

To the breach again

A landmark judgment by the House of Lords has redefined the scope and nature of torts for economic loss caused by intentional acts. **Alan Ma** gives an overview



▶ **Alan Ma** is a partner at **Maxwell Alves Solicitors** (alan.ma@maxwellalves.co.uk)

Three separate appeals were heard together by the House of Lords, but the case that attracted the most publicity was *Douglas and Others v Hello! OK! Magazine* sought damages from *Hello!* for the unauthorised publication of photographs of Michael Douglas's wedding to Catherine Zeta-Jones. *OK!* claimed that it was interference by unlawful means with its contractual or business relations.

The other two cases were *OBG v Allan*, relating to an unauthorised appointment of administrative receivers, and *Mainstream v Young*, where the defendant was alleged to have facilitated breach of contract by two employees of a property firm who had diverted business to a joint venture in which they were interested.

The law of economic torts focuses on intentional injury to economic interests. It includes the torts of procuring breach of contract and causing loss by unlawful means.

Liability for procuring a breach of contract will arise where someone intentionally induces or procures a third party to break its contract. Liability for causing loss by unlawful means occurs when a wrongdoer intentionally causes loss to the sufferer by the use of unlawful means through a third party.

Law lords have attempted in the past to characterise the various torts as forming part of a general "unlawful interference in trade or business" (the "unified tort" theory). On occasions the courts have imposed liability where there is neither a breach of contract nor unlawful conduct.

The House of Lords unanimously rejected the "unified tort" theory, drawing a clear distinction between the two separate torts of inducing breach of contract and causing loss by unlawful means.

The Lords clarified that inducing breach of contract is a form of secondary or accessory liability, and requires proof of an actual breach of contract by a third party with the sufferer.

By contrast, causing loss by unlawful means is a form of primary liability. It is not dependent on the third party having committed a wrong against the sufferer. It does, however, require proof of independently unlawful conduct committed by the wrongdoer with intention to cause loss to the sufferer.

The unlawful conduct involves interference with the third parties to deal with the sufferer. It might be threats, intimidation or making false statements, against the third party.

Although the two torts are separate, the Lords acknowledged in some situations they might overlap giving rise to liability under both torts. Consider a situation when a purchaser (P) buys goods from suppliers A and B. A, intending to cause loss to B, threatens to cause damage to P's reputation by making false

statements, unless P breaks its contract with B. A would be liable as accessory to P's breach of contract but he would also be liable for the tort of causing loss to B by unlawful means (in that the threat of damaging P's reputation by making false statements was unlawful and interfered with P's liberty to deal with B).

Conduct that causes losses to rivals is not uncommon in a competitive environment. The judgment should assist businesses to operate lawfully while in competition with others.

There is a clear distinction between the separate torts of inducing breach of contract and causing loss by unlawful means