Neutral Citation Number: [2023] EWHC 3244 (Ch)

Case No: BL-2023-000440

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 19 December 2023

Before :

His Honour Judge Cadwallader sitting as a Judge of the High Court

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Between :

IMG DATA LIMITED **Claimant**
- and –

PERFORM CONTENT SERVICES LIMITED **Defendant**

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Kieron Beal KC, Celia Rooney and Aislinn Kelly-Lyth (instructed by **Baker McKenzie**) for the Claimant
Benjamin Pilling KC and Daniel Khoo (instructed by **Squire Patton Boggs (UK) LLP**) for the Defendant

Hearing dates: 21 November 2023

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JUDGMENT

HHJ Cadwallader:

Introduction

1. This is the Defendant's application to strike out, or for summary judgment on, the Claimant's claim. The application is made after service of the Particulars of Claim and replies to requests for further information, but before service of any defence.

The claim

2. The Claimant's case is that the Defendant operates a multi-jurisdictional ring of unauthorised data collectors which it deploys at stadium events in respect of which the Claimant has exclusive data collection rights which are of considerable value, and for which the Claimant has entered into an agreement dated 22 February 2022 with 19 foreign football leagues and the European league; an opportunity for which both the Claimant and the Defendant tendered, and in which the Claimant alone was successful.

3. The Claimant sues the Defendant for the tort of inducing or procuring breaches of contract, and unlawful means conspiracy. Its case is set out in the Particulars of Claim and now in draft Amended Particulars of Claim in respect of which it seeks permission to amend. The Defendant does not resist the application to amend save on the footing which forms the basis of its application to strike out and for summary judgment, and the parties are agreed that for present purposes the application is to be approached on the basis that the Claimant's case is that contained in the draft Amended Particulars of Claim. Much of the amendment is in any event foreshadowed in the replies to Requests for Further Information.

Strike out

4. The basis of the application to strike out under CPR 3.4(2)(a) is that the Claimant's statements of case disclose no reasonable grounds for bringing the claim, that is, that the claims are unwinnable or not valid as a matter of law. It is not appropriate to strike out unless the claim is bound to fail. But nor is it right to strike out a claim in an area of developing jurisprudence, because decisions in such areas should be based on findings of fact: *Farah v British*

Airways, The Times, 26 January 2000, CA; *Barrett v Enfield LBC* [2001] 2 AC 550 (HL).

Summary judgment

5. Summary judgment may only be granted where there is no real prospect of success and no other compelling reason why the case should be disposed of at trial. I am reminded of the observations of the Chancellor in *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011] EWHC 2665 (Ch) which are helpfully set out in the Claimant's skeleton argument. I am reminded, also, that foreign law and its effect constitutes a special fact usually provable by expert evidence.

6. I should say immediately that no jurisdictional challenge to these proceedings has been mounted. The parties agree that the court should approach the matter on the basis of an assumption that the facts alleged are true. Those facts include the allegations as to the nature and effect of foreign law, in relation to which the Defendant is explicitly not seeking any findings at this stage.

The Claimant's case

7. The Claimant's case may be summarised in the following way. Scouts have, at the instance of the Defendant, attended a number of football matches at football stadia in various countries to gather and distribute real-time information on the Defendant's fast data app or application. In doing so, those persons have acted in breach of their contract with the relevant clubs under what are described as the ground regulations and ticket conditions, and perhaps of other obligations, all under the applicable local foreign laws. Those breaches of contract between the unauthorised scouts and the clubs have been induced or procured by the

Defendant, which was aware of the restrictions contained in those contracts, and of the fact that the Claimant had the exclusive licence to collect and use such data, and that the Defendant did not. The Claimant is, under the respective relevant local laws, a 'third party beneficiary' of the contractual terms breached, or the relevant terms had a 'beneficiary effect' for the Claimant. This course of conduct has caused loss to the Claimant. On the basis that it is a third party beneficiary of the contractual terms, albeit not a party to the relevant contracts itself, the Claimant claims to be entitled to sue the Defendant under English law in the courts of England and Wales for inducing those breaches.

8. It is also alleged that the Defendant is party to an unlawful means conspiracy. The way which the Claimant pleads that case may be roughly summarised as follows. The Defendant was a party to an agreement, combination or understanding, or acted in concert with, the scouts to carry out the actions described above; and their conspiracy relied on unlawful means, namely the breaches of contract between the scouts and the clubs mentioned above, and perhaps also the other claims which I have mentioned; and the inducement or procuring of breach of contract itself. In doing so, the Defendant intended to injure the Claimant, caused loss to the Claimant and profited by its actions.

9. Part 18 requests were made by the Defendant and answered in relation to the causes of action under foreign law, but the adequacy of the answers is criticised.

Inducing Breach of Contract

10. I deal first with the inducing breach of contract claim. The Defendant asserts that it is an essential element of the tort that the Claimant should be a party to the contract allegedly breached. That means that in this case the Claimant needs

to be able to sue the ticketholder (that is, the scout), because the liability for inducing a breach of contract is an accessory liability to the primary liability for breach of contract itself. But the Claimant is admittedly not party to any contract with the ticketholder and so, it is said, the claims based on inducing breach of contract are bound to fail.

11. The leading modern statement of the law in relation to such claims is the decision of the House of Lords in *OBG v Allan* [2008] AC 1.

12. In that case, Lord Hoffman stated:

> "3. Liability for inducing breach of contract was established by the famous case of *Lumley v Gye* (1853) 2 E & B 216 . The court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. As Erle J put it (at p 232):
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> > "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."
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> 4. For a court in 1853, the difficulty about applying this principle to procuring a breach of contract was that the appropriate action for the wrong committed by the contracting party lay in contract but no such action would lie against the procurer. Only a party to the contract could be sued for breach of contract. The answer, said the court, was to allow the procurer to be sued in tort, by an action on the case. There was a precedent for this mixing and matching of the forms of action in the old action on the case for enticing away someone else's servant: see Gareth Jones "Per Quod Servitium Amisit" (1958) 74 LQR 39 . Some lawyers regarded that action as a quaint anomaly, but the court in *Lumley v Gye* treated it as a remedy of general application.
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> 5. The forms of action no longer trouble us. But the important point to bear in mind about *Lumley v Gye* is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong. Wightman J made this clear when he said (at p 238):

> "It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so …"

Again at paragraph 44 he stated:

> "Finally, what counts as a breach of contract? In *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 , 138 Lord Denning said that there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach. This dictum was approved by Lord Diplock in *Merkur Island Shipping Corporation* [1983] 2 AC 570 , 607–608. One could therefore have liability for interference with contractual relations even though the contracting party committed no breach. But these remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations have been treated as coming within the *Lumley v Gye* tort (like *Dimbleby & Sons v National Union of Journalists* [1984] 1 WLR 67 and 427) are really cases of causing loss by unlawful means."

13. Lord Nicholls stated as follows.

> "168. The other tort requiring consideration is the tort of inducing a breach of contract. This tort is known by various names, reflecting differing views about its scope. At its inception in 1853 this tort was concerned with a simple tripartite situation of a non-party to a contract inducing a contracting party to break her contract. Did the other party to the contract have a cause of action against the non-party?
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> 169. The facts in *Lumley v Gye* 2 E & B 216 are familiar to every law student. The well-known opera singer Johanna Wagner had contracted with Mr Lumley to perform exclusively at the Queen's Theatre. Mr Gye, the owner of Her Majesty's Theatre, 'enticed and procured' Miss Wagner to break her contract. The action came before the court on a plea of demurrer. The question was whether the counts disclosed a cause of action against Mr Gye. The court, by a majority, held they did.
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> 170. The reasoning of the judges differed in its generality. It was established law that a person who knowingly procured a servant to leave his master's service committed an actionable wrong. Crompton J saw no reason to confine this principle to contracts for services of any particular description. Erle J reasoned more widely. He said, at page 232, that the principle underlying the master and servant cases is that procurement of the violation of a right is a cause of action:
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> > 'It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in

> violations of a right to property, whether real or personal, or to personal security: *he who procures the wrong is a joint wrongdoer* , and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' (emphasis added)
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> This principle, of liability for procurement of a wrong, applies to a breach of contract as well as an actionable wrong: page 233. Wightman J expressed himself similarly, at page 238:
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> 'It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant [knowingly] *to procure her to do so* .' (emphasis added)

171. This 'procurement' analysis commended itself to Lord Watson in *Allen v Flood [1898] AC 1* . Lord Watson approved Erle J's reasoning as quoted above, and continued, at pages 106–107:

> 'These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case [*Lumley v Gye*] was decided. He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held responsible for the wrong which he procured.'

172. Thus understood, the rationale and the ingredients of the 'inducement' tort differ from those of the 'unlawful interference' tort. With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability."

14. These statements of the law require that there be a liability on the part of the contract-breaker to the claimant and at least assume that it will be under a claim in contract on the contract broken.

15. The decision of Birss J in *77m Ltd v Ordnance Survey* [2019] EWHC 3007 (Ch) repeats the relevant part of the test as set out in the *OBG* case at paragraph 328 in the following terms

> "(i) A contract between a claimant and a third party must have been breached by the third party." *(emphasis added).*"

But it is fair to say that Birss J was not concerned with the question now under consideration, and I do not understand him to have intended to add to the decision in *OBG* at this point.

16. Again, in *Protea Leasing Ltd v Royal Air Cambodge Co Ltd* [2002] EWHC 2731 Moore-Bick J stated:

> "The tort of inducing breach of contract is based on the wrongful interference with contractual rights. It must follow, therefore, that a person who has effected a legal assignment of his rights under a contract to a third party cannot maintain an action for interference with those rights any more than he can himself bring an action to enforce them."

But that, I think, was concerned with the situation in which a claimant had parted with his rights to mount a claim, rather than with the question presently under consideration.

17. In *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, Popplewell LJ gave the judgment of the Court and stated at paragraphs 20 to 21:

> "20. In *Global Resources Group v Mackay* [2008] SLT 104, Lord Hodge, then sitting in the Outer House, articulated the tort (or delict in Scotland) in these terms at paragraph 11: "A commits the delict or tort of inducing a breach of contract where B and C are contracting parties and A, knowing of the terms of their contract and without lawful justification induces B to break that contract."
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> 21. He went on in the following paragraphs to identify the five ingredients of the tort as being:
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> (1) there must be a breach of contract by B;
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> (2) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so;
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> (3) A must know of the contract and know his conduct will have that effect;

> (4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end;
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> (5) if A has a lawful justification for inducing B to break his contract with C, that may provide a defence against liability" *(emphasis added).*

Again, this at least assumes that the claimant will be a party to the contract broken and will have been entitled to sue on the contract; but the question whether it might also be enough that the claimant might instead be entitled to sue in respect of an interest in the contract other than that of a party was not then under consideration.

18. The Defendant also points to *National Phonograph Company Limited v Edison Bell Consolidated Phonograph Company Limited* [1908] 1 Ch 335 as an example of a case where the absence of an underlying contract between the claimant and the contract-breaker was fatal to the claim. Again, however, this may go no further than the uncontroversial proposition that the claimant must have some actionable claim against the contract-breaker, in a case in which the absence of a contractual claim meant the absence of a claim.

19. I accept that these are authorities for the proposition that the claimant in a claim for inducing breach of contract must be able to sue the contract-breaker for breach of contract. It does not seem to me necessarily to follow that the claimant must have been a party to the contract. While under the general law of contract in England and Wales the doctrine of privity of contract would usually mean that only a party to the contract could sue, that is not necessarily the case under the law of other jurisdictions. Indeed, it is not even necessarily the case in this jurisdiction, since the enactment of the Contract (Rights of Third Parties) Act 1999. True, I have not been taken to any authority in which anything other than a contractual claim by a contractual party against the contract-breaker has

supported a claim for inducement to breach contract. Given that for over 20 years it has been possible under the law of England and Wales for a person to sue on a contract to which it was not a party under the 1999 Act, the Defendant submits that this is a powerful indication that no such claim is possible. But since there is no decision either way, the question appears to be an open one, and it remains to be established whether the requirement is that the claimant be a party to the contract so that it can sue, or whether some other basis for suing upon the contract might also be sufficient. It seems to me that the point is arguable.

20. The Defendant claims that it is not clear what exactly the Claimant means by describing itself as a third party beneficiary of the relevant terms but that it appears to be a function of foreign laws, the terms and effect of which are unlikely to be uniform. In that context, it describes the pleadings as to being a third party beneficiary as 'threadbare', such that credence ought not to be attached to them. That is inconsistent with its acceptance that the facts alleged are to be taken at face value, nor yet with the level of detail supplied in the draft Amended Particulars of Claim and the Part 18 Replies. It is also the case that the terms of the relevant foreign laws and their effect are matters of fact for expert evidence. As such it seems to me that they need to be pleaded out and sufficiently particularised. However, if and to the extent that it is said that the particulars supplied so far are inadequate, it seems to me in the present case that they are in any event not so inadequate as to mean that further particulars must be provided by amendment before the court can be satisfied as to the adequacy of the allegation for present purposes; instead, if necessary, an application for an order for further information is a course potentially open to the Defendant.

21. Although the Defendant argues that in any event the Claimant has not actually alleged that it could bring claims against the ticketholders under the foreign laws in question, that is to adopt an unduly restrictive understanding of the reference in the draft Amended Particulars of Claim to its being a beneficiary of the contracts under those laws. It is absolutely explicit in its Part 18 Replies. In my judgment, the Claimant has alleged, and at any trial would have to prove by evidence, that it could bring such claims. That it has not in fact brought claims is in my view nothing to the point for present purposes.

22. The Defendant further argues that the Claimant's agreement in February 2022, to the exclusive football licence, has the effect that only the foreign leagues could sue in respect of the wrongs of which the Claimant complains. Certainly, it provides for certain obligations on the part of the leagues to disrupt activity arguably of the kind allegedly undertaken by the Defendant. But it does not specify in terms that the Claimant cannot take its own action, and it seems to me at least arguable that it can. Even if to do so would be a breach of its obligations to the leagues, it is not obvious how that would deprive the Claimant, as against the wrongdoing ticketholders, of its rights to do so.

23. The Defendant argues that the proper forum for any such cause of action against the ticketholders would be the local courts rather that the courts of England and Wales, and points out that the German tickets and/or ground regulations have an exclusive jurisdiction provision. Since, however, the Claimant is not in fact pursuing those claims, but merely seeking to prove that it could successfully do so, it does not appear to be a point relevant to the jurisdiction of this court to deal with the claims which it does pursue here.

24. The Defendant argues that the Claimant's claim as pleaded represents a novel and unjustifiable expansion of the tort of inducing breach of contract, pointing out that, on this footing, any number of strangers might be able to sue in the tort. But it appears to be limited to third party beneficiaries or the close equivalent; and it is not clear that that would represent an out-of-control field of potential claimants.

25. The Defendant says that the third parties might have different rights in respect of different terms, and of course they might; but I do not see that as necessarily unmanageable, nor in principle objectionable.

26. Finally, it argues that the tide of legal development is to restrict, rather than expand, the ambit of the tort. Maybe so; but that is a matter best considered on full argument after a determination of the facts, so that the ambit of any such restriction can be considered in a fully elaborated context, which it cannot in the context of this application.

27. I accept, of course, that allowing the claim to go to trial will involve the parties in substantial expense, including expert evidence as to the law in more than one jurisdiction, and substantial and perhaps expanding factual enquiries. I bear in mind, also, that the rights which the Claimant seeks to protect are highly valuable. But in any event, my conclusion that the claim is arguable in law and that it is not the case that there is no reasonable prospect of success in pursuing it, means that I ought not to strike it out or to give summary judgment to the Defendant upon it. I also consider that the question would be best argued in the context of a set of facts as found, that is, following a trial.

Unlawful means conspiracy

28. The Claimant further asserts that there was a conspiracy between the Defendant and the ticketholders to collect data by unlawful means. The means relied upon are the breaches of the foreign ticket contracts, breaches of various foreign laws, and the tort of inducing breach of contract itself. The Defendant argues, however, that it is a fundamental requirement of any claim based on unlawful means conspiracy that the unlawful means should be the 'instrumentality' by which the loss has been caused. It argues that the present claim must fail because there is no instrumentality between the unlawful means and the loss alleged. What the Defendant seems to mean by this is that the unlawful means need to have been directed at the Claimant.

29. Additionally, or perhaps alternatively, the Defendant argues that the present claim must fail because there has been no interference with any third party's freedom to deal with the Claimant (something which is sometimes referred to as 'the dealing requirement'). The Defendant's argument seems possibly to involve the assertion that the dealing requirement and the instrumentality requirement were one and the same.

30. The Defendant says that not only has nothing done by the Defendant (or, perhaps, the ticketholders) interfered with the Claimant's rights under this agreement, because it is just as able to collect data and to describe itself as the official betting data partner as it always was, but also that the agreement contemplated the possibility that data might be collected unofficially, and had agreed that only the foreign leagues would be the party to disrupt such activity, so that the relations between the Claimant and the foreign leagues are likewise unaffected.

31. This dealing requirement is said to be an essential element of the tort of unlawful means conspiracy, just as much in the tort of causing loss by unlawful means. Furthermore, insofar as it may have been suggested by Arnold LJ in *Racing Partnership Ltd v Sports Information Services Ltd* [2020] Ch 289, that the instrumentality requirement was a question of causation rather than intention, he was wrong: the instrumentality requirement effectively amounts to the dealing requirement.

32. In considering this argument, it is useful to remind oneself of the ingredients, as usually understood, of the tort of causing loss by unlawful means, and the tort of unlawful means conspiracy. In the case of causing loss by unlawful means, there needs to be an intention to cause loss to the claimant, the deliberate use of unlawful means against a third party, and interference with that third party's freedom to deal with the claimant. As regards the intention, it need not be the defendant's dominant purpose to cause loss to the claimant, but the defendant's actions must at least in some sense be directed at the claimant: *OBG v Allan* [2008] AC 1. As regards the unlawful means, the view of Lord Nicholls was that any means which a defendant was not permitted to use, whether by the civil law or criminal law, might be sufficient; but he held that there could only be liability where the claimant was harmed through the 'instrumentality' of a third party. The majority, Lady Hale, Lord Brown and Lord Hoffmann, disagreed: they held that the only unlawful means which might found this tort were those which were actionable by the third party (or would be actionable if the third party had suffered loss as a result). So not only was the instrumentality requirement different from the dealing requirement in the context of causing loss by unlawful means, the instrumentality requirement was not adopted by the

majority. The majority of the House of Lords in *Revenue and Customs Commissioners v Total Network SL* [2008] UK 19 treated *OBG* as having decided that criminal conduct could not in this context amount to relevant unlawful means. It follows that instrumentality as referred to by Lord Nicholls is not a requirement in establishing causing loss by unlawful means.

33. The dealing requirement for causing loss by unlawful means, was upheld by the House of Lords in *Secretary of State for Health and another v Servier Laboratories* [2021] UKSC 24. This reduced the range of claimants to which the tort was available. What is noticeable here is that in this context the dealing requirement is entirely separate from the instrumentality requirement.

34. The Claimant has not pleaded a case based on causing loss by unlawful means, however, but on the basis of unlawful means conspiracy. The elements of this tort are that there must be a combination between two or more persons; they must have combined to take action which is unlawful in itself; they must have intended to cause damage to the Claimant; and the Claimant must have suffered the intended damage see *Kuwait Oil Tanker Co SAK v Al-Bader (No. 3)* [2000] 2 All ER (Comm) 271 (CA) at [106] – [108].

35. This cause of action differs from causing loss by unlawful means, in that the unlawful means do not need to be actionable by the third party. They may consist of a tort against the claimant itself, for example. In *Racing Partnership Ltd v Sports Information Services Ltd* [2020] Ch 289, Zacaroli J considered that the court might not treat a breach of contract as adequate unlawful means where the claimant had not been party to the contract, so that the breach was not unlawful as between the claimant and the defendant. On appeal ([2021] EWCA

Civ 1300), the majority held that a breach of contract with a third party might be unlawful means for these purposes because there was no requirement that the means be actionable, on the basis of *Revenue and Customs v Total Network* [2008] 1 AC 1174. The Court of Appeal also reintroduced the instrumentality requirement, borrowed from Lord Nicholls in the *OBG* case of causing loss by unlawful means, into unlawful means conspiracy. However, Arnold LJ distinguished two senses in which he discerned that the word instrumentality had been used. The first was the requirement that the defendant intended to injure the claimant, so that the defendant's intention was 'directed at' the claimant. The second was that the unlawful means must have caused loss to the claimant, rather than merely being this occasion of such loss.

36. It seems to me that whether this requirement relates to intention or causation or both, and in what sense in either case, is a matter which is open to further legal discussion and development. But whatever the position as to this, it appears to be a different requirement from the dealing requirement, and I am not persuaded that the dealing requirement is a necessary element of unlawful means conspiracy, and I have not been taken to any authority which says that it is.

37. Nor does it follow from the fact that it is a requirement in the context of causing loss by unlawful means that it is a requirement in unlawful means conspiracy. While the concept of instrumentality may be said to have been a feature of, if anything, unlawful means, in the context both of causing loss by unlawful means, and of unlawful means conspiracy, it appears to be a different requirement from the dealing requirement, which, in the context of causing loss by unlawful means, was not a feature of the concept of unlawful means itself

but of the effect of those means; and, as I say, does not appear to be a requirement of unlawful means conspiracy at all.

38. It is my clear view that the Claimant's case on unlawful means conspiracy is arguable as a matter of law and accordingly should not be struck out; and that the Claimant has a real prospect of success on the basis of this part of its claim, so that summary judgment ought not to be granted; and in any event that there is a compelling reason why the case should be disposed of at trial, namely that a determination of the legal point should be made, not on an application such as this, but on the facts as found.

Conclusion

39. Accordingly, I will dismiss this application.