Trinity Term
[2021] UKSC 24
On appeal from: [2019] EWCA Civ 1160

JUDGMENT

Secretary of State for Health and another (Appellants) *v* Servier Laboratories Ltd and others (Respondents)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

2 July 2021

Heard on 14 and 15 April 2021

Appellants	*Respondents*
Jonathan Crow QC David Drake (Instructed by Peters & Peters Solicitors LLP (London))	Marie Demetriou QC Daniel Piccinin (Instructed by Sidley Austin LLP (London))

Appellants:
(1) Secretary of State for Health
(2) NHS Business Services Authority

Respondents:
(1) Servier Laboratories Ltd
(2) Servier Research and Development Ltd
(3) Les Laboratoires Servier SAS
(4) Servier SAS

LORD HAMBLEN: (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Briggs and Lord Kitchin agree)

1. The tort of causing loss by unlawful means ("the unlawful means tort") is one of the "economic torts". It was subject to detailed consideration by the House of Lords in *OBG Ltd v Allan* [2007] UKHL 21; [2008] AC 1. As stated by Lord Hoffmann in para 51 of his leading speech in that case, it "consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant".

2. The essential issue in this 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. As a convenient shorthand, this has been referred to by the parties as "the dealing requirement".

3. Roth J and the Court of Appeal held that the majority of the House of Lords in *OBG* found this to be a necessary element of the tort and that this formed part of the ratio of their decision and was binding upon them. The Court of Appeal indicated that it would have followed that view of the majority even if not bound so to do.

4. The appellants contend that the dealing requirement should not be treated as forming part of the ratio of *OBG* so far as it applies to the present appeal. Alternatively, this court should depart from *OBG*, at least to that extent.

5. It is common ground that the relevant third parties in the present case had no dealings with the appellants and that if the dealing requirement is a necessary element of the unlawful means tort then the claim was properly struck out by Roth J.

The background facts

6. The appellants are the claimants in the proceedings. They fund the cost of drugs dispensed by the NHS in England and are also the successors in title to the rights of action of various NHS bodies, that were originally claimants, but have since been abolished.

7. The respondents are the defendants in the proceedings. They developed and manufactured the medicinal product perindopril erbumine ("perindopril"), which is used in the treatment of cardiovascular diseases, including the treatment of high blood pressure, and marketed it under the trade name "Coversyl".

8. The relevant third parties for the purpose of the claim are the European Patent Office ("EPO") and the English courts.

9. In 2001 the respondents (specifically the third respondent) applied to the EPO for a patent in respect of the alpha crystalline form of the tert-butylamine salt of perindopril. The patent was granted in 2004: EP 1 296 947. It had, among others, a UK designation. Opposition proceedings were commenced by ten companies and pursued by nine to a hearing before the Opposition Division of the EPO in July 2006, following which the patent was upheld.

10. The respondents (specifically the first and third respondents) defended and sought to enforce the UK designation of the patent in proceedings before the English courts, in particular by obtaining injunctions against other pharmaceutical companies, and successfully resisting the application for summary judgment by one such company, Krka, on the basis of the alleged invalidity of the patent.

11. The issue of the validity of the UK designation of the patent went to trial and in July 2007 Pumfrey J held that it was invalid since it lacked novelty, or alternatively was obvious over another existing patent - [2007] EWHC 1538 (Pat). That decision was upheld in the Court of Appeal in May 2008 - [2008] EWCA Civ 445. In 2009 the EPO Technical Board of Appeal revoked the patent.

12. The appellants allege that in obtaining, defending and enforcing the patent, the third respondent practised deceit on the EPO and/or the courts, with the intention of profiting at the expense of the appellants. It is alleged that the patent was obtained, defended and enforced on the basis of representations about the novelty and/or lack of obviousness of the alpha form that the third respondent knew to be false, or that were made with reckless indifference as to their truth. These allegations are denied by the respondents but are assumed to be true for the purpose of the strike out application.

13. The appellants allege that, as a result of the respondents' deceit, 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 so this delayed entry into the market meant that the appellants had to pay higher prices. Damages and interest in excess of £200m are claimed.

14. The basis of the unlawful means tort claim is therefore that the respondents intentionally caused loss to the appellants through their deceit (the unlawful means) of the EPO and the English courts (the third parties). At no time, however, were there any dealings between the appellants and the EPO or the English courts.

The proceedings below

The judgment of Roth J

15. In his judgment dated 2 August 2017 Roth J struck out the unlawful means tort claim - [2017] EWHC 2006 (Ch); [2017] 5 CMLR 17.

16. Roth J held at para 34 that in *OBG* "the ratio of Lord Hoffmann's determination of the elements of the tort is in para 51" of his speech:

> "Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."

This includes a requirement that the acts affect the third party's freedom to deal with the claimant.

17. Roth J further held at para 34 that:

> "… the whole approach of Lord Hoffmann and the express opinions of Lord Walker, Baroness Hale and Lord Brown emphasised the need to confine the tort within careful limits, and support the view that the unlawful means must affect the third party's freedom to deal with the claimant."

18. At para 43 he stressed the wide-ranging liability implications of the appellants' case, stating as follows:

> "If the claimants here were correct, then given the broad interpretation of the element of intention adopted in *OBG v Allen*, the right to claim against Servier would cover not only all the various UK Health Authorities but also all potential generic competitors who suffered loss through their inability to supply a generic version of perindopril by reason of the 947 Patent; any private medical expenses insurer who paid higher prices for reimbursement of the cost of perindopril; and, subject to any issues of jurisdiction, all foreign health authorities and insurers in each of the various other states in Europe that were designated under the 947 Patent. Mr Turner did not shrink from such implications, and indeed urged that the court should not shrink from them either."

19. He also set out at para 44 particular concerns as to the imposition of such wide-ranging liabilities in the context of the statutory regime governing patents, stating as follows:

> "… this would be the very opposite of confining the tort within a narrow ambit. Moreover, a patent is a creation of statute, and the statutory regime governing patents prescribes rights and remedies in a manner that reflects the legislative assessment of the policy issues involved. If those who suffered economic loss by reason of a patent being obtained by dishonest or reckless misrepresentations as to novelty or obviousness could use the unlawful means tort at common law to claim damages, that would circumvent that legislative balance, the very thing against which Jacob J (as he then was) warned in the passage of his judgment in *Isaac Oren v Red Box Toy Factory Ltd*, quoted with approval by Lord Hoffmann. … And as Jacob LJ indicated in his judgment concerning the 947 Patent …, any remedy should be found in the field of competition law, which of course also reflects legislative policy and is indeed the basis of the separate claim here for abuse of a dominant position …"

The Court of Appeal judgment

20. In its judgment dated 12 July 2019 the Court of Appeal (Sir Terence Etherton MR, Longmore and McCombe LJJ) dismissed the appeal - [2019] EWCA Civ 1160; [2020] Ch 717.

21. The Court of Appeal held at para 32 that "it is clear that the second sentence of para 51 of Lord Hoffmann's speech was intended to lay down an essential ingredient of the unlawful means tort in all cases". It considered that this was the "natural reading" of para 51 and that it was consistent with Lord Hoffmann's summary of the earlier case law.

22. It further held at para 50 that:

> "Finally, on the proper interpretation and significance of the second sentence of para 51 in Lord Hoffmann's speech in *OBG*, it is clear that Lord Walker, Baroness Hale and Lord Brown all understood Lord Hoffmann to be advocating an essential 'interference with liberty to deal' ingredient of the unlawful means tort …"

23. The Court of Appeal considered that *OBG* was a binding precedent on this question, pointing out as follows:

> "84. … the majority of the members of the appellate committee were intending to provide a comprehensive analysis of the unlawful means tort. Lord Hoffmann undertook a painstaking and detailed analysis of the relevant case law from the beginning of the history of the tort, explaining how confusion had arisen obscuring the difference between the separate torts of causing loss by unlawful means, on the one hand, and the *Lumley v Gye* tort of procuring a breach of contract by a third party, on the other hand, and examining the problems created by the so-called 'unified theory' of treating procuring breach of contract as one species of a more general tort of actionable interference with contractual rights.
>
> …
>
> 87. … the essential ingredients of the unlawful means tort, including specifically the need for claimant to show that the defendant's conduct interfered with the liberty of the third party to conduct dealings with the claimant, and their application to the facts were the subject of argument in *OBG* and were the subject of both analysis and conclusion in the speeches in the House of Lords …"

The *OBG* decision

24. It will be apparent that a central issue on this appeal is what was decided by the House of Lords in *OBG* and it is therefore necessary to consider the speeches in that case in some detail.

25. In *OBG* the House of Lords heard three appeals consecutively over a ten day period, all of which concerned claims in tort for economic loss caused by intentional acts. As Lord Nicholls of Birkenhead observed at para 139:

> "Counsel's submissions were wide-ranging. In particular the House is called upon to consider the ingredients of the tort of interference with a business by unlawful means and the tort of inducing breach of contract. These are much vexed subjects. Nearly 350 reported decisions and academic writings were placed before the House. There are many areas of uncertainty. Judicial observations are not always consistent, and academic consensus is noticeably absent. In the words of one commentator, the law is in a 'terrible mess'. So the House faces a daunting task. ..."

26. The House of Lords, with the benefit of extensive argument and citation, accordingly saw it as its "task" to seek to clarify the law relating to some of the main economic torts and specifically to consider the "ingredients" of the unlawful means tort.

27. All members of the House of Lords were agreed on important clarifications of the law relating to economic torts. In particular, they agreed that there is no "unified theory" of the economic torts and that the unlawful means tort and the tort of inducing breach of contract (or *Lumley v Gye* tort, named after the case in which it was first established - *Lumley v Gye* (1853) 2 E & B 216) are separate torts. This marked a return to the distinction drawn between them by Lord Watson in *Allen v Flood* [1898] AC 1, which had been obscured and confused by later case law, as reflected in the alleged tort of interference with contractual relations.

28. As Lord Hoffmann explained, the unlawful means tort is a tort of primary liability, while inducing a breach of contract is a tort of accessory liability, with the party procuring the breach of contract being liable as an accessory to the liability of the contracting party for its breach. At para 8 Lord Hoffmann identified four main differences between the two torts:

> "First, unlawful means is a tort of primary liability, not requiring a wrongful act by anyone else, while *Lumley v Gye* created accessory liability, dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means requires the use of means which are unlawful under some other rule ('independently unlawful') whereas liability under *Lumley v Gye* 2 E & B 216 requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person … Thirdly, liability for unlawful means does not depend upon the existence of contractual relations. It is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the claimant's economic expectations. ... Under *Lumley v Gye*, on the other hand, the breach of contract is of the essence. If there is no primary liability, there can be no accessory liability. Fourthly, although both are described as torts of intention … the results which the defendant must have intended are different. In unlawful means the defendant must have intended to cause damage to the claimant (although usually this will be, as in *Tarleton v M'Gawley Peake* 270, a means of enhancing his own economic position). Because damage to economic expectations is sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under *Lumley v Gye*, on the other hand, an intention to cause a breach of contract is both necessary and sufficient. Necessary, because this is essential for liability as accessory to the breach. Sufficient, because the fact that the defendant did not intend to cause damage, or even thought that the breach of contract would make the claimant better off, is irrelevant."

29. Having concluded at para 38 that it was time for the "unnatural union" of the two torts to be "dissolved" and that they should be "restored to the independence which they enjoyed at the time of *Allen v Flood*", Lord Hoffmann then addressed "the essential elements" of each of the torts.

30. In relation to the tort of inducing breach of contract, Lord Hoffmann stated that the essential elements were (i) knowledge that a breach of contract was being induced (paras 39-41); (ii) intention to procure a breach of contract as an end or a means to an end, but not merely as a foreseeable consequence (paras 42-43), and (iii) an actual breach of contract (para 44).

31. In determining that an actual breach was required, the House of Lords was rejecting the alleged tort of interference with contractual relations. As Lord Hoffmann stated at para 44: "No secondary liability without primary liability".

Lord Hoffmann's speech on the unlawful means tort

32. In relation to the unlawful means tort, all members of the House of Lords agreed with Lord Hoffmann's analysis of its essential elements, apart from Lord Nicholls.

33. In tracing the history of the unlawful means tort, Lord Hoffmann identified its origins in cases such as *Garret v Taylor* (1620) Cro Jac 567 in which liability was established when customers of a quarry were driven away by the defendant's threats of mayhem and vexatious lawsuits. He also referred to *Tarleton v M'Gawley* (1794) Peake 270 in which there was liability when potential customers of a rival trading ship were driven away by cannon fire on a canoe which was approaching the rival ship. He described these cases as involving primary liability "for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others" (para 6). He said that these cases were examined at length by the House of Lords in *Allen v Flood* "and their general principle approved" (para 7).

34. As to the tort's essential elements, Lord Hoffmann addressed first what constitutes unlawful means. It was primarily on this issue that Lord Nicholls disagreed with the majority.

35. Lord Hoffmann began his analysis as follows:

> "45. The most important question concerning this tort is what should count as unlawful means. It will be recalled that in *Allen v Flood* [1898] AC 1, 96, Lord Watson described the tort thus:
>
> > 'when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case ... the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.'

> 46. The rationale of the tort was described by Lord Lindley in *Quinn v Leathem* [1901] AC 495, 534-535:
>
> > ‘a person’s liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified - the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done.’
>
> 47. The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.”

36. Lord Hoffmann stated that the “old cases of interference with potential customers by threats of unlawful acts clearly fell within this description” and then referred to other more recent cases which he considered also did so, such as *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376.

37. At para 49 Lord Hoffmann addressed when means will be “unlawful”, concluding that this requires actionability by the third party, subject to the qualification that it includes cases where the only reason that it is not actionable is that the third party has suffered no loss. In relation to this qualification, he referred to *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 and *Lonrho plc v Fayed* [1990] 2 QB 479. This was the principal issue on which Lord Nicholls disagreed. He considered that means will be “unlawful” if they involve an act which a defendant is not permitted to do, whether by the civil law or the criminal law, and was not limited to actionable civil wrongs.

38. In para 51 Lord Hoffmann then set out what "unlawful means therefore consists of", namely "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". He added that it does not "include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant". This is the paragraph which the courts below considered contained the definition of the unlawful means tort, as held by the majority of the House of Lords.

39. Lord Hoffmann then cited three cases in support of his opinion that the acts must affect the third party's freedom to deal with the claimant.

40. *RCA Corpn v Pollard* [1983] Ch 135 involved a claim made by RCA against a bootlegger who was selling records made at Elvis Presley concerts without his consent. This was an offence under section 1 of the Dramatic and Musical Performers' Protection Act 1958 and would have been actionable by Elvis Presley, the third party. RCA had the exclusive right to exploit records made by Elvis Presley, but it was held by the Court of Appeal that it had no tortious cause of action. As Lord Hoffmann explained, the defendant "was not interfering with the liberty of the Presley estate to perform the exclusive recording contract", nor "did it prevent the Presley estate from doing any other act affecting the plaintiffs" (para 52). "The wrongful act did not interfere with the estate's liberty of action in relation to the plaintiff" (para 53).

41. In *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785 the defendant sold articles alleged to infringe the design right of the claimant who was the exclusive licensee of a registered design. The claimant's tortious claim was rejected in reliance upon the *RCA* case. As Lord Hoffmann explained, the defendant was doing nothing which affected the relations between the owner (the third party) and licensee (the claimant). "The exclusive licence meant that the licensee was entitled to exploit the design and that the owner contracted not to authorise anyone else to do so" (para 54). Those contractual relations and their performance were unaffected.

42. In *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 the claimant, Lonrho, owned and operated a refinery in Rhodesia (now Zimbabwe) which was rendered idle as a result of UK sanctions imposed following Rhodesia's declaration of independence in 1965. Lonrho alleged that Shell had prolonged the independence regime and thereby caused it loss by illegally supplying Rhodesia with oil. It was held by the House of Lords that Lonrho had no cause of action. Lord Hoffmann explained this on the basis that "Shell did not interfere with any third party's dealings with Lonrho" (para 55).

43. Lord Hoffmann then gave policy reasons to support this restrictive approach to what constitutes unlawful means, stating as follows:

> "56. Your Lordships were not referred to any authority in which the tort of causing loss by unlawful means has been extended beyond the description given by Lord Watson in *Allen v Flood* [1898] AC l, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535. Nor do I think it should be. The common law has traditionally been reluctant to become involved in devising rules of fair competition, as is vividly illustrated by *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so. …
>
> 57. Likewise, as it seems to me, in a case like *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law."

44. Later in his speech, Lord Hoffmann was to explain that "the way to keep the tort within reasonable bounds is to restrict the concept of unlawful means to what was contemplated in *Allen v Flood*" (para 135). At para 58 he explained why he did not consider that the concept of causation was adequate to do so, stating that:

> "It is not, I think, sufficient to say that there must be a causal connection between the wrongful nature of the conduct and the loss which has been caused. If a trader secures a competitive advantage over another trader by marketing a product which infringes someone else's patent, there is a causal relationship between the wrongful act and the loss which the rival has suffered. But there is surely no doubt that such conduct is actionable only by the patentee."

45. Lord Hoffmann then explained why he considered that a narrow definition of intention was also not adequate to do so, stating as follows at para 60:

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

46. Lord Hoffmann then addressed the question of intention, adopting a similar approach to that taken in relation to the requisite intention for the tort of inducing a breach of contract, and stating as follows at para 62:

> "In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

47. Having set out the applicable principles Lord Hoffmann considered how they were to be applied to the facts of the three appeals. The appeal which involved an alleged unlawful means tort was *Douglas v Hello! Ltd*. That case concerned the taking of photographs at the wedding of the well-known actors, Michael Douglas and Catherine Zeta-Jones. *OK!* magazine had exclusive rights to publish photographs of the wedding but a freelance photographer, Mr Thorpe, infiltrated the wedding and took photographs which he sold to *Hello!* magazine which published them. *OK!* sued *Hello!* for breach of confidence and for the tort of causing loss by unlawful means.

48. The breach of confidence claim succeeded before the trial judge, Lindsay J, but was reversed on appeal to the Court of Appeal. The majority of the House of Lords allowed *OK!*'s appeal.

49. The unlawful means tort claim failed before both Lindsay J and the Court of Appeal on the grounds that *Hello!* did not intend to cause loss to *OK!*.

50. Lord Hoffmann disagreed with that reason for dismissing the claim. He held that the injury to *OK!* was the means of attaining *Hello!*'s desired end and not merely a foreseeable consequence of having done so (para 134). He also considered that the

Court of Appeal's decision illustrated "the danger of giving a wide meaning to the concept of unlawful means and then attempting to restrict the ambit of the tort by giving a narrow meaning to the concept of intention. The effect is to enable virtually anyone who really has used unlawful means against a third party in order to injure the plaintiff to say that he intended only to enrich himself, or protect himself from loss" (para 135).

51. Lord Hoffmann further held as follows at para 129:

> "In view of my conclusion that 'OK!' was entitled to sue for breach of an obligation of confidentiality to itself, it is a little artificial to discuss the alternative claim on the footing that the obligation was owed solely to the Douglases. I would have considerable difficulty in reconciling such a hypothetical claim with *RCA Corpn v Pollard* [l983] Ch 135 and *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785. Neither Mr Thorpe nor 'Hello!' did anything to interfere with the liberty of the Douglases to deal with 'OK!' or perform their obligations under their contract. All they did was to make 'OK!'s' contractual rights less profitable than they would otherwise have been."

The speeches of the other members of the majority on the unlawful means tort

52. Lord Walker of Gestingthorpe discussed the differences between the approach of Lord Hoffmann and that of Lord Nicholls in the following terms:

> "266. On the economic torts, the most important difference is in the identification of the control mechanism needed in order to stop the notion of unlawful means getting out of hand-for example, a pizza delivery business which obtains more business, to the detriment of its competitors, because its drivers regularly exceed the speed limit and jump red lights. Lord Hoffmann sees the rationale of the unlawful means tort as encapsulated in Lord Lindley's reference (in *Quinn v Leathem* [1901] AC 495, 534) to interference with 'a person's liberty or right to deal with others'. In his view acts against a third party count as unlawful means only if they are (or would be if they caused loss) actionable at the suit of the third party.

> 267. Lord Hoffmann does not question the correctness of the decisions of the Court of Appeal in *RCA Corpn v Pollard* [1983] Ch 135 or of Jacob J in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, which show that a bootlegger's activities, although actionable by the owner of the intellectual property rights in question, are not actionable (by statute or at common law) by a contractual licensee entitled to exploit those rights, even if the licensee's profits are demonstrably reduced by the unlawful activities. As Oliver LJ said in *RCA Corpn v Pollard* [1983] Ch 135, 153:
>
> > 'the defendant's conduct involves no interference with the contractual relationships of the plaintiffs but merely potentially reduces the profits which they make as the result of the performance by Mr Presley's executors of their contractual obligations.'
>
> 268. Lord Nicholls also accepts the correctness of *Isaac Oren v Red Box Toy Factory Ltd* (and also, I infer, the correctness of *RCA Corpn v Pollard*). He proposes a wider test of unlawful means relying on the notion of instrumentality as the appropriate control mechanism."

53. His reasons for preferring Lord Hoffmann's "proposed test" were as follows:

> "269. Faced with these alternative views I am naturally hesitant. I would respectfully suggest that neither is likely to be the last word on this difficult and important area of the law. The test of instrumentality does not fit happily with cases like *RCA Corpn v Pollard*, since there is no doubt that the bootlegger's acts were the direct cause of the plaintiff's economic loss. The control mechanism must be found, it seems to me, in the nature of the disruption caused, as between the third party and the claimant, by the defendant's wrong (and not in the closeness of the causal connection between the defendant's wrong and the claimant's loss).
>
> 270. I do not, for my part, see Lord Hoffmann's proposed test as a narrow or rigid one. On the contrary, that test (set out in para 5l of his opinion) of whether the defendant's wrong interferes with the freedom of a third party to deal with the claimant, if taken out of context, might be regarded as so

> flexible as to be of limited utility. But in practice it does not lack context. The authorities demonstrate its application in relation to a wide variety of economic relationships. I would favour a fairly cautious incremental approach to its extension to any category not found in the existing authorities."

54. Baroness Hale of Richmond set out her reasons for agreeing with the "refinement" proposed by Lord Hoffmann as follows:

> "306. … The underlying rationale of both the *Lumley v Gye* (1853) 2 E & B 216 and the unlawful means torts is the same: the defendant is deliberately striking at his target through a third party. But the means used to strike must be unlawful: see *Allen v Flood* [1898] AC 1. They may either be a wrong committed by the third party against the target or be a wrong committed by the defendant against the third party. But the rules governing each are different: in particular, the intention is different and the damage procured is different. Nevertheless, the common thread is striking through a third party who might otherwise be doing business with your target, whether by buying his goods, hiring his barges or working for him or whatever. The refinement proposed by my noble and learned friend, Lord Hoffmann, is entirely consistent with the underlying principles to be deduced from the decided cases. It is also consistent with legal policy to limit rather than to encourage the expansion of liability in this area. In the modern age, Parliament has shown itself more than ready to legislate to draw the line between fair and unfair trade competition or between fair and unfair trade union activity. This can involve major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise. Such things are better left to Parliament. The common law need do no more than draw the lines that it might be expected to draw: procuring an actionable wrong between the third party and the target or committing an actionable (in the sense explained by Lord Hoffmann at para 49 above) wrong against the third party inhibiting his freedom to trade with the target."

55. Lord Brown of Eaton-Under-Heywood expressed his agreement with the reasoning and conclusion of Lord Hoffmann on all issues, adding the following observations in relation to the unlawful means tort:

> "320. As Lord Hoffmann explains, any liability for this tort is primary (unlike the accessory liability which arises under the principle in *Lumley v Gye* (1853) 2 E & B 216 where the defendant induces a contracting party to commit an actionable wrong against the claimant) and it arises where the defendant, generally to advance his own purposes, intentionally injures the claimant's economic interests by unlawfully interfering with a third party's freedom to deal with him. In this tort there is no question of the third party's conduct (which ex hypothesi will have been inhibited or obstructed by the defendant's actions) being unlawful vis-a-vis the claimant; if it were, the case would be one of *Lumley v Gye* secondary liability. Rather the unlawfulness is that of the defendant towards the third party and the defendant's conduct must be such as would be actionable at the suit of the third party had he suffered loss. To define and circumscribe the tort in this way seems to be not only faithful to its origins as described by Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535, and consistent with the great bulk of authority which has considered the tort over the ensuing century, but also to confine it to manageable and readily comprehensible limits. This whole area of economic tort has been plagued by uncertainty for far too long. Your Lordships now have the opportunity to give it a coherent shape. This surely is an opportunity to be taken."

56. Before addressing the parties' submissions on *OBG* I would make the following general observations on the majority judgment on the unlawful means tort.

57. 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 relating to economic torts.

58. Lord Hoffmann's explanation of the essential elements of the unlawful means tort needs to be considered in this context. It was meant to clarify the law going forward and it served a definitional purpose.

59. Secondly, in carrying out this task a central concern of the majority was, in the words of Lord Hoffmann, "to keep the tort within reasonable bounds". This is also reflected in the statements of Lord Walker that it was important to identify an appropriate "control mechanism", and Lord Brown that there was a need to confine the tort "to manageable and readily comprehensible limits".

60. This was partly, as Lord Walker said, "to stop the notion of unlawful means getting out of hand", but it also reflected the policy consideration that this is an area of economic activity the regulation of which the courts have recognised should largely be left to Parliament. Thus, Lord Hoffmann observed that the tort was "designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour", and that the common law had largely left rules of fair competition "to be laid down by Parliament" (para 56). Baroness Hale observed that it was "legal policy to limit rather than to encourage the expansion of liability in this area" and that drawing the line between "fair and unfair trade competition or between fair and unfair trade union activity" involved economic, social and politically sensitive questions "better left to Parliament".

61. Thirdly, Lord Hoffmann considered that the best way to keep the tort within reasonable bounds was through giving a narrow rather than a wide meaning to unlawful means. In his view this could not satisfactorily be done by applying principles of causation or by adopting a narrow meaning of intention.

62. Fourthly, the restrictive policy approach towards economic torts adopted by the majority of the House of Lords in *OBG* is reflected not only in its decision as to the elements of the unlawful means tort, but also in its decision on inducing breach of contract and on conversion. Thus, inducing a breach of contract was held to require knowledge that a breach was being induced and an actual breach rather than interference with contractual relations. A new economic tort of strict liability for economic loss caused by conversion of a chose in action was also rejected.

Issue 1 - is the dealing requirement part of the ratio of *OBG*?

63. I agree with the courts below that the dealing requirement is part of the ratio of *OBG* for a number of reasons.

64. First, it is consistent with Lord Hoffmann's explanation of the rationale of the unlawful means tort as set out in the passage from Lord Lindley's judgment in *Quinn v Leathem* cited at para 46 of his judgment. This passage focuses on "a person's liberty or right to deal with others" and on wrongful interferences with that "liberty to deal". Mr Jonathan Crow QC on behalf of the appellants questioned whether this was Lord Lindley's view when one considers his judgment as a whole, but what is significant for the purpose of identifying the ratio of *OBG* is that Lord Hoffmann stated it to be the rationale of the tort.

65. Secondly, although Lord Hoffmann does not refer specifically to the dealing requirement when describing the essence of the tort in the first sentence in para 47 of his judgment, he goes on to explain and expand upon the essence of the tort in the paragraphs which follow. This includes the dealing requirement, as expressly stated by him in para 51.

66. Thirdly, para 51 sets out Lord Hoffmann's definition of what unlawful means "consists of". The second sentence of that paragraph, which sets out the dealing requirement, is part of that definition. It cannot be divorced from the first sentence which is plainly definitional and which it qualifies. As Lord Walker observed, this paragraph sets out Lord Hoffmann's "proposed test".

67. Fourthly, Lord Hoffmann explains and justifies the dealing requirement through his analysis of the cases of *RCA Corpn v Pollard*, *Isaac Oren v Red Box Toy Factory Ltd* and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*, all of which he explains by reference to there being no dealings between the claimant and the third party which were affected. It may be that other explanations of those decisions can be advanced, but what matters for present purposes is that this is how Lord Hoffmann analysed and explained them.

68. Fifthly, the dealing requirement is consistent with the authorities in which liability for the unlawful means tort has been established, which, as Lord Hoffmann explained, all involved dealings. As he stated at para 56, no case was cited to the House of Lords in which the tort had been extended beyond the description given by Lord Lindley in *Quinn v Leathem*, focusing as it does on the liberty to deal.

69. Sixthly, the dealing requirement is consistent with and reflects Lord Hoffmann's concern that the tort be kept within reasonable bounds and that a narrow meaning be given to unlawful means.

70. Seventhly, it is apparent, and was not disputed by Mr Crow, that the other members of the majority understood Lord Hoffmann's definition of the tort to include a dealing requirement and that they endorsed it. Thus, Lord Walker said at para 269 that the "control mechanism" for the tort should be the "*nature of the disruption caused, as between the third party and the claimant*, by the defendant's wrong". Baroness Hale described the requisite unlawful means at para 306 as involving a "a wrong against the third party inhibiting his *freedom to trade* with the target". Lord Brown stated at para 320 that the tort is limited to situations in which the defendant "intentionally injures the claimant's economic interests by unlawfully interfering with *a third party's freedom to deal with him*" (emphasis added).

71. Eighthly, *OBG* has been understood to impose a dealing requirement by the courts both in this country and elsewhere in the Commonwealth - see, for example, *Emerald Supplies Ltd v British Airways plc (Nos 1 and 2)* [2015] EWCA Civ 1024; [2016] Bus LR 145, para 128 (Court of Appeal); *Intellihub Ltd v Genesis Energy Ltd* [2020] NZHC 807, para 30 (New Zealand High Court, upheld on appeal [2020] NZCA 344); *Wolero Pte Ltd v Lim* [2017] SGHC 89, paras 69-71 and 78 (Supreme Court of Singapore); *Hardie Finance Corpn Pty Ltd v Ahern (No 3)* [2010] WASC 403, paras 720 and 722(iii) (Supreme Court of Western Australia), and *A I Enterprises Ltd v Bram Enterprises Ltd* 2014 SCC 12; [2014] 1 SCR 177, para 87 (Supreme Court of Canada). This has also been the common understanding of academic commentators - see, for example, Hazel Carty, *An Analysis of the Economic Torts*, 2nd ed (2010), at pp 95-98; Sales and Davies, "Intentional harm, accessories and conspiracies" (2018) 134 LQR 69-93, at pp 74-75.

72. Mr Crow submitted that in so far as the majority of the House of Lords were specifying that there is a dealing requirement, they should only be regarded as doing so for the purposes of the appeals before them and not as an essential element of the tort generally. The stated purpose of the decision in *OBG* was, however, to bring clarity to the law and to set out and define the requisite elements of the unlawful means tort and the tort of inducing breach of contract. That is what they were purporting to do and that is what they did.

73. Mr Crow further submitted that if the dealing requirement was intended to be of general application, it is surprising that the House of Lords did not address the facts of *Lonrho v Fayed* since they involved an alleged deceit on the Secretary of State for Trade and Industry, with whom the claimant would have had no dealings. Lord Hoffmann referred to that case at para 50, but only did so as it arguably provided support for the view that the requirement of actionability may be satisfied even if the third party has suffered no loss. The case was not referred to or considered in relation to the dealing requirement. In any event, that was not a matter specifically considered or addressed by the Court of Appeal in *Lonrho v Fayed*, save in passing by Woolf LJ who doubted that a claim could lie where there were no dealings between the Secretary of State and the claimant (at p 493G). Yet further, the decision in that case was merely that the claim was arguable and therefore should not be struck out. It was not stated or suggested that the claim was sound in law if it was made out on the facts.

74. Mr Crow also submitted that what was said in *OBG* was not part of the ratio as the appeal in *Douglas v Hello!* succeeded on the breach of confidence claim and so the appeal on the unlawful means tort claim did not need to be and was not determined. However, Lord Hoffmann, with whose reasoning and conclusion the other members of the majority agreed, specifically addressed the unlawful means tort claim at para 129 of his judgment and made it clear that it was the absence of

any interference in dealings between the Douglases and *OK!*, rather than the absence of the requisite intention, which meant that that claim would fail.

Issue 2 - should *OBG* be departed from?

75. The appellants' case is that the dealing requirement is an undesirable and unnecessary addition to the essential elements of the unlawful means tort.

76. 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 fails to cater for the possibility that a defendant may strike at a claimant, not through the claimant's customers, suppliers, employers or employees, but by other equally objectionable and damaging means. There will be cases where the claimant's interest in the third party's actions derives from something other than actual or potential commercial or labour relations between them and it is unsatisfactory and arbitrary to limit the ambit of the unlawful means tort to such cases.

77. It is said to be unnecessary because the other elements of the tort, and in particular the instrumentality requirement, are adequate both to explain the existing authorities and to keep the tort within reasonable bounds. The appellants describe the instrumentality requirement in terms that the defendant must have engaged in conduct that harms the claimant indirectly, by interfering with the actions of a third party, in which actions the claimant has an interest, so that the third party's conduct forms a necessary link in the causal chain between the defendant's conduct and the harm suffered by the claimant, with the result that the defendant uses the third party as an instrument to strike at the claimant. They describe it as a structural causal requirement.

78. The appellants put forward three alternative approaches as to how the unlawful means tort can and should be "refashioned", shorn of the dealing requirement.

79. The first alternative is to reject the dealing requirement as an element of the tort in favour of the requirement that the defendant's conduct must interfere with actions of the relevant third party in which the claimant has an interest.

80. The second alternative is that the dealing requirement should be rejected as part and parcel of a redefinition of the tort, according to which it would be made out wherever a defendant deliberately employs means that the law prohibits (whether or not civilly actionable), with the intention of harming the claimant.

81. The third alternative is that the dealing requirement should be rejected as part and parcel of a redefinition of the tort, according to which it would be made out wherever the defendant employs means that are unlawful (in the sense that they are actionable by a third party, or would be, if the third party had suffered loss) with the intention of harming the claimant.

82. 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: *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. I summarised the applicable principles in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2020] 3 WLR 1124, para 87 as follows:

> "As this court has recently emphasised, it will be 'very circumspect before accepting an invitation to invoke the 1966 Practice Statement': *Knauer v Ministry of Justice* [2016] AC 908, para 23. It is important not to undermine the role of precedent and the certainty which it promotes. Circumstances in which it may be appropriate to do so include where previous decisions 'were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy' - per Lord Reid in *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966. Even then the court needs to be satisfied that a departure from precedent 'is the safe and appropriate way of remedying the injustice and developing the law' - per Lord Scarman in *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 106."

83. Whilst the appellants can point to some academic criticism of the decision in *OBG*, they have not provided any real life examples of it causing difficulties, creating uncertainty or impeding the development of the law.

84. In their written case, the appellants identified some hypothetical examples which they suggested showed that the dealing requirement meant that there would be no liability in cases in which redress was called for and thereby worked unjustly. These examples were as follows:

> (i) A defendant uses a series of bomb hoaxes or bogus reports of drone sightings to shut Heathrow airport repeatedly, with the intention of causing loss to British Airways, the claimant, which uses Heathrow as its hub. The appellants question why the claimant's ability to obtain redress should

depend on whether the third party to whom the defendant communicates his deceitful warnings is Heathrow airport itself (in relation to which the dealing requirement may be satisfied) or the British Transport Police (in relation to which the dealing requirement cannot be satisfied).

(ii) A defendant deceives a doctor, the third party, into amputating an unconscious patient's healthy limb by telling him deceitfully that it is the left leg that is scheduled for amputation, when in fact it is the right leg. The appellants question why redress should be denied simply because the defendant's deceit does not interfere with the third party's freedom to deal with the claimant, so that the dealing requirement cannot be satisfied.

(iii) A defendant uses deceit to procure that the security services, the third party, "destroy the claimant's baggage, left briefly unattended in a public place, by telling them deceitfully that the baggage has been so for several hours". The appellants question why the defendant should escape responsibility on the basis that the claimant's interest in a third party's actions lies in not having his or her baggage incorrectly destroyed, rather than in potential dealing or trading between the claimant and the third party.

85. It is to be noted that the appellants' second and third examples both arise out of their contention that the unlawful means tort should not be confined to protection of the economic interests of the claimant. That, however, is not an issue which arises in this case since the appellants' claim is for economic loss. Historically the tort has been so confined and in *OBG* the House of Lords considered that as a matter of policy liability in this area should be limited rather than expanded. It may be that in an appropriate case a challenge is made to the established position, but this is not that case. In any event, as the respondents pointed out, in both these examples the claimant is likely to have a claim for malicious falsehood and possibly other tortious causes of action.

86. As to the first example, Heathrow may well have a claim in deceit if it relied on the false statement made by the defendant, communicated via the British Transport Police. In such circumstances British Airways, whose dealings with Heathrow were disrupted, would be likely have a claim against the defendant in the unlawful means tort. In any event, the example begs questions as to what the position would or should be in relation to other airlines whose dealings were similarly disrupted.

87. Mr Crow did not develop these examples in oral submissions but instead focused on the facts of the present case. He stressed that these illustrate how the dealing requirement operates in an arbitrary and unprincipled manner by excluding

public authorities as potential claimants. He questioned why as a matter of justice, if a defendant obtains patent protection by deceit practised on the EPO so as to profit at the expense of the NHS, redress should be denied because the EPO does not trade with the NHS. One answer is the distinction between this case and the other examples given, namely that there is no suggestion of any lies being told by the respondents about the appellants or its property or anyone they dealt with. The alleged lie is about the respondents' own purported invention and does not in any way relate to the appellants. In such circumstances any damage to the appellants would be "remote", the term used by Lord Lindley in *Quinn v Leathem*. Another answer, developed below, is that extending liability to claimants, such as public authorities, who have no dealings with the third party creates a risk of indeterminate liability, as the facts of the present case illustrate.

88. Mr Crow further submitted that *OBG* was not consistent with earlier authority and in particular some general statements made by members of the House of Lords in *Allen v Flood*. He pointed out that none of their Lordships in that case stated that there was a dealing requirement and that some of their Lordships spoke of the tort in general terms which did not require any particular kind of relations between the third party and the claimant, and in particular commercial or trading relations. In this connection, Mr Crow referred in particular to the speeches of Lord Watson at pp 96-98; Lord Herschell at p 137; Lord Shand at p 165; Lord Davey at p 173 and Lord James of Hereford at p 180.

89. It is correct that neither *Allen v Flood* nor any other pre-*OBG* authority holds that the dealing requirement is an essential element of the unlawful means tort. The House of Lords in *OBG* were, however, considering and deciding what the essential elements of a tort of previously uncertain ambit should be. Their policy decision was that it should include the dealing requirement. That was consistent with all previous decisions on the tort, since they were all dealing cases. The only example which the appellants have been able to provide of a case which did not involve dealing is *Lonrho v Fayed* and the reliance in that case on false representations made to the Secretary of State. But all that was decided in that case was that the claim was arguable, and that decision appears to have been reached without any particular focus on the dealing issue.

90. As to the speeches in *Allen v Flood*, the decision of the majority in that case was that the plaintiff shipwrights had no cause of action against the defendant ironworkers who had ensured that the third party shipyard did not continue to employ them because this involved no breach of contract or other unlawful act and acting maliciously or with a bad motive did not render the ironworkers' conduct tortious. Anything said about circumstances in which a cause of action might lie was therefore necessarily obiter. Further, it was a dealing case since the ironworkers' actions were directed at interfering with and stopping the shipyard's dealings with the shipwrights. It follows that no question arose as to whether a cause of action

could arise even if there were no such dealings. Many of the general statements relied upon by Mr Crow need to be seen in the specific factual context of the case and the arguments being made on behalf of the shipwrights as to the importance of trading relations in order to support their case that malicious interference with trading relations is itself tortious. Furthermore, all the passages relied upon by Mr Crow involve examples of there being relations and dealings between the claimant and the third party, albeit not necessarily economic or trade dealings.

91. The appellants are not therefore able to point to any injustice which calls for remedy by invocation of the 1966 Practice Statement. Nor can they show that their alternatives offer a safe and appropriate way of developing the law.

92. The appellants' first alternative involves leaving the law as stated in *OBG* but without a dealing requirement. This would mean, however, that the control mechanism which the House of Lords considered to be both necessary and desirable would be dispensed with. The appellants argued that the other elements of the tort, and in particular the instrumentality requirement, provide a sufficient control mechanism, but that was an argument which was specifically rejected in *OBG*. As the appellants recognise and assert, the instrumentality requirement is a causation requirement: the damage to the claimant must be caused in fact through the instrumentality of the third party. Both Lord Hoffmann (at para 58) and Lord Walker (at para 269) stated, however, that causation did not provide an adequate control mechanism. It is also to be noted that Lord Walker reached that conclusion having had express regard to Lord Nicholls' proposal of "the notion of instrumentality as the appropriate control mechanism" (para 268).

93. As the respondents submitted, factual causation is too weak a factor to perform a useful limiting role. It would also be likely to give rise to uncertainty as to what would constitute a sufficient causal relationship. It would potentially embrace very remote connections between the unlawful means used in relation to the third party and the damage to the claimant. That can be illustrated by reference to the facts of the present case. The alleged causal sequence and connections in this case are as follows: (i) the respondents deceived the EPO/High Court; (ii) this had the consequence of persuading the EPO/High Court to grant the patent/injunction; (iii) this had the further consequence of persuading or compelling particular generic manufacturers not to enter the market; (iv) this had the further consequence of preventing a competitive process from arising, which would have eventually resulted in lower prices; (v) this had the further consequence of causing the appellants to pay too much for perindopril. It may be that such a chain of factual causation can be made out, but it is obvious that the damage is very remote from the unlawful means.

94. 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 in relation to a tort which permits recovery for pure economic loss and, moreover, by persons other than the immediate victim of the wrongful act. It does so in a straightforward and easily applicable manner. It also captures within an easily defined compass the historical origins from which the unlawful means tort emerged. As with most legal rules which involve the drawing of a line, there may be hard cases which fall outside the operation of the rule, but that is not a good or sufficient reason for dispensing with the rule.

95. The dealing requirement also minimises the danger of there being indeterminate liability to a wide range of claimants. As Roth J pointed out in para 43 of his judgment, if the appellants' case is accepted the potential claimants in the present case would include the various UK Health Authorities, generic competitors, private medical insurers, foreign health authorities and indeed individuals who had to pay more for perindopril. This was previously conceded by the appellants, and although Mr Crow withdrew that concession, the risk of a wide range of claimants clearly exists. An important reason why that is so is that the House of Lords in *OBG* rejected a narrow and specific test of intention which requires targeting of the claimant. Instead, it laid down a test of intention which includes intending harm as a means to an end, such as enrichment. Consequences that are the necessary means by which the defendant's aim is achieved are taken to be intended. In the economic context of the unlawful means tort this may operate very broadly. Competition is the essence of trade and it involves gain at the expense of others. Keeping the law as stated in *OBG* but dispensing with the dealing requirement would mean losing an important counterbalancing factor to the broader test of intention adopted in that case. Adopting the appellants' first alternative would involve undermining the coherence of the majority decision in *OBG* and the careful and considered policy choices which were made.

96. The appellants' second alternative involves adopting in whole or in part the alternative formulation of the unlawful means tort proposed by Lord Sales and Professor Davies in their 2018 LQR article. In brief summary, they advocate that unlawful means should not be limited by actionability but should extend to any criminal, statutory or civil wrong. They also consider that the tort should be extended beyond economic interests and that there should be no dealing requirement. They recognise the need for a control mechanism but consider that this can be provided by adopting a narrow test of intention. They acknowledge that the test of intention in *OBG*, which they refer to as the *Sorrell v Smith* view of intention (*Sorrell v Smith* [1925] AC 700), may operate too broadly in some areas. As they explain as at p 77:

> "… in many contexts the *Sorrell v Smith* view of intention to harm seems to come adrift from a view of intention to harm in the sense of specifically targeting the use of unlawful means

> against a particular person … For instance, a defendant might be broadly aware of competing against others in a limited market but have only a hazy idea who those others are or which of them might actually be harmed by that defendant's own actions: would that create a sufficient nexus between the defendant and the (unknown) claimant competitor to give rise to liability? We suggest not. A more specific intention to use unlawful means to harm a particular person should be required, using those means as the club to hit them …"

97. We have not been addressed on whether it would be appropriate to revisit the *OBG* test of intention. That is no doubt because the only intention which the appellants are able to plead is *Sorrell v Smith* intention. Their case is that the elevated prices sought by the respondents were achieved "at the expense" of the appellants and that expense was "a means to an end, that end being elevated prices" (para 75 of the Particulars of Claim). This is not therefore an appropriate case to consider the possibility of adopting the Sales/Davies reformulation of the tort and it would not avail the appellants if the court was to do so. In so far as the appellants are suggesting that we should adopt part of the Sales/Davies proposal, abandon the dealing requirement, but ignore the rest, that is incoherent and unsustainable. If such a reformulation ever falls to be considered, it would be necessary to consider it in its entirety, not on a pick and choose basis.

98. It should also be noted that Lord Hoffmann specifically considered a similar proposal made in an earlier article written by Lord Sales - Sales and Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411-437. He noted that they considered that the tort could be kept within reasonable bounds by a requirement of a specific intention to target the claimant, but agreed with other writers who "consider that it would be arbitrary and illogical to make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant". He also pointed out at para 60 that a narrow test of intention may be too exclusionary.

99. The appellants' third alternative is that the approach taken by the Canadian Supreme Court in the *A I Enterprises* case should be followed. In that case the court rejected the dealing requirement on the grounds that it was an "additional requirement" not supported "either by the authorities or the rationale for imposing liability" (para 87). This does not engage with Lord Hoffmann's identification of the rationale of the tort at para 46 of his judgment by reference to the passage cited from Lord Lindley's judgment in *Quinn v Leathem*. The court considered that a sufficient control mechanism was provided by adopting a narrow approach to unlawful means and to intention, but its test of intention involved a *Sorrell v Smith* view of intention (para 95). Moreover, it appears that the court did not include an instrumentality requirement in its reformulation of the tort. In the result it provides

a more extreme version of the appellants' first alternative and if that is rejected, as it should be, this alternative must equally be rejected.

Conclusion

100. I am grateful to Mr Crow for the appellants and Ms Marie Demetriou QC for the respondents for the skilful, clear and concise arguments presented by them. Despite Mr Crow's valiant efforts, I have reached the firm conclusion that the appeal must 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.

LORD SALES:

101. I agree with Lord Hamblen's clear and elegant judgment. The dealing requirement is part of the ratio decidendi of the *OBG* decision and no sufficient reason has been put forward in this case to justify departing from it in accordance with the 1966 Practice Statement. I add a short judgment of my own only because the appellants, for part of their argument, sought to rely on an article written by myself and Professor Paul S Davies: "Intentional harm, accessories and conspiracies" (2018) 134 LQR 69. As to that, I agree with what Lord Hamblen says at paras 96 and 97.

102. It is no secret that the decision of the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19; [2008] AC 1174, by a differently constituted panel of the appellate committee shortly after the *OBG* case, has to some degree potentially resurrected issues which the majority in *OBG* may have hoped they had laid to rest regarding the nature of the so-called "economic torts" and what sort of unlawful means may qualify as "unlawful means" in this area. In *Total Network* the House affirmed that a wide class of unlawful means, including conduct which is unlawful according to the criminal law but is not independently actionable in civil law, qualify as "unlawful means" for the purposes of the tort of conspiracy to injure using unlawful means. Similarly, the speeches in *Rookes v Barnard* [1964] AC 1129, the leading authority on the tort of intimidation, proceeded on that premise. In his speech in the *OBG* case, Lord Hoffmann did not attempt to explain the relationship between the unlawful means tort and the tort of conspiracy to injure by unlawful means, nor did he discuss the speeches in *Rookes v Barnard* in any detail or attempt to give a full account of the tort of intimidation. Professor Davies and I are not the only commentators to suggest that the *Total Network* decision raises a question as to how well, or coherently, the unlawful means tort as analysed by the

majority in the *OBG* case fits with the unlawful means conspiracy tort as analysed in *Total Network*. I venture to think that this is an issue which will have to be resolved at some stage, along with the relationship between these torts and general concepts of accessory liability in civil law: see eg *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] AC 1229. I wish to reserve my opinion about this.

103. What is clear, however, is that, as explained by Lord Hamblen, the present appeal is in no way an appropriate vehicle for undertaking any such exercise. The development of the "economic torts" has involved a search for appropriate control mechanisms, lest they get out of hand and cast the net of legal liability too widely. The dealing requirement articulated by Lord Hoffmann in the *OBG* case was deliberately adopted by him as one control mechanism in relation to the unlawful means tort, as was his holding that to qualify as relevant unlawful means the conduct in question should be independently actionable in civil law. On the other hand, he endorsed a relatively wide concept of intention to harm, drawn from *Sorrell v Smith* [1925] AC 700. The balance struck by Lord Hoffmann and the majority in the *OBG* case between these elements was considered and deliberate. If consideration were now to be given to adjusting his approach to the first two elements to relax their limiting effect, it would also require careful consideration of whether that could be compensated by a countervailing adjustment to tighten and narrow the concept of intention. Mr Crow QC for the appellants did not make submissions about this, because on the facts of this case the appellants could only succeed on the basis of a wide, *Sorrell v Smith* form of intention as an element of the tort. As Ms Demetriou QC rightly responded to Mr Crow's reference to things said by Professor Davies and me in our article, he adopted a "pick and mix" approach which was very different from the analysis we set out and which could not be accepted.