Neutral Citation Number: [2020] EWCA Civ 258

Case No: A4/2019/1647

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**
**His Honour Judge Halliwell**
**E40MA103**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2020

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE DAVID RICHARDS**
and
**LADY JUSTICE ROSE**

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**Between :**

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| **MR DAVID ALLEN**<br>**t/a DAVID ALLEN CHARTERED ACCOUNTANTS** | **Appellant** |
| **- and -** | |
| **DODD & CO LIMITED** | **Respondent** |

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**Mr Richard Stubbs** (instructed by **Weightmans LLP**) for the **Appellant**
**Mr Ghazan Mahmood** (instructed by **Baines Wilson LLP**) for the **Respondent**

Hearing date : 19 February 2020

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# Approved Judgment

## Lord Justice Lewison:

1. The issue raised on this appeal is what amounts to a sufficient state of mind to make a person liable in tort for inducing a breach of contract.

2. Mr Pollock was employed by David Allen, an accountancy firm, as a business service specialist, whose principal role was preparing tax returns. His contract of employment contained what appeared to be restrictive covenants. On 23 May 2018 he was offered a job by Dodd & Co Ltd, a competitor. Mr Pollock resigned with effect from 6 July 2018 and joined Dodd three days later. Before Mr Pollock took up his new job Dodd had obtained legal advice from their solicitors about whether the restrictive covenants were enforceable. Based on the advice received Dodd took the view that while the matter was not entirely without risk, it was more likely than not that the restrictive covenants were ineffective and unenforceable against Mr Pollock. In fact it turned out, after a contested hearing, that subject to some permissible excisions, the covenants were enforceable after all; and that, by working for Dodd as he did, Mr Pollock was in breach of them. The question raised on this appeal is whether Dodd had sufficient knowledge to expose them to liability in tort for procuring a breach of Mr Pollock's contract. HHJ Halliwell answered that question "no". He said that Dodd did not turn a blind eye to Mr Pollock's contractual obligations. Nor was Dodd indifferent to them because it went to the trouble of obtaining early legal advice; upon which it honestly relied. The fact that the legal advice turned out to be wrong was not enough.

3. Mr Pollock was first employed by David Allen in 2007. On 28 April 2015 he signed a new contact of employment; and on the same day he signed a restrictive covenant agreement containing post termination restrictions. Once he had signed the two agreements, Mr Pollock was credited with a back-dated salary increase. The judge was satisfied that David Allen had given consideration for the restrictions; and that Mr Pollock signed the two agreements in order to receive his salary at the revised and increased level. The judge was also satisfied that David Allen had significant goodwill and had a legitimate interest in protecting it. But in considering the scope of the restrictions, the judge considered that they went beyond what was necessary to protect David Allen's legitimate business interests. Nevertheless, he came to the conclusion that, applying the principles of severance, it was possible to excise those parts of the restrictions which went beyond what was necessary; and that once certain words were deleted, the covenant still made sense and was something on which David Allen could rely. The judge went on to consider whether Mr Pollock had breached the covenants (in their modified form) and concluded that he had.

4. The judge then turned to the question that arises on this appeal: whether Dodd was liable in tort for inducing the breach of contract. He made the following relevant findings of fact. In late June Mr Pollock passed on to Dodd the advice that he said he had received to the effect that "the 12 months won't legally stand and that I should only adhere to 6 months". On 28 June 2018 (before Mr Pollock joined the firm) Mr Johnston of Dodd asked their solicitors for advice. At that stage it was thought that Mr Pollock had not received any pay rise or any other consideration when he signed the restrictive covenants. On 3 July 2018 Dodd's solicitors advised that the general position was that for new restrictive covenants to be valid or enforceable they must be supported by consideration. The advice continued:

> "So, unless there is something I do not know, the most likely outcome, without even considering the restrictions substantively is that they are not enforceable for want of consideration."

5. The solicitors then turned to the substance of the restrictions. The advice was to the effect that the 12 month period during which the restrictions operated was too long. In relation to the non-solicitation clause they considered that the clause "probably" failed; and in the case of the non-dealing clause, the advice was given "on balance". The overall conclusion was:

> "Given the above, the restrictive covenant hasn't got a lot going for it. You could, therefore, act and allow [Mr Pollock] to act on the basis that it isn't enforceable and contact DA's clients. This is almost certain to provoke a strong reaction. He will probably write to [Mr Pollock] setting out why he believes [Mr Pollock] is in breach."

6. The judge said at [57]:

> "Based on that advice, I am satisfied that [Dodd] was entitled to take the view that, while the matter was not entirely without risk, it was more likely than not that the restrictive covenants were ineffective and unenforceable against [Mr Pollock]. He would thus be free to take on work from [David Allen's] clients. In cross-examination Mr Johnston said that, in reliance upon that advice, [Dodd] took the view that there was only a very small element of risk which he later revised to a negligible risk. However, in his initial answer, he made the point that he was working on probability. In my view that is the most plausible of his answers based upon the contents of the email. I am satisfied that, upon receipt of the email [Dodd] took the view that it was likely that the restrictive covenants were unenforceable but there was some risk to the contrary."

7. The judge did not quantify that risk. On about 26 October 2018 Dodd learned that Mr Pollock had in fact been given a salary increase at the time that he had signed the new restrictions. That was duly conveyed to the solicitors; but because of the duration of the restrictions, their advice did not change. They thus reiterated their advice that 12 months was too long for both non-solicitation and non-dealing in the circumstances. Some further information was passed to the solicitors later; but that did not change their advice either. If anything, it reinforced it.

8. The judge concluded:

> "[61] … It cannot realistically be said that [Dodd] turned a blind eye to [Mr Pollock's] contractual obligations, if any. Nor can it be said that [Dodd] was indifferent to the issue of whether [Mr Pollock] was in breach since [Dodd] went to the extent of obtaining copies of the employment agreement and the restrictive covenant agreement and forwarding them to a

> solicitor for advice. Not only that, it did so at an early stage. It also provided [the solicitor] with instructions that accorded with the information that had been provided by [Mr Pollock].
>
> [62] Over time, [Dodd] obtained more information and, having done so, it referred the matter back to its solicitors for review. Moreover, it did not have any reason to doubt the pertinence or accuracy of the advice it received or, indeed, the information on which the advice was based. It is true that [the solicitor] did not entirely eliminate the risk that [Mr Pollock] would be liable on the covenants. However, it was entitled to rely on the advice that was given and, in my judgment, it did so honestly."

9. Thus the claim failed. With the permission of Leggatt LJ, David Allen appeals. The issue, then, is whether Dodd's state of mind, as found by the judge is sufficient to ground liability in tort for inducing a breach of contract.

10. Mr Stubbs, for David Allen, submits that the advice that Dodd received was not firm advice. It was aware that there was a risk that the covenants would prove to be enforceable. If you are aware that there is a chance that the acts you are inducing would amount to a breach of an enforceable contract, that is or should be enough to found liability in tort for inducing a breach of contract. Businesses often take commercial risks and they can hardly complain if the risk eventuates. Here Dodd knew that there was a risk that their actions would amount to procuring a breach of contract. In the event, the judge found that they did; so Dodd cannot complain if they are found to be liable. They took a risk, and the risk has eventuated.

11. The seminal modern case is the decision of the House of Lords in three appeals heard together under the title *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1. The leading speech for the majority was that of Lord Hoffmann. He traced the history of the torts of inducing breach of contract and causing loss by unlawful means. It is the first of those torts with which we are concerned. Lord Hoffmann dealt with the requisite state of mind for that tort at [39]. He said:

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

12. At [41] he went on to say that:

> "… a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact."

13. That conscious decision is not the same as negligence, or even gross negligence. Lord Nicholls made much the same point at [191]; and went on to consider the necessary mental element at [192];

> "He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort."

14. He added at [202]:

> "An honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract. He is not to be held responsible for the third party's breach of contract in such a case. It matters not that his belief is mistaken in law. Nor does it matter that his belief is muddle-headed and illogical…"

15. The point may be illustrated by some of the cases to which Lord Hoffmann referred; as well as the appeals actually under consideration by the House.

16. In *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 Mr Doherty had been employed by BIP. He offered to disclose to Mr Ferguson information about a process used by BIP, which he had invented, and which Mr Ferguson knew was secret and confidential. But Mr Ferguson was found not to have known that the process belonged to BIP rather than to Mr Doherty. The reason for that was that "muddle-headedly and illogically" he believed that, if the process was patentable, that would establish that the process belonged to Mr Doherty and not to anyone else. Mr Ferguson sent Mr Doherty to his (Mr Ferguson's) patent agents for advice; but they only advised on the question of patentability. Mr Ferguson then took the secret information in the honest belief that Mr Doherty would not be in breach of contract. As McKinnon LJ remarked in the Court of Appeal, Mr Ferguson's honesty was vindicated at the expense of his intelligence. Because Mr Ferguson had an honest belief that there would be no breach of contract, an action against him for inducing a breach of Mr Doherty's contract failed both in this court and in the House of Lords. It is pertinent to observe that Mr Ferguson knew that Mr Doherty had a contract with BIP. He knew the information about the process that was disclosed to him was potentially confidential. What he did not know was that the contract would be breached. Mr Stubbs referred to the trial judge's conclusion that at an earlier stage Mr Ferguson had a suspicion that Mr Doherty would be in breach of contract. It was that suspicion that motivated him to send Mr Doherty to the patent agents. The trial judge said that he would have been liable, because of the suspicion that what Mr Doherty was going to disclose was the property of his former employers. However, commenting on that passage Lord Russell said:

> "Whether or not this would be so must, I should think, depend upon how far, in all the circumstances of the case, the "suspicion" approximated, or was equivalent, to knowledge."

17. It is, I think, implicit in that observation that mere suspicion is not enough. The touchstone is knowledge.

18. In *Mainstream Properties Ltd v Young* (heard together with *OBG*) Mainstream was a development company owned and controlled by Mr Moriarty. He engaged Mr Young as a working director and Mr Broad as a manager and left the business to them. In 2000 they diverted the purchase of development land at Findern in Derbyshire to a joint venture consisting of themselves and Mr De Winter, who financed the project. The participation of Messrs Young and Broad in that venture was a breach of their obligations to Mainstream. The question was whether Mr De Winter was liable in tort. Mr De Winter knew that they were employed by Mainstream and that there was an obvious potential conflict between their duties to Mainstream and their participation in the joint venture. But he raised the question of conflict of interest with Mr Young and Mr Broad and had received an assurance that there was no conflict because Mainstream had been offered the site but refused it. This was untrue but Mr De Winter genuinely believed it. He had been given a similar (and more truthful) assurance concerning another project which Mr Young and Mr Broad had brought to him in the previous year and that was proceeding smoothly without objection.

19. The action against him failed. At [69] Lord Hoffmann said:

> "On the finding of the judge, Mr De Winter honestly believed that assisting Mr Young and Mr Broad with the joint venture would not involve them in the commission of breaches of contract. Nor can Mr De Winter be said to have been indifferent to whether there was a breach of contract or not, … or made a conscious decision not to inquire in case he discovered a disagreeable truth. He therefore did not intend to cause a breach of contract and the conditions for accessory liability under the *Lumley v Gye* tort are not satisfied."

20. In both these cases the defendant knew that there was a contract; but in each case they believed that there would be no breach. Neither of them actually realised that what they were doing would amount to a breach.

21. *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 concerned a series of agreements relating to a block of flats in London. One company (B) granted to another (ACP) a lease for the development of penthouses on the roof of the block. In the event of a failure to complete the development B had the right to a leaseback at a nominal sum. The development was badly behind schedule. A mortgagee of the lease (FP) took possession of the lease in exercise of its power of sale and sold it. That sale prevented ACP from granting the leaseback. The question was whether FP had committed the tort of inducing a breach of contract. At first instance, I held that it had not; but this court held that my view of the facts was unsustainable. I had held that FP's lawyers had advised that there would be no breach of contract. This court reversed that finding, holding that the advice in that respect was not "definitive", but was to the effect that it was arguable that there was no breach. But this court found instead that there was firm advice that the exercise of the power of sale would overreach the leaseback option. The parties relied on that advice and considered that "they were entitled to cause ACP to breach its obligation to deliver the development sub-lease under the leaseback option": see [124]. That firm

advice was therefore sufficient to negate the requisite intention to induce a breach of contract.

22. Although the court did not say explicitly that reliance on advice to the effect that it was "arguable" that there would be no breach was enough, it is a fair inference that they thought it would not be.

23. In other cases, judges had said that if the defendant knew the facts, then a mistake about their legal consequences would not amount to a defence: *Greig v Insole* [1978] 1 WLR 302; *Pritchard v Briggs* [1980] Ch 338 (Goff LJ). But in *Mainstream* in this court Arden LJ specifically disagreed with that view on the basis that the law about mistakes of law had moved on. In *Mainstream* she said at [85]:

> "… this court must ask whether the policy behind the tort of interference with contractual relations would be furthered if a defendant to a claim based on this tort were to be prevented from relying on a mistake he made on the law to explain why he took the action he did. In my judgment there is nothing in the policy of this tort that requires this bar. It is clearly important that the law should provide proper incentives to parties to familiarise themselves with the law, but if the bar under consideration does not now apply to the recovery of money paid under a mistake, it is difficult to see why it should apply to the economic tort of interference with contractual relations"

24. She adhered to that view in *Meretz* at [118] and [119]. Both Pill and Toulson LJJ agreed with her. Her reasoning in *Meretz* therefore binds us. The potency of a misunderstanding of the law is also demonstrated by the outcomes in both *British Industrial Plastics* and also *Mainstream* itself.

25. It seems to me to be clear that in order for a person to be liable in tort for inducing a breach of contract, the contract in question must be a binding and enforceable contract. If it were not, then the inducement cannot have caused any loss, which is part of the essence of the tort. Put another way, since liability in tort for inducing a breach of contract is an accessory liability to that of the contract breaker, if the party to the contract is not liable (because the relevant term of the contract is unenforceable) the accessory cannot be liable either.

26. In the present case Dodd knew that there was what appeared to be a contract; but were advised that the relevant term was probably unenforceable. In other words, Dodd knew that there was a risk that what they were doing would result in a breach of Mr Pollock's contract; but engaged him anyway. Does the fact that the advice that Dodd received was not unequivocal mean that the defence fails?

27. Lord Hoffmann's broad proposition in *OBG* was that in order to be liable for the tort of inducing a breach of contract, you must know that you *are* inducing a breach of contract. "Are" is not the same as "might be". You must *actually realize* that the act you are procuring *will have* the effect of breaching the contract in question. "Will have" is not the same as "might have". That is consistent with earlier authority. Lord Nicholls' formulation was much the same. With knowledge of the contract, the

defendant proceeded to induce the other contracting party to act in a way the defendant knew *was* a breach of that party's obligations under the contract. Again, "was" is not the same as "might be". It is also important that both their Lordships expressed the test in positive terms: it is for the claimant to prove the defendant's actual knowledge of the breach; not for the defendant to prove an absolute belief that there would be no breach.

28. Mr Stubbs submits that nothing less than an absolute belief that one's actions will not amount to inducing a breach of contract will suffice. A bright line test of liability makes contracts easier to police; and gives certainty to the business community. If a bright line test encourages commercial enterprises to respect their rivals' contracts, that is all to the good.

29. I do not agree. First, there is no binding authority that holds that to be the case. Even *Meretz*, which is the high point of the submission, went no further than to decide, inferentially, that advice that it was "arguable" that no breach would be committed was not enough. Moreover, *Meretz* is not an easy case to fit into the requirement of knowledge necessary for the tort of inducing a breach of contract. FP did not escape liability because of a belief that there would be no breach of contract. On the contrary, on the facts as found by this court FP knew that exercise of the power of sale would induce a breach of contract; but believed that it was lawfully entitled to cause that breach: see Arden LJ at [124]. That belief may go to the question of intention, rather than knowledge: see *OBG* at [218] (Lord Nicholls). Second, I doubt whether, in the real world, many people hold "absolute beliefs" about legal rights and wrongs. Third, I do not consider that the way in which both Lord Hoffmann and Lord Nicholls formulated the test is consistent with that submission. Fourth, the submission is inconsistent with earlier authority.

30. In *Smith v Morrison* [1974] 1 WLR 659 Mr Morrison and Mr Smith made an oral agreement under which Mr Morrison agreed to sell his farm to Mr Smith. Mr Smith paid a deposit; and Mr Morrison signed a memorandum which appears to have satisfied section 40 of the Law of Property Act 1925. Shortly afterwards Mr Morrison agreed to sell the farm to a company called Coyles. Mr Smith sued Coyles in tort for inducing a breach of contract. Mr Smith's solicitors had asserted the existence of a binding contract. Plowman J considered the state of mind of Mr Pritchard who was both a director of and solicitor acting for Coyles. He accepted Mr Pritchard's evidence that there was a doubt whether the memorandum was complete when Mr Morrison signed it; and that Mr Morrison was emphatic that he had not entered into a binding contract with Mr Smith. Mr Pritchard said that the decision to complete "was not an easy decision" but believed that there were serious doubts whether Mr. Smith had a binding contract. In cross-examination he said that there were grave doubts whether Mr. Smith had a binding contract and that it was a try-on. The judge held that Coyles were not liable. As he put it:

> "I have already stated what Mr. Pritchard's state of mind was — one of honest doubt — and that, in my judgment, is not enough to bring him within the principles of liability enunciated in the cases to which I have referred."

31. *Smith v Morrison* was cited in *OBG* but, despite the fact that both Lord Hoffmann and Lord Nicholls had appeared in the case as junior counsel, neither of them referred to

it. At the time when that case was decided, it was perfectly possible to enter into a valid oral contract for the sale of land; but in the absence of a written memorandum (or part performance) it was *unenforceable* by action. That is why the emphasis in *Smith v Morrison* was not whether there was something that looked like a contract; but whether there was a *binding* contract.

32. If either Lord Hoffmann or Lord Nicholls had intended to disapprove that case in which they had both appeared, one might have expected them to do so expressly.

33. I find it difficult to find a principled distinction between (a) a case in which the defendant does not know that there is a contract; (b) a case in which the defendant knows that there is a contract but does not know that the act that he induces will be a breach of contract; (c) a case where the defendant has an honest doubt about whether a contract as a whole is binding or enforceable; and (d) a case in which the defendant knows that there is a contract but believes that it is probable that the relevant term of the contract is unenforceable with the consequence that the act he proposes to procure will not amount to a breach.

34. The recent tide of authority has, in my judgment, been to restrict rather than to expand the scope of the economic torts: see *OBG* at [306] (Lady Hale). It must, I think, also be borne in mind that part of the policy underlying the restricted version of the tort as explained both in *OBG* and *Meretz* is that people should be able to act on legal advice, responsibly sought, even if the advice turns out to be wrong. As everyone knows, lawyers rarely give unequivocal advice; and even if they do the client must appreciate that there is always a risk (or in Mr Stubbs' word, "a chance") that the advice will turn out to be wrong. Although this case arises in the context of restrictive covenants in contracts of employment, it is important to remember that the tort of inducing a breach of contract applies to all sorts of contracts across the whole spectrum of commercial endeavour. While there may be relatively clear guidelines about the enforceability of restrictive covenants, those guidelines are absent in other fields of commercial activity. It is also important to bear in mind that the knowledge in question is not simply knowledge of a fact; but knowledge of a legal outcome. That is often hard to predict, as the constant diet of contested breach of contract cases in our courts demonstrates. To insist on definitive advice that no breach will be committed would have a chilling effect on legitimate commercial activity.

35. In addition, if "definitive" advice is to be the touchstone there would be a question how definitive the advice must be. Must the advice be that there is no risk at all? What about a negligible risk (i.e. a risk that can be ignored)? What if the lawyer is 80 per cent sure that there will be no breach of contract? Or 70 per cent?

36. It may be the case that if the legal advice goes no further than to say that it is arguable that no breach will be committed, that would not be enough to escape liability. That question does not arise in this appeal, and I express no opinion one way or the other. But in my judgment if the advice is that it is more probable than not that no breach will be committed, that is good enough. Whether something is more probable than not is a question that is frequently asked in the civil law. In this case the advice that Dodd received was that "You could, therefore, act and allow [Mr Pollock] to act on the basis that it isn't enforceable and contact DA's clients." In my judgment Dodd was entitled to act on that advice without exposing itself to liability in tort.

37. Mr Stubbs argues that this will encourage people to obtain bad advice, and unfairly disadvantages a person who obtains correct advice; or unfairly advantages a person who is advised that there is a risk of breach, but nevertheless ignores the risk or decides to take it. As far as the first part of this argument is concerned, I consider that it has already been answered by *OBG*. If the defendant honestly believes that the act that he procures will not amount to a breach of contract, he is not liable in tort even if his belief is mistaken in law. I cannot see that it matters whether a defendant's erroneous belief is caused by his own ignorance or by the incorrect advice he receives from his lawyers. As far as the second part of the argument is concerned, I do not consider that it adds to the argument that I have already rejected.

38. I would dismiss the appeal.

**Lord Justice David Richards:**

39. I agree.

**Lady Justice Rose:**

40. I also agree.