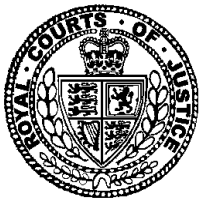

Neutral Citation Number: [2017] EWHC 2006 (Ch)

Case No: HC-2011-000064

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Competition Appeal Tribunal
Victoria House, London WC1A

Date: 02/08/2017

Before :

THE HONOURABLE MR JUSTICE ROTH

- -

Between :

(1) THE SECRETARY OF STATE FOR HEALTH
(2) THE NHS BUSINESS SERVICES AUTHORITY **Claimants**

- and -

(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED
(3) LES LABORATOIRES SERVIER SAS
(4) SERVIER SAS **Defendants**

- -
- -

JON TURNER QC, DAVID DRAKE & PHILIP WOOLFE (instructed by **Peters & Peters Solicitors LLP**) appeared on behalf of the Claimants

KELYN BACON QC & DANIEL PICCININ (instructed by **Bristows LLP)** appeared on behalf of the Defendants

Hearing dates: 18 & 19 July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE ROTH

Mr Justice Roth:

Introduction

1. This is an application to strike out one of several distinct grounds of the claim in these proceedings. In particular, the defendants (to whom I shall refer collectively as "Servier" save where it is necessary to distinguish between them) seek an order which would remove from the claim the tort of causing loss by unlawful means, sometimes also called the intentional interference tort. For convenience, I shall refer to it simply as the tort of unlawful means. At the conclusion of the argument, I informed the parties that I would grant Servier's application, for reasons to be delivered later. This judgment sets out my reasons for that decision.

2. The proceedings in which this arises concern the pharmaceutical drug perindopril, a prescription only medicine which Servier sold in the UK under the brand name "Coversyl". It is an ACE (Angiotensin-Converting Enzyme) inhibitor used in the treatment of hypertension and cardiac insufficiency. Supply of Coversyl, protected by European patents with a UK designation, began on the UK market in about 1990, after Servier obtained a UK marketing authorisation. One of those patents was in respect of a process of industrial synthesis of perindopril: EP No 0 308 341 ("341 Patent").

3. The present action relates to a further patent which was granted to the 3rd defendant ("LLS") for the alpha crystalline form of the perindopril salt: EP No 1 296 947 ("947 Patent") which had, among others, a UK designation. The application for the 947 Patent was filed at the EPO on 6 July 2001 and the patent was granted on 4 February 2004. The patent was opposed by ten opponents and following the hearing of the opposition on 27 July 2006, the Opposition Division of the EPO decided to maintain the patent, for reasons which it gave on 21 September 2006. The 1st defendant ("SLL") was the exclusive licensee under the UK designation of the 947 Patent.

4. In August 2006, LLS and SLL obtained an interim injunction in the Patents Court against the generic supplier Apotex, which had launched a generic version of perindopril in the UK, for alleged infringement of the 947 Patent: [2006] EWHC 2137 (Pat).

5. By a judgment dated 11 July 2007, Pumfrey J held that the 947 Patent was invalid since it lacked novelty, or alternatively was obvious over the 341 Patent: [2007] EWHC 1538 (Pat). On 28 April 2008, for reasons which it gave on 9 May 2008, the Court of Appeal dismissed Servier's appeal against that decision: [2008] EWCA Civ 445. Those decisions of course only applied to the UK designation of the European patent.

6. In the meantime, an appeal was proceeding before the EPO Technical Board of Appeal. By a decision dated 6 May 2009, the Board of Appeal revoked the European 947 Patent.

7. The present proceedings were commenced in 2011. Originally, along with the present 1st claimant, the Secretary of State for Health, and the 2nd claimant, the authority responsible for making reimbursement to pharmacists in England for prescriptions, there were a further 156 claimants: ten Strategic Health Authorities ("SHAs") and 146 Primary Care Trusts ("PCTs") forming part of the English National Health Service

("NHS"). Pursuant to a fundamental reorganisation of the NHS, those SHAs and PCTs were abolished with effect from 1 April 2013 and their rights of action vested in the 1st claimant. I shall refer to the claimants simply as "the English Health Authorities" and to these proceedings as the English Health Authorities' action.

8. The action alleges a series of infringements of both EU and UK competition law for which the English Health Authorities claim that Servier is liable in damages ("the competition law claims"). In particular, it is alleged that Servier entered into a series of agreements with generic manufacturers and suppliers not to enter the market with a generic version of perindopril and/or to withdraw their patent challenges; and that those agreements constituted an infringement of Art 101 of the Treaty on the Functioning of the European Union ("TFEU") and/or sect 2 of the Competition Act 1998 ("CA"), and also an abuse of a dominant position which Servier held in the UK, and therefore an infringement of Art 102 TFEU and/or sect 18 CA. Moreover, the claim alleges that LLS obtained the grant of the 947 Patent, and further successfully defended it in opposition proceedings, by misleading or dishonest misrepresentations made to the EPO; and that LLS and SLL further repeated or relied on those misrepresentations in obtaining interim relief in the English courts. That alleged conduct, which is expressly pleaded as constituting deceit, is said to be a separate abuse of Servier's dominant position and thus contrary to Art 102 TFEU and/or sect 18 CA. Further and alternative grounds of abuse are alleged on the basis that the conduct of LLS and/or SLL by which they "obtained, defended and enforced" the rights in relation to the 947 Patent was unreasonable or an abuse of process, and that Servier was "not transparent in its provision of relevant information to the EPO and courts". However, in addition to these competition law claims, the deceit (but not the other alleged grounds of abuse) is alleged to give rise to a right of action in tort for unlawful means. As I understand it, this tort claim is alleged only against LLS.

9. Separate proceedings have also been commenced against Servier concerning perindopril by the Welsh Ministers and others: claim no HC-2012-000188; and by the Scottish Ministers together with the Department of Health, Social Services and Public Safety for Northern Ireland, and others: claim no HC-2012-000189. I shall refer to these, respectively, as the Welsh Health Authorities' action and the Scottish/NI Health Authorities' action. Both those actions are similar to the English Health Authorities' action in alleging breaches of Art 101 TFEU/sect 2 CA and Art 102 TFEU/sect 18 CA. However, neither goes beyond a competition claim to include a claim for the unlawful means tort.

10. By order of Henderson J (as he then was) of 26 February 2016, the English Health Authorities' action, the Welsh Health Authorities' action and the Scottish/NI Health Authorities' action will be tried together and they are subject to joint case management.

11. Following the commencement of these proceedings, on 9 July 2014, the EU Commission adopted a decision ("the EC Decision") addressed to SLL, LLS and the 4th defendant finding that they had contravened Arts 101 and 102 TFEU by reason of various agreements made with generic manufacturers and suppliers involving patent settlements or the acquisition of technology, and imposing very substantial fines: Case AT.39612 *Perindopril (Servier)*. The EC Decision has been appealed by the relevant Servier companies to the EU General Court: Case T-691/14 *Servier v Commission*. An oral hearing in the appeal was held in June 2017 and judgment is pending. There

is of course the possibility of a further appeal to the Court of Justice of the European Union ("CJEU").

12. Accordingly, the English Health Authorities' action now comprises:

    a) what has become effectively a follow-on claim as regards Art 101/sect 2, and also as regards Art 102/sect 18 insofar as concerns the infringement of Art 102 found by the EC Decision;

    b) a stand-alone claim as regards the additional grounds of abuse of dominance based on conduct before the EPO and the English court, but if the General Court (or on further appeal, the CJEU) should annul the EC Decision as regards the finding that Servier was dominant, that claim will very probably fall away since the national court cannot take a decision inconsistent with the decision of the European Courts; and

    c) a free-standing claim for the tort of unlawful means.

13. It is only claim (c) which is the subject of the present application. Since there is no parallel claim in the Welsh Health Authorities' action or the Scottish/NI Health Authorities' action, the claimants in those actions have taken no part in this hearing. However, Mr Turner QC, appearing for the English Health Authorities, emphasised that the tort claim is important for his clients since it is not dependent on a finding of dominance and it also goes back earlier in time than the competition law infringements found by the EU Commission, which started in late 2004.

The unlawful means claim

14. It is necessary to explain the way this part of the claimants' case is framed.

15. Section IX of the Particulars of Claim is headed "Abuse of the Patent System". It states that the application filed by LLS at the EPO for what became the 947 Patent:

> "contained express and implied representations that the alpha form was novel and implied representations that the alpha form was not obvious."

16. Then it is alleged that "the said representations" were "repeated and/or further relied on" by LLS in contesting the opposition proceedings before the EPO, and by LLS and/or SLL "in the stance they adopted in the proceedings in the English courts" in successfully obtaining interim relief.

17. It is stated that the representations were untrue, in that the alpha form was not novel and/or not obvious, in particular because:

    a) The 341 Patent led to the production of the alpha form as its inevitable result;

    b) The perindopril marketed by Servier in the UK both before and after 6 July 2000 was in the alpha form;

    c) "Consequently, the alpha form was part of the state of the art … and/or would have been obvious to a person skilled in the art."

18. It is alleged that the servants or agents of LLS (as regards the application and proceeding before EPO) and of LLS and/or SLL (as regards the proceedings in the English courts) either knew or were reckless as to these matters. After setting out the basis on which such knowledge or recklessness is to be inferred, the pleading states (at para 71):

> "In the premises, LLS and/or SLL obtained, defended and enforced statutory patent rights in the United Kingdom in relation to [the 947 Patent] by deceit: that is, by means of misrepresentations made dishonestly or recklessly to the EPO and/or to the English courts."

19. This section of the pleading refers to, and seeks to rely upon, certain observations made by Jacob LJ in the Court of Appeal, both in the judgment dismissing the appeal against Pumfrey J's decision on validity: [2008] EWCA Civ 445; and in a subsequent judgment concerning the application by Apotex to enforce the cross-undertaking given as a condition of obtaining interim relief: [2010] EWCA Civ 279. I note that in the former judgment, dismissing the substantive appeal, Jacob LJ (with whom the Lord Chief Justice and Lloyd LJ agreed) said this:

> "9. … It is the sort of patent which can give the patent system a bad name. I am not sure that much could have been done about this at the examination stage. There are other sorts of case where the Patent Office examination is seen to be too lenient. But this is not one of them. For simply comparing the cited prior art ('341) with the patent would not reveal lack of novelty and probably not obviousness. You need the technical input of experts both in the kind of chemistry involved and in powder X-ray diffraction and some experimental evidence in order to see just how specious the application for the patent was. The only solution to this type of undesirable patent is a rapid and efficient method for obtaining its revocation. Then it can be got rid of before it does too much harm to the public interest.
>
> 10. It is right to observe that nothing Servier did was unlawful. It is the court's job to see that try-ons such as the present patent get nowhere. The only sanction (apart, perhaps, from competition law which thus far has had nothing or virtually nothing to say about unmeritorious patents) may, under the English litigation system, lie in an award of costs on the higher (indemnity) scale if the patent is defended unreasonably."

20. Since, unlike the position in the United States, there is no doctrine of 'fraud on the patent office' as part of the regime of patent law under the European Patent Convention or in the United Kingdom, it may be challenging for the claimants to establish the express or implied representations which are the foundation of their allegation of deceit. But Servier does not suggest that this part of the claim is unarguable. For present purposes, I assume that the allegation of deceit is made out. That is important, since it is that deceit which constitutes the unlawful means on which the alleged liability of Servier in tort is based.

21. The unlawful means tort is pleaded in the next section of the Particulars of Claim. It is appropriate to quote the six paragraphs of the pleading setting out this head of claim:

> "X. INTERFERENCE WITH THE CLAIMANTS' AND FORMER CLAIMANTS' ECONOMIC INTERESTS BY UNLAWFUL MEANS
>
> 73. The application for, defence of and enforcement of patent EP 1 296 947 and the representations complained of as having been made and/or relied on by LLS and/or SLL in so doing were made and/or relied on with the intention (on the part of the servants and agents of LLS and/or SLL responsible for the drafting and filing of the application, and the defence and enforcement of patent EP 1 296 947) of:
>
> 73.1. securing the grant of a European patent enforceable inter alia in the United Kingdom;
>
> 73.2. deterring competition in relation to the supply of Perindopril to the United Kingdom market;
>
> 73.3. achieving prices and volumes in respect of the supply of Perindopril by the Servier Undertaking in the United Kingdom higher than those consistent with a more competitive market.
>
> 74. It is the Claimants' case, pending the completion of disclosure, that the existence of the state(s) of mind alleged in paragraph 73 above are legitimately to be inferred as the natural incidents of the making of the relevant application for, defence of and enforcement of patent EP 1 296 947.
>
> 75. It was the case, and it was reasonably foreseeable from the point of view of LLS and/or SLL, that the elevated prices referred to in paragraph 73.3 above would be and were necessarily achieved at the expense of the Claimants, PCTs and SHAs, by virtue of their bearing the financial burden of reimbursement payments to pharmacists and doctors for Perindopril dispensed and/or administered pursuant to the NHS. Accordingly, the expense caused to the Claimants, PCTs and SHAs constituted a means to an end, that end being elevated prices achieved by the Servier Undertaking.
>
> 76. Further, the application for, defence of and enforcement of patent EP 1 296 947 involved the adoption by LLS of unlawful means, in the form of the deceit practiced on the EPO and/or the English courts, referred to in paragraph 71 above.
>
> 77. The Claimants' case is that the application for, defence of and enforcement of patent EP 1 296 947 had among their

> effects delay to generic entry into the Perindopril market, to the prejudice of the Claimants', PCTs' and SHAs' economic interests, as set out in paragraph 96 below.
>
> 78. In the premises, LLS committed the tort of interference with the economic interests of the Claimants, PCTs and SHAs by unlawful means. The law applicable to the said tort is English law."

The present application

22. Servier applies to strike out paras 73-78 of the Particulars of Claim, and thus this head of claim, on the basis that it discloses no cause of action. In brief outline, the rival arguments on this application for the two sides were as follows.

23. Ms Bacon QC, for Servier, relied on the landmark decision of *OBG Ltd v Allen* [2007] UKHL 21, in which the House of Lords analysed and restated the ingredients of the unlawful means tort. In particular, she emphasised the passage in the discussion of this tort by Lord Hoffmann, with whose judgment all the other members of the Appellate Committee except for Lord Nicholls agreed, where he said, at [51]:

> "Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."

24. Here, the "third party" are the EPO and the English court, and there is no question of interference with their "freedom to deal" with the English Health Authorities, or indeed with anyone else. Accordingly, if that is the correct interpretation of this tort, the present claim is not within its ambit.

25. Mr Turner, for the claimants, submitted that the ratio of *OBG v Allen* does not lie within such narrow terms. He argued that the scope of the tort is wider, and emphasised that Lord Hoffmann did not suggest that the previous House of Lords case of *Lonrho plc v Fayed* [1992] 1 AC 448 was wrongly decided. There, the tort was pleaded on the basis of a fraud practised on, inter alios, the Secretary of State, causing him not to refer the defendants' proposed bid for House of Fraser Plc (the company controlling Harrods department store) to the Monopolies and Mergers Commission, thereby causing commercial damage to the plaintiff, which was seeking to acquire House of Fraser Plc itself. The facts of that case, Mr Turner stressed, do not fit with Ms Bacon's narrow definition of the tort. Further, Mr Turner argued that this common law tort is still in the process of development, such that it would be inappropriate to strike out the claim on a summary application, before finding all the facts at trial.

Discussion

26. Both sides agreed that *OBG v Allen* now presents an authoritative statement of the law. It is therefore necessary to analyse that case in some detail.

27. The opinions in the House of Lords were given on three appeals heard together, concerning a number of the so-called economic torts. The leading judgment was given by Lord Hoffmann, who analysed the origins and development of the various different economic torts, in particular inducing breach of contract, causing loss by unlawful means, and interference with contractual relations. He explained the different origins of the different torts, found that they had become confused over the years, and rejected the 'unified theory' which sought to establish a common basis for the "*Lumley v Gye* tort" of inducing breach of contract (a tort of accessory liability) and the tort of causing loss by unlawful means (a tort of primary liability). He proceeded to discuss the latter under the heading: "*Causing loss by unlawful means: elements of the tort*", in a section of his judgment which merits extensive quotation:

> "45. The most important question concerning this tort is what should count as unlawful means. It will be recalled that in *Allen v Flood* [1898] AC 1, 96, Lord Watson described the tort thus—
>
> > "when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case…the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."
>
> 46. The rationale of the tort was described by Lord Lindley in *Quinn v Leathem* [1901] AC 495, 534-535:
>
> > "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified - the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done."
>
> 47. The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which

the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.

…

49. In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss. Likewise, in *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (*dolus*) is obviously very similar to procuring them by intimidation (*metus*).

50. *Lonrho plc* v *Fayed* [1990] 2 QB 479 was arguably within the same principle as the *National Phonograph Co* case. The plaintiff said that the defendant had intentionally caused it loss by making fraudulent statements to the directors of the company which owned Harrods, and to the Secretary of State for Trade and Industry, which induced the directors to accept his bid for Harrods and the Secretary of State not to refer the bid to the Monopolies Commission. The defendant was thereby able to gain control of Harrods to the detriment of the plaintiff, who wanted to buy it instead. In the Court of Appeal, Dillon LJ (at p 489) referred to the *National Phonograph* case as authority for rejecting an argument that the means used to cause loss to the plaintiff could not be unlawful because neither the directors nor the Secretary of State had suffered any loss. That seems to me correct. The allegations were of fraudulent representations made to third parties, which would have been actionable by them if they had suffered loss, but which were intended to induce the third parties to act in a way which caused loss to the plaintiff. The Court of Appeal therefore refused to strike out the claim as unarguable and their decision was upheld by the House of Lords: see [1992] 1 AC 448.

> 51. Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant."

28. Lord Hoffmann proceeded to discuss a number of late 20th century cases where the unlawful means tort had been considered, and then said this:

> "56. Your Lordships were not referred to any authority in which the tort of causing loss by unlawful means has been extended beyond the description given by Lord Watson in *Allen v Flood* [1898] AC 1, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535. Nor do I think it should be. The common law has traditionally been reluctant to become involved in devising rules of fair competition, as is vividly illustrated by *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25. It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so. As Jacob J said in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, 800:
>
> > "the right to sue under intellectual property rights created and governed by statute [is] inherently governed by the statute concerned. Parliament in various intellectual property statutes has, in some cases, created a right to sue and in others not. In the case of the 1988 Act it expressly re-conferred the right on a copyright exclusive licensee, conferred the right on an exclusive licensee under the new form of property called an unregistered design right (see section 234) but did not create an independent right to sue on a registered design exclusive licensee. It is not for the courts to invent that which Parliament did not create." "

29. Lord Hoffmann went on to reject the argument that the concept of "intention" in the tort should be given a narrow meaning. He said, at [62]:

> "One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

30. Lord Nicholls took a different view of the scope of the unlawful means ingredient of the tort, in particular as regards actionability. He considered that the law seeks to provide a remedy for intentional economic harm caused by unacceptable means, and for that purpose all unlawful means were unacceptable. He rejected the narrower interpretation whereby the role of the tort was to provide a remedy where intentional harm was inflicted indirectly by committing an actionable wrong against a third party: see at [153]-[155]. In Lord Nicholls' view, the means of keeping the tort within bounds was by careful attention to the causative mechanism. As he explained at [159]:

> "the function of the tort is to provide a remedy where the claimant is harmed through the *instrumentality* of a third party."

That provides the basis for dismissing the hypothetical claim by its commercial rival against a pizza delivery company which gained an unfair advantage by offering a speedier service because its motorcyclists frequently exceeded the speed limit and ignored traffic lights:

> "The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression."

31. Lord Walker agreed with Lord Hoffmann on the unlawful means tort (but reached a different view on the distinct claim for breach of confidence). He noted, at [266], that the important difference between Lords Hoffmann and Nicholls concerned "identification of the control mechanism needed to stop the notion of unlawful means getting out of hand", citing the example of the pizza delivery business. After summarising the views of Lord Hoffmann and Lord Nicholls, Lord Walker continued:

> "269. Faced with these alternative views I am naturally hesitant. I would respectfully suggest that neither is likely to be the last word on this difficult and important area of the law. The test of instrumentality does not fit happily with cases like *RCA Corpn v Pollard*, since there is no doubt that the bootlegger's acts were the direct cause of the plaintiff's economic loss. The control mechanism must be found, it seems to me, in the nature of the disruption caused, as between the third party and the claimant, by the defendant's wrong (and not in the closeness of the causal connection between the defendant's wrong and the claimant's loss).
>
> 270. I do not, for my part, see Lord Hoffmann's proposed test as a narrow or rigid one. On the contrary, that test (set out in para 51 of his opinion) of whether the defendant's wrong interferes with the freedom of a third party to deal with the claimant, if taken out of context, might be regarded as so flexible as to be of limited utility. But in practice it does not lack context. The authorities demonstrate its application in relation to a wide variety of economic relationships. I would

> favour a fairly cautious incremental approach to its extension to any category not found in the existing authorities."

32. Baroness Hale and Lord Brown agreed with Lord Hoffmann, but they nonetheless delivered concurring opinions. Baroness Hale noted the differences between the rules governing the *Lumley v Gye* tort (inducing breach of contract) and the unlawful means tort, and continued, at [306]:

> "Nevertheless, the common thread is striking through a third party who might otherwise be doing business with your target, whether by buying his goods, hiring his barges or working for him or whatever. The refinement proposed by my noble and learned friend, Lord Hoffmann, is entirely consistent with the underlying principles to be deduced from the decided cases. It is also consistent with legal policy to limit rather than to encourage the expansion of liability in this area. In the modern age, Parliament has shown itself more than ready to legislate to draw the line between fair and unfair trade competition or between fair and unfair trade union activity. This can involve major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise. Such things are better left to Parliament. The common law need do no more than draw the lines that it might be expected to draw: procuring an actionable wrong between the third party and the target or committing an actionable (in the sense explained by Lord Hoffmann at para 49 above) wrong against the third party inhibiting his freedom to trade with the target."

33. And Lord Brown, at [320], summarised the basis of liability under the unlawful means tort as arising:

> "… where the defendant, generally to advance his own purposes, intentionally injures the claimant's economic interests by unlawfully interfering with a third party's freedom to deal with him… the defendant's conduct must be such as would be actionable at the suit of the third party had he suffered loss. To define and circumscribe the tort in this way seems to be not only faithful to its origins as described by Lord Lindley in *Quinn v Leatham* [1901] AC 495, 535, and consistent with the great bulk of authority which considered the tort over the ensuing century, but also to confine it to manageable and readily comprehensible limits."

34. The thorough analysis of the tort in *OBG v Allen* makes clear that it comprises three elements: (a) the use of unlawful means towards a third party; (b) which is actionable by that third party, or would be if he suffered loss; and (c) an intention to injure the claimant. On the present application, Servier directed its challenge to element (a) in the claim. As to that, I agree with Ms Bacon that the ratio of Lord Hoffmann's determination of the elements of the tort is in para [51]: see at para 27 above. Of course, that paragraph of his opinion has to be read in context. But the whole

approach of Lord Hoffmann and the express opinions of Lord Walker, Baroness Hale and Lord Brown emphasised the need to confine the tort within careful limits, and support the view that the unlawful means must affect the third party's freedom to deal with the claimant.

35. This was indeed the basis on which the actual appeal in *OBG v Allen* involving the unlawful means tort was decided. It arose in the case of *Douglas and ors v Hello! Ltd (No 3)*. That was a claim against the publishers of the popular magazine "Hello!" for publishing photographs of the celebrity wedding of Michael Douglas and Catherine Zeta-Jones ("the Douglases"), who had contracted to give the exclusive right to publish photographs to a rival magazine, "OK!". The defendant knew that the photographs had been surreptitiously taken by an unauthorised photographer, and the claimant contended that this was unlawful interference with its business or contractual relations with the Douglases. Lord Hoffmann upheld the claimant's distinct claim for breach of confidence, but explained why, on the basis of his earlier analysis, the claim for the unlawful means tort should be dismissed not on the grounds of lack of intention (as had been held by the Court of Appeal) but because:

> "Neither Mr Thorpe [the unauthorised photographer] nor "Hello!" did anything to interfere with the liberty of the Douglases to deal with "OK!" or perform their obligations under the contract. All they did was to make "OK!'s" contractual rights less profitable than they would otherwise have been." (at [129]).

36. This view of the scope of the unlawful means tort is reinforced by the judgment of the Court of Appeal in *Emerald Supplies Ltd v British Airways plc* [2015] EWCA Civ 1024, where the Court noted the limitations imposed by the majority of the House of Lords in *OBG v Allen.* The judgment states, at [128]:

> "First, Lord Hoffmann emphasised that in order to constitute relevant unlawful means, the unlawful acts must affect the freedom of the third party to deal with the claimant. This reflects the rationale as explained by Lord Lindley in *Quinn v Leatham* [1901] AC 495. If the freedom remains, the tort is not committed even though the defendant acts unlawfully and thereby makes a profit at the expense of the claimant who thereby suffers damage."

37. I appreciate that this was perhaps *obiter*, since the actual grounds for striking out the unlawful means claim in *Emerald* was for failure to satisfy the element of intention. But these observations express the Court of Appeal's understanding of Lord Hoffmann's opinion, and I respectfully agree with them.

38. As I mentioned above, Mr Turner sought to rely heavily on the earlier case of *Lonrho v Fayed*, and the reference to that decision by Lord Hoffmann in *OBG v Allen*. *Lonrho v Fayed* was a strike out application and it was of course made before the clarification of the economic torts provided by *OBG v Allen.* The grounds there advanced for striking out were that the actions of the Fayeds could not be regarded as specifically directed at the claimant (so that the requisite intention to injure was not made out), and that because the Secretary of State suffered no actionable damage, the

deceit allegedly practised towards him was not a complete tort (and so could not be the foundation for the unlawful means claim). In the Court of Appeal, Dillon LJ (with whose judgment Ralph Gibson and Woolf LJJ agreed) said that he did not see why it should be necessary for there to be a complete tort as between the defendant and the third party to the extent that the third party had himself suffered damage: [1990] 2 QB 479 at 489B; see also Ralph Gibson LJ at 492C-D. When the case reached the House of Lords on further appeal, the main issue addressed in the leading judgment delivered by Lord Bridge (with whom all the other members of the Appellate Committee agreed) was the requisite intention for the separate claim in the tort of conspiracy. On that, the Court of Appeal had felt itself bound by an earlier judgment,[1] which the House proceeded to overrule. There was little separate consideration of the distinct unlawful means tort, save for Lord Bridge's observation (at 469B) that the two causes of action should stand or fall together, and his approval of the reasons of the Court of Appeal.

39. In *OBG v Allen,* Lord Hoffmann's reference to *Lonrho v Fayed* was accordingly to the Court of Appeal decision, and in particular to the passage in the judgment of Dillon LJ referred to above where he rejected the argument that it was necessary for the unlawful means to amount to a complete tort. That was the approach which Lord Hoffmann expressly approved, consistently with the qualification he had set out in his own reasoning at [49]. Beyond that, Lord Hoffmann simply said that the Court of Appeal's decision was "arguably" within the same principle as the *National Phonograph* case decided on a similar basis. That discussion therefore concerned the element of actionability.

40. Accordingly, I do not regard those limited references as casting any doubt on what I regard as the relevant holding of *OBG v Allen.* I recognise that the circumstances of *Lonrho v Fayed* would support the claimants' case here, since the actions of the Fayeds obviously did not interfere with the Secretary of State's freedom to deal with Lonrho, or indeed with anyone else. But the fact that this did not lead the Court of Appeal in that case to a different conclusion is readily explicable in terms of the state of the unlawful means tort at that time. All three judges stressed that the tort was of uncertain ambit and that its limits had still to be defined, such that any decision should be made only after the facts had been found at trial. And in the House of Lords, Lord Templeman, with whose opinion all the other Law Lords agreed, observed (at 471):

> "I apprehend that the ambit and ingredients of [the] torts of conspiracy and unlawful interference may hereafter require further analysis and reconsideration by the courts."

41. That further analysis and reconsideration is precisely what the House provided in *OBG v Allen,* decided after 12 days of argument. At the outset of his judgment and referring to the unlawful means tort, Lord Brown said this, at [320]:

> "This whole area of economic tort has been plagued by uncertainty for far too long. Your Lordships now have the opportunity to give it a coherent shape. This surely is an opportunity to be taken."

[1] *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] 1 QB 391.

42. I accept that there may be some aspects of the tort which may still require refinement, for example the precise boundary of what may constitute *unlawful* means. But as regards the only relevant issue for the present application, namely whether those means must affect the third party's freedom to deal with the claimant, I consider that the issue has been clearly determined by Lord Hoffmann's seminal judgment and the concurrence of Baroness Hale and Lords Walker[2] and Brown. This view is also reflected in an extra-judicial article by Lord Hoffmann, "The Rise and Fall of the Economic Torts", in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law* (2011). Discussing *OBG v Allen*, Lord Hoffmann wrote that the decision reflected:

> "at least on the part of the majority, a wish to confine the economic torts as narrowly as possible, on the grounds that they have little rational basis in social or economic policy and that such matters are best left to the legislature."

He proceeded to highlight several aspects of the decision which demonstrated this approach, including the following:

> "the tort of causing loss by unlawful means was severely restricted to loss caused by acts which were tortious against third parties and caused loss to the plaintiff by restricting the ability of the third party to deal with him, so pruning the tort back to the original cases of deliberate violence or fraud against customers or suppliers for the purpose of taking away a rival's business."

43. If the claimants here were correct, then given the broad interpretation of the element of intention adopted in *OBG v Allen*, the right to claim against Servier would cover not only all the various UK Health Authorities but also all potential generic competitors who suffered loss through their inability to supply a generic version of perindopril by reason of the 947 Patent; any private medical expenses insurer who paid higher prices for reimbursement of the cost of perindopril; and, subject to any issues of jurisdiction, all foreign health authorities and insurers in each of the various other states in Europe that were designated under the 947 Patent. Mr Turner did not shrink from such implications, and indeed urged that the Court should not shrink from them either. As he put it:

> "… at root we are concerned with a case where the allegations are made out, a drug company has secured by fraud extended patent protection causing loss, both to the ultimate customer and the public purse and also, it is true, to generic suppliers who are barred because of the extended patent."

44. However, this would be the very opposite of confining the tort within a narrow ambit. Moreover, a patent is a creation of statute, and the statutory regime governing patents prescribes rights and remedies in a manner that reflects the legislative assessment of the policy issues involved. If those who suffered economic loss by reason of a patent

[2] Although Lord Walker indicated that Lord Hoffmann's test, as set out at [51], was if anything too broad and flexible, he certainly did not suggest that it should extend further, beyond economic relationships: see at [270].

being obtained by dishonest or reckless misrepresentations as to novelty or obviousness could use the unlawful means tort at common law to claim damages, that would circumvent that legislative balance, the very thing against which Jacob J (as he then was) warned in the passage of his judgment in *Isaac Oren v Red Box Toy Factory Ltd*, quoted with approval by Lord Hoffmann: see at para 28 above. See also the observations of Baroness Hale quoted at para 32 above. And as Jacob LJ indicated in his judgment concerning the 947 Patent (para 19 above), any remedy should be found in the field of competition law, which of course also reflects legislative policy and is indeed the basis of the separate claim here for abuse of a dominant position: para 12(b) above.

45. I should add that the unlawful means claim here also raises the question whether another necessary ingredient of the tort is satisfied, i.e. actionability. Assuming, as I have, that Servier made to the EPO and the High Court the fraudulent misrepresentations alleged, I find it difficult to see how either the EPO or the High Court could be said to have a cause of action in deceit against Servier, or that they would have had a cause of action subject only to suffering damage. But as this was not the basis of Servier's application and was not fully argued, it is unnecessary to explore that aspect further.

Conclusion

46. At the outset of his submissions, Mr Turner reminded me of the caution that should be exercised before striking out a ground of claim on a summary application, referring to para 3.4.2 of the White Book. However, in this case, assuming all the facts in the claimants' favour, the issue raised is a pure point of law. Given that I have concluded that the answer is clear such that this head of claim is bound to fail, it is appropriate and indeed desirable to dispose of it now, so that the parties know where they stand and the potentially significant costs of additional disclosure on this aspect can be avoided.

47. Accordingly, paras 73-78 of the Particulars of Claim are struck out.