who consciously assists in the continuing diversion of the money'. He adds that 'most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money': *ibid*, at 194. The recognition of a new tort of inducing a breach of trust would, it is submitted, put the matter beyond doubt and allow a claimant to pursue a third party where their wrongdoing consisted solely in threats or persuasion falling short of actual participation in, or the facilitation of, a breach of trust.

As we have seen, accessory liability is grounded in establishing dishonesty on the part of the accessory. This element, however, is absent in the tort of inducing a breach of contract which requires mere knowledge of the contract to found liability. More importantly, the tort hinges on showing an intention to persuade the contracting party to breach the contract. The requirements of knowledge and intention are closely linked, but remain separate elements in the tort – the first goes to circumstances and the second to consequences. Significantly, it is not necessary to show that the defendant should have intended the breach to result in harm to the claimant. It is enough that a breach was intended: see, for example, *South Wales Miners' Federation v Glamorgan Coal Co Ltd*

[1905]. However, this does not undermine the requirement that the claimant must actually suffer loss by virtue of the breach of contract in order to invoke the tort.

In terms of remedies, like accessory liability, the tort provides the claimant with a remedy in damages but has the advantage of allowing them to seek an injunction to restrain any future acts of inducement. It seems that aggravated damages may also be recovered in circumstances where the breach was intended to inflict 'humiliation and menace': *Pratt v BMA* [1919]. Moreover, while an equitable claim relying on accessory liability does not attract any of the fixed periods of limitation applicable in tort (see, s21 of the Limitation Act 1980 and *Statek Corporation v Alford* [2008] at para 125), nevertheless, any such claim for equitable compensation may be time-barred by analogy if it corresponds to a damages claim in tort at common law: see, *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] (involving claims for alleged dishonest breaches of fiduciary duty as well as those arising in contract and tort).

Conclusion for practitioners

While the principle in *Lumley* is commonly associated with interference with contractual rights, it is, in fact, seen as a wider principle covering violation of legal rights: see, *Quinn v Leathem* [1901] at 510. Thus, the English courts have already recognised a cause of action for inducing breach of statutory duty where the duty gives rise to a private right on behalf of the claimant: see, for example, *Meade v Haringey London Borough Council* [1979]. The tort probably also extends to procuring breaches of equitable obligations such as that of confidence, but its importance in this context is limited by the readiness of the courts to restrain the use of confidential information by the third party.

As mentioned earlier, the recognition of a new tort of inducing a breach of trust would have the advantage of allowing the claimant to pursue a third party where their wrongdoing consists solely of threats or persuasion falling short of actual participation in the commission of a breach of trust. There is a dearth of case law, as we have seen, on exactly what is meant by the concept of 'assistance' apart from recognising that any substantive act (or omission) which facilitates the breach of trust will be sufficient. The tort would also impose liability on the third party without proof of dishonesty provided that they had (actual or blind-eye) knowledge of the trust and the requisite intention to cause a breach.

Several commentators have already alluded to the possibility of recognising accessory liability as a tort: see, for example, P Birks, 'Civil Wrongs: A New World', 1990 Butterworth Lectures, (London, Butterworths, 1991), at 100. If morally the law condemns a person who induces a breach of contract by imposing tortious liability on them, why not do the same for someone who induces a breach of trust? Indeed, it could be argued that there is a higher level of moral outrage against a person who actively threatens an innocent trustee to breach their fiduciary obligations under the trust than someone who, at the invitation of a trustee, passively lends their assistance in the commission of the breach.

Interestingly, those who advocate an assimilation of equitable accessory liability with the tort of inducing a breach of contract do so primarily on the need to remove unnecessary distinctions between law and equity: see, A Burrows, 'We do this at Common Law but that in Equity', (2002) Vol 22/1, *Oxford Journal of Legal Studies* 1. In the absence of such assimilation, however, tortious liability for inducing a breach of trust would, it is argued,

operate as a separate and distinct claim from the equitable wrong of dishonestly assisting in a breach of trust. This view is supported by Lord Millett in *Twinsectra* where he stated, at p463:

> *The claim for 'knowing assistance' is the equitable counterpart of the economic torts. These are intentional torts; negligence is not sufficient and dishonesty is not necessary. Liability depends on knowledge.*

It is, therefore, envisaged that the same set of facts may give rise to alternative claims against the stranger to the trust involving liability both in tort and equity. This, of course, is not uncommon – proprietary estoppel, by way of example, is a doctrine involving the assertion of an equitable claim which is satisfied by the minimum award necessary to do justice between the parties. Constructive and resulting trusts, on the other hand, involve identifying beneficial ownership. But here again, the same set of facts may prompt the claimant to rely on all three of these alternative claims.

Points for the practitioner

- Although there already exists a modern tort of inducing a breach of contract, this does not currently extend to imposing liability in the case of an inducement of a breach of trust.
- Any such new tort would inevitably have similar characteristics to the existing tort of inducing a breach of contract: namely, that the defendant:
    - acted with the requisite knowledge of the existence of a trust; and
    - intended deliberately to interfere with the duties of the trustee.

  Actual knowledge would not be essential as it would be enough that the defendant turned a blind eye to the facts.

- The tort would allow a claimant to pursue a third party where their wrongdoing consists solely in threats or persuasion falling short of actual participation in, or the facilitation of, a breach of trust.
- The tort would impose liability on the third party without proof of dishonesty provided that they had knowledge of the trust and the requisite intention to cause a breach. Significantly, there would be no requirement that the defendant should have intended the breach to result in harm to the claimant. It would be enough that a breach was intended. However, the claimant would need to show actual loss suffered by virtue of the breach of trust in order to invoke the tort.
- Apart from the remedy of damages, the claimant would have the advantage of seeking an injunction to restrain any threatened or future inducement. Aggravated damages could also be recovered in appropriate circumstances.
- The same set of facts could give rise to alternative claims against the stranger to the trust involving liability both in tort and equity. This would be in addition to any claim brought against the trustee themselves for breach of trust.

Cases Referenced

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- Statek Corporation v Alford [2008] WTLR 1089 Ch D
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