

## THE TANGLE OF THE TORT OF UNLAWFUL MEANS CONSPIRACY

LAURA LIM

In *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd*<sup>1</sup> [*EFT*], the Singapore Court of Appeal (SGCA) discussed the tort of unlawful means conspiracy. While the Court addressed several interesting questions, much was ultimately left to be decided in future cases. Although arguably the more prudent approach, this leaves the tort of unlawful means conspiracy in a tangled mess. Of all the unanswered questions about the tort, one strikes me as particularly fundamental, but was scarcely addressed in *EFT* – precisely what constitutes “unlawful means”? At first blush, the answer may seem simple enough, but the history of the tort and its development in other jurisdictions suggest that there is more than meets the eye.

Before we proceed, it may be useful to understand the elements of unlawful means conspiracy as helpfully laid out by the SGCA in *EFT*<sup>2</sup>:

- (1) there was a combination of two or more persons to do certain acts;
- (2) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
- (3) the acts were unlawful;
- (4) the acts were performed in furtherance of the agreement; and
- (5) the plaintiff suffered loss as a result of the conspiracy.

The scope of “unlawful means” therefore evidently relates to the substance of the third element. This requirement of unlawfulness is particularly crucial to distinguish unlawful means conspiracy from conspiracy by lawful means, which is a separate tort requiring not only that the alleged

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<sup>1</sup> [2013] SGCA 64, [2014] 1 SLR 860.

<sup>2</sup> *Ibid* at [112].

conspirators had the intention to injure the plaintiff (as per element (2)), but that they did the acts with the *predominant* intention of injuring the plaintiff.

In considering the substance of “unlawful means”, perhaps the best starting point is a statement by Lord Walker in the case of *Total Network SL v Revenue and Customs Commissioners*<sup>3</sup>, cited with approval by the SGCA in *Beckett Pte Ltd v Deutsche Bank AG*<sup>4</sup>, that “unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness)”. This statement not only (1) suggests that the content of “unlawful means” *includes* “crimes and torts”, but also (2) reminds us of similar torts involving “unlawful means” such as the intentional harm tort. These will be examined in turn.

Firstly, specifying the content of “unlawful means” to include “crimes and torts” seems intuitively fair. Given that this is not an exclusive definition, however, it remains unclear if other forms of “unlawful” behaviour can also be considered. Pertinently, it remains to be determined if a breach of contract or a breach of confidence constitutes unlawful means for the purpose of establishing unlawful means conspiracy (as has been held in several High Court cases<sup>5</sup> in which the breaches were simply assumed to be unlawful). Given the existence of the tort of lawful act conspiracy, which has a higher threshold for establishing intention, it is submitted that as long as the distinction between lawful and unlawful conspiracy is preserved, a breach of contract or confidence would have to be considered “lawful” so as not to render the tort of lawful act conspiracy devoid of substance and, consequently, otiose<sup>6</sup>.

Secondly, the question of what constitutes “unlawful means” may ultimately turn on the larger issue of whether the tort of unlawful means conspiracy can be considered a species tort to the genus

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<sup>3</sup> [2008] UKHL 19, [2008] 1 AC 1174.

<sup>4</sup> [2005] SGCA 34, [2009] 3 SLR (R) 452 at [120].

<sup>5</sup> See *The Monarch Beverage Company (Europe) Ltd v Kickapoo (Malaysia) Sdn Bhd* [2009] SGHC 55; *Nagase Singapore Pte Ltd* [2007] SGHC 169, [2008] 1 SLR(R) 80; *Clearlab SG Pte Ltd v Ting Chong Chai* [2014] SGHC 221, [2015] 1 SLR 163.

<sup>6</sup> See Lee Pey Woan, “A Rare Case of Conspiracy by Lawful Means”, Singapore Law Blog (25 December 2014) (<http://www.singaporelawblog.sg/blog/article/72>), in which Lee notes that in *SH Cogent Logistics Pte Ltd v Singapore Agro Agricultural Pte Ltd* [2014] SGHC 203, “possibly the first and only instance of lawful means conspiracy in Singapore”, the means employed by the defendants were “not, on closer examination, entirely lawful in nature”.

of a broader unlawful means tort or the general body of economic torts such as conspiracy, indirect interference with contract, and intimidation. This issue is relevant to the discussion about “unlawful means” because the term is often an element that requires definition in these torts. While the question of whether to consider the torts together was discussed by the SGCA in *EFT*, the court eventually made no definite pronouncement. The furthest the court went was to note that while economic torts were traditionally understood as being related, this view has since been rejected by the House of Lords in *OBG Ltd v Allan*<sup>7</sup> [*OBG*] on the basis that each tort within the supposed “genus” is in fact supported by a distinct underlying rationale.

It would be helpful for the SGCA to clarify whether or not a unified body of economic torts can be said to exist in Singapore. If the English position in *OBG* is accepted, the task of clarifying the content of “unlawful means” in the tort of conspiracy becomes much less daunting, since courts would no longer have to consider the many potential knock-on effects on other doctrines. Conversely, if Singapore courts reject the English position and recognise a unified doctrine of economic torts, it becomes all the more critical to develop a robust definition of “unlawful means” to apply uniformly to the whole body of economic torts for the sake of clarity and doctrinal coherence.

Until then, this area remains mired in uncertainty.

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<sup>7</sup> [2007] UKHL 21, [2008] 1 AC 1.