



In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF APPEAL
BETWEEN**

AC NETWORK HOLDING LIMITED
First Appellant

AC POOL HOLDING LIMITED
Second Appellant

KHALIL MOHAMED BINLADIN
Third Appellant

DALIA KHALIL BINLADIN
Fourth Appellant

HORIZON LIGHT INVESTMENTS LLC
Fifth Appellant

and

POLYMATH EKAR SPV1
First Respondent

POLYMATH EKAR SPV2
Second Respondent

VILHELM NIKOLAI PAUS HEDBERG
Third Respondent

RAVI NAGESH BHUSARI
Fourth Respondent

ALI HASHEMI
Fifth Respondent

LUX 2 INVCO
Sixth Respondent

CLARA FORMATIONS LIMITED
Seventh Respondent

EKAR HOLDING LIMITED
Eighth Respondent

JUDGMENT



Neutral Citation:	[2023] ADGMCA 0002
Before:	Chief Justice, Lord David Hope His Honour Justice Kenneth Hayne His Honour Justice Sir Peter Blanchard
Decision Date:	17 November 2023
Decision:	<ol style="list-style-type: none"> 1. The Appeal be allowed. 2. The Fifth Respondent is jointly and severally liable with the First to Fourth Defendants for damages in the total sum of US\$779,500, plus simple interest at 5% per annum from 27 April 2020. 3. The Fifth Defendant shall pay the Appellants' costs of the proceedings against the Fifth Defendant in the Court of First Instance and in this Court, to be assessed, if not agreed.
Hearing Dates:	8 and 9 November 2023
Date of Order:	17 November 2023
Catchwords:	Shareholders' Agreement. Drag Along procedure. Validity of Drag Notice. Unlawful means conspiracy. Whether knowledge of the unlawfulness required. English Court of Appeal decisions. Application of the English common law doctrine of precedent.
Cases Cited:	<p>Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited [2007] DIFC 005/006/007</p> <p>The Racing Partnership v Done Bros Ltd [2021] Ch 233</p> <p>Meretz Investments NV v ACP Ltd [2008] Ch 244</p> <p>Young v Bristol Aeroplane Co Ltd [1944] KB 718</p> <p>Miliangos v George Frank (Textiles) Ltd [1975] QB 487, at p 503</p> <p>Farrell v Alexander [1977] AC 59 at p 92</p> <p>Patel v Home Secretary [2013] 1 WLR 63, para 59</p> <p>Minister of Pensions v Higham [1948] 2 KB 153, 169</p> <p>Colchester Estates (Cardiff) v Carlton plc [1986] Ch 80, 85</p> <p>Barrington v Lee [1972] 1 QB 326, [1971] 3 WLR 962, 976</p> <p>British Industrial Plastics Ltd v Ferguson [1938] 4 All ER 504</p> <p>Churchill v Walton [1967] 2 AC 224</p> <p>Belmont Finance Corp v Williams Furniture Ltd (No 2) [1980] 1 All ER 393</p>



Legislation Cited:	Application of English Law Regulations 2015 DIFC Law No. 3 of 2004
On appeal from:	ADGMCFI-2020-015
Case Number:	ADGMCA-2023-001
Parties and representation:	<p>Appellants</p> <p>Mr David Halpern KC Instructed by Al Tamimi & Company</p> <p>First to Sixth and Eighth Respondents</p> <p>Mr Alain Choo Choy KC Instructed by DLA Piper Middle East LLP</p>

JUDGMENT

Introduction

1. On 3 March 2015, the Board of Directors of the Abu Dhabi Global Market enacted the *Application of English Law Regulations 2015*. Article 1(1) of the Regulations (the “**Article**”) provides:

“The common law of England (including the principles and rules of equity), as it stands from time to time, shall apply and have legal force in, and form part of the law of the Abu Dhabi Global Market”.

The Article is subject to a number of qualifications. But they do not need to be listed here, as it is agreed that they do not apply in this case.

2. The rule which the Article lays down lies at the heart of the system of law that was created for ADGM. The position in the Dubai International Financial Centre (the “**DIFC**”) is different. Common law rules in various areas have been codified, and it is only if those rules or the laws of other relevant legal systems do not provide an answer that the laws of England and Wales are applied: see Article 8 of DIFC Law No 3 of 2004. In *Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited* [2007] DIFC 005/006/007, para 40, Justice Michael Hwang said that there was no natural presumption that UAE law or English law was intended to apply in the DIFC.
3. Among the advantages of ADGM’s approach that are mentioned in the Guidance Notes that have been issued about English Law in ADGM are that English law has direct precedential value in the ADGM Courts, and that the body of precedent that it contains provides predictability to the law. The way this rule is to be applied by the ADGM judges is therefore a matter of some importance. They are not sitting as English judges. But they are bound to apply the rule laid down by the Article. This case provides us with an opportunity to explain the relationship between this rule and the English common law doctrine of precedent and how it is to be applied.



The issues in this appeal

4. The appeal raises an issue about the tort of unlawful means conspiracy. The question is whether the ADGM Courts are bound to follow a majority decision of the English Court of Appeal on the question whether knowledge of the unlawfulness of the means employed is required to establish the tort. The answer to that question, if it was raised in an English court, would be found by applying the English common law doctrine of precedent.
5. The judge in the Court of First Instance, Justice Stone, having reviewed the authorities, said that the current position on that question is far from settled under English law. He held that, as he was not sitting as an English court of first instance, he was not bound as a matter of *stare decisis* by the decision of the English Court of Appeal in *The Racing Partnership v Done Bros Ltd* [2021] Ch 233 (“**Racing Partnership**”). So he declined to follow it. He applied what he considered to be the better view of the law on this issue, for which he had found support in an earlier decision of the Court of Appeal in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 (“**Meretz**”).
6. The first two issues before this court are whether the judge was right to decline to follow the judgment in *Racing Partnership* for the reason that he gave, and whether he was right to hold that it is a requirement for the tort of conspiracy to cause loss that the alleged tortfeasor knew that the unlawful means that were to be applied were unlawful. If he was right do so, a further issue arises as to where the burden of proof lies as to the tortfeasor’s state of knowledge and what the judge found to be established by the evidence.

Factual background

7. The Eighth Respondent, Ekar Holding Limited (“**Ekar**”), is a start-up car sharing company which is active in Abu Dhabi, Dubai and Saudi Arabia. On 27 April 2020 the shares of the Appellants, a group of minority shareholders in Ekar, were compulsorily acquired by the service on them of a Drag Along Notice (the “**Drag Notice**”). It was issued on behalf of the majority shareholders under the provisions of a Shareholders’ Agreement dated 29 October 2019. This resulted in the entirety of the issued shares of Ekar being purchased by, and thereafter transferred to, the Sixth Respondent, Lux 2 Invco (“**Lux**”), for the consideration of US\$1.00.
8. The Appellants claim that the Drag Notice was issued in breach of the Shareholders’ Agreement by reason of four independent breaches of the provisions of that agreement. After a trial that lasted fourteen days the judge rejected the Appellants’ contentions in respect of three of them. But he upheld the fourth contention, which was that the sale of the Appellants’ shares was not to a bona fide purchaser who had made an offer for them on arm’s length terms.
9. That attack on the validity of the Drag Notice was based on the wording of clauses 1 and 17(1) of the Shareholders’ Agreement. Clause 17(1) provided the holders of more than 51% of the shares in the company who wished to sell all their shares to a proposed purchaser with the right, in the exercise of a Drag Along Option, to compel each of the other shareholders to sell and transfer all their shares to the proposed purchaser. The words “*Proposed Purchaser*” were defined in clause 1 as “*a proposed bona fide purchaser who at the relevant time has made an offer on arm’s length terms*”. Clause 37 provided that English law was to apply, and Clause 38 gave the ADGM courts exclusive jurisdiction to determine any disputes arising under the Agreement.



10. Ekar had started business in a small way in the UAE through its subsidiary Ekar FZ LLC (“**Ekar FZ**”). As time went on the capital which had been raised initially diminished, and Ekar FZ was in urgent need of further funds with which to continue operating. Among the sources of finance that emerged during this period was the fifth Respondent, Mr Ali Hashemi, who is a director of Polymath Holdings. The First and Second Respondents, Polymath 1 and Polymath 2, which are special investment vehicles, are wholly subsidiaries of Polymath Holdings. The proposed purchaser, the Sixth Respondent Lux, was incorporated on 18 March 2020. It also is a wholly owned subsidiary of Polymath Holdings Limited (“**Polymath Holdings**”).
11. Mr Hashemi is neither a director nor a shareholder of Polymath 1, Polymath 2 or Lux. The beneficial owner of these companies is named as Mr Hashemi’s wife, Ms Zeina Abdella. Mr Hashemi said that Polymath Holdings is owned and controlled by Ms Abdella, who is also its sole director. The judge declined, however, to accept his evidence as to Ms Abdella’s exclusive ownership and control. He held that the overwhelming probability was that in all the activities of Polymath Holdings and Lux it was Mr Hashemi who was running the show and pulling the strings, and that in holding these corporate positions Ms Abdella was his nominee. So, when the issue of good faith of the proposed purchaser was being examined, it was Mr Hashemi’s commercial behaviour that had to be subjected to scrutiny.
12. Throughout April 2020 there was a profound difference of view between the two groups of shareholders in Ekar about the issue of emergency funding. Mr Hashemi insisted that a minimum of US\$10m was required, and his intransigence as to how this would be achieved led to the souring of good relations and eventually to deadlock. He was aware of the Drag Notice provisions in the Shareholders’ Agreement. He consulted a Mr Majid of the law firm CMS, who advised favourably about the service of such a notice. So, unknown to his fellow shareholders other than Mr Hedberg, the CEO of Ekar, and Mr Bhusari, the company secretary, he decided to institute the Drag Along procedure in which Lux was named as the proposed purchaser.
13. The Drag Notice of 27 April 2020 was signed by Mr Hashemi on behalf of Polymath 1 and Polymath 2 and by Mr Hedberg and Mr Bhusari, who are the Third and Fourth Respondents, as the selling shareholders. It was served on that date. This was followed by a letter of protest on behalf of the shareholders whose shares were to be transferred to the proposed purchaser. Legal advice was sought from CMS, which was appointed as company counsel at an emergency Board Meeting on 30 April 2020. Among the points made in the letter of advice was that there was no requirement in the Shareholders’ Agreement for the proposed purchaser to be a third party, and that there were clearly good arguments that the Drag Along procedure was not subject to the pre-emption rights in the Shareholders Agreement. The transfer of the shares to Lux was then approved. The transfer forms were executed on 3 May 2022.
14. The Appellants claimed damages from Mr Hashemi for the economic torts (a) of intentionally inducing or procuring Polymath Holdings to commit breaches of the Shareholders’ Agreement, and (b) of conspiracy by Mr Hashemi together with Polymath Holdings and Mr Hedberg and Mr Bhusari to use unlawful means for breaching that Agreement.

The decision by the Judge

15. After a careful review of the evidence, the judge held that Lux, wholly owned by Polymath, was Mr Hashemi’s vehicle. Through the medium of Lux he stood on both sides of the fence in the Drag process and the share expropriation that took place. No mention of the Lux offer was made to anyone than Mr Hedberg and Mr Bhusari, who had decided to throw in their lot with Mr Hashemi. The judge concluded that it was not possible to characterise Mr Hashemi as having



acted in good faith in setting the Drag Along procedure in train. It was self-serving and cynical, a manoeuvre calculated to benefit no-one but himself. The purported sale to Lux was not made to a bona fide purchaser who had made an offer at arm's length. It was not valid and so was a contractual breach of the Shareholders' Agreement.

16. The judge said that the essential issue in consideration of the inducing breach claim was the issue of knowledge and intention: did Mr Hashemi know that the issue of the Drag Notice would breach the Shareholders' Agreement, and did he intend to procure that breach? But there was no hard evidence nor inescapable inference that he knew a breach of the Shareholders' Agreement was to occur consequent upon his actions. He had made positive inquiries to confirm the lawfulness of the Drag Notice and received the advice that was given on 30 April 2020. The existence of the advice by CMS militated against the contention that at the time Mr Hashemi was on notice that service of the Drag Notice would constitute a breach of the Shareholders' Agreement. The allegation of inducing breach of contract had not been made out, and he dismissed that claim.
17. There remained the case of unlawful means conspiracy. The judge said that this tort differs from the tort of inducing breach of contract in the requirement of knowledge, given that it appeared to be no longer settled in English law that knowledge of the unlawfulness of the means employed is required to establish unlawful means conspiracy. In support of that observation the judge referred to dicta in *Meretz* by Arden LJ at para 127 and Toulson LJ at para 174 to the effect that it was a defence to an action for conspiracy to injure by unlawful means if the defendant acted as he did in the belief that he had the lawful right to act as he did, and then to the majority decision of the Court of Appeal in *Racing Partnership* by Arnold and Phillips LJJ to the effect that knowledge of the unlawfulness of the means employed was not required for unlawful means conspiracy. He said that the majority decision in *Racing Partnership* had injected uncertainty into the requirement for establishment of this tort. Lewison LJ had dissented, following the approach of Arden and Toulson LJJ in *Meretz*.
18. The judge said that the Appellants' counsel, Mr Halpern KC, went so far as to suggest that his court was sitting as an English court of first instance, and that it was bound by the Court of Appeal decision in *Racing Partnership*. He did not accept that argument. He said that he was sitting as a first instance court within the jurisdiction of the ADGM Courts, and not as an English court of first instance. So he was not bound by that decision.

"For the purposes of Regulation 1 of the Application of English Law Regulations 2015, decisions of the English Court of Appeal are highly relevant in so far as they are demonstrative of "the common law of England (including the principles and rules of equity) as it stands from time to time", but those Founding Regulations do not justify the conclusion that this court is bound by the doctrine of precedent by a decision of the English Court of Appeal." (para 167)

19. As he saw it, his task was to ascertain the correct position under English law, having regard to all relevant decisions which form part of English jurisprudence. It appeared to him that there was a dissonance in the current state of English law, which had created an unanticipated distinction between the two torts as to what was required to establish such claims. In his opinion the better view was that in unlawful conspiracy claims knowledge of the unlawful means should be a requirement. He accepted that Mr Hashemi thought that he was legally entitled to act as he did, as he had gone out of his way to obtain legal advice. There was no evidence that either Mr Hashemi or any of the alleged co-conspirators knew that the Drag Notice as issued constituted a contractual breach. The burden that was on the Appellants to show that this was so had not



been discharged. So he dismissed the conspiracy allegation that had been brought against Mr Hashemi.

The grounds of appeal

20. The Appellants have appealed against that decision on the following grounds:

“1. The Court erred in law in holding that it was not bound by a decision of the English Court of Appeal.

2. The Court erred in law in holding that it was not bound to follow the decision of the majority of the Court of Appeal in Racing Partnership.

3. The Court erred in law in holding that liability for ‘unlawful means’ conspiracy is dependent upon the Claimant proving that the tortfeasor knew that the proposed acts would amount to a breach of contract.

4. The Court erred in failing to conclude that Mr Hashemi was jointly and severally liable with the First to Fourth Defendants for damages in the total sum of \$779,5000, plus simple interest at 5% per annum from 27 April 2020.

The Court erred in declining to award costs against Mr Hashemi.”

21. The issues that these grounds raise can be restated as follows. The first is whether the judge was right to say that he was not bound as a matter of *stare decisis* by the decision in *Racing Partnership* and could reach his own view as to what the correct position on this issue was under English law. The second is whether, under the common law of England, the decision of the Court of Appeal in *Racing Partnership* must be taken, for the time being, as having settled the question whether knowledge of the unlawfulness of the means is required as an ingredient of the tort of unlawful means conspiracy. The third issue, which only arises if the Appellants fail on the first two grounds, relates to the burden of proof. It is agreed that the last two grounds are consequential on the answers to these questions.

Ground 1: *Stare decisis*

Stare Decisis in the ADGM Courts

22. Mr Halpern said that if he gave the impression to the judge that his argument was that he was sitting as a first instance court in England, that was an error on his part. His recollection was that he said that the judge was bound by the decision in *Racing Partnership* just as an English judge would be because he was applying English law. Mr Choo Choy KC for Mr Hashemi said that the judge did fairly characterise Mr Halpern’s argument. The way Mr Halpern put it was that the judge had to behave as if he were sitting in an English courtroom in the English High Court. But that, said Mr Choo Choy, was perhaps too vivid a description of the legal exercise that the judge was supposed to take when applying the Regulations. There is force in that point. Clearly the judge was sitting as a judge of the ADGM Courts and not as judge of the English High Court.

23. The judge was bound, however, to give effect to the rule set out in Article 1(1) of the Regulations. The doctrine of precedent which is encapsulated by the phrase *stare decisis* is part of the common law of England. So the question is, as Mr Choo Choy put it, how do you apply the rule in the Article? He said that this was an argument about nothing. But the question does need to be answered in case there is any doubt about the right approach.



24. The judge's discussion of this question in paragraph 167 of his judgment seems, with great respect, to miss the point which the Article raises. He said that for the purposes of the Regulations decisions of the English Court of Appeal are highly relevant, but that the Regulations did not justify the conclusion that his court was bound by the doctrine of precedent by a decision of the English Court of Appeal.
25. He was right to say in the following paragraph that in formulating its decisions in any given point his court must ascertain the correct position under English law on any particular point. He was also right to say that in doing so it will have regard to all relevant decisions which form part of English jurisprudence. But the effect of those decisions cannot be determined without applying to them the doctrine of precedent. That is what the rule about the common law of England requires the ADGM judge to do when applying the rule in the Article. The application of that doctrine is essential to a correct understanding of what the English common law is on the point at issue.
26. In most cases this approach to the application of the rule in Article 1(1) will be simple to apply. But in this case it is not so easy. This makes it necessary to say a bit more about the doctrine of precedent as it is applied in England.

Stare decisis in England

27. As Rupert Cross and JW Harris, *Precedent in English Law*, 4th edition (1991) say, at pp 3-5, English law is to a large extent based on case-law, which consists of the rules and principles stated and acted upon by judges in giving decisions. In a system based on case law, a judge in a subsequent case *must* have regard to these matters. They are not, as in some other legal systems, merely material which he *may* take into consideration in reaching his decision. Among its constant features is the rule that a single decision is always a binding precedent as regards courts below that from which it emanated.
28. We are concerned in this case with the application of the doctrine to decisions in the Court of Appeal. It is well settled that the English Court of Appeal (Civil Division) is bound by its own decisions, unless the case falls within one of the three exceptions set out in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. As Lord Denning MR said in *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487, at p 503, the Court of Appeal is bound to follow its own decisions, including majority decisions, except in closely defined circumstances. That, as Lord Simon of Glaisdale said in *Farrell v Alexander* [1977] AC 59 at p 92, is, for sound practical reasons, the law of the land. Otherwise the law would become unpredictable, changing from court to court and case to case, and it would be failing the public. As R W M Dias, *Jurisprudence*, 5th edition (1985), put it:

“No system of law can be a ‘system’ without regularity in the way in which disputes are decided. Therefore, a fundamental reason for the acceptance of a doctrine of precedent is the moral dictate of justice that like cases should be decided alike.”

29. The exceptions as summarised by Lord Greene MR in *Young v Bristol Aeroplane Co Ltd* are, first, that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow; secondly, the court is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; and thirdly, the court is not bound to follow a decision that was given per incuriam, as where a statute or rule having statutory effect was not brought to the attention of the earlier court.



30. There is another rule about the operation of precedent that should be noted. It applies where the court is faced with two decisions in courts of co-ordinate jurisdiction that are in conflict with each other. At first sight it might seem that the court should be free to make its own choice as to which to prefer. But that would run counter to the overriding need for certainty in the law. In *Patel v Home Secretary* [2013] 1 WLR 63, para 59, Lord Neuberger of Abbotsbury MR sitting in the Court of Appeal said that the highest that it could be put was that the court was free to choose between them, but that there was a strong argument for saying that it would be more appropriate to follow the later decision:

“In Minister of Pensions v Higham [1948] 2 KB 153, 169, Denning J referred to ‘the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it is reached after full consideration of the earlier decision’ – a principle applied by Nourse J in Colchester Estates (Cardiff) v Carlton plc [1986] Ch 80, 85. Although that referred to first instance decisions, I consider that it also has force in relation to decisions of this court.”

31. Nourse J said in *Colchester* at p 85 that he would make an exception to that rule only in the case, which must be rare, where the third judge is convinced that the second case was wrong in not following the first, such as where some binding or persuasive authority has not been cited in either of the first two cases. Mr Choo-Choy said that Lord Neuberger appeared to have accepted that exception in *Patel*.
32. But there is no mention of that exception in Lord Neuberger’s judgment at para 59, and it runs counter to the guidance that was given by *Stephenson LJ in Barrington v Lee* [1972] 1 QB 326, [1971] 3 WLR 962, 976, where he referred to the first exception to the rule in *Young v Bristol Aeroplane Co Ltd*, which is that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow:

“It is clear from the sentence preceding the statement of the rule that that exception is limited to cases in which the later decision has been given in ignorance of the earlier. It was so understood by Viscount Simon when he approved on appeal the rule that ‘the previous decision must be followed (unless, of course, it was given per incuriam, or unless the House of Lords has in the meantime decided that the law is otherwise)’: [1946] AC 163, 169. A later decision given not per incuriam nor in ignorance of the previous decision but after the most careful consideration of it cannot come within the exception, however faulty the reasoning or unjust the result of the later decision may seem to be.”

33. *Barrington v Lee* was overruled in *Sorrell v Finch* [1977] AC 718, as was the previous case in the Court of Appeal which it held was binding on it when reaching its decision. But there is nothing in the speeches in that case that casts doubt on the soundness of guidance given by Stephenson LJ. The House was simply fulfilling the function which Stephenson LJ referred to at p 976 in *Barrington* of reviewing decisions in the Court of Appeal which, as Lord Edmund-Davies said in *Sorrell*, had been “off course” and correcting them where they had gone wrong.
34. With that background we can turn to the second ground of appeal, which is whether under the common law of England the decision of the Court of Appeal in *Racing Partnership* must be taken, for the time being, as having settled the question whether knowledge of the unlawfulness of the means is required as an ingredient of the tort of unlawful means conspiracy.



Ground 2:

35. In *Racing Partnership* Arnold LJ said at paragraph 106 that the case raised a thorny issue of law with which a number of first instance judges had had to grapple in recent years, reaching different conclusions. He then proceeded to examine a number of cases of high authority in which the question of the unlawfulness had not been directly addressed, before turning to three authorities in which the question of knowledge had been considered. He then drew from them the conclusion in paragraphs 139 and 144 that knowledge of the unlawfulness of the means employed was not required.
36. It is sufficient to note the following comments that Arnold LJ made about these three authorities. In regard to the first case, *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504, he regarded the judgment of Finlay LJ at p 514D as persuasive authority that knowledge of the unlawfulness is required for unlawful means conspiracy. But he said that that case was not binding authority for that proposition as the point was not in issue, and because all the judgments treated the claim for unlawful means conspiracy as standing or falling within the separate tort of inducing breach of contract: paragraph 122. The ratio of the second case, *Churchill v Walton* [1967] 2 AC 224, on the other hand was that, in order to establish a criminal conspiracy to do an unlawful act, it was necessary to show that the accused had knowledge of the facts that made the act unlawful, but that knowledge of the law on the part of the accused was not required: paragraph 126. As for the third, *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, the Court of Appeal's reasoning did not appear to him to turn on the fact it was dealing in that case with a criminal offence as opposed to a civil wrong. In his view it was authority binding on his court that knowledge of the unlawfulness was not required for unlawful means conspiracy: paragraph 133.
37. Arnold LJ then referred to the judgments of Arden and Toulson LJ in *Meretz*. He said that Arden LJ, who gave the principal judgment, did not address the present issue, and still less the tension between *British Industrial Plastics* and *Belmont v Williams*: paragraph 136. After quoting a passage from Toulson LJ's concurring judgment in which he said that he would support Arden LJ's view that it is a defence to an action for conspiracy to injure by unlawful means that the defendant acted in the belief that he had a lawful right to act as he did, Arnold LJ made the following comment about it in paragraph 138:

“First, it is explicitly obiter. Secondly, the reference to Arden LJ’s judgment is to a passage dealing with inducing breach of contract, not conspiracy. Thirdly, Toulson LJ is not addressing knowledge, but intention. Fourthly, neither British Industrial Plastics nor Belmont v Williams is referred to.”

38. Lewison LJ, having examined the authorities, said at paragraph 265 that he would hold that, where the unlawful means consist of a violation of some private right, knowledge of unlawfulness is an ingredient of the tort of intention to injure by unlawful means, and of conspiracy to commit that tort. But Phillips LJ agreed with Arnold LJ's conclusion, based on his analysis of the authorities for the reason he gave in paragraph 171:

“The point was directly in issue and so decided by this Court in Belmont v Williams, a decision that was not referred to by Toulson LJ in his obiter dictum in Meretz. The interplay between unlawful means conspiracy and inducing breach of contract (where knowledge of an unlawful breach of contract is an essential element) may merit further examination in a suitable case, but I am not convinced that many cases in which a defendant induces a breach of contract, but without knowing that



he is doing so, would be capable of being re-formulated as an unlawful means conspiracy.”

39. On 12 May 2022 the UK Supreme Court gave leave to appeal against the decision in *Racing Partnership*. The appeal was later withdrawn, so the clarification from the Supreme Court to which the judge looked forward in paragraph 169 of his judgment has yet to take place. As is the practice, the Supreme Court gave no reasons for its decision, other than it considered that the application for permission raised a point of general public importance which it ought to consider at that time. The comments by Arnold and Phillips LJ referred to in paragraphs 18 and 21 above, provide a sufficient explanation for that decision. No conclusions one way or the other can be drawn as to whether the committee that gave permission thought that the appeal was likely to succeed. It would have been sufficient for the Justices to have reached the decision that they did that the decisions before them raised an issue of law of that required to be clarified.
40. Mr Choo Choy said that the judge was entitled, in accordance with the *Colchester* and *Patel* principles, to choose between the conflicting decisions of the Court of Appeal if such a conflict was demonstrated. The judgment in *Miliangos* did not clarify the criteria that the court is to apply in making its choice. So one might reasonably suppose, by implication, that the choice is to be made in accordance with the court's view of which of the two conflicting decisions appears to be correct as just a matter of logic and commonsense.
41. He then turned to *Meretz* in order to show that, contrary to what Arnold LJ had said in *Racing Partnership*, on a proper reading of that case it was part of the ratio that the element of intention to cause harm is negated if, on the facts, the defendant had no knowledge of the unlawfulness of his conduct. This led him to conduct a detailed analysis of the case. He drew our attention to the fact that the three cases which persuaded Arnold LJ to the contrary conclusion were referred to, and to passages in the judgment of Arden LJ that showed that the ratio of her decision to dismiss the unlawful conspiracy claim was that there was an absence of knowledge of unlawfulness because the defendants believed, on the advice they had received, that they were entitled to act as they did. Turning to Toulson LJ's judgment, he said that the basis of his agreement with Arnold LJ at paragraph 174, although introduced by his comment that it was unnecessary to decide the point, was properly to be treated as part of the ratio of the decision as to why the conspiracy claims were not maintainable.
42. In summary, he said, the position in *Meretz* was that all three members of the Court of Appeal decided that the conspiracy claims failed because, amongst other reasons, the necessary element of intention to cause harm was lacking in circumstances where the defendants in reliance upon legal advice, believed that they were entitled to act as they did. So Arnold LJ was wrong to characterise Toulson LJ's observations in paragraph at paragraph 174 as being *obiter* and that, as the earlier conflicting decisions had been considered by the court in arriving at its decision, the court in *Racing Partnership*, applying the principles in *Young v Bristol Aeroplane Co*, should have followed *Meretz* unless satisfied that it had been decided *per incuriam*. The majority in *Racing Partnership* had failed to appreciate the status and significance of *Meretz*.
43. We do not need to decide whether or not *Meretz* was decided *per incuriam*, as that is not what Stephenson LJ's guidance in *Barrington v Lee* requires us to do. It is not a question as to which of the two conflicting decisions appears to be correct as just a matter of logic and commonsense, as Mr Choo Choy submitted. The question, rather, is the other way round. It is the decision in *Racing Partnership* that must be examined. That decision cannot be said to have been given in ignorance of *Meretz*. On the contrary, the court gave careful consideration to that case in reaching its decision that knowledge of the unlawfulness was not required for unlawful means



conspiracy. So the only remaining question is whether that decision was given per incuriam. If it was not, it cannot come within the exception, however faulty its reasoning might seem to be.

44. To say that the result of the very detailed analysis of the cases, including *Meretz*, which Arnold LJ undertook in *Racing Partnership* was reached per incuriam is a very large proposition, and it is not one that we can accept. The breadth and depth of that analysis points firmly away from that conclusion. It may be that some of the reasoning can be criticised. But we do not need to pursue that point, as faulty reasoning does not bring the case within the exception.
45. So the answer to the question raised by this ground of appeal is that, under the common law of England, the decision of the Court of Appeal in *Racing Partnership* must be taken, for the time being, as having settled the question whether knowledge of the unlawfulness of the means is required as an ingredient of the tort of unlawful means conspiracy. This means that we do not need to provide an answer to the third ground of appeal. The fourth and fifth grounds, being consequential to the answers we have given on the first two grounds, must be answered in the affirmative.

Conclusion

46. The appeal must be allowed. Mr Hashemi is jointly and severally liable with the First to Fourth Defendants for damages in the total sum of US\$779,500, plus simple interest at 5% per annum from 27 April 2020. The Appellants are entitled to the costs of the proceedings against Mr Hashemi in the Court of First Instance and in this Court.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
17 November 2023