Fraud, corporate crime and investigations

A guide to the tort of conspiracy in the 21st century

Unlawful means conspiracy is a tort in English civil law. It is referred to as one of the "economic torts", so named because they can be used to protect a party's economic interests.

Although it dates back over 100 years, we have observed that conspiracy is being used more and more frequently to bring claims in civil fraud matters. However, the law on unlawful means conspiracy is particularly complicated and can be difficult to understand. For this reason, Macfarlanes' civil fraud litigation practitioners have prepared this three-part guide to explain more about the tort.

Part one - covers the history of the tort and the elements of the cause of action.

Part two - covers the practical implications of pleading and defending conspiracy claims.

Part three – discusses the remaining areas of uncertainty in the law and what might happen next.

Part one: history and elements

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History

The economic torts in general, conspiracy included, were developed considerably between the late 19th century and mid-20th century. This was in part related to the rise of trade unions, the idea being that incitement to industrial action was damaging to the economic interests of relevant companies, and so consideration should be given as to the circumstances in which that damage ought to be actionable as opposed to legitimate behaviour for which union officials should have immunity.

Following a period of relative quiet, there has been something of a revival of interest in pleading these torts in the 21st century. The continuing lack of clarity in the law has meant a number of key cases have made it as far as the House of Lords or Supreme Court, including OBG Ltd v Allan [2007] UKHL 21 (**OBG**), Revenue and Customs Commissioners v Total Network SL [2008] UKHL 19 (Total), JSC BTA Bank v Ablyazov (No.14) [2018] UKSC 19 (**Ablyazov**) and, most recently, permission to appeal to the Supreme Court was granted in *The Racing Partnership* case (*The Racing Partnership Ltd and others v Sports Information Services Ltd [2020]* EWCA Civ 1300).

As we move to discuss the current law on the components of unlawful means conspiracy, even these cases have not fully clarified the law; as Lewison LJ said in his dissenting judgment in The Racing Partnership *"the so-called economic torts have been considered by the House of Lords and the Supreme Court on a number of occasions in recent years; but it cannot be said with confidence that the law is clear."*

Elements

To make up a complete cause of action, the claimant must show

"that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

(Kuwait Oil Tanker Company SAK v Al-Bader (No.3) [2000] 2 All E.R. (Comm) 271 at [108]*)*

There are a number of limbs to that definition, and they merit closer inspection. The elements may be broken down as:

1. A combination or agreement between two or more legal persons;
2. Concerted action pursuant to the agreement;
3. The action uses unlawful means;
4. The conspirators intend to injure the claimant;
5. The claimant does in fact suffer damage.

Combination or agreement between two or more legal persons

The first limb of a conspiracy is that two or more parties form an agreement to injure some other legal person. This is not likely to be a formally expressed agreement. For that reason, sometimes a different term such as "combination" is used to describe the agreement. This limb of the cause of action can be satisfied by a tacit understanding between the conspirators. Moreover, although there needs to be an agreement, it is not necessary that all conspirators join it at the same time. It is enough that they all have the same aim in mind and know the central facts.

Concerted action pursuant to the agreement

The divergence between the crime of conspiracy and the tort is perhaps starkest in this element, which is needed only in the latter. The crimes of statutory conspiracy and conspiracy to defraud are committed by formation of the agreement alone.[1] In contrast, it is an essential element of the civil cause of action in tort that the conspirators act on their plan and carry out some deliberate act(s) and/or omission(s) to further it.

The action uses unlawful means

This limb has been the subject of considerable judicial debate and the meaning is less obvious than might be expected. The term "unlawful means" can encompass a wide variety of acts, and the courts have been reluctant to devise a definitive test, taking the view that it would likely be more hindrance than help.

In unlawful means conspiracy, possible unlawful means include commission of another tort, a breach of contract, or a breach of fiduciary duty. Following the decisions in *Total* and *Ablyazov*, it has been established that it can also be commission of a crime. The general approach of the court is to adopt a broad interpretation of the term embracing all acts a defendant is not permitted to do, whether by civil or criminal law, provided those acts were instrumental in causing the claimant's loss.

[1] statutory conspiracy is defined in s.1 Criminal Law Act 1977; conspiracy to defraud is a common law offence.

The conspirators intend to injure the claimant

An unlawful means conspiracy requires that a purpose of the agreement is to injure the claimant. It does not have to be the only or the main purpose (contrasting it with the tort of lawful means conspiracy), but it does have to be amongst the intended outcomes of the conspirators' planned action(s) and/or omission(s).

The requirement that the conspirators intend harm to the claimant means that an agreement to act together in certain ways for which injury to the claimant is an incidental outcome will not meet this test. There are two important clarifications of this point, however. First, where injury to the claimant is the "other side of the coin" of the intended outcome, this will meet the test of intention to injure the claimant. Thus, an agreement to take concerted action to promote the conspirators' own interests where that is necessarily at the expense of the claimant is construed as involving an intention to injure the claimant. And second, even if it is not the direct flip side of the intended outcome, if the planned action is inevitably going to involve injury to the claimant, perhaps as unavoidable collateral damage, again this will satisfy the intention to injure requirement. The court is quite prepared to impute an intention that a particular event comes about if it was the obvious and predictable consequence of the defendants' actions.

The claimant does in fact suffer damage

Unlike the crime of conspiracy, which is complete when the agreement is formed, not only must there be deliberate action or omission for the tort of unlawful means conspiracy, but the claimant must also suffer harm as a result of the unlawful act.

Of course, although we have presented the components of the tort separately to explain how the cause of action is made up, in reality these components are heavily interlinked, and at times attempts to unpack them may have caused more confusion than clarity.

Concluding remarks

The tort of unlawful means conspiracy is a complex cause of action. This is in large part due to its lengthy development and the different purposes it has served over time. It is possible that the tort will evolve yet further in future cases.

Part two: strategy and practicalities

In part one of this series, we examined the history of the tort of unlawful means conspiracy and the elements of the cause of action that have developed over time. In this second part, we discuss the practical implications of dealing with a conspiracy case for both claimants and defendants. Conspiracy claims present particular difficulties for statements of case and evidence which require specialist consideration.

When should you plead conspiracy?

When a claimant suspects deliberate wrongdoing, they will often be inclined to plead fraud. Fraud is not a cause of action itself, but there are several causes of action available in England and Wales where an element of fraud is suspected, for example fraudulent misrepresentation, deceit and dishonest assistance. Unlawful means conspiracy is a cause of action which is often pleaded alongside one of these other heads of claim where there are multiple defendants and the claimant suspects that the defendants co-ordinated their conduct. As we noted in part one, another tort such as fraudulent misrepresentation might be pleaded as the unlawful means used in the conspiracy.

Unlawful means conspiracy appears to fit naturally in such cases where multiple parties are accused of deliberate wrongdoing. There are numerous legal and strategic reasons to bring conspiracy claims but potential claimants should consider matters carefully. Conspiracy is a serious allegation and if improperly pleaded it is vulnerable to being struck out. There may also be costs consequences for a party who pleads conspiracy when they ought not to have done so. Claimants must be careful not to bring allegations of conspiracy based purely on suspicion or bad feeling.

Considerations for claimants

Damages

Conspiracy is an attractive cause of action for various reasons. One such reason is difference in the level of recoverable damages when contrasted with non-dishonesty based claims such as breach of contract or negligence. In successful conspiracy claims (as in all fraud-based claims) an increased scope of recoverable damages is available and the Court is generally more willing to take an expansive approach to the calculation of loss. Damages in unlawful means conspiracy are "at large". This means that the amount to be awarded to a successful claimant is not limited to the amount of loss that can be strictly proved, and the claimant does not have to quantify its losses precisely. The unsuccessful defendant will have to pay for all damage arising directly from the conspiracy, and there is no requirement that the damage be of a sort that was foreseeable (in contrast with other torts such as negligence).

Evidence

Claimants have the burden of proving the conspiracy which presents a challenge. Conspirators are unlikely to have left detailed, direct evidence of wrongdoing, so at the start of a claim the claimant may have limited material on which to base its case. As we explained in part one, the cause of action requires both a combination between two or more persons and intention of the defendants to injure the claimant. Any combination or agreement with such a purpose is unlikely to have been documented, and proving intention, which is to say the defendants' states of mind, can be difficult. The claimant will therefore usually need to rely on inference to prove its case. Thought should be given at an early stage as to whether it might be possible to supplement the evidential picture with the assistance of investigators or through the strategic use of third party disclosure such as Norwich Pharmacal relief, Bankers Trust orders or, in a case with US-based third parties, Chapter 15 or Section 1782 relief.[1]

The English court is willing to accept evidence by inference if that inference has a proper basis. It is important for claimants and their legal representatives to bear in mind the seriousness of an allegation of conspiracy and the consequences this has for pleadings and evidence. The court has commented that it is *"a very serious tort, which requires clear evidence"*[2] and has endorsed comments that the standard of proof is commensurate with the seriousness of the allegation.

The particular requirements for any claim that alleges fraud are relevant here. In fraud cases, special requirements are imposed because fraud involves dishonesty, and the law considers dishonesty inherently less likely than honesty. Any allegation of fraud must be specifically set out in the particulars of claim (or counterclaim). The allegation must be supported by the essential primary facts which are said to make up the fraud. Those can be primary facts from which an inference of fraud is to be drawn, however facts which are equally consistent with honesty (including negligence) will not suffice. The balance must be tilted in favour of fraud such that there is an arguable case.

The court has clarified that where a claim is brought for unlawful means conspiracy, the seriousness of the allegation engages many of the same requirements:

"aspects of the applicable principles [for pleading fraud] will be of relevance when allegations of serious wrongdoing are made more generally, even if there is no requirement to plead or prove fraud, as such, as an element of the cause of action (such as in unlawful means conspiracy) and even though the strictures applicable to a plea of fraud or dishonesty are not automatically triggered."[3]

In addition, if the unlawful means alleged involve fraudulent or dishonest conduct then those strictures on pleading fraud are necessarily engaged. As the court confirmed in *Ivy Technology v Martin* [2019] EWHC (Comm), *"[w]here a conspiracy claim alleges dishonesty, then "all the strictures that apply to pleading fraud" are directly engaged, i.e. it is necessary to plead all the specific facts and circumstances supporting the inference of dishonesty by the defendants."*

[1] Please see our articles about Norwich Pharmacal and Bankers trust relief and section 1782 relief.
[2] *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB)

Early determination

If a claimant fails to meet these requirements, its claim may be struck out or the defendants might apply for summary judgment in their favour (sometimes called "reverse" summary judgment). The court has often stated that it will be cautious about dismissing this type of claim at an early stage because it is mindful of the imbalance of evidence between claimant and defendants, particularly before disclosure. The court will adopt a "generous" approach in favour of claimants for this reason. As such, summary judgment is rarely granted to defendants; the court is willing to consider what additional evidence is likely to emerge during disclosure and to allow a case to proceed so that it can be assessed in light of all that evidence. The court is perhaps less generous to claimants whose pleadings are in and of themselves inadequate, as strike out will be based solely on the statement of case itself without regard to possible additional evidence. We explored the interaction between strike out and summary judgement for fraud claims in our article.

A recent example of a conspiracy claim being struck out because the claimant had failed to meet many of the requirements described above is *King and others v Steifel and others* [2021] EWHC 1045 (Comm), which we wrote about. The judge found that the claimant had been too quick to infer fraud and had pleaded many facts which were more likely explained by honest conduct. The plea also engaged in circular reasoning, basing allegations of dishonesty on the assumption that there was a conspiracy. To support the inferences needed, the claimants also alleged facts which it accepted were not themselves supportive of the necessary inference but from which it said other facts could be inferred which would then support the inference to the primary claim for conspiracy. This fell a long way short of the type of primary facts needed to sustain a pleading of conspiracy.

Costs

Conspiracy claims can be expensive for claimants. By their nature, they involve multiple defendants, who can be separately represented. Not only is preparing a case against multiple defendants likely to be more expensive to begin with, it also automatically increases the costs risk for a claimant. If they lose, they will be exposed to having to pay costs for all defendants. As noted above, this risk is increased if it is found the claim should not have been brought at all. In those circumstances, the court might award indemnity costs to the defendants.

Relatedly, claimants who are vulnerable to security for costs applications can expect to be required to provide security for multiple defendants. In a complex and substantial piece of litigation, the level of security required may be significant.

Strategic considerations

An allegation of conspiracy can reduce the prospects of reaching an out of court settlement. It is emotive to accuse other parties of conspiracy and dishonest conduct, and so more difficult to engage in dispassionate and pragmatic settlement discussions. An accused party may also feel compelled to publicly clear their name at trial which, again, may impact the prospects of settlement.

Claimants to conspiracy claims will find themselves fighting on numerous fronts given they will be facing multiple defendants, often with separate representation. The practical realities of this are obvious and claimants must ensure they are properly resourced and ready to face what may turn out to be a group of independent defendants focussed on a common adversary.

Lastly, consideration should be given to the insurance position of the defendants. Any claim which establishes dishonesty (i.e. by means of final judgment or award which is not capable of being appealed) on the part of the insured (including unlawful means conspiracy) will not be covered under an insurance policy. Claimants will therefore want to consider the defendants' ability to pay any damages or compensation awarded if there is no insurance to respond to a claim based in fraud.

Issues for defendants

Evidence

Defendants to a conspiracy claim must grapple with the other side of the evidential difficulties discussed above. A claimant may struggle to produce direct evidence that there was a conspiracy, but a defendant may find it even more difficult to produce evidence that there was ***not*** a conspiracy. Proving a negative is notoriously hard to do. The defence is more likely, therefore, to be based on undermining the inferences the claimant seeks to make. The defendants should seek to convince the court that the balance of probability is against dishonesty and conspiracy, and that plausible honest explanations are available.

Strategic considerations

Defendants may feel especially vexed by conspiracy claims. Honest defendants are often outraged to be accused of such conduct. Despite this, they are required to devote time and money to defeating the claim. Defendants may want to reduce the cost by seeking early determination of the claim, either through strike out of the conspiracy allegations if they have not been pleaded correctly, or through summary judgment if the claimant's case has no real prospect of success. However, as we noted above, summary judgment is not often available in cases involving allegations of dishonesty. This should not, however, deter defendants from applying to have inadequately pleaded allegations struck out.

Tactically, defendants might wish to find ways to put pressure on a claimant and to flush out weaker claims. If a claim is for conspiracy with an alternative claim in negligence, defendants might aim to pressure the claimants to drop the conspiracy aspect through applications for strike out and security for costs to bring home that a claimant is taking unnecessary costs risk by trying to prove the more difficult allegation of deliberate wrongdoing.

[3] *Lakatamia Shipping Co Limited v Nobu Su* [2012] EWHC 1907 (Comm) at [40]

Equally, defendants should consider whether there are other parties who are liable for the claim such that they should be joined to the proceedings as an additional defendant (pursuant to Part 20 of the Civil Procedure Rules). Alternatively, and if the claim has already been resolved through trial or settlement, a defendant may consider whether there is an available contribution claim against a third party (pursuant to Civil Liability (Contribution) Act 1978).

As we noted above, aggrieved defendants will often be most unwilling to engage in settlement discussions. The result is that unfortunately the parties may end up spending a considerable amount on such a claim and must hope to recover as much of that outlay as possible either in an award of costs if they win at trial or as part of a settlement agreement if they feel able to reach one.

Insurance is also relevant to defendants facing conspiracy claims in two ways. First, insurance will not cover an insured's acts of dishonesty. This means that an insurer will not pay any damages awarded where an insured's fraud has been established. Further, an insurer may not agree to contribute to any settlement, even on a "no admission of liability" unless it is satisfied the insured has not been dishonest. Second, to the extent that an insurer has paid legal defence costs for the lifetime of any claim brought against an insured in which fraud/dishonesty is alleged, any binding/final decision which establishes fraud/dishonesty on the part of the insured will usually trigger a clawback provision in the insurance policy which enables the insurer to recover from the insured all sums paid under the insurance to that point. Insured defendants will need to consider all of these risks as part of any settlement strategy.

Ambit of the tort

Any fraud claim requires a claimant to comply with additional requirements for their statement of case. However, the broad ambit of unlawful means conspiracy means that defendants are also faced with significant challenges. It is not necessary to prove that each defendant took part in each unlawful act pursuant to the conspiracy. Indeed, the current legal position is that it is possible for a defendant to be liable for a conspiracy without personally having undertaken or induced any of the unlawful acts. Should that defendant be found to have been a party to a combination and the unlawful acts were undertaken (by other defendants) pursuant to that combination, then that defendant will be liable. Therefore, defendants who may not have considered themselves to be part of a conspiracy nor aware that the combination involved means which are unlawful find themselves caught by the broad ambit of the tort, largely and unusually as a result of the actions of others.

Conclusion

From the outset of a conspiracy claim the expectations of claimants and defendants need to be carefully managed from a legal, strategic and practical perspective. There are substantial benefits in bringing conspiracy claims but these must be considered in the context of the potential complexities. Similarly, defendants who find themselves subject to these claims have a number of options available which should be considered in detail at the earliest opportunity.

In the final part of this series, we will look to the future of unlawful means conspiracy.

Part three: where next?

This is an abridged version of our full article available here.

To conclude our series, we offer some reflections on the two main questions of law left outstanding following *The Racing Partnership*[1] case and the considerations for resolving them.

The Court of Appeal's decision in The Racing Partnership has left the door open to rather broad use of this tort, which has experienced a recent increase in popularity as a cause of action. There are two main findings in that case that are considered debatable. These are whether the defendants need to know their conduct is unlawful, and the interpretation of what qualifies as "unlawful means".

Knowledge of unlawfulness

A significant point of difference between the High Court and Court of Appeal decisions in *The Racing Partnership* was whether the conspirators needed to know that their actions were unlawful. The Court of Appeal found by a majority of two to one that knowledge of the unlawfulness is *not* required, although previous cases on this point were in conflict.

The differing majority and dissenting judgments on the meaning and weight to be afforded to the various previous cases on the knowledge question show that it is not obvious what should be inferred from them. As the Court of Appeal acknowledged, however, an appeal court is both permitted and required to choose between authorities if they are genuinely conflicting, so it was open to them to decide this point as they saw fit. This appears prime territory, therefore, for consideration by the Supreme Court in a suitable case.

If it is right that the authorities are in conflict and a decision must be made, the arguments based on policy, that the unlawful means conspiracy tort needs to be kept within reasonable bounds and should not become an 'easy' cause to plead at the expense of other torts, have force. If the alleged conspirators do not need to realise that their conduct is unlawful, there may be few constraints on the bounds of the tort. This may not be desirable and seems to emphasise the tension between the tort of unlawful means conspiracy and the tort of causing loss by unlawful means. Such an expansive tort of conspiracy might also run contrary to the general policy of the courts to keep the economic torts narrow and leave restrictions on what is fair or unfair commercial activity for Parliament to set.

Relevant unlawful means and alignment with other economic torts

The other debated conclusion of the Court of Appeal in *The Racing Partnership* is the ambit of relevant unlawful means. In The Racing Partnership, it was found that the "unlawful means" in a claim for unlawful means conspiracy can be a breach of a contract (or other wrong) that is not itself relevant to the claimant. This finding seems to create scope for claimants to sue in any situation where they are adversely affected by a breach of contract that is otherwise unconnected to them if two or more defendants collaborated in the breach.

It is helpful to review the tort of causing loss by unlawful means in this context. The meaning of unlawful means is different as between these two torts, and the courts have cautioned against assuming commonality between them. Nevertheless, the careful examination to which the topic has been subjected by the courts is instructive.

In *Secretary of State for Health and another v Servier Laboratories Ltd and others* [2021] UKSC 24 (**Servier**), the Supreme Court had the opportunity to review the tort of causing loss by unlawful means and to confirm its requirements. The Supreme Court examined Lord Hoffman's judgment from *OBG*[2]. The Supreme Court examined Lord Hoffman's judgment from *OBG* in din detail, explaining that he had been concerned to make sure the tort was not expanded beyond reasonable bounds. This was achieved "*through giving a narrow rather than a wide meaning to unlawful means*" and in Lord Hoffman's view "***could not satisfactorily be done by applying principles of causation or by adopting a narrow meaning of*** *intention.*"[3]

For this reason, the tort of causing loss by unlawful means requires that the unlawful means used by the defendant has affected the claimant's ability to deal with the relevant third party (the **dealing requirement**). Upholding the dealing requirement, the Supreme Court in Servier said it *"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…The dealing requirement also minimises the danger of there being indeterminate liability to a wide range of claimants."*[4]

[1] *The Racing Partnership Ltd and others v Sports Information Services Ltd* [2020] EWCA Civ 1300

[2] *OBG Ltd v Allan* [2007] UKHL 21, referred to in part one of this series..

[3] *Servier*, per Lord Hamblen at [61]

[4] *Servier* per Lord Hamblen at [94] – [95]

These comments are insightful in light of the difficulties some commentators have observed with the decision of the Court of Appeal in *The Racing Partnership*. In *The Racing Partnership* the relevance of the unlawful means turned on whether it was the "instrumentality" by which the claimant was harmed. It was said that there had been confusion over whether this mean intention or causation, and it ought to be construed as denoting the causation requirement. However, whether "instrumentality" means intention or causation, if Lord Hoffman was right in *OBG*, then his criticisms of relying on either intention or causation to keep the tort of causing loss by unlawful means within reasonable bounds might readily be transferable to the tort of unlawful means conspiracy.

In *The Racing Partnership*, the unlawful means was breach of contract as between the defendant and third parties, but those contracts had no relevance to the claimant other than that the defendant's breach led to the claimant's loss. If this had been a case in causing loss by unlawful means, rather than conspiracy, then the reasoning of *OBG* would have applied and this could not be relevant unlawful means. However, following the majority in the Court of Appeal, the tort of unlawful means conspiracy is not currently subject to a restriction equivalent to that in *OBG*.

The future

One might hope that this persistent confusion will be resolved by the courts and clear policy decisions will be taken as to what conduct should or should not be actionable. In *Servier*, Lord Sales noted the finding in *Total* that "unlawful means" is different as between the two torts and said that this had *"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 means may qualify as "unlawful means"".*[5]

However, Lord Sales agreed with Lord Hamblen that *Servier* was not the case in which to resolve that issue. It would be welcome news for parties grappling with these uncertainties if another case were to provide the opportunity to do so.

For now, the decision in *The Racing Partnership* means the ambit of the tort of unlawful means conspiracy is very broad. We can therefore expect to see it pleaded with greater frequency. However, the ongoing debate on the questions of law raised means that further appeals are also likely. Given the willingness of the Supreme Court to hear *The Racing Partnership*, we may infer that it might well be willing to hear another unlawful means conspiracy case when the opportunity arises.

[5] *Servier* per Lord Sales at [102]

Contact details

If you would like further information or specific advice please contact:

James Popperwell
Partner
DD +44 (0)20 7849 2693
james.popperwell@macfarlanes.com

Nikolas Ireland
Partner
DD +44 (0)20 7849 2587
nikolas.ireland@macfarlanes.com

Madeleine Brown
Senior Knowledge Lawyer
DD +44 (0)20 7849 2307
madeleine.brown@macfarlanes.com

Neill Blundell
Partner
DD +44 (0)20 7849 2209
neill.blundell@macfarlanes.com

Lorna Emson
Partner
DD +44 (0)20 7849 2764
lorna.emson@macfarlanes.com

Joanna Constantis
Senior Counsel
DD +44 (0)207 849 2824
joanna.constantis@macfarlanes.com

Helen Carter
Senior Counsel
DD +44 (0)20 7849 2058
helen.carter@macfarlanes.com