



# Opera stars and chorus girls

## The vexing tort of inducing breach of contract

“[C]ontracts should be kept rather than broken.” — Lord Justice Rix in *Stocznia Gdanska SA v Latvian Shipping Co* (No 3).<sup>1</sup>

Economic torts are curious beasts. The field is infrequently litigated, partly because these common law actions have had their utility curtailed by legislation, and beset by jurisprudential uncertainty. The situation is not improved by the patchwork quilt of distinct claims within this category, ongoing disagreement about unifying threads and the divergent approaches taken by courts in Australia, New Zealand and the United Kingdom.

While a practitioner might therefore approach this topic with hesitancy, it is imperative that lawyers — particularly those in employment and commercial practices — have a firm grasp of the topic.

At their essence, the torts permit a loss-suffering party to seek damages from the true wrongdoer, even where a third party stands in the middle and is seemingly responsible for the loss. Since the tort of inducing breach of contract was first promulgated in Britain in 1853, the action and its siblings have arisen in a diverse range of contexts. Opera impresarios, milkmen and the organisation behind World Series Cricket have all sought to take advantage of these torts, with

mixed success. Their utility ranges from a helpful adjunct alongside other claims to a “useful measure of last resort”,<sup>2</sup> and the spectre of these actions can also help ensure contractual relations are respected.

It has been suggested that these separate torts — among them inducement to breach contract, unlawful interference with trade, intimidation and conspiracy<sup>3</sup> — may flow from a common source. The prospect of a general tort of causing economic loss by unlawful means has been mooted; Lord Denning MR suggested that “if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means ... then he is acting unlawfully.”<sup>4</sup>

The High Court of Australia has similarly proposed that “independently of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other.”<sup>5</sup>

This article will focus on the tort of inducing breach of contract, given its foremost relevancy in the employment law context. David Howarth has estimated that 40 per cent of British cases involving the tort concern industrial relations

(predominantly strikes), 20 per cent arising in other employment disputes and the remainder in commercial settings.<sup>6</sup> The article will begin with a discussion of the seminal case of *Lumley v Gye*, before outlining each element of the tort’s modern incarnation and the relevant remedies. The article will conclude with a brief discussion of the reform-oriented criticisms levelled against the action.

### A German opera singer’s lasting legal legacy

165 years after it escalated into the British courts, a competition between two rival London theatres for the services of a star German opera singer has enduring relevance for private law across the common law world.<sup>7</sup>

A much sought-after singer in the early 1850s, Johanna Wagner, was lured to London by Benjamin Lumley of Her Majesty’s Theatre in Haymarket on an exclusive singing contract. Before she arrived in Britain, Wagner’s services were poached by Frederick Gye of the Royal Italian Opera in Covent Garden. The day before her much-anticipated debut for Gye, Lumley secured an *ex parte* injunction to prevent her performance.

The ensuing litigation had two strands; the first, *Lumley v Wagner*,<sup>8</sup>

remains the starting point today for equitable injunctions enforcing negative covenants — Wagner was prevented from performing for a short period in London other than for Lumley’s company. The second, *Lumley v Gye*,<sup>9</sup> gave birth to the tort of inducing breach of contract.

In the end, Wagner sang for neither theatre and Lumley’s victory against Gye was pyrrhic — he won the legal claim on demurrer but lost an action for damages. As one legal historian observes, “in the end Lumley, Gye, Wagner and the opera-going public — everyone in fact except the lawyers — were all losers.”<sup>10</sup>

To understand the outcome in *Lumley v Gye* and its ramifications, it is necessary to briefly backtrack to an earlier opera-related case.

In 1847, another famous singer of the era broke her contract with Drury Lane Theatre to sing for Lumley at Her Majesty’s Theatre. The resulting litigation between Drury Lane and the singer, Jenny Lind, ultimately settled for £2,000. Despite indemnifying Ms Lind and paying her handsomely, Lumley was still able to recoup a considerable profit from his new singer. SM Waddams thus suggests that Lind’s case, which demonstrated “that the ordinary remedy ... was ineffective ... and that the real dispute was between the rival employers, must almost certainly have been in the minds of the judges when they came to deal with Lumley’s cases against Wagner and Gye.”<sup>11</sup>

And so, with the shoe on the other foot, Lumley brought proceedings against Gye for £30,000. In a creatively-framed claim, Lumley argued that his rival had “wrongfully and maliciously enticed and



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procured” Lumley’s breach of contract. Standing against Lumley was the contractual principle of privity — counsel for Gye responded that “the breach of contract is a wrong between the plaintiff and Johanna Wagner alone, and against her he may maintain an action on the contract, but not of tort.”<sup>12</sup>

By a 3:1 majority, the Court of Queen’s Bench held for Lumley and thereby established a new tort that endures today. The comments of Crompton J are particularly illuminating. “[T]he servant or contractor,” he wrote, “may be utterly unable to pay anything like the amount of the damages sustained entirely from the wrongful act of the defendant: and it would seem unjust, and contrary to the general principles of law, if such wrongdoer were not

responsible for the damage caused by his wrongful and malicious acts.”<sup>13</sup>

*Lumley v Gye* was not entirely novel. Since the 1500s, it had been accepted that an action arose where a master’s servant was enticed or harboured by another.<sup>14</sup> But this tort was grounded on a master’s proprietary right to the servant (a concept which seems unthinkable today), and was distinguished by Coleridge J in dissent. His Honour chastised: “I should be glad to know how any treatise on the law of contract could be complete without a chapter on this [tort], or how it happens that we have no decisions upon it.”<sup>15</sup> Yet while *Lumley v Gye* would go untouched for almost three decades,<sup>16</sup> the tort it created has since become firmly established across the common law world.

## The tort of inducing breach of contract

Despite one commentator suggesting that the tort today “is almost unrecognisable as a descendant of its ancestor”,<sup>17</sup> *Lumley v Gye* still provides the essential foundation for the modern action. A helpful statement of the tort was offered in *Crofter Hand-Woven Harris Tweed v Veitch*:

[I]f A has an existing contract with B and C and is aware of it, and if C persuades or induces A to break the contract with resulting damage to B, this is generally speaking, a tortious act for which C will be liable to B for the injury he has done him. In some cases, C may be able to justify his procuring of the breach of contract.<sup>18</sup>

The elements of 1) a contract between A and B; 2) C’s knowledge thereof; 3) C’s persuasion or inducement for A to breach the contract with B; 4) resulting damage; and 5) the defence of justification will be considered in turn.

### Contract between A and B

There must be a contract on foot; inducing someone *not* to enter into a contract is not actionable.<sup>19</sup> The contract must be valid, enforceable and not voidable or otherwise defective — cases involving mistake, a lack of capacity and contracts invalid for being contrary to public policy did not give rise to the tort.<sup>20</sup>

### Knowledge

The defendant must know of the contract between A and B. While “there need not be knowledge of the precise terms of the contract,”<sup>21</sup> an appreciation of the broad nature

of the contractual relationship is required. Once that knowledge exists, “the intervener is sufficiently fixed with notice that he interferes at his own risk.”<sup>22</sup>

### Inducement and breach

The defendant must then induce or procure A to breach their contract with B. Any breach is sufficient.<sup>23</sup> While malice is not a necessary element, a degree of deliberateness

or intention is required — “[m]ere negligent interference is not actionable”.<sup>24</sup> The scope of this element and the requisite directness is an area of jurisprudential uncertainty.

In a series of British cases in the second half of the twentieth century, liability was significantly expanded to the extent that the tort could be established with indirect interference with a contract’s performance.<sup>25</sup> In

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2008, the House of Lords reversed this trend and emphasised the need for an intentional procurement of the breach.<sup>26</sup>

The current state of the law in Australia is unclear. That uncertainty notwithstanding, the test is one of basic causation: was the breach “fairly attributable to any such pressure, persuasion or procurement on the part [of the defendant]?”<sup>27</sup>

### Damage

Damage must be proven or inferred, although it is sufficient for the plaintiff to demonstrate “the likelihood of more than nominal damage resulting” from the complained of conduct.<sup>28</sup>

There must also be a minimal nexus between the defendant’s conduct and the damage — in one case, the damage would have been sustained in any event, so the action failed.<sup>29</sup>

### A defence?

There is only one defence to the tort — justification — and its boundaries are ill-defined. The defence is circumscribed — “[i]n a society which values the rule of law, occasions when a legal right may be violated with impunity ought not to be frequent”<sup>30</sup> — and highly fact-specific. Relevant factors may include the nature of the breached contract, the position of the parties, the grounds for the breach and the method in which the breach was procured.<sup>31</sup>

In one eye-catching case, the defence succeeded where union officials persuaded a theatre manager to breach his contract because the company’s salaries were so low “some chorus girls were compelled to resort to prostitution”.<sup>32</sup>

The High Court delivered an extensive consideration of the defence in 2004 in *Zhu v Treasurer of New South Wales*.<sup>33</sup> A company contracted with the appellant to market the 2000 Sydney Olympics in China, but was then induced by the local organising committee to breach the contract on the grounds that it was inconsistent with overarching contractual undertakings relating to the Games’ hosting. The Court rejected the defence, holding an inconsistent contractual obligation is insufficient, although proprietary or statutory rights may satisfy the justification test.<sup>34</sup>

### Remedies

There are two available remedies if the tort is proven: damages and injunctions. While a contract claim would typically also lie against the breaching party, the outcome via tort can be more attractive — both



for practical reasons (the third party may be more pecunious than the breaching party) and legal considerations. Damages in tort “may be more extensive” than their contractual equivalent, with a more liberal remoteness test and absent a stringent duty to mitigate.<sup>35</sup> In an extreme case, exemplary damages might even be available via the tort.<sup>36</sup> Additionally or alternatively, an injunction may issue to prevent the respondent continuing to induce non-performance of contract. The usual equitable requirements are applicable where an injunction is sought.

## Criticism

The prohibition on inducing breach of contract has long been controversial in both theory and practice, exacerbated no doubt by the tort’s appearance in highly-contentious strike cases. Howarth offers bluntly: “[*Lumley v Gye*] should be treated as wrong.”<sup>37</sup>

In the employment context, the tort is superficially attractive for numerous reasons, several of which motivated *Lumley v Gye*. Mandatory injunctions will not issue to compel personal service from employees or contractors, damages in this setting are often incalculable or difficult to precisely attribute, employees are typically unable to pay hefty damages awards in any event, and suing ongoing staff inevitable causes relationship difficulties. Thus while “employers have not relished the prospect of suing their employees for breaching their contracts”, the ability to sue unions (for strikes) and competitors (for poaching) has been where “*Lumley v Gye* finds its most enthusiastic audience.”<sup>38</sup>

But the tort raises troubling personal liberty considerations and the additional contractual certainty has associated costs. The practical effect of the tort, not unlike the prohibitory injunction that also grew out of the opera litigation, is to restrict individual liberty in contractual relations.<sup>39</sup> At a principled level, why should a third party be held responsible for a contracting party’s breach where remedies are available against the breaching party? “[C]ontract law protects expectations of performance by the other contracting party, not performance by the whole universe.”<sup>40</sup> The tort is also inconsistent with the efficient breach theory of contract, and the opt-in nature of contract law.<sup>41</sup>

Despite these criticisms, the prospects for reform are slim. As one leading critic admitted, “it is now too late to correct that mistake”.<sup>42</sup> While the tort’s scope has been curtailed somewhat by recent British jurisprudence,<sup>43</sup> there have been no judicial suggestions that it might be scrapped entirely.

In Australia, the tort has taken a slightly different path from its British counterpart due to intruding legislation. In the workplace context, for example, the *Fair Work Act 2009* (Cth) establishes a comprehensive regime for industrial action that means resort to the tort is often unnecessary. Indeed several cases have affirmed that courts will be hesitant to intervene in such disputes where there is a specialised statutory body: “injunctive relief will not ordinarily be granted where it can be seen that there is another tribunal particularly suited to deal with the matter in issue”,<sup>44</sup> such as the Fair Work Commission.<sup>45</sup> *Corporations Act 2001* (Cth) and consumer law

remedies have similarly limited the tort’s utilisation in the commercial context.

## Conclusion

The theoretical basis of the prohibition on inducing a breach of contract is peculiar to the common law world. In civil law jurisdictions, the approximate equivalents typically arise from obligations on contracting parties not to enter into inconsistent contractual relationships. Thus J G Starke (no relation to the High Court judge) wrote, “[t]he English common law practically stumbled upon the *Lumley v Gye* rule, almost as if by historical accident.”<sup>46</sup>

That accident has proven fortuitous. Despite legislative encroachment and jurisprudential uncertainty, the economic tort remains relevant to this day and even at the forefront of judicial creativity. In 2002, a British court used the tort to pierce the corporate veil in *Stocznia Gdanska*.<sup>47</sup> A holding company had permitted its subsidiary to “wither on the vine”,<sup>48</sup> forcing it to default on contractual obligations the holding company had negotiated and then leaving a hollow corporate shell to absorb liability. Rix LJ, with Tuckey and Aldous LJJ agreeing, found the holding company liable on tortious grounds.

In 1923, scholar FB Sayre described the tort as “an *ingénue* in the law”, whose “characteristics and limitations ... have not yet been determined or agreed upon”.<sup>49</sup> Yet it is precisely this flexibility that gives the tort its persisting utility. The comments of Rix LJ in *Stocznia Gdanska* are apposite:

[The flexible and unsettled] considerations are designed to

keep a wide-ranging tort within bounds. It is therefore important that they are not applied mechanically and that regard is had to the balancing demands of moral constraint and economic freedom. For these purposes the concepts of knowledge and intention, direct participation, the causative relevance of unlawful means, and the possibilities of justification, are presumably sufficiently flexible to enable the principles of the tort to produce the right result.<sup>50</sup>

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## Endnotes

1. [2002] 2 All ER (Comm) 768.
2. RP Balkin and JLR Davis, *Law of Torts* (2013, 5<sup>th</sup> ed, LexisNexis Butterworths) 608.
3. See generally JD Heydon, 'The Future of Economic Torts' (1975) 12 *University of Western Australia Law Review* 1, 1–16.
4. *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, 1191.
5. *Beadesert Shire Council v Smith* (1966) 120 CR 145, 156.
6. David Howarth, 'Against *Lumley v Gye*' (2005) 68 *Modern Law Review* 195, 197.
7. For an engaging historical account, see SM Waddams, 'Johanna Wagner and the Rival Opera Houses' [2001] *Law Quarterly Review* 431.
8. (1852) 64 ER 1209.
9. (1853) 118 ER 749.
10. Waddams, above n 7, 440
11. *Ibid* 433.
12. *Ibid* 447.
13. (1853) 118 ER 749, 755.
14. Balkin and Davis, above n 2, 611; S Mills, 'The Tort of Inducement of Breach of Contract' 27.
15. (1853) 118 ER 749, 762.
16. *Bowen v Hall* (1881) 6 QBD 333.
17. J G Starke, 'Unlawful Interference with Contractual Relations' (1957) 32 *Res Judicatae* 136, 142.
18. [1901] AC 495, 510. (Lettering choice altered for consistency.)
19. Balkin and Davis, above n 2, 611 n 15.
20. *Ibid* 613 n 36.
21. Starke, above n 17, 143.
22. *Ibid*.
23. Balkin and Davis, above n 2, 613. But see *De Jetley Marks v Lord Greenwood* [1936] 1 All ER 863, 872 (Porter J).
24. Starke, above n 17, 143.
25. See, eg, *Torquay Hotel Co Ltd v Cousins* [1969] 1 All ER 361.
26. *OBG Ltd v Allan* [2008] 1 AC 1.
27. *DC Thomson & Co Ltd v Deakin* [1952] 2 All ER 361, 373.
28. *Grieg v Insole* [1978] 3 All ER 449, 490 (Slade J).
29. *Jones Brothers (Hunstanton) v Stevens* [1955] 1 QB 275.

30. *Building Workers' Industrial Union v Odco Pty Ltd* (1991) 29 FCR 104, 145.
31. *Glamorgan Coal Co v South Wales Miners' Federation* [1903] 2 KB 545, 745–5.
32. *Brimelow v Casson* [1924] 1 Ch 302.
33. (2004) 218 CLR 530.
34. *Edwin Hill & Partners v First National Finance Corporation PLC* [1988] 3 All ER 801 (CA).
35. Balkin and Davis, above n 2, 620–1.
36. *Multinail Australia Pty Ltd v Pryda (Aust) Pty Ltd* [2002] QSC 105.
37. Howarth, above n 6, 196.
38. *Ibid* 200.
39. See generally G Wexler, 'Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations' (1994) 27 *Connecticut Law Review* 279.
40. *Ibid* 209.
41. Howarth, above n 6, 217–21.
42. David Howarth, *Textbook on Torts* (Butterworths, 1995) 475–6.
43. See, eg, *OBG Ltd v Allan* [2008] 1 AC 1.
44. *Davies v Nyland* (1975) 10 SASR 76, 102 (Bray CJ).
45. Balkin and Davis, above n 2, 622.
46. Starke, above n 17, 151.
47. [2002] 2 All ER (Comm) 768.
48. Peter Edmundson, 'Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract' (2006) 30 *Melbourne University Law Review* 62, 64.
49. FB Sayre, 'Inducing Breach of Contract' (1923) 36 *Harvard Law Review* 663, 663.
50. [2002] 2 All ER (Comm) 768, 804.



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