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INTENTION AND UNLAWFUL MEANS IN THE TORT OF CONSPIRACY

OCM Opportunities Fund II, LP v. Burhan Uray[1]

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I. INTRODUCTION

The twin requirements of the intention to injure and the use of unlawful means in the tort of conspiracy have eluded easy definitions.[2] In so far as intention to injure is concerned, it is clear that the existence of a predominant purpose to harm the plaintiff is not required in unlawful means conspiracy.[3] However, beyond this relatively settled principle, the precise meaning and scope of the intention to injure remains in doubt. With respect to the requirement of unlawful means, the sub-categories of acts (such as criminal and tortious acts and contractual breaches) which would qualify as unlawful means have yet to be clearly delineated. Whilst there have been attempts to achieve greater coherence in the general realm of economic torts,[4] there remains much controversy on the scope of unlawful means.[5]

This case note focuses on two specific issues in the tort of conspiracy. The first issue is whether the defendants have to act with a "purpose to harm" the plaintiff in order to satisfy the requirement of the intention to injure, or is it sufficient so long as they embark "deliberately" upon a course of conduct whilst appreciating the probable consequences to the plaintiff. What is the difference anyway? The second issue is whether the unlawful means have to be actionable in their own right by the plaintiffs against at least one of the conspirators.[6] The Singapore High Court was

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1 [2004] S.G.H.C. 115 [*OCM Opportunities Fund II, LP*].

2 W. V. H. Rogers, *Winfield & Jolowicz on Tort*, 16th ed. (London: Sweet & Maxwell, 2002) at 652.

3 *Lonrho v. Fayed* [1992] 1 A.C. 448; see Singapore Court of Appeal decisions in *Chew Kong Huat v. Ricwil (Singapore) Pte. Ltd.* [2000] 1 S.L.R. 385 and *Quah Kay Tee v. Ong & Co. Pte. Ltd.* [1997] 1 S.L.R. 390 at 403 on the distinction between conspiracy by lawful and unlawful means. For a good overview of economic torts in Singapore, see Lee Pey Woan, "Economic Torts" in Andrew Phang, ed., *Basic Principles of Singapore Business Law* (Singapore: Thomson Learning, 2004) at 555.

4 E.g., see Lord Diplock's classification of unlawful interference with trade as a "genus tort" in *Merkur Island Corporation v. Laughton* [1983] 2 A.C. 570.

5 See Lee Eng Beng, "A Perspective on Economic Torts" (1996) S.J.L.S. 482 at 520.

6 This must be distinguished from the issue of whether the unlawful means is required to be independently actionable by the *third party* against whom the act was directed. See discussion in text below.

recently presented with the unenviable task of unraveling these vexed issues in the case of *OCM Opportunities Fund II, LP*.[7] Recent English and Australian cases will be discussed in relation to the issues stated above.

In the present case, some institutional investors (the plaintiffs) brought proceedings against several individuals and companies (the defendants) for conspiring to defraud the former by misrepresenting the true financial position of a company (one of the defendants). It was alleged that the profits of the company were falsely inflated due to the defendants' "creation" of fictitious sales and contracts with related companies. The plaintiffs alleged that the misrepresentations induced them to purchase guaranteed notes issued by one of the defendants whilst funds derived from the issue were diverted. A world-wide Mareva injunction was granted by the Singapore High Court (Ang J.) to prevent the defendants from dissipating their assets.[8] In response, the defendants applied to strike out the claim on the grounds that it does not disclose a reasonable cause of action, or as being frivolous, vexatious and an abuse of process. The two important issues highlighted above will be discussed in the context of this striking out application. The defendants also sought to set aside the injunction,[9] and alternatively, to stay the proceedings on *forum non conveniens* grounds.[10] However, the High Court dismissed the defendants' applications and ordered that the allegations of conspiracy proceed to trial.[11]

II. The Requisite Intention to Injure

With respect to the requirement of intention to injure, the defendants' counsel argued in support of the "purpose to harm" principle enunciated in the New South Wales ("NSW") Supreme Court decision of *Fatimi Pty. Ltd. v. Bryant*.[12] Campbell J. in *Fatimi* had opined that this "purpose to harm" must be "what is actuating the defendants in acting" and that damage to the plaintiff must be one of the things which the defendants are trying to achieve. The learned judge in *Fatimi* also added that it would not be sufficient for the defendants to realise that harm to the plaintiffs is a likely (or even inevitable consequence) of their actions. It should be noted, however, from the outset that the NSW Court of Appeal has since discredited Campbell J.'s test.[13] We shall return to this in a moment but it suffices, at this juncture, to mention that the NSW Court of Appeal decision was issued after Ang J.'s decision in the present case.

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7 *Supra* note 1.

8 [2004] 4 S.L.R. 74 ("Mareva injunction application"). The worldwide injunction was issued on 19 January 2004 and required the defendants to disclose their assets wherever located by affidavit. Following incomplete disclosure in the affidavits, the High Court allowed the plaintiffs to cross-examine most of the defendants on 6 August 2004.

9 The High Court refused to discharge the injunction as the plaintiffs have a good arguable case of unlawful means conspiracy so that the risk of dissipation of assets was made out. Further, the plaintiffs were not culpable of material non-disclosure of facts. *Supra* note 1 at para. 72–73.

10 The defendants' argument that the matter should be stayed on the grounds that New York or Indonesia was a more appropriate forum were roundly rejected by the High Court, *supra* note 1 at para. 70.

11 The plaintiffs were, however, required to fortify their undertaking as to damages and furnish additional security for costs.

12 [2002] N.S.W.S.C. 750 [*Fatimi*].

13 [2004] N.S.W.C.A. 140.

On the other hand, the plaintiffs' counsel argued that it is sufficient so long as the defendants embarked "deliberately" upon the course of conduct, appreciating the probable consequences to the plaintiff.[14] This is, of course, the same test employed by Woolf L.J. in *Lonrho v. Fayed*[15] in the context of interference with trade by unlawful means. Interestingly, Ang J. observed that the above English view was "somewhat different" from the Australian jurisprudence in *Fatimi* as cited by the defendants' counsel above.[16] It is submitted, however, that the differences between the English and Australian jurisprudence are in fact less marked than what the learned judge might have envisaged.

First, with respect to the definitional test argued by the plaintiffs' counsel, the word "deliberately" appears to imply the presence of some specific agenda (or purpose) on the part of the defendants. Coupled with the notion of the defendants' *appreciation* of the probable consequences to the plaintiff, it would not be far off the mark to say that the defendants, in embarking upon that particular course of action, are likely to have the requisite "purpose to harm" the plaintiff. Seen from this perspective, the test proposed by the plaintiffs' counsel does not seem to be materially different from the "purpose to harm" the plaintiff test proposed by the defendants' counsel.[17] Moreover, the intention to injure need not feature as the predominant state of mind (to use a neutral phrase) in unlawful means conspiracy, whichever proposed test is employed.

Secondly, the NSW Court of Appeal in *Fatimi*, as mentioned above, had recently discredited the Australian test employed by the defendant's counsel in the present case.[18] The NSW Court of Appeal instead preferred the test that the unlawful means should be *directed or aimed at* the plaintiff. Thus, in conspiracy by unlawful means, where the unlawful means were *aimed at* the plaintiff, damage to the plaintiff that was foreseen or foreseeable or was necessarily caused in carrying out the conspiracy will satisfy the requirement of intention to injure.[19] Another very recent Australian decision, *Coomera Resort Pty. Ltd. v. Kolback Securities Ltd.*,[20] referring to the "concept of a requirement of some intent or conduct directed at the plaintiff" was cited in support. Consistent with the trend, the NSW Court of Appeal added that the existence of reasonably foreseeable damage would not be sufficient to found the tort of conspiracy by unlawful means.[21]

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[14] John Frederic Clerk and William Harry Barber Lindsell, *Clerk & Lindsell on Torts*, 18th ed. (London: Sweet & Maxwell, 2000) at para. 24-124.

[15] [1995] 2 Q.B. 479 at 494.

[16] The same opposing views concerning the meaning of intention have been observed by Lee Eng Beng in the context of interference with trade by unlawful means. See *supra* note 5 at 518.

[17] See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2000) at 105-106, in which the author described a different set of contrasting views of the intention to injure, namely (1) foresight of inevitable or even probable consequences; and (2) requirement of deliberate harm, with the defendant targeting the plaintiff.

[18] *Supra* note 13 at para. 15.

[19] *Ibid.* at para. 13. See also Mason P. in *McWilliam v. Penthouse Publication Ltd* [2001] N.S.W.C.A. 237 at para. 13.

[20] [2004] 1 Qd. R. 1 at 34-5 (*per* Mackenzie J.). But the NSW Court of Appeal in *Fatimi*, *supra* note 13 at para 18-22 appeared to have also embraced another test of "dishonest means".

[21] *Supra* note 13 at para. 14.

In any event, it should be pointed out that the narrow test of unlawful means targeted or aimed at the plaintiff is not novel in Australia.[22] Moreover, this test is similarly applied in various English court decision[23] and favoured by several academics.[24] Thus, on an overall analysis, there is little divergence between the English and Australian positions on this issue.

So what is the preferred position in Singapore? Instead of attempting to consider the definitional issue directly, Ang J. referred in the next breath to the English case of *Kuwait Oil Tanker Co. S.A.K. v. Al Bader* (No. 3).[25] This relates to the evidence required to prove the conspirators' intention to injure. In this regard, Ang J. observed that it would be necessary, citing Nourse L.J.'s views in *Kuwait Oil Tanker*, to prove the conspirators' intention by inference from the facts of the case. Nourse L.J. in *Kuwait Oil Tanker* had stated that "in the case of *most* conspiracies to injure by tortious means it will be clear from the acts of the conspirators that they must have intended to injure the plaintiff"[26] (emphasis added). It is argued that, whilst the meaning of intention to injure cannot be entirely divorced from the adducing of the evidence in support, the latter task would surely be impossible without a workable definition at hand.

Ang J. proceeded to quote Oliver L.J. in *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food*[27] that if an act is done "deliberately" and with knowledge of its consequences, the requisite intention exists. Further, Oliver L.J. added that in such a case, it could not be said that the act was not "aimed at" the person who, it is known, will suffer them. Two points need to be noted. First, we observe that Oliver L.J. appeared to have linked the notion of deliberateness or deliberation on the part of the defendants (an important facet of the plaintiffs' counsel's proposed test) with the concept of a targeted plaintiff (which is somewhat akin to the "purpose to harm" the plaintiff test propounded by the defendants' counsel). This again suggests that the proposed tests of the counsel are not quite as divergent as contemplated in the present case. Secondly, the point concerning the targeted plaintiff must be qualified by Ang J.'s subsequent statement in the judgment that "it is not necessary to have an identifiable victim to show that the conduct was done with intention to injure that victim" as long as the plaintiff is a member of a class of persons which was targeted.[28]

Further, Ang J. also treated "reckless conduct" of the defendant as sufficient to constitute the requisite intention. In this regard, the learned judge stated that the defendant may be regarded as having intended the result of an act if a particular result is "substantially certain" to follow from the defendant's act. Thus, the learned judge appeared to have equated recklessness with the notion of the outcomes which

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[22] See *Copyright Agency Ltd. v. Haines* [1982] 1 N.S.W.L.R. 182 at 194 (*per* McLelland J.); see *Northern Territory v. Mengel* (1995) 185 C.L.R. 307 at 341-2 (High Court of Australia); Windeyer J. in *Womboin Pty. Ltd. v. Reichelt*, 25 August 1995, Supreme Court of NSW (unreported).

[23] E.g., *Lonrho v. Fayed* [1990] 2 Q.B. 479 at 488 (*per* Dillon L.J.) and 492 (*per* Ralph Gibson L.J.); Denning M.R. in *Lonrho v. Shell Petroleum Co. Ltd.* [1981] Com. L. R. 74; in the context of other economic torts, see *Rookes v. Barnard* [1964] A.C. 1129 at 1208 (*per* Lord Devlin); *Quinn v. Leathem* [1901] A.C. 495 at 537 (*per* Lord Lindley).

[24] E.g., Rogers, *supra* note 2 at 658 and Carty, *supra* note 17 at 17.

[25] [2000] 2 All E.R. (Comm.) 271 [*Kuwait Oil Tanker*].

[26] *Ibid*. at para. 120.

[27] [1986] Q.B. 716 at 777.

[28] *Supra* note 1 at para. 35. But conspiracy targeted at the general public is insufficient: *Vickery v. Taylor* (1910) 11 S.R. (N.S.W.) 119.

are "substantially certain" to flow from the defendants' conduct. But this, as we know, is merely one version of "reckless conduct"; recklessness is not necessarily linked to the knowledge that a result is "substantially certain" to occur. By way of analogy to other areas of tort law, "reckless conduct" could, for example, encompass an indifference to the ensuing result of one's actions or statements.[29] Hence, the use of the term "reckless conduct" does not add much to the understanding of the tests proposed by counsel but may possibly serve as a source of confusion.

At this interlocutory stage of proceedings, Ang J. had sought to reserve her judicial opinion on the questions of law. As these legal issues are fairly controversial, the learned judge's decision to allow these disputed matters to proceed to trial based on formally adduced evidence is certainly correct. Thus, there was, at this juncture, no cross-reference to the positions taken by the opposing counsel in order to expound on the law. Indeed, there was no explicit statement as to the correctness of either counsel's submissions on the case authorities. However, in the process of drawing upon the relevant pleadings to establish that the conspiracy was aimed at the plaintiffs as investors, it is suggested that the learned judge appeared to have favoured the plaintiffs' interpretation of the law for a lower threshold of intention, rather than the arguments of the defendants' counsel.

Firstly, Ang J. observed that the plaintiffs pleaded an intention on the part of the defendants that their misrepresentations as to the financial position of a company would be acted upon by investors or potential investors of the issued notes, i.e. the targeted class of persons which included the plaintiffs, so that it suffices to establish a conspiracy aimed at the plaintiffs.[30]

Secondly, the learned judge indicated that there was an intention on the part of the defendants to do an unlawful act (in this case, to make fraudulent misrepresentations to induce the plaintiffs to invest in the notes). The following statements by Ang J. repay close attention:

> "… where there is an intention to do an unlawful act, that on any view will do harm to the plaintiff, the intention to injure will most probably be inferred. The conspirators' intention to benefit themselves in the knowledge that loss to the plaintiff will result from their unlawful act, will be treated also as an intention to harm the plaintiff. Ultimately, it is a matter of evidence for the court at trial to evaluate, on an objective basis, whether a particular result is substantially certain to follow an act and if the answer is in the affirmative, the defendant may be treated as having intended the result of that act."[31]

From the above statement, it seems that, in Ang J.'s view, the intention to injure the plaintiff may arise in the following three ways —

(a) the conspirators' intention to do an unlawful act which will harm the plaintiffs;

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[29] See *Derry v. Peek* (1889) 14 App. Cas. 337 (indifference as to the truth of the defendants' statement in the tort of deceit); the English court decision in *Inshore Services (International) v. N.F.F.O.* [2001] E.W.C.A. Civ. 1722 at para. 20 (indifference as to whether defendants' conduct involves breaches of the law in the tort of unlawful interference with trade).

[30] *Supra* note 1 at para. 37; *supra* note 2 at 653.

[31] *Ibid*. at para.. 38.

(b) the conspirators' knowledge of loss to the plaintiff arising from the unlawful act (notwithstanding the conspirators' motives of self-interest?); and
(c) where it is substantially certain that a particular result will follow the defendant's act.

It is doubtful whether (a) may be treated as a working definition of the requirement of intention as opposed to merely an evidential guideline for drawing inferences. More importantly, Ang J. appeared to be suggesting that the intention requirement may be satisfied even if there is no link between the conspirators' state of mind and the harm suffered by the plaintiff. Hence, the unlawful act need not be "aimed at" the plaintiff. Indeed, if the learned judge is correct, (a) is even less stringent than the test proposed by the plaintiffs' counsel which is based on the defendants' appreciation of the probable consequences of his or her "deliberate" conduct. Caution must be exercised in applying even an evidential guideline where it is inconsistent with the substantive definitional criteria. A wide definition of intention may result in potential indeterminate liability to unintended third parties and not merely to the targeted plaintiff.[32]

As regards (b), it is settled law that intention must be distinguished from motives.[33] And motives by themselves do not ground an action in conspiracy. Hence, it is curious that the Ang J. had referred to the "conspirators' intention to benefit themselves" which, it is argued, is tantamount to motives of self-interests. Perhaps the learned judge was trying to point out that motives of self-interest do not negate actionability so long as the knowledge of loss to the plaintiff exists. Thus, it might be a veiled reference to the view that in unlawful means conspiracy, motives of self-interest rather than the intention to injure the plaintiff may be the predominant purpose of the conspirators, unlike in simple conspiracy. On this interpretation, the conspirators' knowledge of loss to the plaintiff is similar to (if not slightly more stringent than) the test in (c) which is based on a result "substantially certain" to flow from the defendants' act.

There may, however, be a material difference between (b) and (c) depending on the interpretation of "knowledge". The "substantially certain" test in (c) appears to embrace an *objective* notion of knowledge based on the connection between the defendants' acts and the ensuing outcomes. In this regard, the *subjective* state of mind of the defendant as to the plaintiff's loss which may be relevant under (b) is thus irrelevant under (c). It must also be noted that (c) is different from the plaintiffs' counsel's proposed test which requires some level of mental state on the part of the defendant. That is, the defendant must "appreciate" the probable consequences ensuing from his or her deliberate conduct under the plaintiffs' counsel's proposed test whilst the thrust of (c) seems to indicate that the mental state, if any, is to be solely inferred from the link between the defendants' act and the outcomes.

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[32] See the parallel debate in the context of limiting recovery of economic losses arising from negligent acts or omissions. See Andrew Phang, *supra* note 3 at 508.

[33] See Viscount Maugham in *Crofter Hand-Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435 at 452 that "motive" is clearly not the same as "intention", but in many cases one is the parent of the other.

III. Must the "Unlawful Means" be Actionable by the Plaintiffs?

The second issue the Singapore High Court was required to consider was whether the unlawful act must be actionable *per se* by the plaintiffs against at least one of the conspirators. Two contending legal propositions were cited.

The first legal proposition relied on the case of *Bank Gesellschaft Berlin International S.A. (BGBI) v. Raif Zihnali*.[34] In *BGBI*, Colman J. favoured the position that the unlawful means need not be actionable by the plaintiffs. He opined that the requirement of actionability as enunciated in *Credit Lyonnais Bank Nederland v. Export Credit Guarantee Department*[35] and *Yukong Lane Ltd. v. Rendsburg Investments*[36] was "conceptually irrelevant" but he did not, unfortunately, elaborate. Moreover, Colman J. arrived at this conclusion based on two case precedents[37] without any specific discussion of the underlying rationale or bases.

In truth, one of the case precedents relied on by Colman J., namely *Surzur Overseas Ltd. v. Koros*,[38] did not state categorically that there is no legal requirement that the unlawful means need not be actionable by the plaintiff. Waller L.J. in *Surzur*, upon remarking that the issue was raised only at the last moment before the court, merely opined that it was "eminently arguable" that unlawful means do not have to be actionable by the plaintiff.[39] The learned judge was not obliged to state the law categorically in *Surzur* as the issue before the English Court of Appeal was whether the plaintiffs could show there was a serious issue to be tried in order to succeed on its application to amend points of claim. In fact, Waller L.J. had stated in *Surzur* that "[i]t would clearly be wrong to reach any final conclusion" on this issue. Thus, it is submitted that the reliance by the court in the *BGBI* case on *Surzur* was, unfortunately, misplaced.

The second and preferred legal proposition cited in the present case was based on the English decision of *Michaels v. Taylor Woodrow Developments Ltd.*[40] Laddie J. in *Michaels* adopted the opposing view that the unlawful means must be actionable in their own right by the plaintiffs against at least some of the conspirators.[41] The learned judge regarded the issue of actionability as a point of distinction between simple conspiracy and conspiracy by unlawful means. Laddie J. also rejected the counsel's argument that the requirement of actionability would render the tort of conspiracy by unlawful means otiose since the plaintiffs could have sued on the underlying wrong. The learned judge countered that conspiracy by unlawful means would remain advantageous in some situations,[42] for example, in a case where only *some* conspirators would be liable individually under the underlying wrong.[43] Further, Laddie J. added that a suit by way of unlawful means conspiracy (instead of

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[34] Q.B.D. (Commercial Court), 16 July 2001 (unreported) [*BGBI*].
[35] [1998] 1 Lloyd's Rep. 19 at 32.
[36] [1998] 1 W.L.R. 294 at 314 (*per* Toulson J).
[37] *Watson v. Dutton Forshaw Motor Group Ltd.* [1998] EWCA Civ 1270 (22 July 1998); *Surzur Overseas Ltd. v. Kouros* [1999] 2 Lloyd's Rep. 611 at 616 [*Surzur*].
[38] [1999] 2 Lloyds's Rep. 611.
[39] *Ibid*. at 617.
[40] [2001] Ch. 493 [*Michaels*].
[41] *Supra*, note 17 at 21.
[42] *Supra*, note 25 at para. 129.
[43] See also *Rookes v. Barnard* [1964] A.C. 1129; John Eekelaar, "The Conspiracy Tangle" (1990) 106 L.Q.R. 223 at 224.

the underlying wrong against the defendants individually) may affect the scope of damages claimable.

Ang J. in the present case did not, however, make a concrete decision on either proposition of law enunciated in *BGBI* or *Michaels* (though there appeared to a slant towards *Michaels*). Instead, Ang J. sought to counter the defendants' reliance on the decision in *Michaels.* On the facts, the conspiracy to commit a breach of a statutory provision was not actionable as the provision did not give rise to a cause of action for breach of statutory duty. Ang J. proceeded to distinguish the facts in *Michaels* from the pleaded facts in the present case. Ang J. observed that, in the present case, the purchasers in the secondary market (that is, apart from the investors including the plaintiffs) could bring, "if deceived and injured", an independent action in deceit against the defendants.[44]

Hence, Ang J. seemed to have interpreted the actionability requirement as referring to the potential action taken out by a *third party* (in this case, the purchasers in the secondary market) against the conspirators based on the underlying tort of deceit instead of the suit by the *plaintiffs* against the conspirators on the underlying tort. In the former case, it is not necessary that the third party must have a proper cause of action against the conspirators before the plaintiffs can sue the conspirators. For instance, the third party may not have suffered any damage and thus, could not have sued the conspirators independently.[45] But this would have been irrelevant in the context of *Michaels* which is focused on the plaintiffs' action against the conspirators. But even if we consider the plaintiff's perspective, it would not have been difficult for Ang J. to make the assessment based on the pleadings that the *plaintiffs* could have "if so deceived and injured" brought an independent action in deceit against at least one of the conspirators. However, in the present case, no such assessment was made by the learned judge. In the circumstances, it remains doubtful whether the High Court was inclined towards a *legal* requirement for actionability in unlawful means conspiracy.

It should be noted, in this regard, that the position in Australia is quite different from the English courts. In the context of Australia, Campbell J. in *Fatimi* had opined that there is no requirement for unlawful means to be itself tortious. The learned judge took the view that if what is done by one person would amount to a tort, the pleading of conspiracy to do that act would be "mere surplusage". Further, Campbell J. based his view on some Australian cases showing that it is not possible to plead an alternative to a substantive cause of action the tort of conspiracy to commit that substantive wrong. Indeed, Handley J.A.'s statement in *Fatimi Pty. Ltd. v. Bryant*[46] that the decision of Laddie J. in *Michaels* is not the law in Australia could not have been clearer.

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[44] *Supra* note 1 at para. 44. See also the very recent English decision in *Commissioners of Customs & Excise v. Total Network S.L.* [2005] E.W.H.C. 1 (10 January 2005). The plaintiffs in that case argued that they had a cause of action independent of their conspiracy claim against at least one of the conspirators and thus would satisfy the test in *Michaels*. The court confirmed that fraud by the conspirators can establish the element of unlawful means under the tort of conspiracy: para. 50. Notwithstanding that the impugned act is the common law offence of cheating the revenue authorities, the court opined that this act of cheating includes any fraudulent conduct and is thus within the ambit of unlawful means for purposes of the tort: para. 47.

[45] See *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335 (interference with trade by unlawful means).

[46] *Supra* note 13 at para. 27.

On this issue, it is suggested that the preferred position is to treat the actionability of the unlawful means by the plaintiffs as a legal requirement for unlawful means conspiracy. This is consistent with the notion of unlawful means conspiracy as a form of secondary liability premised on the existence of some primary liability (such as the tort of deceit). Thus, unlawful means conspiracy here permits the extension of liability to include suits against other potential defendants (or conspirators).[47] The view of Campbell J. that a pleading in conspiracy would be "mere surplusage", taken from an English case precedent[48] which must now be considered fairly dated, is not persuasive in the light of Laddie J.'s counterarguments above. Moreover, the position taken in Australian against pleading an alternative to a substantive cause of action in conspiracy has been rejected in England[49] and doubted in Australia itself.[50] It is not quite logical or sensible to permit a *procedural* rule to supplant or determine the scope of a *substantive* element in the tort of conspiracy by unlawful means.

IV. Conclusion

The present debate on the meaning and scope of intention to injure in unlawful means conspiracy is still in a flux. This is because the opposing camps (or definitions) do not appear to be as materially different as some of the proponents might have envisaged. At present, most lawyers, judges and academics agree that the defendant's foresight of the (probable or inevitable) consequences of the defendants' act or conduct is not *per se* sufficient. However, beyond this fairly obvious conclusion, it is debatable which formulation discussed in this paper (deliberate conduct and appreciation of probable consequences, unlawful means aimed at the plaintiff, purpose to harm the plaintiff or some other formulation) would emerge as the preferred test in the near future. Unless and until the supposed differences of each of the formulations are elaborated and analysed in greater detail, it is likely that the tort of conspiracy would remain in a flux.

With respect to unlawful means, the present case reminds us of the need to distinguish between actionability by *third parties* and that by the *plaintiffs* against at least one of the alleged conspirators. The requirement of actionability by the plaintiffs does not render the tort of unlawful means conspiracy redundant in the face of the underlying tort because there are material differences in terms of potential defendants and scope of damages in taking out a suit based on the tort of unlawful means conspiracy. And reasons based on pleadings procedures aside, the requirement of actionability may also help to stem the potential flood of opportunistic overtures by potential plaintiffs against alleged conspirators in the absence of actionable primary wrongs.

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[47] *Supra* note 17 at 271.

[48] See Lord Dunedin in *Sorrell v. Smith* [1925] A.C. 700 at 716.

[49] *Supra* note 25 at para. 126 (*per* Nourse L.J.).

[50] See the decision of the Federal Court of Australia in Brisbane in *State of Queensland v. Pioneer Concrete (Qld.) Ltd.* [1999] F.C.A. 499, allowing both suits on a conspiracy to commit a tort of deceit and the joint tort.