



Neutral Citation Number: [2020] EWCA Civ 1300

Case Nos: A3/2019/1764, 1821

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY**  
**COURTS, INTELLECTUAL PROPERTY LIST (CHANCERY DIVISION)**

**Zacaroli J**

**[2019] EWHC 1156 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 October 2020

**Before :**

**LORD JUSTICE LEWISON**

**LORD JUSTICE ARNOLD**

and

**LORD JUSTICE PHILLIPS**

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**Between :**

**(1) THE RACING PARTNERSHIP LIMITED**

**Claimants**

**(2) ARENA LEISURE LIMITED**

**(3) ARENA RACING CORPORATION LIMITED**

**- and -**

**SPORTS INFORMATION SERVICES LIMITED**

**Defendant**

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**Ian Mill QC and Tom Cleaver (instructed by K&L Gates LLP) for the Claimants**  
**Michael Bloch QC and Craig Morrison (instructed by CMS Cameron McKenna Nabarro**  
**Olswang LLP) for the Defendant**

Hearing dates : 7-9 July 2020

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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 9 October 2020.

## **Lord Justice Arnold:**

### Introduction

1. These appeals raise important issues as to the limits of, first, the equitable doctrine of breach of confidence or, as I would prefer to describe it, misuse of confidential information; and secondly, the tort of conspiracy to injure by unlawful means.
2. The First Claimant (“TRP”) supplies live betting and horseracing data collated at various racecourses pursuant to agreements with the course owners to off-course (including online) bookmakers. In relation to six racecourses (“the Arena Racecourses”) owned by the Second Claimant (“Arena”), TRP’s right to conduct this business from 1 January 2017 derives from an agreement with Arena dated 13 May 2016 (“the TRP Media Rights Agreement”). The Arena Racecourses are a subset of the courses in respect of which TRP claims such rights (collectively referred to as “the TRP Racecourses”), but for the purposes of the appeals it is not necessary to consider the position in relation to the other TRP Racecourses.
3. The Defendant (“SIS”) previously had the right to collect and distribute to off-course bookmakers data from the Arena Racecourses, among other rights, for a period of five years pursuant to an agreement between SIS and Arena (“the SIS-Arena Agreement”), the term of which ended immediately prior to the commencement of the TRP Media Rights Agreement. We were told that SIS paid an eight-figure sum for the package of rights, which included broadcasting rights, and a further eight-figure sum in fees over the duration of the agreement.
4. TRP claimed that SIS, notwithstanding that it had lost the right to collect and distribute data from the Arena Racecourses on 1 January 2017, continued to do so until July 2017 in ways which involved infringing TRP’s copyrights and database rights, misuse of confidential information and breach of contract. In addition, TRP claimed that SIS conspired with others to injure TRP by unlawful means. SIS admitted some limited infringements of database rights and breach of contract in respect of later periods, but denied wrongdoing in the respects alleged during the period from January to July 2017.
5. After a three-week trial, Zacaroli J dismissed all of TRP’s claims except its claim for misuse of confidential information. SIS now appeals against the judge’s conclusion that it is liable for misuse of confidential information, while TRP cross-appeals against his dismissal of the claim for unlawful means conspiracy. Permission to appeal was granted on certain grounds by the judge and on other grounds by Lewison LJ. Although the other Claimants are parties to the appeals, it is TRP’s claims that are in issue and so I shall focus on TRP.
6. The appeals were well argued on both sides, and it seems clear that certain issues came into greater focus than they had before the judge, who had to deal with a mass of other issues as well.

### Factual background

7. The factual background is set out in full in the judge’s clear and comprehensive judgment ([2019] EWHC 1156 (Ch), [2020] Ch 289), to which reference should be

made. At this stage, the following brief summary, much of it taken directly from the judgment, will suffice to set the scene, although I shall have to consider some of the facts in more detail later in this judgment.

8. TRP's claims relate to two types of horseracing data: (i) betting prices; and (ii) factual information relating to the courses and the relevant races.
9. The betting prices relevant in this case are the fixed odds either offered by bookmakers (both on-course and off-course) or offered and accepted between market participants on online betting exchanges. A vital piece of information collated from racecourses is a single representative price for each horse in a race, sometimes referred to as the consolidated pre-race price, but which is known, when transmitted to off-course bookmakers, as a "Betting Show". Each Betting Show is the product of an algorithm (which essentially calculates a form of average price) into which is fed a selection of the fixed odds being offered by a sample of on-course bookmakers. Betting Shows are produced from time to time in the period of eight to ten minutes before the start of the relevant race. The Betting Shows are vital information for off-course bookmakers because they enable them to offer odds to their customers that reflect the prices being offered by the on-course bookmakers.
10. The second type of data comprises information specific to the racecourse on the day of the race, such as the weather conditions, the state of the course (the "going"), the withdrawal or non-running of any horses, changes in jockeys, the "off" (i.e. the start time), the finish time, any steward's inquiry and the result. This is referred to as "Raceday Data". It is of particular value to off-course bookmakers as it enables them to take bets right up to the start time of the race, but not beyond, and pay out winnings as promptly and accurately as possible after the conclusion of the race.
11. For the reasons outlined above, in order for off-course bookmakers to offer bets on horseraces to their customers, it is essential for them to have access to Betting Shows and Raceday Data as quickly as possible. It is also essential that the information is accurate and reliable. There is accordingly a commercial value in being able to collate Betting Shows and Raceday Data and distribute them in real time to off-course bookmakers. It is for that reason that TRP is (and SIS before it was) willing to pay substantial sums to the owners of racecourses to be allowed the exclusive right to collate and distribute such information to off-course bookmakers. The value in the information is, however, short-lived. Its value lasts for a matter of minutes only, and much of the value does not extend beyond the start of the race.
12. In order to protect its interest in such information generated at the racecourse, including its interest in granting, for reward, the exclusive right to collate and distribute such information, Arena imposes restrictions on the use to which those who attend races can make of the information they acquire. Those restrictions are contained in standard terms and conditions of entry, published on Arena's website, signposted at the entrances to the racecourses and incorporated into contracts with those that enter (for example, upon purchase of a ticket) ("the Arena Terms").
13. TRP's claims at trial concerned the supply by SIS of Betting Shows and Raceday Data to the Betfred Group ("Betfred") and the Ladbrokes Coral Group ("Ladbrokes").

14. SIS created its Betting Shows using data from sources which included the Betfair and (to a lesser extent) Betdaq betting exchange websites (“the Exchanges”). At trial SIS admitted that, during January and February 2017, it had knowingly breached the express terms and conditions of the Exchanges by taking and using pricing information available on the Exchanges for this purpose. Although there were issues at trial concerning SIS’s alleged use of another source and as to whether its use of Betdaq after March 2017 was authorised, the judge resolved those issues adversely to TRP and there is no appeal against those conclusions.
15. It is common ground that SIS collected Raceday Data through an agreement with Tote (Successor Company) Ltd trading as “Totepool” (“the Tote”) dated 30 December 2016 (“the Tote HoT”). The Tote is the successor to a body originally established by the Racecourse Betting Act 1928. This authorised the Racecourse Betting Control Board, later known as the Horserace Totalisator Board (“the Board”), to operate a “totalisator” on approved racetracks. The Board was a public body. On 13 July 2011 all property, rights and liabilities to which the Board was entitled or subject vested in the Tote, a private company. On the same day, the Tote became part of Betfred. The Board and the Tote have successively had a presence on British racecourses, including the Arena Racecourses, for many years.
16. Apart from a few occasions when the Tote operated “Totesport” fixed-odds betting outlets on certain TRP Racecourses (which it did under separate agreements), the Tote has only ever undertaken a pool betting service. That service includes collecting certain elements of Raceday Data from racecourses and making it available to off-course bookmakers via a dedicated data feed (“the Tote feed”). The Tote had carried out this service at the Arena Racecourses during the period covered by the SIS-Arena Agreement and continued to do so after 1 January 2017.
17. From January to July 2017 the Tote provided to SIS a data feed containing Raceday Data for use for fixed-odds betting pursuant to the Tote HoT. It is important to note that the judge found that the data provided by the Tote to SIS in this way included, but extended beyond, data which the Tote collected and distributed for pool betting purposes in the Tote feed. Indeed, it even extended beyond the data which the Tote was contracted to provide in Appendix 2 to the Tote HoT. The judge also found that SIS’s employees had attended the Tote’s premises in Wigan in January 2017 for the purposes of obtaining information that was not within the Tote feed. There is no challenge by SIS to any of these findings.
18. TRP alleges that SIS, Ladbrokes, Betfred and the Tote conspired to use unlawful means to injure it. The judge found that these entities had combined with each other in relation to the supply of Betting Shows and Raceday Data. Since there is no challenge to that finding, I shall for convenience, and without intending to be pejorative, refer to them collectively as “the Conspirators”. The Conspirators are related to each other as follows: SIS is wholly owned by Sports Information Services (Holdings) Ltd (“Holdings”); Ladbrokes owns 23% of the shares in Holdings; the Tote owns 6% of the shares in Holdings; in turn, the Tote is wholly owned (indirectly) by Betfred; and Fred Done, the founder of Betfred, owns 8% of the shares in Holdings. In addition, Philip Siers was, at the material times, Chief Commercial Officer of both Betfred and the Tote.

19. The judge also found that the purpose of the combination was to enable Betfred and Ladbrokes to resist signing up to an agreement with TRP in January 2017, thus improving their bargaining position with TRP, and that the Conspirators had the requisite intent to injure for the purposes of unlawful means conspiracy, because the acts carried out pursuant to the combination necessarily caused loss to TRP (and Arena). There is no challenge by SIS to these findings.

#### Issue 1: Applicability of the Arena Terms

20. The first issue on the appeals concerns the applicability of the Arena Terms to the Tote. The judge held that the Arena Terms did not apply to the Tote. TRP challenges that conclusion. This issue is relevant to TRP's claims in two ways. First, TRP relies upon the Arena Terms as fortifying its case that the Raceday Data, or at least some of it, constituted confidential information. Secondly, TRP relies upon a breach of the Arena Terms by the Tote as one of the unlawful means deployed by the Conspirators.
21. Before addressing this issue, it is important to begin by putting it into context. At trial TRP contended that, while the Tote was permitted by Arena to collect and distribute on-course data to bookmakers for pool betting purposes, it was prohibited from collecting and distributing such data for any other purpose. TRP contended that the Tote had acted in breach of a contract with Arena in two ways: (i) collecting and distributing data that was not required for pool betting and (ii) collecting and distributing data for fixed-odds betting that it was only permitted to collect and distribute for pool betting. TRP relied upon two sources of contractual restriction on the Tote: (a) an agreement between Arena and the Tote entered into some time in 2013 ("the Tote Agreement") with effect from 1 January 2013; and (b) the Arena Terms. For reasons that will appear, it is necessary to consider the position with respect to the Tote Agreement before turning to the Arena Terms.

#### *The Tote Agreement*

22. The judge described the Tote Agreement at [118]. It superseded an earlier agreement between Arena and the Board dated 27 April 2009 ("the 2009 Agreement"), a copy of which is annexed to the Tote Agreement. It is not necessary to set out the terms of either agreement, since they are mainly concerned with sponsorship. Neither agreement contains a term which expressly grants the Board/the Tote a right to enter the Arena Racecourses, but both contain provisions which assume that the Board/the Tote will be present at the Arena Racecourses and offering pool betting services. It appears that, prior to 13 July 2011, the Board had a statutory right to do so.
23. Although TRP alleged in paragraph 13 of its Re-Re-Amended Particulars of Claim that the 2009 Agreement entitled the Tote to enter the Arena Racecourses and to offer pool betting services at, and from, the Arena Racecourses, this was not admitted by SIS in its Defence, and the contention was abandoned by TRP at trial. Instead, TRP submitted in paragraph 144 of its written closing submissions as follows:

“[The 2009 Agreement] does not purport to confer any right of access to the racecourse. It might be argued the provisions of the [2009] Agreement assume that the [Board] will discharge various functions on the racecourse and therefore that, in the absence of any other apparent grant of access, it must be taken as constituting an implied

permission. But even if that were right, the implied permission would be limited to that which is necessary to give efficacy to the agreement. It could not possibly confer on the [Board] the right to collect and exploit data for purposes unconnected with any relevant business it had carried on.”

Although TRP did not say in terms, it is implicit in this submission that, at least to the extent that the Tote supplied Raceday Data to SIS for fixed-odds betting purposes, the Tote was a trespasser.

24. TRP adopted the same position with respect to the Tote Agreement. We were told by counsel for TRP that SIS did not advance any positive case at trial that the Tote had a right to enter the Arena Racecourses based on the Tote Agreement.
25. The judge made no finding as to the extent, if any, of the Tote’s right to enter the Arena Racecourses under the Tote Agreement. In my judgment TRP is correct that it is necessary to imply into the Tote Agreement a term granting the Tote permission to enter the Arena Racecourses for the purposes of that agreement, and in particular the collection and distribution of Raceday Data for the purposes of the Tote’s pool betting service, but no wider permission.
26. It is common ground that the Tote Agreement did not contain any express restriction upon the Tote’s use of data collected on the Arena Racecourses. The judge recorded that:
  - “119. ... Although an implied term was pleaded by the claimants, this was not pursued in closing argument.
  120. Accordingly, while the claimants did not abandon their claim that the Tote’s conduct involved a breach of the Tote Agreement, attention focused in closing on the Arena Terms.”

TRP did not appeal against this aspect of the judgment.

27. During the course of his submissions in reply on issues 1, 2 and 3 counsel for SIS submitted for the first time that there was no contract between Arena and the Tote on the Arena Terms because the Tote’s entry on to the Arena Racecourses was authorised by the Tote Agreement and therefore the Tote could not be said to have accepted Arena’s offer to allow it to enter those racecourses subject to the Arena Terms. As Lewison LJ pointed out during the course of argument, this submission requires consideration of the effect of the Tote having exceeded the limits of its licence to enter the Arena Racecourses under the Tote Agreement. Although this is not a point which had previously been relied upon by TRP, save to the extent that it was implicit in paragraph 144 of its closing submissions, I consider that it is only fair that TRP should be permitted to take this point in response to SIS’s new argument. Moreover, counsel for SIS did not object to the point being taken.
28. It follows from what I have said already that, from January to July 2017, the Tote exceeded its permission to enter the Arena Racecourses under the Tote Agreement, and therefore was, at least to that extent, a trespasser.

29. The first question which arises is whether the doctrine of trespass *ab initio* applies. This doctrine, which applies both to trespass to land and trespass to the person, is stated by *Clerk & Lindsell on Torts* (22<sup>nd</sup> ed) in relation to land at 19-49 in the following terms:

“Where a person having entered upon land under an authority given by law subsequently abuses that authority, he becomes a trespasser *ab initio*, his misconduct relating back so as to make his original entry tortious.”

30. The doctrine was helpfully analysed in the context of trespass to the person by Burnett LJ (as he then was), with whom Sir Brian Leveson PQBD agreed, in *McCarthy v Chief Constable of Merseyside Police* [2016] EWCA Civ 1257:

“45. The authority for the first proposition is *The Six Carpenters' Case* [(1610) 8 Coke Reports 146a]. The six carpenters entered a tavern in the City of London called the Queen’s Head. They had a right by law to enter into it because it was a common tavern. They ordered wine and bread but refused to pay. As Lord Denning MR noted in *Cinnamond v British Airways Authority* [1980] 1 WLR 582 at 588:

‘The inference was that from the beginning they went in with the intention of having the wine and the bread and not paying for it. The court held that they were guilty of a trespass from the beginning. It was resolved, said Lord Coke at p. 135, that “when entry, authority, or licence is given to anyone by the law, and he abuses it, he shall be a trespasser *ab initio*” — from the beginning.’

46. The doctrine of trespass *ab initio* is best understood as an evidential one, rather than an absolute rule of law. It could safely be inferred that when the carpenters entered the tavern they had no intention of paying for the goods they consumed. They had no lawful authority to enter to consume goods without payment so they were trespassers from the outset. The different approach reflected in the authorities relating to detention which was lawful at the beginning but later became unlawful illustrates that the doctrine is evidential. In the *Smith v Eggington* case [(1837) 7 Adolphus and Ellis 167] Littledale J observed:

‘Where there is an authority given by law for doing an act, there an abuse may turn the act into a trespass *ab initio*. But that rule does not apply here. The rule is said to rest upon this: — that the subsequent illegality shews the party to have contemplated an illegality all along, so the whole becomes a trespass. But here the Sheriff could not, from the first, have had in view the detention of the plaintiff after the time should have expired.’”

31. In the present case there is no basis for thinking that the Tote intended to exceed its licence under the Tote Agreement from 1 January 2013. As the judge found, discussions between the Tote and SIS only started in 2016. It follows that, applying

Burnett LJ's reasoning, the Tote did not become a trespasser *ab initio* when it exceeded its licence in January 2017.

32. The second question is whether the consequence of the Tote exceeding its licence under the Tote Agreement was that the Tote thereafter became a trespasser with respect to all its acts on the Arena Racecourses, as counsel for TRP submitted, or only with respect to the acts which related to fixed-odds betting. *Clerk & Lindsell* states immediately after the sentence quoted above:

“Where a person enters premises for a purpose partly lawful and partly unlawful, for example, in order to seize goods or documents some of which are lawfully removable and others not, he becomes a trespasser *ab initio* in respect of the unlawful seizure only.”

In my judgment the same principle must apply where the trespass is not *ab initio*.

33. In summary, therefore, the Tote Agreement impliedly granted the Tote permission to enter the Arena Racecourses for the purpose of collecting and distributing Raceday Data for its pool betting service, but from January to July 2017 the Tote was a trespasser on the Arena Racecourses in so far as it collected and distributed data for SIS's fixed-odds betting service unless its entry was authorised by the Arena Terms.

#### *The Arena Terms*

34. The judge set these out as follows:

“121. Notices posted at the entrance to Arena racecourses stated that: ‘Entry to this racecourse and grounds ... is granted subject at all times to the Arena Racing Company Terms and Conditions of entry’, and identified where those terms could be found.

122. The notices stated that special conditions may apply if ‘you are attending the Racecourse as a member of staff ... or otherwise than in your personal capacity as a spectator.’

123. The notices drew attention specifically to two provisions, prohibiting attendees from conducting any commercial activities, including distributing data relating to races, and from using any devices for, among other things, transmitting any data relating to a race, unless they were expressly permitted to do so.

124. I was shown the terms and conditions applicable to Wolverhampton racecourse, it being common ground that materially the same terms apply at the other Arena racecourses. The preamble states:

‘These Conditions apply to all persons entering the Racecourse. If you attend the Racecourse in any capacity other than as a private individual, you must also agree to a set of Special Conditions which will apply in addition to the Conditions.’

125. The conditions include the following:



- ‘4.6 No Ticket gives any Attendee any right to receive, use or exploit any racing data, audio, visual or audio-visual coverage of any race or fixture. All such rights are reserved. Any coverage or data made available at the Racecourse is made available for the personal use and consumption of Attendees only and redistribution to any person outside the Racecourse is strictly prohibited.’
- ‘10.1 You shall not use any device or technology to capture, record, store, transmit or broadcast any data relating to any race, fixture or other race-related activity unless you are expressly permitted to do so by Condition 10.4.’ (Clause 10.4 permitted mobile devices for personal use.)
- ‘10.2 In particular, you must not capture, record, store, transmit (including live stream): ... (d) any data relating to any race ... e.g., odds, Going, colours and colour changes, jockey changes, results...’ (Clause 10.3 stated that the list in 10.2 was indicative of the types of activity prohibited, but not an exhaustive list.)
- ‘10.6 Unless specifically permitted by these Conditions, you shall not use mobile telephones or any other communications device while on the Racecourse to communicate with anyone outside the Racecourse for the purpose of or in connection with any betting.’
126. Additional terms and conditions are provided for a variety of categories of commercial third parties. These are: (A) participants in racing; (B) media contractors and licensees; (C) photographers; (D) press; (E) on-course bookmakers; and (F) contractors, trades and exhibitors. The only one of these that the claimants contend is relevant is (B). At the start of the special terms and conditions, the following appears:
- ‘Attendees will only be required to comply with, and will only be entitled to any of the rights and privileges set out in, the following Special Conditions where specifically and expressly admitted to the Racecourse on the basis of one or more of the categories of Special Condition.’
127. Special Conditions B apply to ‘Media Attendees’, being those attendees who are present under the terms of a ‘Third Party Media Agreement’ or ‘for purpose(s) equal or similar to those permitted by a Third Party Media Agreement’. A Third Party Media Agreement is defined as an agreement with a third party under which they, their sub-contractors and licensees were permitted to enter the Racecourse ‘for the purpose of producing still images or audio/visual/data coverage of races and fixtures and/or transmitting, broadcasting or otherwise distributing [the same]’.

128. By clause 24.3 of Special Conditions B, save where otherwise agreed expressly in writing:
- ‘...Media Attendees will not be entitled to exercise any rights to, or to produce and exploit, audio/visual/data coverage of races and fixtures on their own behalf or for any purpose other than that permitted under the Third Party Media Agreement.’”
35. There is no issue as to the applicability of the Arena Terms to entrants to the Arena Racecourses in general.
36. The judge rejected TRP’s contention that the Tote was contractually bound to comply with Special Conditions B for the following reasons:
- “129. The first question arising is whether the special terms and conditions relating to Media Attendees applied to the Tote. There is no evidence of any agreement having been entered into between the Tote and Arena (or any predecessor of Arena in relation to the Arena Racecourses), whether in writing or otherwise, which regulated the activities the Tote in fact (as is common ground) carried out, over many decades, in respect of pool betting on the Arena Racecourses. The Tote's presence on racecourses for the purposes of pool betting was originally pursuant to a statutory right, and there is no evidence of its presence on the Arena Racecourses having been made the subject of any agreement (other than the Tote Agreement, dealt with above). There is accordingly no evidence of there being any agreement that might constitute a Third Party Media Agreement within the meaning of Special Conditions B.
130. It remains possible that the Tote's presence on the Arena Racecourses was for purposes ‘similar to those permitted by a Third Party Media Agreement’. Even if so, however, there is no evidence that the Tote was ‘specifically and expressly admitted’ to any of the Arena Racecourses ‘on the basis of’ the Special Conditions B. Unless it did, then the preamble to the Special Conditions makes it clear that the Special Conditions do not apply to it.”
37. Although counsel for TRP challenged this conclusion, he presented no coherent argument as to why the judge was wrong.
38. As to the general conditions, the judge held at [132] as follows:
- “So far as the general conditions in the Arena Terms are concerned, those cannot have been intended by Arena to apply to the Tote. The provisions I have set out above (from clauses 4.6 and 10) are in absolute terms. They would preclude the Tote from carrying out any activity at all, yet it is common ground that the Tote was carrying on its pool betting activities at the Arena Racecourses lawfully. I reject the claimants’ contention that it is necessary to read clause 4.6 of the general conditions subject to an implied term ‘save insofar as expressly authorised’. Arena recognised that it was necessary to set

out in express terms (i.e. the Special Conditions) the extent to which a third party would be entitled to make use of information acquired at the racecourse. It is possible to imply a term (among other requirements) only if it can be said with certainty what the term would have been. That is not possible given the inherent complexity in seeking to identify precisely what use the Tote could make of information acquired on course and to which of the restrictions in the general conditions it should remain bound.”

39. It is not necessary to recite TRP’s criticisms of this reasoning in any detail. In essence, the submission made by counsel for TRP was that the Arena Terms applied to all entrants to the Arena Racecourses and that the correct legal mechanism for addressing the judge’s concerns was to imply through conduct a gratuitous licence limited to pool betting. Nor is it necessary to recite SIS’s original responses to those criticisms. As noted above, in his submissions in reply, counsel for SIS raised the more fundamental question of whether any contract was concluded between Arena and the Tote on the Arena Terms. As he pointed out, in the case of ordinary racegoers, they accepted Arena’s offer to admit them to the Arena Racecourses on the Arena Terms because that was the only basis on which they could gain admittance. In the case of the Tote, however, he argued that its employees gained admittance by virtue of the Tote Agreement, and therefore they had not accepted an offer to enter on the Arena Terms.
40. Counsel for TRP’s response to this submission was to argue that, either (i) because the Tote would otherwise be a trespasser or (ii) because the Tote only had a limited licence to enter the Arena Racecourses for pool betting purposes and would otherwise be a trespasser with respect to fixed-odds betting, the Tote must be deemed to have accepted Arena’s offer to enter on the Arena Terms at least for fixed-odds betting purposes.
41. I do not accept TRP’s argument. It is TRP’s own case that the Arena Terms prohibited the Tote from (among other things) collecting and distributing Raceday Data for fixed-odds betting purposes. The Tote cannot have accepted an offer of entry to the Arena Racecourses for fixed-odds betting purposes on terms that prohibited it from doing that very thing. That would not amount to an offer capable of meaningful acceptance. To put essentially the same point another way, no consideration would move from Arena.
42. Accordingly, my conclusion, albeit for slightly different reasons, is that the judge was correct to hold that the Tote was not bound by the Arena Terms. The consequence of this, however, is that, for the reasons given above, the Tote was a trespasser on the Arena Racecourses during the period from January to July 2017 in so far as it collected and distributed Raceday Data for fixed-odds betting purposes.

Issue 2: Did the Raceday Data have the necessary quality of confidence?

43. TRP contends that the Raceday Data which SIS obtained from the Tote constituted information confidential to one or more of the Claimants (and since they have all been joined, it does not matter which) and that by obtaining such data and supplying it to Betfred and Ladbrokes SIS acted in breach of an equitable obligation of confidence. As noted above, the judge upheld these contentions and SIS now appeals.

44. The clearest statement of the elements necessary to found an action for breach of an equitable obligation of confidence remains that of Megarry J in *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 47:
- “First, the information itself ... must ‘have the necessary quality of confidence about it’. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it.”
45. This statement of the law has repeatedly been cited with approval at the highest level: see Lord Griffiths in *Attorney-General v Guardian Newspapers Ltd (No 2) (“Spycatcher”)* [1990] 1 AC 109 at 268, Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [13] and Lord Hoffmann in *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 AC 1 at [111]. (It is not, however, a complete statement of the ingredients of a successful claim: there is a further requirement, namely that the unauthorised use of information was without lawful excuse.)
46. I would add two points. The first is that, whatever its origins may have been, in its contemporary incarnation the doctrine of misuse of confidential information is, as Lord Hoffmann made clear in *Douglas v Hello!*, all about the control of information. The second is that misuse of confidential information is a species of unfair competition: see Article 10*bis* of the Paris Convention for the Protection of Industrial Property read together with Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and see also recitals (2), (16), (17) and (39) and Article 3(1)(d) of European Parliament and Council Directive 2016/943/EU of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.
47. The expression “the necessary quality of confidence” was coined by Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215. Lord Greene defined this quality by antithesis: “namely, it must not be something which is public property and public knowledge”. SIS’s first ground of appeal is that the Raceday Data did not have “the necessary quality of confidence”, but was “public property and public knowledge”.
48. The only authority on this question cited by either side was *Douglas v Hello!*. There is, however, a considerable body of authority on this question. The authorities up to 2012 are exhaustively analysed in Chapter 5 of Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2<sup>nd</sup> ed). As the authors’ analysis makes clear, the issue is context- and fact-sensitive, and confidentiality is a relative and not an absolute concept. They identify the basic attribute which information must possess before it can be considered confidential as being inaccessibility: see paragraphs 5.14 to 5.20. I agree with this.
49. The starting point in any confidential information case is to identify with precision the information which is alleged to be confidential. Experience shows that claimants are apt to make unfocused allegations of misuse of confidential information, and that when they are required precisely to identify the allegedly confidential information, it

can turn out that the information is either not protectable or has not been misused. Moreover, even if confidential information has been misused, it is necessary precisely to identify what has been misused when it comes to considering remedies for such misuse, such as an injunction.

50. TRP's pleaded case was that what it described as "the Key Raceday Triggers" constituted confidential information which had been misused by SIS. The expression "the Key Raceday Triggers" was defined in paragraph 4B.3 of the Re-Re-Amended Particulars of Claim to mean "non-runners, withdrawals, the off and the result". This has to be read together with paragraph 4A.2, which defined "the result" as "in particular ... (i) the point in time at which the race has finished, (ii) whether any issue are referred to the Stewards and (iii) the official outcome of the race taking into account any such issues".
51. Despite this limitation in TRP's pleaded case, the judge found that all of the Raceday Data constituted confidential information, and made an order on that basis. With due respect to the judge, this was not open to him. Moreover, it leads to irrelevant and distracting issues, such as whether there is any conceivable basis for a claim to confidentiality in information as to the weather, bearing in mind that, as well as being attended by thousands of racegoers, races are broadcast "almost instantaneously" (in the judge's words at [147]) on television. (The judge did not explain what he meant by this, but I understand this to be a reference to the normal time delay imposed on "live" broadcasting, which is typically seven seconds.)
52. TRP's pleading is ambiguous as to whether the claim is that (a) each type of information comprised in the Key Raceday Triggers constituted confidential information or (b) a compilation of some or all of such types of information did. In my view it is broad enough to encompass both ways of putting the case.
53. The next point to note is that TRP's claim is only concerned with the short period of time between the information coming into existence and either shortly after the start of the race (for information about non-runners, withdrawals and the off) or shortly after the end of the race (for information about the result). As the judge explained, it is only during this short period of time that the information has value to bookmakers. The judge stated at [15] that "its value lasts for a matter of minutes only". TRP accepts that the information comes into the public domain, and thus ceases to be confidential, after this period.
54. Accordingly, correctly formulated, the issue is whether, during the relevant time frame, either (a) each type of information comprised in the Key Raceday Triggers constituted confidential information or (b) a compilation of such information did.
55. TRP contends that the present case is indistinguishable from *Douglas v Hello!*. In order for that case properly to be understood, it is necessary to explain the facts in some detail.
56. Michael Douglas and Catherine Zeta-Jones were married at the Plaza Hotel in New York on 18 November 2000. On 10 November 2000 Northern & Shell, the publisher of *OK!* magazine, entered into an agreement with the Douglases under which it was granted the exclusive right to publish photographs of the wedding taken by photographers engaged, and selected, by the Douglases for a nine-month period in

consideration of the payment of £1 million. The agreement provided *inter alia* that the Douglasses undertook to use their best efforts to ensure that no other media would be permitted access to the wedding and that no guests or anyone else present should be permitted to take photographs and that the Douglasses would take all reasonable means to provide such security as to minimise the risk of photographs being made available to third-party media.

57. The Douglasses required most companies providing services at the wedding and their employees to enter into confidentiality agreements and informed all suppliers and potential suppliers that the wedding plans were confidential. Guests were requested not to take photographs or videos, and were required to pass through a security check at which a notice prohibiting photography and videos was posted. Both guests and employees were checked to ensure that they were not carrying cameras. In addition, security personnel looked for anyone carrying cameras during the wedding reception and confiscated six or more cameras. Security measures were taken to prevent unauthorised persons attending the wedding. Various additional steps were taken to ensure that no media coverage other than that of Northern & Shell took place.
58. Hola was the publisher, and Hello! was the distributor, of *Hello!* magazine. Sr Sanchez Junco was a director and the controlling shareholder of Hola, and the editor of *Hello!*. Hola had bid for the rights to cover the wedding, but had not been successful. Even before it became clear that Hola had not secured the rights, Hola began making preparations for that eventuality by informing Philip Ramey, a paparazzo photographer and agent, that Hola would be interested in acquiring photographs of the wedding. Immediately prior to the wedding, Mr Ramey indicated to Hola that he would attempt to obtain photographs.
59. The wedding was infiltrated by another paparazzo, Rupert Thorpe, who surreptitiously took about 15 photographs. The unauthorised photographs were electronically transmitted by Mr Ramey to Hola. On 19 November 2000 Hola agreed with Mr Ramey that Hola would acquire exclusive rights for the United Kingdom, Spain and France in the unauthorised photographs for £125,000. Subsequently, six of the unauthorised photographs were selected for publication in the edition of *Hello!* which was due for publication in London on 21 November 2000.
60. On 20 November 2000 Northern & Shell learnt that Mr Ramey had been marketing unauthorised photographs of the wedding and was informed by him that Hola had acquired rights in them. Later that day the Douglasses and Northern & Shell applied without notice for, and obtained, an injunction to restrain Hello! from publishing any photographs of the wedding until after 21 November 2000. On 21 November 2000 the injunction was continued until trial or further order. On Hello!'s appeal to the Court of Appeal, the injunction was discharged on 23 November 2000.
61. The edition of *Hello!* containing the unauthorised photographs went on sale on 24 November 2000. The first of two issues of *OK!* containing the authorised photographs, which had been brought forward by Northern & Shell after learning of *Hello!*'s intended publication, also went on sale on the same day. According to Lord Hoffmann, the latter publication occurred a few hours before the former.
62. At trial the Douglasses and Northern & Shell contended that the publication of the unauthorised photographs was actionable upon a number of bases, including misuse

of confidential information. Lindsay J upheld the claim for misuse of confidential information and awarded the Douglases £14,600 and Northern & Shell £1,033,156. The Court of Appeal dismissed an appeal by the defendants against the judgment in favour of the Douglases, but allowed the appeal in relation to Northern & Shell's claim. The majority of the House of Lords upheld Northern & Shell's claim.

63. Lord Hoffmann, with whom Baroness Hale of Richmond agreed and whose reasoning was shared by Lord Brown of Eaton-under-Heywood, said:

“117. ... The point of which one should never lose sight is that ‘OK!’ had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of *any* photographs of the wedding. ... Provided that one keeps one’s eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward.

118. It is first necessary to avoid being distracted by the concepts of privacy and personal information. ... ‘OK!’s’ claim is to protect commercially confidential information and nothing more. ... The fact that the information happens to have been about the personal life of the Douglases is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglases, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information.

...

123. The Court of Appeal’s analysis, which treats the obligation of confidence as having been imposed in favour of OK! only in respect of the photographs with which it was supplied by the Douglases ... seems to me to make no commercial sense. The essential purpose of the security arrangements and the prohibition of unauthorised photography were to impose an obligation of confidence in respect of *any* pictures of the wedding. Only in that way could the commercial interests of ‘OK!’ be protected. And it was clear to everyone, Mr Thorpe and Senor Sanchez Junco in particular, that this obligation was imposed for the benefit of ‘OK!’ as well as the Douglases. As the Court of Appeal put it when stating ‘OK!’s’ argument ... ‘the photographs published by ‘Hello!’ fell within a generic class of commercially confidential information ... which ‘OK!’ were entitled to protect’.

124. ... The information in this case was capable of being protected, not because it concerned the Douglases’ image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglases had sufficient control to enable them to impose an obligation of confidence. ...”

64. On the key issue which divided their Lordships, which was whether the confidential information had entered the public domain as a result of the prior publication of the

approved photographs, Lord Hoffmann held at [122] that it had not for the following reasons:

“... it is certainly the case that once information gets into the public domain, it can no longer be the subject of confidence. Whatever the circumstances in which it was obtained, there is no point in the law providing protection. But whether this is the case or not depends on the nature of the information. Whether there is still a point in enforcing the obligation of confidence depends on the facts. If the purpose of publishing the pictures was simply to convey the information that the Douglases had married, the bride wore a wedding dress and so forth, then the publication of any photographs would have put that information in the public domain. So would a description of the event. In this case, however, the point of the transaction was that each picture would be treated as a separate piece of information which ‘OK!’ would have the exclusive right to publish. The pictures published by ‘OK!’ were put into the public domain and it would have had to rely on the law of copyright, not the law of confidence, to prevent their reproduction. But no other pictures were in the public domain and they did not enter the public domain merely because they resembled other pictures which had. ...”

65. Turning to the present case, the judge concluded at [143]-[154] that the Raceday Data was confidential information during the relevant time frame. In summary, his reasoning was that the information was time-critical information of substantial commercial value the dissemination of which was controlled by Arena for the benefit of itself and its exclusive licensee for fixed-odds betting (formerly SIS, now TRP) through (i) its ownership of the Arena Racecourses and (ii) the Arena Terms, which prohibited anyone who attended the race from transmitting off-course any information relating to “any race, fixture or other race-related activity” and from communicating with anyone outside the racecourse “for the purpose of or in connection with any betting”. Accordingly, he considered that there were “strong parallels” with *Douglas v Hello!*. As he said at [153]:

“SIS contends that because the information comprising Raceday Data was visible to everyone (potentially thousands) on the racecourse, it did not have the necessary quality of confidence. Moreover, because other racecourses ... did not contain similar restrictions to those set out in the Arena Terms, it is impossible to conclude that the information is subject to any ‘general obligation of confidence’. That, however, misses the point. Raceday Data is not confidential because it is of an inherently confidential nature, but because there is a substantial commercial value in the information, provided it is disseminated to off-course bookmakers as soon as possible, and Arena has the ability to, and does in fact, control its dissemination via exclusive channels so as to exploit that value. As in the *Hello!* case, the fact that TRP (and, before it, SIS) was willing to pay substantial sums for the benefit of an exclusive right to collect and disseminate the information to off-course bookmakers engaged in fixed-odds betting is a strong indication of its confidential nature.”



66. In their skeleton argument for the appeal, counsel for SIS advanced four submissions as to why the judge was wrong. Although not of all these were pressed in oral argument, I shall address each of them.
67. First, counsel for SIS submitted that the law only protected information that could properly be described as secret, and the Raceday Data could not be described as secret. I do not accept this submission. As discussed above, the true criterion is not secrecy, even though that word can be found in many of the authorities, including several of the opinions in *Douglas v Hello!*, but inaccessibility.
68. The Key Raceday Triggers constituted information that, during the relevant time frame, was, by virtue of the control exercised by Arena through its ownership of the Arena Racecourses and its imposition of the Arena Terms, inaccessible save to (i) the Tote and (ii) TRP, which had paid Arena a substantial sum for the right to collect and distribute the information. The point may be demonstrated by posing the following question: why did SIS not source the Key Raceday Triggers simply by watching television broadcasts of the races? The answer is that, as the judge found, the information was not available to SIS by that route quickly enough (and accurately enough) to satisfy the needs of SIS's customers. This is illustrated by an internal SIS email which the judge quoted at [149] saying, "The data necessary to take and settle bets has to get into the public domain at some point at which point anyone can collect it and use it but it is not clear whether we (or anyone else) can source the data quickly enough to be useful to bookmakers." Hence, as explained in more detail below, SIS went to considerable trouble to obtain a data feed from the Tote that met its customers' needs. The information comprising the Key Raceday Triggers was inaccessible from any public domain source during the relevant time frame.
69. Counsel for SIS sought to meet this point by arguing that it was not sufficient for the claimant in a case of this nature to have a legal right to control the information, it must exercise that right, and that Arena/TRP had failed to do so. I do not accept this argument either. Arena *did* exercise its rights of property in the Arena Racecourses and its contractual rights under the Arena Terms to control the information by exclusively licensing TRP to collect and distribute Raceday Data. It is true that Arena did not seek to restrain the actions of the Tote by imposing contractual restrictions upon it, but as explained above the Tote was, so far as use of the data for fixed-odds betting purposes was concerned, a trespasser. In other words, the Tote was in materially the same position as Mr Thorpe in *Douglas v Hello!*. I repeat: the information was not in the public domain at the relevant time.
70. Secondly, counsel for SIS submitted that the judge's conclusion was inconsistent with the law of privacy, which only applies to information in respect of which the claimant has a reasonable expectation of privacy. I do not accept this submission. As Lord Hoffmann pointed out in *Douglas v Hello!*, commercial confidentiality is distinct from privacy. This is reinforced by the subsequent decision of the Court of Appeal in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 that breach of confidence and misuse of private information are two separate and distinct causes of action which rest on different legal foundations and protect different interests, and hence a claim for misuse of private information is "made in tort" even though a claim for breach of confidence is an equitable one.

71. Thirdly, counsel for SIS submitted that there was “no need to expand” the law of confidentiality to sporting events. There is no question of expanding the law of confidentiality, however, nor of elevating sports events into some special category for protection. As Lord Hoffmann explained in *Douglas v Hello!*, what matters is not the subject matter of the information, but the fact that it can be controlled and thus has commercial value. The fact that the information here relates to a sporting event rather than a celebrity wedding is immaterial.
72. Fourthly, counsel for SIS submitted that, if information concerning a sporting event was to be confidential, then clear restrictions were required, but no sufficiently clear restrictions had been imposed in this case. I accept that the claimant in a case of this kind must demonstrate that it has sufficient control over the information to render it relevantly inaccessible. I agree with the judge, however, that Arena did have sufficient control.
73. Counsel for SIS relied upon the fact that no contractual restrictions were imposed on the Tote. As discussed above, however, the Tote’s implied licence to enter the Arena Racecourses was limited to collecting and distributing certain Raceday Data for pool betting purposes. The implied licence to the Tote did not enable other parties to access that information otherwise than through the Tote. Moreover, the information obtained by SIS was both obtained for a different purpose and extended beyond that previously supplied by the Tote.
74. Counsel for SIS also submitted that, on their proper construction, the Arena Terms did not prevent the collection and distribution of Raceday Data by racegoers. At least so far as the Key Raceday Triggers are concerned, I do not accept this submission. As the judge rightly held, the Arena Terms clearly prohibit racegoers from transmitting off-course any information relating to “any race, fixture or other race-related activity” and from communicating with anyone outside the racecourse “for the purpose of or in connection with any betting”.
75. Finally, I should deal with a point made by counsel for SIS concerning TRP’s case that the compilation of the Key Raceday Triggers obtained by SIS was confidential even if none of the individual types of information was. This is that the compilation was made by the Tote, and not by Arena or TRP. Accordingly, he submitted that, if and in so far as the compilation constituted confidential information, then it was confidential to the Tote, and not to TRP or Arena, because it was the Tote which did the work of making the compilation.
76. I accept that it is possible that the Tote might have a claim to confidentiality in the compilation on that basis, but that does not detract from the claim of Arena/TRP as the parties in control of the constituents of the compilation. Counsel for SIS’s submission pre-supposes that the Tote had the right, as against Arena/TRP, to supply the Key Raceday Triggers to SIS; but the Tote did not have the right to supply Raceday Data which it collected for pool betting purposes for fixed-odds betting purposes, still less did the Tote have the right to supply additional data for the latter purposes. I will return to this point below.
77. In conclusion, I consider that each type of information in the Key Raceday Triggers was, during the relevant time frame, confidential information. Moreover, even if there

was doubt about any of the individual types, a compilation of such information was certainly confidential to Arena/TRP.

Issue 3: Were the Key Raceday Triggers imparted to SIS in circumstances importing an obligation of confidence?

78. SIS's second ground of appeal is that the Raceday Data were not imparted to SIS "in circumstances importing an obligation of confidence". For the reasons explained above, the correct question is whether the Key Raceday Triggers were so imparted.
79. So far as the law is concerned, neither side took issue with the test that I derived from the authorities in *Primary Group (UK) Ltd v Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch), [2014] RPC 26 at [223], which was approved by this Court in *Matalia v Warwickshire County Council* [2017] EWCA Civ 991, [2017] ECC 25 at [46] and referred to by the judge at [135]:

"It follows from the statements of principle I have quoted above that an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that that is the case, but also where confidential information is acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient."

Thus the issue between the parties is not as to the law, but its application to the facts of this case.

80. Before considering the judge's reasoning and SIS's criticisms of that reasoning, it is necessary to be clear about what information SIS obtained from the Tote. I do not understand it to be in dispute that, on the judge's findings, SIS obtained all of the information comprised in the Key Raceday Triggers. As discussed above, some of this was information which the Tote collected and distributed for pool betting purposes in the Tote feed, but some of it was additional information.
81. Although the judge made a clear finding at [207]-[209] that the Tote had supplied additional information to SIS, he did not specify what the additional information consisted of. Having regard to the arguments on the appeal, however, it is desirable to be more precise about this.
82. The judge referred to two important documents in this passage. The first is a document sent by Jimmy Hanlon of SIS to John DeAbaitua of the Tote on 7 October 2016 setting out "Race Day Data Required". As the judge explained at [206(iii)], the various items of information were colour-coded: green (for those already in the Tote feed), amber (for those which would need to be telephoned through) and red (not currently available). Just one item is coloured red, but two-thirds of the items (20) are coloured amber and only one-third (10) are coloured green.

83. The second is a SIS document referred to as “the operations manual”. The judge described the operations manual at [207] as follows:

“... a document setting out what should be done by the SIS employees who attended the Tote's premises in Wigan for the purposes of providing information to SIS's traders that was not within the Tote feed. This was a document which Mr Ames said dated from around January 2017. It is the best evidence of what information was actually provided by the Tote to SIS (as opposed to what was potentially to be provided according to documents created during the negotiations with the Tote during the latter part of 2016).”

84. As the judge recorded at [207], SIS's witness Richard Ames, who had (re)joined SIS as interim Product Director at the end of November 2016, was cross-examined on this document and admitted that “the feed [from SIS to bookmakers] required not just the information in appendix 2 but a vast array of other information which is also needed but was not provided as part of the Tote data”.

85. On the basis of this evidence the judge found at [209] that some of the information referred to in the operations manual and supplied by the Tote to SIS was additional to both (i) the items specified in Appendix 2 to the Tote HoT (which the judge set out at [39] and comprised 13 items, six of which were explicitly identified as “Pool” data) and (ii) the items coloured green on the document dated 7 October 2016 i.e. the information contained in the Tote feed. It follows from the judge's findings that the additional information comprised all of the items coloured amber in the 7 October 2016 document. Thus the additional information included items such as “OFF (Actual time race starts)”, “Official Off time”, “Stewards Enquiry or Objection called” and “Outcome of stewards Enquiry or Objection”, which fell within the definition of the Key Raceday Triggers. (There might be room for argument as to whether the judge was correct about “OFF (Actual time race starts)” given that Appendix 2 included an item described as “Totepool Pool OFF (Actual Pool off time)”, but I see no such doubt about the other items.)

86. The judge's approach to the present issue was first to consider at [155]-[167] whether the confidential information was imparted to the Tote in circumstances importing an obligation of confidence. He concluded that it was. His reasoning in summary was that a reasonable person in the Tote's position (i) would have known of the steps taken by Arena and TRP to preserve confidentiality in Raceday Data for fixed-odds betting purposes, (ii) would appreciate that the Tote acquired Raceday Data for the purposes of pool betting and thus (iii) would appreciate that the Tote could not use Raceday Data for fixed-odds betting purposes.

87. The judge made three points in this context at [157] which are of some importance for the arguments on the appeal:

“... First, the absence of a contractual restriction on the Tote is not determinative of the question. Indeed, the equitable obligation of confidence is of practical relevance precisely because there is no contractual restriction. Second, I do not think it makes any difference that the Tote is allowed on to the Arena Racecourses in order to collect the information, as opposed to the information being provided

to it by Arena. In either case it is information over which Arena asserts control and decides to whom it should be made available. Third, the fact that the Tote was lawfully permitted to collect Raceday Data and use it for one purpose (pool betting) does not in itself mean that the information cannot have been acquired by it in circumstances importing an obligation of confidence. It is perfectly possible that where A provides information to B knowing and intending that it be used by B for a specific purpose, the circumstances may be such that B ought to have been aware that it was otherwise confidential and thus could not be exploited by B for its own purposes. ...”

88. Although he did not say so in terms, it is clear from what he said later in this paragraph that the judge saw the present case as analogous to *Saltman v Campbell*, where the defendants got the drawings “for a strictly limited purpose” (in Lord Greene MR’s words at 216), and therefore were bound by an obligation of confidence not to use the drawings for other purposes. As was explained in that case, this is unaffected by the absence of a contractual restriction.
89. Although the judge’s conclusion with respect to the Tote is not directly challenged by SIS, counsel for SIS appeared to question it at points in his submissions. In my judgment, however, the judge was correct for the reasons he gave.
90. The judge then turned to consider whether SIS knew or should have appreciated that the information was confidential. His approach to this question was first carefully to consider at [168]-[182] the evidence as to what the Tote actually knew during the period from July to December 2016. I shall have to return to aspects of this later, but for the moment it is convenient to proceed directly to his findings:
  - “183. In light of the above evidence, the most significant hurdle facing SIS, in relation to the second of the *Coco v A.N. Clark* requirements, is that it knew essentially the same information that was known to the Tote, on the basis of which I have concluded that a reasonable person in the position of the Tote would have appreciated that the information was acquired by them in circumstances which imported an obligation of confidence.
  184. Thus SIS knew: (1) that Arena imposed restrictions on the use of Raceday Data upon all attendees; (2) that Arena had granted exclusive rights to exploit Raceday Data for fixed-odds betting purposes to TRP; (3) that there was considerable commercial value in being able to disseminate Raceday Data to off-course bookmakers as soon as possible, and that the exclusivity given to TRP was in order that TRP and Arena could exploit that value; (4) that the Tote had no contractual arrangement with Arena regulating its entitlement to collect, or sub-licence to others, Raceday Data; and (5) while the Tote had the right to be on the Arena Racecourses, that had only ever in fact been exercised for the purposes of pool betting.
  185. In addition SIS was also aware that its own agreement with Arena [had] granted it the exclusive right to collect and distribute Raceday Data. I infer that any reasonable person in SIS’s position would

appreciate that the rights which TRP had been granted were similarly exclusive, even if SIS had not appreciated the significance of the press release from TRP in September 2016 which made express reference to that fact.”

91. Pausing there, it is important to note that, as counsel for TRP submitted, the list of the matters that SIS knew which the judge set out at [184]-[185] is incomplete. It represents what SIS knew as at late December 2016. On the judge’s findings at [207]-[209], however, SIS knew more than that by some time in January 2017. For the reasons explained above, by then, SIS knew that the Raceday Data being supplied to it by the Tote was (i) additional to that supplied as part of the Tote feed for pool betting purposes and (ii) additional to that specified in Appendix 2 to the Tote HoT.
92. Having made the findings set out above, the judge then proceeded to consider the impact on SIS of assurances which, the judge found at [174]-[177], SIS had sought and obtained from the Tote during September and October 2016 that the Tote had the right to provide Raceday Data to SIS. Although at least one member of SIS’s management team had previously thought that the Tote had contractual rights to supply Raceday Data, by 29 November 2016 SIS’s Chief Executive Officer Gary Smith knew that was not so. The judge found:
- “178. ... Following a discussion he had with Mr Siers and Mr Scanlon of the Tote on that date, Mr Smith relayed to his colleagues (including Mr Witten, Ms Coulson and Mr Ames) the contents of his conversation about the provision of Tote Raceday Data for Arena courses, saying:
- ‘I know that Paul and Rachel have already been researching this and have already had discussions with Phil Siers. I have been rather pessimistic about the opportunity so far because of the perceived legal risk. After talking it through with Joe and Phil today I am somewhat more comfortable because they are offering us Tote data (“Tote Off”; “Tote results”; “Tote Non-Runners”) and are not offering official race-day data. Apparently the Tote versions are usually very similar or the same as the official data but there are some minor differences ... They are also taking into account there are no detailed contracts in place between racecourses and the Tote, probably because of its roots as a government franchise. Please can we schedule some time to discuss this to decide whether to proceed?’
179. This email demonstrates that Mr Smith (like his SIS colleagues) had initially had concerns, that he recognised enquiries should be made in relation to them, and that having made those enquiries of Mr Siers and Mr Scanlon he was sufficiently comfortable to proceed with the transaction.
180. The assurances that had been received from Mr Siers were formalised in the Tote HoT, negotiated and signed at the end of December 2016. Mr Ames, who had re-joined SIS as interim Product Director at the end of November 2016, was deputed to lead the negotiations with the

Tote over the Tote HoT. SIS's legal department were involved in the drafting of the Tote HoT.

181. By clause 3.2 of the Tote HoT the Tote warranted that:-

- '(a) it has (and so far as it is reasonable aware, will continue to have during the Term) save to the extent that it has notified SIS that it no longer has any of the underlying rights) all necessary rights from any and all third parties and the power and full authority to grant the Rights to SIS in relation to all Events from the Tracks and for SIS to lawfully receive, access and use the data contained in the Race Day Data Feed as permitted under these HOT.
- (b) use of the Race Day Data Feed by SIS in connection with the performance of each party's obligations and/or exercise of their rights under these HOT will not breach any third party rights, including any Intellectual Property Rights (as defined in clause 3.5 below) of any third party.'

182. By clause 3.3, the Tote granted an indemnity to SIS for any loss arising out of a breach of the warranties in clause 3.2. By clause 3.4 the indemnity was limited to the sums actually paid by SIS under the Tote HoT."

93. As the judge explained at [39], by clause 1.1 of the Tote HoT the Tote was required to deliver to SIS a data feed defined as the "Race Day Data Feed" containing the data listed in Appendix 2 to the Tote HoT. Thus the warranties and indemnities in clause 3.2 and 3.3 applied to the information specified in Appendix 2.

94. Against that background, the judge reasoned as follows:

"186. In these circumstances, I consider that the crucial factor, in determining what a reasonable person in SIS's position (as opposed to the Tote's position) would have understood, is that SIS received assurances from the Tote that it had the right to provide Raceday Data to SIS: would a reasonable person in the position of SIS, having received these assurances, have understood that the Tote was free to use (and pass on) Raceday Data for purposes unconnected with pool betting?

187. In my judgment, the answer to this question is no. It is important to pay close consideration to the details of the assurances given. As I have already explained, Mr Smith, as of 29 November 2016, knew that the Tote did not claim a contractual basis for its rights to use the information. Had the basis of the Tote's rights been contractual, then it would be difficult to argue that SIS's reliance on an assurance by the Tote that it could lawfully provide the Raceday Data was unreasonable. Instead, Mr Smith knew that the Tote was relying solely on its 'roots as a government franchise'. I conclude that a reasonable person, knowing the matters I have identified above in paragraph 184,

would have appreciated that it was highly unlikely that the Tote's roots as a government franchise, for the purpose of pool betting, would have enabled it to circumvent the commercial confidentiality which Arena imposed on Raceday Data so that it could exploit the value in it in connection with fixed-odds betting. With such an appreciation, a reasonable person would have sought assurances from Arena itself before proceeding to take Raceday Data from the Tote.

188. Accordingly, I conclude that a reasonable person in the position of SIS would have appreciated that the Tote acquired the information in circumstances imposing obligations of confidence, which would be breached by use of that information otherwise than by the Tote for the limited purpose of pool betting. The second of the *Coco v A.N. Clark* requirements is therefore satisfied.”
95. Counsel for SIS submitted that this reasoning was flawed for two main reasons. First, the judge asked himself the wrong question at [186]. The starting point was that parties were free to receive information and pass it on to others unless some lawful restriction prevented them from doing so. A recipient of information would only be fixed with an equitable obligation of confidence if it had notice, objectively assessed, that the information was confidential. Thus the question the judge should have asked himself was whether SIS had had notice that the Raceday Data which it obtained from the Tote (or, more specifically, the Key Raceday Triggers) was confidential to Arena and/or TRP. Secondly, and in any event, SIS had acted entirely reasonably in relying upon the assurances, warranties and indemnities it had received from the Tote as the supplier of the information. The judge, counsel submitted, had held SIS to far too high a standard.
96. While I acknowledge that these submissions have some force, I am not persuaded by them. So far as the first submission is concerned, while I accept that, read in isolation, what the judge says at [186] appears to suggest that he was looking at the matter the wrong way round, I do not think this does justice to the judge's process of reasoning. As I have explained, by this stage in his judgment, the judge had already concluded that (i) the Tote was bound by an equitable obligation of confidence and (ii) SIS knew essentially the same facts that were known to the Tote. *Prima facie*, that would lead to the conclusion that SIS was also bound by an obligation of confidence. Thus it is understandable that the judge asked himself whether the assurances which SIS had received from the Tote made any difference. I am not satisfied that this demonstrates any error of principle on the part of the judge.
97. As to the second submission, I agree with the judge's statement at [187] that it is important to pay close attention to the details of the assurances given. Although counsel for SIS relied upon evidence concerning discussions between SIS and the Tote earlier in 2016, these do not assist SIS because SIS had acquired further information by late November 2016, and in particular it had learnt that the Tote had no contractual right to collect and distribute Raceday Data at the Arena Racecourses.
98. I acknowledge that, as the judge found, SIS was not aware of any contractual prohibition upon the Tote supplying it with Raceday Data, and in particular the Key Raceday Triggers, because there was no such contractual prohibition. Given knowledge of all the facts known to SIS which the judge set out at [184]-[185],



however, a reasonable person standing in the shoes of SIS would appreciate that the absence of a contractual prohibition could not be equated with a right to supply the information. Otherwise, the exclusivity which both SIS and TRP had paid good money for would have been non-existent.

99. A point which I would emphasise is that the judge did not merely find that SIS was not aware of any contractual *prohibition* upon the Tote supplying it with Raceday Data, and in particular the Key Raceday Triggers. What the judge found at [184] was that “SIS knew ... (4) the Tote had no contractual arrangement with Arena regulating its entitlement to collect, or sub-licence to others, Raceday Data”. Thus the judge found that SIS knew that the Tote had no contractual *entitlement* to supply it with Raceday Data, particularly for fixed-odds betting purposes. Thus I consider that the judge was correct to conclude that there was a precise parallel between this case and *Douglas v Hello!*. Mr Thorpe was not subject to any contractual prohibition either, but the Hello! defendants were perfectly well aware that that did not entitle him to supply them with the unauthorised photographs, because he had no contractual right to do so.
100. As the judge noted, it appears from the email quoted by the judge at [178] that SIS took comfort from the Tote’s “roots as a government franchise”. I agree with the judge that that should not have given SIS any comfort. As SIS must have been aware, the Tote had been privatised in 2011. Moreover, as SIS certainly knew, the Tote’s operations had hitherto been restricted to pool betting, but SIS wanted it to supply Raceday Data for fixed-odds betting. A reasonable person standing in the shoes of SIS would therefore appreciate that the Tote’s “roots as a government franchise” could not be sufficient to entitle it to supply Raceday Data, and in particular the Key Raceday Triggers, to SIS for fixed-odds betting purposes.
101. Accordingly, I do not accept that the judge held SIS to too high a standard. Contrary to the submission of counsel for SIS, the judge’s conclusion did not require SIS to have the legal knowledge and powers of analysis of a High Court Judge or even a majority of Law Lords. It simply rested upon his findings that SIS knew all of the facts which gave it notice that the Key Raceday Triggers were confidential to Arena/TRP.
102. Furthermore, the judge’s conclusion is reinforced by the following points. First, it can be seen from the 29 November 2016 email that Mr Smith felt reassured by the fact that what the Tote was offering was “Tote data (‘Tote Off’); ‘Tote results’; ‘Tote Non-runners’) and ... not ... official race-day data”. The reference to “Tote data” must mean the data which the Tote supplied as part of the Tote feed for pool betting purposes (hence the references in Appendix 2 to the Tote HoT to “Totepool Pool” data). But, as I have explained above, the judge found that the data which SIS obtained from the Tote went well beyond this. Secondly, the warranties and indemnities contained in clauses 3.2 and 3.3 of the Tote HoT were clearly intended to protect SIS against the eventuality that the Tote did *not* have the right to supply SIS with the Raceday Data listed in Appendix 2 to the HoT. They did not cancel out the knowledge that SIS had as to the Tote’s (lack of) entitlement to supply the data. Thirdly, in the event, the data which SIS obtained from the Tote exceeded even that specified in Appendix 2. SIS obtained no warranties or indemnities in respect of the additional data. Thus, even if SIS was not on notice that information comprised in the Key Raceday Triggers was confidential to TRP/Arena as at late December 2016, it was certainly on notice by some point in January 2017.

103. Accordingly, I consider that the judge was correct, at least from January 2017, to conclude that SIS became bound by an equitable obligation of confidence in respect of the Key Raceday Triggers. I would therefore dismiss SIS's appeal against the finding of misuse of confidential information, except that I would restrict the judge's order to the Key Raceday Triggers.

Issue 4: Must the defendant know that the unlawful means is unlawful in order to be liable for unlawful means conspiracy?

104. I now turn to TRP's appeal against the dismissal of its claim for conspiracy to injure by unlawful means. It was common ground at trial that liability in the tort of unlawful means conspiracy required at least the following: (i) a combination between two or more people, (ii) concerted action pursuant to that combination which is unlawful, (iii) an intention to injure the claimant (which need not be the predominant purpose, it being sufficient that the conspirators seek a benefit at the claimant's expense) and (iv) damage to the claimant. The judge held that each of these elements had been established by TRP.
105. The judge nevertheless dismissed TRP's claim because he held that: (1) a defendant will only be liable in unlawful means conspiracy, at least where the unlawful means involves an infringement of a private right, if both (a) the defendant and (b) at least one other conspirator knew that the means in question was unlawful; (2) the burden lay on the claimant to prove such knowledge; (3) SIS's breaches of the terms and conditions of the Exchanges, although knowing, did not constitute relevant unlawful means; and (4) on the facts neither SIS nor any of the other Conspirators had had the requisite knowledge that either the misuse of confidential information or (in the case of the other Conspirators) the breaches of the Exchanges' terms and conditions by SIS was unlawful. TRP challenges each of these conclusions.
106. The first question is whether the judge was correct to rule that a defendant will only be liable for unlawful means conspiracy if the defendant knew that the means was unlawful. TRP contends that he was wrong. This raises a thorny issue of law with which a number of first instance judges have had to grapple in recent years, reaching divergent conclusions.
107. Counsel for TRP relied upon a series of statements of high authority of the ingredients of the tort of conspiracy to injure by unlawful means which do not include any requirement of knowledge of unlawfulness as demonstrating that there is no such requirement. I will take these in chronological order.
108. In *Mogul Steamship Co v McGregor, Gow & Co* (1888) 21 QBD 544 Lord Coleridge CJ held at first instance at 549-550 (in a passage cited with approval in several subsequent cases):

“It is, therefore, no doubt necessary to consider the object of the combination as well as the means employed to effect the object, in order to determine the legality or illegality of the combination. And in this case it is clear that if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those

who formed it were misdemeanants and a person injured by their misdemeanour has an action in respect of his injury.”

109. When that case reached the House of Lords, Lord Watson stated [1892] AC 25 at 41-42:

“As the law is now settled, I apprehend that in order to substantiate their claim, the appellants must shew, either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution.”

110. In *Lonrho plc v Fayed* [1992] 1 AC 448 Lord Bridge of Harwich, with whom the other members of the panel agreed, reviewed a number of authorities (including, indirectly, *Mogul v McGregor*) and concluded at 465-466:

“Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.”

Counsel for TRP particularly emphasised the use of the word “sufficient” in the last sentence of this passage.

111. In *Kuwait Oil Tanker Co SAK v Al Bader* [2000] All ER 271 Nourse LJ delivering the judgment of the Court of Appeal held, relying upon (among other authorities) *Lonrho v Fayed*:

“108. ... A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means. ...

132. ... we reject the submission that the claimants were not entitled to claim damages for conspiracy, but we stress that that does not mean that their case must not be properly proved. That involves proving each of the elements in the tort, including the nature of the agreement, the unlawful means alleged, each unlawful act relied upon as causing loss and the fact that each such act was carried out pursuant to the conspiracy. ...”

112. In *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 Lord Hope of Craighead cited Lord Bridge’s statement of the law in *Lonrho v Fayed* with approval by at [39]. Lord Hope noted that no mention was made in that passage of a requirement that the unlawful means must be independently

actionable. The same goes for knowledge that the means are unlawful. Lord Walker of Gestingthorpe cited Lord Coleridge's statement of the law in *Mogul v McGregor* with approval at [69] and cited approvingly from Lord Bridge's speech in *Lonrho v Fayed*, albeit not the passage quoted above, at [83]-[84]. Lord Mance also referred approvingly to Lord Bridge's speech at [117].

113. *In JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2018] 2 WLR 1125 Lord Sumption and Lord Lloyd-Jones, with whom the other members of the panel agreed, again cited Lord Bridge's statement in *Lonrho v Fayed* with approval at [8]. They went on:

“9. Conspiracy is both a crime, now of limited ambit, and a tort. The essence of the crime is the agreement or understanding that the parties will act unlawfully, whether or not it is implemented. The overt acts done pursuant to it are relevant, if at all, only as evidence of the agreement or understanding. ... a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort. Secondly, it is clear that it is not a form of secondary liability, but a primary liability. ... Third, the fact of combination may alter the legal character and consequences of the overt acts. In particular, it may give rise to liability which would not attach to the overt acts in the absence of combination. This latter feature of the tort was what led Lord Wright in *Crofter* ... to say that it was ‘in the fact of the conspiracy that the unlawfulness resides.’ He was speaking of a lawful means conspiracy, but as Lord Hope of Craighead pointed out in *Revenue and Customs Comrs v Total Network SL* at para 44, the same applies to an unlawful means conspiracy, at any rate where the means used, while not predominantly intended to injure the claimant, were directed against him. There is clearly much force in his observation at para 41 that if a lawful means conspiracy is actionable on proof of a predominant intention to injure, ‘harm caused by a conspiracy where the means used were unlawful would seem no loss in need of a remedy’.

10. What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse ... A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some

legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse *for the combination*.

11. Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. ...”
114. As counsel for TRP submitted, this reasoning suggests that knowledge of the unlawfulness of the means used is not a requirement of the tort. As counsel for SIS pointed out, however, the question of knowledge of the unlawfulness is not directly addressed, any more than it is in the other authorities cited above.
115. I therefore turn to consider three authorities in which the question of knowledge has been considered. The first is the decision of the Court of Appeal in *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504. In that case Mr Doherty had been employed by the plaintiffs for many years, and thus had knowledge of a secret process they used for moulding plastics. Having left the plaintiffs’ employment in 1932, Mr Doherty approached the defendant company in 1934. At an interview with Mr Ferguson and Mr Welch of the defendant company, Mr Doherty said that he had a process which was his own, which he was free to use and which he did not think infringed any patents. Messrs Ferguson and Welch suspected that Mr Doherty’s process was the plaintiffs’ secret process, or part of it. Mr Ferguson arranged for Mr Doherty to see the company’s patent agents with a view to getting their advice as to whether Mr Doherty’s process was patentable. The judge found that, in a muddle-headed way, Messrs Ferguson and Welch thought that, if the process was patentable, it would for that very reason not be confidential to the plaintiffs, but open to Mr Doherty to use. The patent agents reported that the process was patentable, and therefore the company hired Mr Doherty and used his process. In fact, the process was, at least substantially, the same as the plaintiffs’.
116. Porter J held that Mr Doherty was in breach of an implied term of his contract of employment that he should not disclose the plaintiffs’ secrets, but dismissed claims by the plaintiffs against Mr Ferguson and the defendant company for (i) inducing breach of contract and (ii) conspiracy on the ground that they had acted bona fide. Finlay LJ in the Court of Appeal quoted the key part of the judgment below at 515F:

“If this was the state of their mind, what is the legal result? It was not argued before me, and indeed I do not think it could have been argued, that the defendant company were liable for inducement, or that the defendant company and Doherty were liable for conspiracy, unless those acting on behalf of the defendant company had a fraudulent mind—that is to say, intended to get, or suspected they would get, a process which was secret. I think that those persons were both negligent and muddle-headed, but I do not find that their mind was

fraudulent. In these circumstances, the case against them fails, and with it any claim against Doherty for conspiracy.”

117. The Court of Appeal and the House of Lords dismissed successive appeals by the plaintiffs. It appears from the report of the argument and from the judgments in the Court of Appeal that, consistently with how the case appears to have been argued at first instance, the plaintiffs relied primarily on inducing breach of contract and secondarily upon conspiracy, and did not differentiate between the states of mind required for the two torts. Nor did the defendants differentiate between the two torts in this respect. Counsel for the defendants did stress, however, that there could not be an inducement of a breach of contract “unless a man acts knowingly and intentionally” (see 506C).
118. Slesser LJ considered the claim for inducing breach of contract at some length from 508H to 511H, and concluded that, on the judge’s findings of fact, the defendants had not induced Mr Doherty to breach his contract knowingly or intentionally. He dealt briefly with the conspiracy claim at 511H to 512B, saying that it was “entirely a question of fact” and that the defendants had not acted “wilfully”.
119. MacKinnon LJ said at 513A that “the same considerations apply to either form of claim”. He went on at 513H to say that whether Mr Ferguson had acted knowingly and intentionally, or honestly but stupidly, was a pure question of fact, and that it was not possible for the Court of Appeal to differ from the judge’s finding of fact.
120. Finlay LJ said at 514D that the two causes of action had been regarded in the court below as standing or falling together, and that this view was in his opinion correct. He went on:

“The essence of conspiracy is the co-operation of the minds of the conspirators in pursuance of the unlawful design. A person could never be liable for conspiracy, either in a civil or in a criminal court, if he had no knowledge that the design was unlawful, and the essence of the action for inducing a breach of contract is knowledge on the part of the defendant. There never could be liability for that tort unless it was shown that the defendant knew that there was a contract, and, having that knowledge, induced its breach.”

As counsel for TRP pointed out, Finlay LJ cited no authority for this statement of the law.

121. In the House of Lords [1940] 1 All ER 479 the only cause of action discussed in the speeches is inducing breach of contract. It is not possible to tell whether this is because that was the only one which was pursued on the appeal, or because it was common ground that conspiracy added nothing.
122. The upshot, in my judgment, is that the judgment of Finlay LJ is persuasive authority that knowledge of the unlawfulness is required for unlawful means conspiracy; but the case is not binding authority for that proposition because the point was not in issue and all the judgments treated the claim for unlawful means conspiracy as standing or falling with the claim for inducing breach of contract.

123. The second case is *Churchill v Walton* [1967] 2 AC 224. The appellant was employed as a book-keeper by a company which, with an associated company, sold a quantity of diesel oil for road transport purposes. When so used, the oil was known as “Derv” and attracted duty at 2s. 9d. a gallon. The same substance, when used as “gas oil” for stationary plant or heating installations, had a red dye added to it and the rate of duty was 2d. a gallon. The companies sold a quantity of gas oil without the red dye as Derv, but did not pay the extra duty. The appellant was charged with two counts. Count 1 was that the appellant had conspired with others to cheat and defraud the Revenue of the extra duty. Count 2 was conspiracy to contravene section 200(2) of the Customs and Excise Act 1952, which prohibited the use of diesel oil as fuel for a vehicle unless the correct duty had been paid, and breach of which was made a criminal offence by section 33 of the Finance Act 1953. The jury acquitted the appellant of count 1, but convicted him on count 2. The judge had directed the jury that they should convict the appellant on count 2 if he was party to an arrangement to use fuel in road vehicles which was (albeit without his knowledge) prohibited by section 220(2) because it had not been fully taxed as Derv. The appellant’s appeal to the Court of Criminal Appeal was dismissed, but his appeal to the House of Lords was allowed.
124. Having noted at 231 that section 220(2) did not require proof of any special intent or knowledge that use of the oil as fuel for a vehicle was unlawful, Viscount Dilhorne, with whom the other members of the panel agreed, stated at 233A-C:

“The use of gas oil in road vehicles only contravenes section 200(2) if a rebate has been allowed on it and the amount of the rebate has not been refunded. An agreement to use in road vehicles gas oil on which a rebate has been allowed is not, therefore, per se an agreement to do an unlawful act, but it will be an agreement to do an unlawful act if the object of the agreement is so to use gas oil in respect of which no repayment has been made. An agreement which is not to do an unlawful act will not be converted into an agreement to do an unlawful act by the fact that, unknown to the accused, gas oil is used in respect of which the required repayment has not been made.”

125. He went on at 237C-F:

“In answer to the question posed by the Court of Criminal Appeal in this case, I would say that mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed.

In cases of this kind, it is desirable to avoid the use of the phrase ‘mens rea,’ which is capable of different meanings, and to concentrate on the terms or effect of the agreement made by the alleged conspirators. The question is, ‘What did they agree to do?’ If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realise that such

an act was a crime. If, on the facts known to them, what they agreed to do was lawful, they are not rendered artificially guilty by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed upon.”

126. In my judgment the ratio of this decision is that, in order to establish a criminal conspiracy to do an unlawful act, it is necessary to show that the accused had knowledge of the facts which made the act unlawful; but knowledge of the law on the part of the accused is not required. This conclusion does not, as I read the judgment, depend on the fact that section 220(2) and section 33 created an offence of strict liability. The decision contradicts Finlay LJ's statement of the law quoted above at least so far as criminal conspiracy is concerned.
127. The third case is *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. In that case Williams owned all the shares in City which in turn owned all the share in Belmont. Mr Grosscurth and his associates owned the shares in Maximum. They wanted to purchase Belmont in order to use its assets to finance some property development projects by other companies they owned. Accordingly, they agreed with Williams and City to sell Maximum to Belmont for £500,000 and to buy the share capital of Belmont from City for £489,000. There were also certain other terms of the transaction which are not essential for present purposes. None of the parties obtained an independent valuation of Maximum, but Mr Grosscurth obtained counsel's opinion that the proposed purchase of Maximum by Belmont would not contravene section 54(1) of the Companies Act 1948, which made it unlawful for a company to give any financial assistance for the purpose of a purchase by any person of shares in the company. Section 54(2) provided that, if a company contravened the section, the company and every officer who was in default would be liable to a fine. The opinion was shared with City.
128. Belmont subsequently went into liquidation with substantial debts. Belmont's receiver obtained an independent valuation suggesting that Maximum was only worth £60,000 at the date of the transaction, and brought an action against Williams, City and Mr Grosscurth for (among other claims) conspiracy to use unlawful means. At trial the chairman of Williams, City and Belmont, Mr James, gave evidence that he believed that buying Maximum for £500,000 was a good commercial proposition for Belmont because they were buying Mr Grosscurth's ability to make money. Foster J accepted that evidence and dismissed the claims. The Court of Appeal allowed Belmont's appeal. The Court held that the transaction contravened section 54 even if £500,000 was a fair price for Maximum, because it was not a commercial transaction in its own right, but merely part of a scheme to enable Mr Grosscurth and his associates to acquire Belmont at no cash cost to themselves, was not a transaction in the ordinary course of Belmont's business and did not enable Belmont to acquire anything which it genuinely needed for its own purposes. The fact that Maximum was actually worth only £60,000 merely reinforced this conclusion.
129. The Court went on to hold that, having regard to the fact that, as a director of both companies, Mr James' knowledge of the objects of the agreement was to be imputed to Williams and City, the claim of conspiracy had been established against the defendants because (a) they had combined to participate in a common intention to enter into the transaction, to procure that Belmont entered into it, and then to ensure that it was implemented, (b) that combination had been to effect an unlawful purpose,



namely the provision of financial assistance to Mr Grosscurth and his associates to acquire Belmont using money provided by Belmont, in contravention of section 54, and (c) that had resulted in damage to Belmont.

130. Buckley LJ held at 404h-405b that the defendants were not exempted from liability on account of counsel's opinion or because they might have believed in good faith that the transaction did not contravene section 54 for the following reasons:

“If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them: see *Churchill v Walton* ([1967] 1 All ER 497 at 503, [1967] 2 AC 224 at 237). That case was one of criminal conspiracy, but it seems to me that precisely similar principles must apply to a conspiracy for which a civil remedy is sought. Nor, in my opinion, can the fact that their ignorance of, or failure to appreciate, the unlawful nature of the transaction was due to the unfortunate fact that they were, as I think, erroneously advised excuse them (*Cooper v Simmons* (1862) 7 H & N 707), and see *Shaw v Director of Public Prosecutions* [1961] 2 All ER 446, [1962] AC 220, where the appellant had taken professional legal advice).

If they had sincerely believed in a factual state of affairs which, if true, would have made their actions legal, this would have afforded a defence (*Kamara v Director of Public Prosecutions* ([1973] 2 All ER 1242 at 1252, [1974] AC 104 at 119)); but on my view of the effect of s 54 in the present case, even if £500,000 had been a fair price for the share capital of Maximum and all other benefits under the agreement, this would not have made the agreement legal. So a belief in the fairness of the price could not excuse them.

131. Goff LJ agreed with Buckley LJ. Waller LJ also agreed, but added at 414h-415a:

“The next question is whether or not the defendants were guilty of conspiracy. A conspiracy is an agreement between two or more persons to effect an unlawful purpose which results in damage to somebody (see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* ([1942] 1 All ER 142 at 147, [1942] AC 435 at 440) per Viscount Simon LC). A person is a party to a conspiracy if he knows the essential facts to constitute that conspiracy even though he does not know that they constitute an offence (see *Churchill v Walton* [1967] 1 All ER 497, [1967] 2 AC 244). Since there was a breach of s 54 and the defendants through their directors made all the arrangements and knew all the facts constituting the breach, it would follow that they conspired together to contravene s 54, the object of their conspiracy being Belmont, and if Belmont suffered damage they are liable.”

132. As in *Churchill v Walton*, the offence created by section 54 was one of strict liability. It does not appear to me, however, that the Court of Appeal's reasoning turned on this. Nor does it appear to me that it turned on the fact that section 54 created a criminal offence (as opposed to a civil wrong, as in *British Industrial Plastics v Ferguson*): I cannot find any reference to this in the judgments.

133. *British Industrial Plastics v Ferguson* was not referred to in the judgments, nor was it cited in argument. Counsel for SIS submitted that *Belmont v Williams* was therefore decided *per incuriam*, while counsel for TRP disputed this. The tension between the two is something that a number of first instance judgments have wrestled with. In this Court, this is a somewhat arid dispute given that, if the two are in conflict, we are entitled and bound to choose between them: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. Nevertheless, given my analysis of *British Industrial Plastics v Ferguson*, I do not consider that *Belmont v Williams* was decided *per incuriam*. It follows that it is authority binding on this Court that knowledge of the unlawfulness is not required for unlawful means conspiracy.
134. In any event, it seems to me to be plain that *Belmont v Williams* is the stronger authority given that the point was in issue and given the intervening decision in *Churchill v Walton*. Although *Churchill v Walton* was, as discussed above, a case concerning criminal conspiracy, and therefore is not binding in a case concerning the civil tort of conspiracy to injure by unlawful means, it is highly persuasive unless there is some relevant distinction between the two. I do not see that there is any relevant distinction. Indeed, it would be surprising if the law imposed a higher threshold of knowledge in civil cases than in criminal ones. Since *British Industrial Plastics v Ferguson*, *Churchill v Walton* and *Belmont v Williams* all concerned wrongs of strict liability, there is no distinction between the three cases in that regard. In any event, it is not clear to me why the test for liability for unlawful means conspiracy should depend on whether the underlying unlawfulness involves strict liability or a mental element given that unlawful means conspiracy is a form of primary, not accessory, liability.
135. Finally on the authorities cited in argument, I should mention *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244. In that case Britel, as freeholder of a block of flats which was registered land, granted a lease of the rooftop space to ACP to use it for the construction of penthouses in accordance with an agreed timetable pursuant to a “preliminary” agreement. ACP undertook to give Britel a share of the proceeds of sale of the penthouses and a “leaseback option” whereby Britel would be entitled to require ACP to grant it a sublease of those parts of the demised property which ACP had failed to develop in accordance with the agreed timetable. First Penthouse, the parent company of ACP, guaranteed ACP’s obligations under the agreement. ACP entered into an “introduction” agreement with Meretz, a sister company of Britel, to pay it part of the profits of the development as commission and charged the development lease to Meretz to secure the commission. First Penthouse provided funding for the development, and ACP also charged the development lease to First Penthouse to secure debts owed to it in connection with the funding. In due course First Penthouse exercised its power as mortgagee to sell the development lease to another defendant, with the result that ACP and First Penthouse were in breach of their contractual obligations under, respectively, the preliminary agreement and the guarantee. Meretz and Britel brought claims against ACP and First Penthouse for breach of contract in, *inter alia*, failing to complete the project within the timetable and failing to perform the leaseback option, and against all the defendants for the torts of inducing breach of contract and conspiracy to injure by unlawful means. Lewison J (as he then was) dismissed the tortious claims and an appeal by the claimants to this Court was dismissed on the ground that the defendants had not had the requisite intention for either tort.

136. Arden LJ gave the principal judgment. She dealt with inducing breach of contract at [111]-[143] and unlawful means conspiracy at [144]-[146]. In the former context she referred in passing at [114] to the House of Lords' decision in *British Industrial Plastics v Ferguson*, which was cited in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [39]-[41] (Lord Hoffmann). She referred to *Belmont v Williams* at [118] before repeating what she had said in *Mainstream Properties Ltd v Young* [2005] EWCA Civ 760, [2005] IRLR 964 at [84]-[85]. She did not address the present issue, however, and still less did she consider the tension between the Court of Appeal decisions in *British Industrial Plastics v Ferguson* and *Belmont v Williams*.

137. Toulson LJ gave a concurring judgment in which he said at [174]:

“Although my conclusion on the issue of unlawful means makes it unnecessary to decide the point, I would support Arden LJ’s view, at para 127, that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did. Just as the tort of conspiracy to induce breach of contract is not committed if the defendant believes that the outcome sought by him will not involve a breach of contract (the *Mainstream* case [2005] IRLR 964), so a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing. This is consistent with Lord Hoffmann’s comment in the *OBG* case [2008] 1 AC 1, para 56, when considering the tort of causing injury by unlawful means, that the common law in this area is designed only to enforce basic standards of civilised behaviour. Moreover, Lord Nicholls was not addressing such a situation in the passage set out at para 125 above. (I would note two supplementary points. First, for avoidance of doubt, I do not consider that this conclusion is inconsistent with the decision of the House of Lords in *R v Churchill (No 2)* [1967] 2 AC 224, which concerned a very different issue, namely, the mens rea element of the crime of conspiracy in the context of an agreement which led to the commission of a strict liability offence. Secondly, we are not in this case concerned with the alternative form of conspiracy to injure, where the intent to injure is the defendant's dominant intention and questions of the lawfulness of the means do not arise.) I would also concur with Arden LJ’s conclusions about intent on the evidence before the judge.”

138. I note the following points about this passage. First, it is explicitly obiter. Secondly, the reference to Arden LJ’s judgment is to a passage dealing with inducing breach of contract, not conspiracy. Thirdly, Toulson LJ is not addressing knowledge, but intention. Fourthly, neither *British Industrial Plastics v Ferguson* nor *Belmont v Williams* is referred to.

139. Accordingly, the conclusion I draw from the authorities is that, having regard both to the general statements of the ingredients of the tort which do not include any requirement of knowledge of unlawfulness, and to the persuasive force, even if not binding status, of *Churchill v Walton* and *Belmont v Williams*, knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy.

140. Counsel for SIS argued, and the judge accepted, that, as a matter of principle, knowledge of the unlawfulness should be required. I acknowledge that there are good arguments in support of that conclusion, but nevertheless I am not persuaded by them. Given the conclusion I have reached above, I will confine myself to a brief consideration of what I see as being the three main points.
141. The first is that the tort of conspiracy to injure by unlawful means would otherwise be a tort of very broad reach, in particular because a predominant intention to injure the claimant is not required, and it is sufficient that the defendant intends to advance his own economic interests at the expense of those of the claimant. Accordingly, counsel for SIS argued, limits are required to keep it within acceptable bounds. I am sympathetic to the proposition that the tort should be kept within bounds, but it does not necessarily follow that requiring knowledge of the unlawfulness of the unlawful means is an appropriate limit. I see very little support for such a limit in the appellate authorities. The judge was impressed by Lord Hoffmann's point in *OBG v Allan*, relied upon Toulson LJ in *Meretz*, that "the common law in this area is designed only to enforce basic standards of civilised behaviour", but it is commonplace for the common law, equity and statute to impose liability without requiring knowledge of unlawfulness. Ignorance of the law is generally no defence either in crime or in the civil law. That proposition is not, I accept, an absolute one, but exceptions to it are infrequent. I am not convinced that an exception is justified here given that what the authorities do require is that the defendant should have knowledge of all of the facts which make the means unlawful.
142. The second point is that otherwise the tort of inducing breach of contract would be rendered redundant. It is now clearly established that this requires knowledge on the part of the defendant that he is inducing an act which is a breach of contract: see in particular *OBG v Allan* at [39]-[41] (Lord Hoffmann). Counsel for SIS argued that almost all cases of inducing breach of contract could be reframed as conspiracy to injure by unlawful means, and it could not be right to require knowledge of unlawfulness for the former tort but not for the latter. I do not accept this argument. In *OBG v Allan* Lord Hoffmann was at pains to differentiate between the economic torts, and in particular the tort of inducing breach of contract and the tort of causing loss by unlawful means, and to debunk the unified theory adopted in some previous cases. He pointed out at [8] that the tort of causing loss by unlawful means differed from that of inducing breach of contract in at least four respects, one of which concerned the intention required. Much of what he said there seems to me to be equally applicable to unlawful means conspiracy. Lord Nicholls of Birkenhead also contrasted the two torts at [194]. Furthermore, in *BTA v Ablyazov* Lord Sumption and Lord Lloyd-Jones cautioned at [6] that it was "dangerous to assume" that common elements of the economic torts, "notably intention and unlawful means", "have the same content in each context".
143. The third point is that knowledge of unlawfulness should be required if the unlawful means consists of an infringement of private law rights, even if it is not required where it consists of a crime or contravention of a regulatory provision imposed for public benefit. This receives a degree of support from the observations of Lord Sumption and Lord Lloyd-Jones in *Ablyazov* at [15] to the effect that breaches of private law rights raise different considerations to crimes. I am unable to see why this should make a difference so far as the present issue is concerned, however. As noted

above, both private law and the criminal law make some acts unlawful without proof of any mental element whatever. To my mind, it would be more logical to say that knowledge of the unlawfulness should be required where the unlawfulness of the means requires knowledge.

144. For the reasons given above, I would respectfully conclude that the judge was wrong to conclude that knowledge that the means is unlawful is required in order for the tort of conspiring to injure by unlawful means to be established where the means is an infringement of a private right.

Issue 5: On whom does the burden of proving knowledge rest?

145. This issue only arises if I am wrong in the conclusion I have reached on issue 4. TRP contends that, even if knowledge that the means is unlawful is relevant, it operates by way of defence, so that the burden lies upon the defendant to prove that it did not know that the means were unlawful, rather than constituting an essential element of the tort, so that burden lies upon the claimant to prove that the defendant did know this. SIS disputes this. The judge held that the burden of proof lay on the claimant since knowledge of unlawfulness was an essential element of the tort.
146. TRP's contention receives some support from what Toulson LJ said in *Meretz* at [174] and from what Lord Sumption and Lord Lloyd-Jones said in *Ablyazov* at [10]. Moreover, I see intrinsic merit in the proposition that it should be a defence to a claim in unlawful means conspiracy for the defendant to prove that he believed that the means in question were lawful. Take the facts of *Belmont v Williams*: it seems quite harsh that the defendants were held liable even though they had obtained counsel's opinion that the transaction would not contravene section 54, although I acknowledge that they may have had a remedy in professional negligence. Accordingly, if it were open to this Court to do so, I would hold that it is a defence to a claim in unlawful means conspiracy for the defendant to prove that they believed that the means were lawful. I would stress, however, that this would require the defendant to establish a positive belief: it should not be sufficient, in my opinion, for the defendant merely to establish that they gave the matter no thought.

Issue 6: Can a defendant be liable for unlawful means conspiracy if its co-conspirators do not know that the means is unlawful?

147. The judge held at [293] that "it is an essential ingredient in the tort of conspiracy to injure by unlawful means that at least one other of the alleged conspirators shared with the defendant the knowledge as to the unlawfulness of the relevant conduct". Counsel for TRP submitted that this was simply illogical: either all of the conspirators had to have such knowledge, or none. Counsel for SIS submitted that, if there was a conspiracy involving three or more persons, then only those persons who had such knowledge would be liable. This is not quite the same as what the judge held: on the judge's formulation, a conspiracy of three requires two to have the knowledge, but not the third, whereas on counsel for SIS's formulation one conspirator out of three could be liable if only that person had the knowledge. If knowledge of the unlawfulness is an essential ingredient of the tort, it seems to me to follow that each of the alleged conspirators must have had that knowledge in order to be liable, although I would accept that the involvement of additional parties who did not have the knowledge

would be immaterial. If, however, belief in lawfulness operates as a defence, then it would be for each conspirator to prove that defence.

Issue 7: Did SIS's breaches of the Exchanges' terms and conditions constitute relevant unlawful means?

148. As noted above, SIS admitted that, during January and February 2017, it had knowingly breached the express terms and conditions of the Exchanges by taking pricing information available on the Exchanges and using it to create Betting Shows. To that extent, therefore, SIS admitted use of unlawful means. The judge held that this did not constitute relevant unlawful means for the purpose of unlawful means conspiracy for reasons he expressed at [251] as follows:

“... I do not see how the breach of the exchanges' terms and conditions can be described as directed at the claimants, or the instrumentality of the harm caused to them. While (assuming all other elements of the tort are present) the use of the prices on the exchanges' websites is the means by which SIS was able to publish its own prices and thus compete with TRP, the *unlawfulness* involved in that conduct was directed solely at the exchanges. The exchanges' terms and conditions were there solely for the exchanges' benefit, and the only persons damaged by the breach of those terms were the exchanges. From the point of view of the claimants, it was irrelevant whether SIS's use of the exchanges' prices was done by agreement with the exchanges (which would no doubt have involved payment of a fee) or not.”

149. TRP accepts that it must establish that the unlawful means in question was the “instrumentality” by which it was harmed, but contends that the judge was wrong to hold that SIS's breaches of the Exchanges' terms and conditions did not satisfy this test.

150. In approaching this issue, it is important to put on one side a different question which is discussed in the authorities and which has sometimes confused discussion of the requirement of “instrumentality”. In some circumstances, statute may impliedly exclude a remedy in unlawful means conspiracy (just as it may impliedly exclude a remedy in unjust enrichment: see *Lone v London Borough of Hounslow* [2019] EWCA Civ 2206, [2019] 1 WLR 952 at [51]-[56]). For example, the Patents Act 1977 confers rights of action against infringers on patentees and their exclusive licensees; it does not confer a right of action on non-exclusive licensees. It would be inconsistent with the statutory scheme for a non-exclusive licensee to have a claim in unlawful means conspiracy (or any other common law claim). Likewise, it would be inconsistent with the scheme of the Registered Designs Act 1949, which at the time did not confer a right of action on an exclusive licensee, for an exclusive licensee to have such a claim: see *Oren v Red Box Toy Factory Ltd* [1999] FSR 785 approved in *OBG v Allan* at [54] and [56] (Lord Hoffmann), [157]-[158] (Lord Nicholls of Birkenhead), [267]-[268] and [297] (Lord Walker of Gestingthorpe) and in *Commissioners v Total* at [99] (Lord Walker again).

151. The expression “instrumentality” appears to have been coined by Lord Nicholls in *OBG v Allan* (in the context of causing loss by unlawful means, but that does not matter):

“159. The difficulties here are more apparent than real. The answer lies in keeping firmly in mind that, in these three-party situations, the function of the tort is to provide a remedy where the claimant is harmed through the *instrumentality* of a third party. That would not be so in the patent example.

160. Similarly with the oft-quoted instance of a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits and ignore traffic lights. The unlawful interference tort would not apply in such a case. The couriers’ criminal conduct is not an offence committed against the rival company in any realistic sense of that expression.”

152. I respectfully disagree with Lord Nicholls’ reference to the patent example in this context. As I have explained, in that example claims for common law causes of action are excluded by statutory implication. More importantly, while the requirement of instrumentality seems clear, I do not find it easy to understand why it is not present in the courier example. The same example, substituting a pizza delivery business for a courier service, was referred to by Lord Walker at [266]. Although Lord Walker appeared to agree that there should be no liability in this example, he hesitated to accept the test of instrumentality at [268]-[269].

153. Although Lord Nicholls’ test did not gain the acceptance of the majority of the House of Lords in *OBG v Allan*, it was approved by Lord Walker in *Commissioners v Total* at [95]. Lord Scott of Foscote agreed with Lord Walker at [47], as did Lord Neuberger at [217], [222] and [225]. Lord Mance agreed at least to some extent with Lord Walker at [116], and in particular he agreed that the pizza delivery business should not be liable at [119], although he did not explicitly endorse the test of instrumentality. Moreover, the test was accepted by Lord Sumption and Lord Lloyd Jones in *Ablyazov* at [14]:

“These two varieties of intention [are] to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant: see paras 93, 95. As an example of the latter situation, Lord Walker cited *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order ‘was not the instrument for the intentional infliction of harm’: para 95. Lord Mance in *Total Network* (para 119) was, we think, making the same point, by reference to the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights. Addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that

‘unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)’: para 93, and cf para 95.

He concluded:

- ‘94. From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort ...
95. In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allen* [2008] AC 1, para 159 called “instrumentality”) of intentionally inflicting harm.’

Lord Hope arrived at the same conclusion, at paras 43–44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the commissioners, ‘the means used by the conspirators were directed at the claimants themselves’:

‘a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious’.”

154. It seems to me that the discussions of instrumentality in the case law tend to conflate two different questions. The first concerns the defendant’s intention. As noted above, it is now well established that, in unlawful means conspiracy, the defendant must intend to injure the claimant, although that need not be the defendant’s predominant intention and it is sufficient that the defendant intends to advance their economic interests at the expense of the claimant’s. To that extent, the defendant’s intention must be directed at the claimant. The second question is one of causation. The unlawful means must have caused loss to the claimant, rather than merely being the occasion of such loss being sustained. As I see it, this is the best explanation of the courier service/pizza delivery example: in that example the claimant’s loss is caused by customers (who may be presumed not to appreciate that the defendant is systematically breaking the law and some of whom may prefer the defendant’s service for other reasons) choosing to place their orders with the defendant, and so the unlawfulness is the occasion for the loss rather than the direct cause of it.
155. The judge’s reasoning raises a third question, which is whether or not the unlawfulness must be unlawful as against the claimant (or at least against a class of



persons of which the claimant is a member, which may include the general public in the case of criminal offences). As to this, the House of Lords held in *Commissioners v Total* that (unlike in the tort of causing loss by unlawful means) it is not a requirement of unlawful means conspiracy that the unlawful acts should be actionable at the suit of a third party. In those circumstances, I cannot see that it can be necessary that they be independently actionable at the suit of the claimant. Accordingly, I cannot agree with the judge's reason for holding that SIS's breaches of the Exchanges' terms and conditions were not relevant unlawful means.

156. It remains necessary to consider, however, whether SIS's breaches of the Exchanges' terms and conditions caused TRP loss, or were merely the occasion for that loss. In other words, can the present case be distinguished from the pizza delivery example? With some hesitation, I have concluded that it can. This case is all about obtaining and supplying information. SIS obtained information in order to supply that information to its customers. SIS obtained some of the information from the Tote in breach of an obligation of confidence to Arena/TRP and some of the information from the Exchanges in breach of their contractual terms and conditions. In both cases TRP suffered loss because it was competing to supply the same information to the same customers. The judge accepted that the breach of confidence satisfied the test of instrumentality. As counsel for TRP submitted, however, there is no relevant distinction between the two means. Accordingly, I consider that in both cases the use of the unlawful means caused loss to TRP.

Issue 8: Did the Conspirators have knowledge of the unlawfulness?

157. The judge held that, if knowledge of the unlawfulness was required, then neither SIS nor any of the other Conspirators possessed the requisite knowledge except that SIS knew that it had breached the Exchanges' terms and conditions. TRP challenges the judge's conclusions on these points. Although this issue is moot if I am right on issue 4, I shall deal with it in case I am wrong.
158. As counsel for TRP acknowledged, this is a challenge to the judge's findings of fact, and therefore TRP faces a high hurdle to overcome. It is unnecessary for me to cite the well-known recent authorities of the appellate courts which make this crystal clear.
159. It is common ground that the requirement of knowledge is satisfied where the defendant has "blind-eye" knowledge.

*Did SIS have the requisite knowledge of misuse of confidential information?*

160. The judge considered whether SIS had the requisite knowledge of misuse of confidential information despite the assurances which it had received from the Tote at [189]ff. Having discussed the evidence, he concluded as follows:
- "199. While this evidence clearly demonstrates that SIS was aware of the *risk* that the Tote was not in a position lawfully to provide Raceday Data from Arena Racecourses, it falls short in my judgment of demonstrating knowledge (including blind-eye knowledge) sufficient to establish liability in conspiracy, when seen in the wider context I have set out above.

200. It is true that Mr Smith undoubtedly continued to recognise the litigation risk of proceeding, and was keen to find ways to mitigate that risk, but there is in my judgment an important distinction between recklessness as to whether conduct is unlawful, turning a blind-eye to suspicions to the contrary, and believing conduct is lawful but recognising the risk that someone affected by it might take a different view, and even seek to vindicate that view by taking legal proceedings.
201. Accordingly, I conclude that although a reasonable person in SIS's position would have appreciated that the Tote acquired the information in circumstances of confidence which precluded its use for fixed-odds betting, it (whether through Mr Smith or others involved in the transaction with the Tote) neither actually knew that, nor turned a blind eye to whether, the Tote was unable lawfully to provide Raceday Data to SIS."
161. TRP contends that the judge's conclusions on this issue are internally inconsistent and irreconcilable with the facts he found. Although counsel for TRP made fairly extensive written submissions on this topic, which I have carefully considered, I do not consider that it is necessary to discuss them all in this judgment. Rather, I shall concentrate on what I see as being TRP's two best points.
162. The first is that, as I have already mentioned in the context of issue 5, the judge focussed in this section of his judgment on SIS's knowledge down to the end of December 2016. The judge did not take into account his findings later in the judgment at [207]-[209] as to the extent of the information SIS actually obtained from the Tote. As discussed above, this not only exceeded the information which the Tote supplied in the Tote feed for pool betting purposes, but even exceeded what the Tote had contracted to supply in Appendix 2 to the Tote HoT. SIS knew this by some point in January 2017.
163. I accept that the judge failed to take this into account, but I do not accept that it undermines his conclusion. There is nothing in the judge's findings at [207]-[209] to suggest that SIS gave any further thought to the lawfulness of the Tote's actions in supplying Raceday Data to SIS in January 2017 than it had done by the end of December 2016. If the question was whether SIS had a positive belief that the Tote was acting lawfully in supplying the Key Raceday Triggers for fixed-odds betting purposes, then I consider that the answer would be that it did not, at least from January 2017. But the fact that SIS carried blithely on despite knowing that it was obtaining more data even than the Tote had contracted to supply does not demonstrate that it turned a blind eye to the fact that the Tote was acting unlawfully. As the judge rightly held, there is a difference between what a reasonable person in SIS's position should have appreciated and a determination on the part of SIS not to consider the lawfulness of the Tote's actions lest such consideration should confirm a suspicion that the Tote was acting unlawfully.
164. The second point is that SIS failed to call Mr Smith to give evidence and the judge should have drawn an adverse inference from this. The judge dealt with this point at [169]:

“The key individual, in this respect, is Gary Smith, its chief executive officer and the person with responsibility for the decision to enter into the Tote HoT. SIS did not call Mr Smith to give evidence. Although Mr Smith had left SIS's employment in 2017 there was no suggestion that he could not have provided a statement or been called. The claimants invite me to draw, where necessary, adverse inferences against SIS from the absence of evidence from Mr Smith. I accept that if there is prima facie evidence as to Mr Smith's state of mind adverse to SIS's case, then SIS's failure to call him would be an important factor in determining whether he had that state of mind. It is necessary in the first place, however, to focus on what was said or written at the time as recorded in the contemporaneous documents.”

165. It is clear from the judge's analysis that, having reviewed the contemporaneous documents, he did not consider that there was prima facie evidence as to Mr Smith's state of mind adverse to SIS's case. In my view that was a conclusion which was open to him on the evidence. Accordingly, I do not accept that the judge was in error in failing to draw an adverse inference from SIS's failure to call Mr Smith.

#### *The other Conspirators*

166. So far as the other Conspirators' knowledge of misuse of confidential information is concerned, it suffices to say that there is no basis for concluding that any of them had any greater knowledge than SIS. In particular, as discussed above, the Tote had essentially the same knowledge as SIS. As the judge held, a reasonable person in the Tote's position should have appreciated that it was not entitled to supply Raceday Data to SIS for fixed-odds betting purposes, but that does not establish that it had blind-eye knowledge that this was unlawful.
167. As for SIS's breaches of the Exchanges' terms and conditions, TRP contends that Betfred and Ladbrokes had the requisite knowledge of this. Counsel for TRP was unable to point to any evidence, however, which established that Betfred or Ladbrokes knew that SIS were contravening the Exchanges' terms and conditions. The furthest the evidence went was to suggest that they knew SIS was creating Betting Shows using information from that source.

#### Overall conclusions

168. For the reasons given above, I would dismiss SIS's appeal against the finding of misuse of confidential information. I would allow TRP's appeal against the dismissal of its claims for unlawful means conspiracy in so far as the means consisted of misuse of confidential information and breaches of the Exchanges' terms and conditions. I would dismiss TRP's appeal in so far as the means relied upon consisted of alleged breaches of the Arena Terms.

#### **Lord Justice Phillips:**

169. I have had the benefit of reading in draft the judgments of Arnold and Lewison LJ, setting out their detailed analyses of the issues arising on these appeals, but reaching opposite conclusions as to their disposal.

170. I agree with Lewison LJ that SIS's appeal should be allowed for the reasons he gives. In considering whether SIS received the Key Raceday Triggers subject to an obligation of confidence (applying the test set out by Arnold LJ at [79] above), the starting point must be that the Tote had provided that data pursuant to a contract with SIS in which the Tote had provided an express warranty that it had all necessary right from third parties to provide the information and that SIS's use of the data would not breach any third party rights. In my judgment, a reasonable person receiving information on the basis of such a warranty from a reputable counterparty would not be on notice that the information was supplied in breach of an equitable duty of confidence unless there were clear countervailing indications, sufficient to override the contractual assurance of the party best placed to assess its own entitlement to provide the information. In the present case SIS made inquiries of and received assurances from the Tote which caused SIS to conclude and proceed on the basis that the Tote was lawfully entitled to provide the information. It is difficult to see why a reasonable person would have been expected to make further or different inquiries and/or to have reached the opposite conclusion. I agree with Lewison LJ that the Judge approached the question from the wrong starting point.
171. As for TRP's appeal, I agree with Arnold LJ's conclusion at [139], based on his analysis of the authorities, that knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy. The point was directly in issue and so decided by this Court in *Belmont v Williams*, a decision that was not referred to by Toulson LJ in his *obiter dictum* in *Meretz*. The interplay between unlawful means conspiracy and inducing breach of contract (where knowledge of an unlawful breach of contract is an essential element) may merit further examination in a suitable case, but I am not convinced that many cases in which a defendant induces a breach of contract, but without knowing that he is doing so, would be capable of being reformulated as an unlawful means conspiracy.
172. I also agree with Arnold LJ that the unlawful obtaining of information from the Exchanges was instrumental in SIS causing injury to TRP, being the very means by which SIS was able to and intended to compete with TRP. I see a clear distinction between the present case and the "pizza delivery" example, where the cause of the claimant's loss results from the competitiveness of the defendant's business due to its offer of speedier deliveries. The defendant's breach of traffic laws is an incident of fulfilling the promise of speedier deliveries, not the cause of the claimant's loss.
173. It follows that I would allow TRP's appeal against the dismissal of its claims for unlawful means conspiracy in so far as the means consisted of the misuse of confidential information by the Tote and SIS's breaches of the Exchanges' terms and conditions, but (as I also agree with Arnold LJ that the Tote was not bound by the Arena Terms) not otherwise.

**Lord Justice Lewison:**

**Preliminary**

174. I have had the benefit of reading in draft Arnold LJ's comprehensive and cogent judgment. I have found this an extremely difficult case. But after consideration, I have the misfortune to disagree with parts of his analysis and conclusions. Let me explain those points on which I disagree. On all other points I agree with his analysis.

175. I begin with two procedural points. First, it is important not to lose sight of the importance of the pleaded case.

176. In *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 Dyson LJ said at [21]:

“It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.”

177. See also *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 W.L.R. 4031 at [14] to [21]. It is necessary in this case to have firmly in mind that TRP’s pleaded case on breach of confidence was limited to the “Key Raceday Triggers”. Arnold LJ has described these at [50].

178. Second, at least in the usual case an appeal is limited to a review of the decision of the lower court: CPR Part 52.21 (1). It is widely accepted that an appeal court must be extremely cautious about interfering with findings of fact made by the lower court. There are a number of reasons for this, including what I have described in another case as “island-hopping” (i.e. making a factual determination on selected parts of the evidence). In my judgment the same caution applies to making findings of fact that the lower court did not make.

### **Was SIS bound by any confidence obligation?**

179. SIS was not contractually bound to either Arena or to TRP not to disclose information. Any obligation it had must, therefore, have arisen in equity.

180. In *Coco v AN Clark (Engineers) Ltd* Megarry J formulated the test as follows:

“It seems to me that if the circumstances are such that *any* reasonable man standing in the shoes of the recipient of the information would realise that upon reasonable grounds the information was being given to him in confidence, then this would suffice to impose on him the equitable obligation of confidence.” (Emphasis added)

181. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 Lord Goff, dealing with notice rather than knowledge, spoke of a document that was “obviously”

confidential. In *Primary Group*, to which Arnold LJ has referred, my Lord put the test this way at [213]:

“The reasonable person who has notice that the information he has received or acquired is confidential is bound by an equitable obligation of confidence precisely because he has such notice. To put it another way, the yardstick for judging whether or not a document is “obviously confidential” is the reasonable person standing in the position of the recipient.”

182. The question, then, is not what is the correct legal analysis; but what a reasonable person would be expected to understand. Applied to the facts of this case, the question becomes: should SIS have realised that the Tote was bound by a confidence obligation even though, as Arnold LJ has said at [26] and [42], there was no contractual restriction on its ability to disseminate information that it had collected and compiled itself?
183. The starting point, in my judgment, is freedom of speech. Unless there is a contrary obligation, a person is free to communicate what he sees or hears. In order to attract an obligation not to communicate information, the information must have the necessary quality of confidence about it. Like Arnold LJ, I do not consider that the judge’s view that all the raceday data was confidential can be sustained. TRP itself only asserted that the Key Raceday Triggers were confidential. Quite apart from any pleading point, it cannot be reasonable to expect SIS to have understood that data were confidential (let alone obviously confidential) that even TRP did not claim were confidential.
184. What about the Key Raceday Data Triggers? As Arnold LJ rightly says at [52] it is not clear whether TRP’s case was that each and every Key Raceday Trigger was confidential; or that the compilation of Key Raceday Triggers was. So it is necessary to look first at the Key Raceday Triggers individually.
185. One important background fact is that the races were televised live. Anyone with a television set (whether at home or in a bookmaker’s office) could have seen for themselves the “off” and both the finish and the winner in real time. It may be that they had to subscribe to a particular channel; but the judge made no finding about that. It is true that the judge described the live broadcast as “*almost* instantaneous” (which Arnold LJ says is typically seven seconds). But the judge made no such finding; nor did he make an explicit finding that the few seconds between the happening of the event and its transmission were the crucial seconds. To the contrary, he held that the raceday data had value for “minutes”.
186. Arnold LJ has posed the question at [68]: why did SIS not source the Key Raceday Triggers simply by watching television broadcasts of the races? For my part, I do not think it is a useful question. It may well be that some of the Key Raceday Triggers could not be collected quickly enough simply by watching television. But the question is whether that applies to each and every Key Raceday Trigger and, in particular, to the off, the finish and the winner. Moreover, as I have said, the judge made no finding to that effect.

187. SIS ran a variant of this argument before the judge; but in the context of the argument that the Tote had no obligation of confidence. The judge rejected it at [153]:

“SIS contends that because the information comprising Raceday Data was visible to everyone (potentially thousands) on the racecourse, it did not have the necessary quality of confidence. Moreover, because other racecourses (in particular the Independent Racecourses) did not contain similar restrictions to those set out in the Arena Terms, it is impossible to conclude that the information is subject to any “general obligation of confidence”. That, however, misses the point. Raceday Data is not confidential because it is of an inherently confidential nature, but because there is a substantial commercial value in the information, provided it is disseminated to off-course bookmakers as soon as possible, and Arena has the ability to, and does in fact, control its dissemination via exclusive channels so as to exploit that value. As in the *Hello!* case, the fact that TRP (and, before it, SIS) was willing to pay substantial sums for the benefit of an exclusive right to collect and disseminate the information to off-course bookmakers engaged in fixed-odds betting is a strong indication of its confidential nature.”

188. One problem with this passage is that the judge did not distinguish between the individual Key Raceday Triggers on the one hand and the compilation on the other. In addition, his discussion is a discussion of Raceday Data, which is not limited to the pleaded Key Raceday Triggers.

189. I do not consider that it can credibly be said that information which anyone with a television set can receive in real time can be confidential. To my mind, therefore, the commercial value of the information does not apply severally to each individual piece of raceday information; but to the compilation considered as a whole.

190. On the judge’s analysis, it was the commercial value of the information that brought it within the scope of the equitable obligation. In *Hello!* Lord Walker said at [299]:

“Lord Hoffmann suggests, in an appeal to economic realities, that if “OK!” thought that it was worth paying £1m for its “exclusive” contractual right (and “Hello!” was willing to pay the same price) then there is no reason why there should not be an obligation of confidentiality. But the confidentiality of any information must depend on its nature, not on its market value.”

191. He continued at [300]:

“For instance, a newspaper or television company might be willing to pay a large sum to the promoter of some important sporting event for the “exclusive” right to all motion pictures and photographs of the event, and it might go to great lengths to publicise its exclusive right (partly to attract custom, and partly in the hope of engaging the law of confidence). If the

event (for instance, figure-skating or show-jumping) was held in a relatively small indoor venue, with tight security, the hoped-for exclusivity might actually be achieved. If the event was a motor rally or a marathon foot-race held on public roads it would be unachievable (although the newspaper or television company might still make a worthwhile profit). But in neither case, in my opinion, should the law of confidentiality afford the protection of exclusivity in a spectacle.”

192. The High Court of Australia took a similar view in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, to which Lord Walker referred.
193. Lord Walker’s view was not that of the majority of the House of Lords; but I do not think that it can be said to be an unreasonable one.
194. As Mr Bloch QC put it, SIS, in the position of a reasonable person, is not to be endowed with the legal knowledge and analytical skills of a High Court Judge, let alone a majority of Law Lords.
195. The second important point is that the judge found at [159] that the Tote honestly believed that there was no restriction imposed on the Tote's ability to provide Raceday Data to SIS. Third, the judge found at [201] that SIS neither actually knew that, nor turned a blind eye to whether, the Tote was unable lawfully to provide Raceday Data to SIS. We are, then, in a position in which neither the imparter of the information, nor its recipient knew that there was any restriction on the provision of that information.
196. In addition, it must not be forgotten that Arena and the Tote were in a contractual relationship. The contract is made between A (the controller of the information) and B (who is authorised to collect and disseminate information). The question now under discussion is whether a reasonable third party (C) would understand that B was bound by a restriction as between himself and A.
197. As Lord Walker said at [276] in *Hello!*:

“... it is necessary to enquire more closely into what is happening, in legal terms, when a court makes an order for the protection of confidential information. If the person disclosing the information is in contractual relations with the claimant, the most natural claim will be for breach of an express or implied term in the contract. ...Where there is *no* contractual tie the cause of action is the equitable jurisdiction to restrain (or if it cannot be restrained, to award compensation or an account of profits for) breach of confidence.” (Emphasis added)
198. In other words, where parties (A and B) have chosen to regulate their relationship by contract, a reasonable person (C) would surely expect to find any bar on the dissemination of information in the express or implied terms of the contract. Again, the question is not the correct legal analysis, but what a reasonable person should have understood. If, as the judge held, there is no implied term in the contract between



the Tote and Arena it follows that (a) such a term is not necessary to give business efficacy to the contract and (b) that it is not so obvious that it goes without saying. Accordingly, in my judgment the judge's finding at [184] (4) (which Arnold LJ has quoted at [90]) far from supporting his view about what SIS ought to have concluded, in fact undermines it.

199. I do not consider that *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* is authority to the contrary. Lord Greene MR explained in that case:

“If two parties make a contract, under which one of them obtains for the purpose of the contract or in connexion with it some confidential matter, then, even though the contract is silent on the matter of confidence, the law will imply an obligation to treat that confidential matter in a confidential way, as one of the implied terms of the contract; but the obligation to respect confidence is not limited to cases where the parties are in contractual relationship.”

200. Lord Greene was dealing with a case where there was no contract. That is not this case: the Tote had a contract with Arena. The judge considered whether a term should be implied; but rejected the argument. There has been no appeal against that.
201. Arnold LJ points out at [99] that in *Hello!* Mr Thorpe (the trespassing paparazzo) was not subject to a contractual prohibition on taking or disseminating photographs of the Douglasses' wedding. Indeed he was not. But it was precisely because there was no contract at all between him and the Douglasses that equity stepped in.
202. Arnold LJ has said on a number of occasions that SIS received information that went beyond what the Tote collected for the purposes of pool betting. Indeed, the judge so found. The difficulty with his discussion at [207] and his conclusion at [209] is that he was dealing indiscriminately with raceday data, rather than with the pleaded Key Raceday Triggers. But it is necessary, once again, to concentrate on the Key Raceday Triggers. As Arnold LJ rightly says at [81] the judge made no specific finding in this regard. In my judgment an appeal court should be extremely cautious about making findings of fact that the judge (who was immersed in all the evidence) did not make. I do not consider that either the colour-coded document to which Arnold LJ refers at [82] or the operations manual to which he refers at [83] are a firm enough foundation. He refers at [85] to certain of the Key Raceday Triggers. But if one looks at Appendix 2 to the heads of terms between the Tote and SIS each of the items comprising the Key Raceday Triggers is prefixed by “Totepool Pool.” That suggests, to me at least, that in so far as the Key Raceday Triggers are concerned, they were items of information that the Tote was entitled to collect (albeit for the purposes of pool betting). There may be some ambiguity about some of the expressions in Appendix 2 (e.g. “Totepool Pool Amended Pool Result”), but we cannot be sure whether that corresponds to the result of a stewards' enquiry. But these precise points were not dealt with by the judge, nor argued before us on the appeal. I do not consider that this court should make detailed findings of fact that the judge did not make. I regret, therefore, that I cannot subscribe to Arnold LJ's analysis on this question.
203. In *Hello!* Lindsay J found that Hello! “firmly kept their eyes shut lest they might see what they undeniably knew would have become apparent to them”: quoted by Lord

Hoffmann at [114]. That is not this case either. SIS did not close its eyes to the potential problem. The judge set out the steps that it took to satisfy itself that the Tote could supply the information. Arnold LJ has already quoted the e-mail of 29 November 2016. But since my reading of it differs from his, I quote it again:

“I know that Paul and Rachel have already been researching this and have already had discussions with Phil Siers. I have been rather pessimistic about the opportunity so far because of the perceived legal risk. After talking it through with Joe and Phil today I am somewhat more comfortable because they are offering us Tote data (‘Tote Off’; ‘Tote results’; ‘Tote Non-Runners’) and are not offering official race-day data. Apparently the Tote versions are usually very similar or the same as the official data but there are some minor differences ... They are also taking into account there are no detailed contracts in place between racecourses and the Tote, probably because of its roots as a government franchise. Please can we schedule some time to discuss this to decide whether to proceed?”

204. The first point is that Mr Smith had investigated the Tote’s ability to provide the information. Second, what reassured him was that what was to be provided was *Tote* data. As I understand that phrase, what was meant was that the information was to be collected by the Tote rather than by TRP or Arena. For the reasons I have given, I do not consider that each of the Key Raceday Triggers, considered individually, can be said to have been separately confidential. What was potentially confidential was the compilation. But in so far as it was the compilation that had value, it was to be a compilation made by the Tote and not by anyone else. That is reinforced by the statement that the Tote were not offering “official” raceday data. Moreover, the data that were to be offered might differ from the official data. The reference to their being no detailed contracts in place explains why, in Mr Smith’s view, there were no restrictions on the Tote’s ability to provide the data. The fact that Tote’s roots were as a government franchise explained *why* (“because of”) there were no detailed contracts restricting that ability; but I do not think that it went further than that. The point is not that one should be looking for a contractual *right* to disseminate information, but a contractual *prohibition* on doing so. Third, the Tote gave a contractual warranty that it could provide the data. SIS could, in my judgment, have reasonably taken the view that the Tote knew far more about its relationship with Arena than SIS.

205. I regard what the judge said at [196] as significant in this context. He said:

“... the claimants contend that anybody with horseracing knowledge would have known that the Tote could not sublicense the information. They rely on the fact that the Tote had never sought to do so and that SIS had, until December 2016, the exclusive right to distribute Raceday Data from Arena Racecourses. It would—if it seriously thought that its rights were vulnerable to being undermined by the Tote (particularly given they viewed Mr Siers as a “canny and aggressive” businessman)—have taken steps to close off that possibility. Moreover, SIS knew (at least from the time of TRP’s press

release in September 2016) that TRP believed that it had exclusive rights. The claimants also rely on the fact that SIS's internal documents from the outset show that it had a concern that the Tote was not in a position lawfully to supply the data, and that this was a potentially "controversial" matter. In my judgment, these points all go to confirm something which is evident from the documents I have already referred to, namely that SIS did indeed have concerns that the Tote was unable to provide Raceday Data to it. That, however, is only the starting point. If SIS, having realised at the outset that there was risk that the Tote could not lawfully provide Raceday Data to it, had thereafter done nothing to satisfy itself on the point, then it would be difficult to avoid the conclusion that it had, at least, blind-eye knowledge of the breach of confidence. But, on the contrary, SIS made enquiries of the Tote and received reassurances, repeated in a formal legal contract, that the Tote was lawfully entitled to provide the information."

206. As I understand this passage, the judge was rejecting the argument that anyone with horseracing knowledge would have known that the Tote could not sub-license the information. If I add to that the fact that SIS both made inquiries of the Tote, and received not only assurances but also a contractual warranty, I find it difficult to see what else a reasonable person should have done. Once again, I consider that the judge was attributing to the reasonable person a degree of legal knowledge and analytical skills which are inappropriate.
207. SIS investigated the Tote's contractual relationship with Arena and concluded (correctly as it happens) that there was no contractual bar on the dissemination of information. An argument to the effect that it was an implied term of the contract to that effect was advanced but abandoned; and has not been resurrected on this appeal. I do not suppose for a moment that it occurred to SIS that the Tote was exceeding the scope of its licence and hence became a trespasser (an argument which arose for the first time in the course of the hearing of this appeal; and even then only after an intervention from the bench).
208. In my judgment the judge's error in this respect was to start with his own legal analysis of the situation, and then to ask whether that was nullified by the warranty. The correct starting point in my judgment was the warranty and assurances that the Tote had given; and then to ask whether SIS should have second guessed them. The Tote was an apparently respectable counterparty; and commercial life would be made much more difficult if a counterparty had to second guess the truth of such a warranty. Put in that way, I consider that the only answer is "no".
209. That only deals with the position at the start of the relationship between SIS and the Tote. Did things change thereafter? I agree with Arnold LJ at [78] that the correct question is whether the Key Raceday Triggers were imparted to SIS under an obligation of confidence. In my judgment that is the only question relevant to this issue.
210. As Arnold LJ points out, by January 2017 SIS were receiving more information from the Tote than the Key Raceday Triggers. Does that make any difference? In my

judgment it does not. TRP's pleaded case on breach of confidence was limited to the Key Raceday Triggers. That is clear from paragraphs 4B.3 and 39 of the Re-Amended Particulars of Claim. There has been no application to amend it. All the identified Key Raceday Triggers were already covered by Appendix 2 to the Tote heads of terms. So the supply of additional information adds nothing to the pleaded case. Once again, this is not just a pleading point. If TRP has not identified the additional information as confidential, why should SIS have realised that it was?

211. I would hold, therefore, in respectful disagreement with Arnold LJ that SIS was not bound by an obligation of confidence.
212. I would allow SIS's appeal on that ground.

### **Is knowledge that the means are unlawful necessary?**

213. We live in a society in which competition between business enterprises is generally regarded as beneficial to consumers, both by keeping prices down and widening consumer choices. At the same time, many sectors of the economy are highly regulated; and the law grows ever more complex. The problem for the common law is how to fit in to this economic background.
214. The so-called economic torts have been considered by the House of Lords and the Supreme Court on a number of occasions in recent years; but it cannot be said with confidence that the law is clear. As has been said (in slightly different terms) in many cases, the quest is for a control mechanism to stop these torts from getting out of hand. In *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 Lord Hoffmann proposed a test of actionability. But in *HMRC v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 the House of Lords disagreed. Another proposed control mechanism is "instrumentality" but as Arnold LJ rightly points out at [149] it is hard to see how the courier company or the pizza delivery business would escape liability on that account. Arnold LJ's explanation at [151] may be the best that one can do, but it does not seem to me to be intellectually satisfying.
215. The particular tort with which we are concerned is what is labelled an unlawful means conspiracy. The specific issue is whether knowledge that the means in question are unlawful is a necessary ingredient of the tort.
216. Mr Mill QC relied on a number of summaries of the ingredients of the tort of conspiracy to injure by unlawful means in which no mention was made of any requirement that the defendant should know that the means were unlawful. In *Lonrho plc v Fayed* [1992] 1 AC 448 the allegation of conspiracy to injure by unlawful means arose in the context of a corporate take-over. Lord Bridge said at 465:

“Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do

so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.”

217. As Mr Mill pointed out, there is no mention here of knowledge of unlawfulness. It was “sufficient” that the means used were unlawful. What was alleged against the defendants in that case was that they persuaded the board of directors of the target company to accept their bid by means of false and fraudulent representations about themselves and the source of finance available to them. It would be surprising if, in that context, the question whether the defendants knew that making false and fraudulent statements about themselves was unlawful could have been in issue. In fact what was in issue was whether it was an essential ingredient of the tort of conspiracy to injure by unlawful means that its predominant purpose was to injure the claimant. The House of Lords held that it was not.

218. In *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 what was alleged against the defendants (and found by the judge) was that they had acted dishonestly and in a variety of ways and had conspired to defraud the claimants of a substantial sum of money. Once again, it is hardly surprising that it was not argued that the defendants did not realise that it was unlawful dishonestly to defraud the claimant.

219. *HMRC v Total Network SL* was a case of a carousel VAT fraud. The specific issue was whether the commission of a criminal offence counted as “unlawful means”. The House of Lords held that it did. Lord Walker surveyed previous authority on unlawful means conspiracies. At [77] he quoted from the judgment of Bowen LJ in *Mogul Steamship Co Ltd v McGregor Gow & Co* (1889) 23 QBD 598, 616:

“The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights.”

220. Commenting on that passage, Lord Walker said:

“The first reason is not very satisfactory, since (as has very often been pointed out, for instance by Lord Sumner in *Sorrell v Smith* [1925] AC 700, 741 and Lord Diplock in *Lonrho v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 189) it all depends on the particular facts. The second reason seems to me more principled, focusing as it does on the fact that the claimant's damage is caused by two or more persons acting in concert to carry out an unlawful plan. That is, I think, what was behind an observation of Lord Dunedin in *Sorrell v Smith*, at p 725:

“Now the moment that that is recognised, i.e., that the essence of conspiracy on which civil action is founded is a criminal conspiracy, though of course unless actual damage has followed no civil action will lie, the moment that fact is

recognised, you at once bring in the spirit of the criminal law, where motive or intention—the *mens rea*—is everything.”

That identifies what sets conspiracy apart from other torts, and emphasises the first point made above—the intense focus, in the tort of conspiracy, on intention. It is also worth noting that in some factual situations (such as that in the present appeal) the fraud disclosed by the assumed facts could not have been carried out otherwise than by a number of persons acting in concert.”

221. There is, I think, an ambiguity here. Does it cover a case in which the “object” or “intention” of the defendant was to exercise his own just rights; but because of a mistake of law he exceeded those rights? I note also that at [89] Lord Walker pointed out that the development of the economic torts had been a long and difficult process “and may not yet be complete”.
222. The most recent authority is that of the Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2918] UKSC 19, [2018] 2 WLR 1125. What was alleged in that case was a conspiracy to injure by unlawful means; namely a series of contempts of court. In their joint judgment Lords Sumption and Lloyd-Jones pointed out at [6] that:
- “The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy. The elements of the four established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle.”
223. They added that of all the economic torts conspiracy “is the one whose boundaries are perhaps the hardest to define in principled terms.” Having considered a number of cases, they went on to say at [10] that what makes a conspiracy actionable is “the absence of just cause or excuse.” They added at [11]:
- “Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant.”
224. The test proposed is whether there is a “just cause or excuse” for combining to use unlawful means; which I take to mean means which are in fact unlawful. But what this test does not answer is the question whether it is a “just excuse” that the actor did not intend to use unlawful means; and did not appreciate that the means that were used were in fact unlawful.
225. In *Ablyazov* the court went on to say at [15]:

“The reasoning in *Total Network* leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds.”

226. It is clear, then, that the Supreme Court decided nothing that binds this court in relation to a conspiracy where the unlawful means alleged are a violation of a private right.
227. Moreover, none of these cases squarely confront the issue with which we are concerned; but it has been confronted by two decisions of this court, which reached opposite conclusions.
228. In *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504 Mr Doherty had been employed by BIP. He offered to disclose to Mr Ferguson information about a process used by BIP, which he had invented, and which Mr Ferguson knew was secret and confidential. But Mr Ferguson was found not to have known that the process belonged to BIP rather than to Mr Doherty. The reason for that was that “muddle-headedly and illogically” he believed that, if the process was patentable, that would establish that the process belonged to Mr Doherty and not to anyone else. Mr Ferguson sent Mr Doherty to his (Mr Ferguson’s) patent agents for advice; but they only advised on the question of patentability. Mr Ferguson then took the secret information in the honest belief that Mr Doherty would not be in breach of contract. As McKinnon LJ remarked in the Court of Appeal, Mr Ferguson’s honesty was vindicated at the expense of his intelligence. BIP sued both Mr Doherty and Mr Ferguson. They relied on two causes of action: inducement to breach a contract; and conspiracy. Both claims failed in this court. An appeal to the House of Lords on the question of inducing a breach of contract also failed: [1940] 1 All ER 479, but the claim in conspiracy was not considered by the House. The clearest statement of principle on the conspiracy claim was that of Finlay LJ who said that Mr Ferguson could not be liable in conspiracy “when he did not know that there was any illegality”.
229. In *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, this court took a very different approach. I am grateful to Arnold LJ for summarising the facts of this complex case. The case was one where money emanating from a company was used to buy its own shares. That was contrary to section 54 of the Companies Act 1948. The alleged conspirators had been advised by counsel that their actions were lawful; but the advice turned out to be wrong. Buckley LJ said:

“In my judgment, the alleged conspiracy is established in respect of these three defendants, and they are not exempt from liability on account of counsel's opinion or because they may have believed in good faith that the transaction did not transgress s 54. If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them: see *Churchill v Walton* [1967] 2 AC 224 at 237. That case was one of criminal conspiracy, but it seems to me that precisely similar principles must apply to a conspiracy for which a civil remedy is sought. Nor, in my opinion, can the fact that their ignorance of, or failure to appreciate, the unlawful nature of the transaction was due to the unfortunate fact that they were, as I think, erroneously advised excuse them (*Cooper v Simmons*, and see *Shaw v Director of Public Prosecutions*, where the appellant had taken professional legal advice).”

230. Mr Bloch QC argues that *Belmont* was decided *per incuriam* because BIP was not cited. Whether or not it was decided *per incuriam* may not matter, because where there are conflicting decisions of this court, we are free to choose between them: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.
231. In my judgment there are a number of difficulties with the decision in *Belmont*. First, the case to which Buckley LJ referred was a case concerning a strict liability offence, namely selling red diesel as DERV. In the case of a strict liability offence there is no need for the prosecution to prove a guilty mind. That is a well-established principle of the criminal law. But it does not answer the question whether in the case of a civil conspiracy to injure by unlawful means a guilty mind *should be* a condition of liability. Although criminal conspiracy and civil conspiracy share the same name, there is no reason why the principles applicable to one form of conspiracy should necessarily be read across to the other: *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529.
232. Second, in setting out the ingredients of conspiracy, Buckley LJ said at 404:
- “To obtain in civil proceedings a remedy for conspiracy, the plaintiff must establish (a) a combination of the defendants, (b) to effect an unlawful purpose, resulting in damage to the plaintiff.”
233. What is missing from this summary is any mention of an intention to injure, or even that the purpose of the conspiracy was to injure. On the findings of the trial judge, which Arnold LJ summarises at [127], Mr James cannot have had any intention to harm Belmont; because he believed that in entering into the transaction Belmont was getting value for money. For that reason (if no other) it seems to me, in respectful disagreement with Arnold LJ, that it was an important part of the decision that the contravention of section 54 was itself an offence of strict liability. Take a case in which A and B agree to do something, believing it to be lawful. In fact it is unlawful because, say, it amounts to a breach of contract. One of A's purposes (but not his predominant purpose) is to injure C. B has no such purpose. Is B liable to C in conspiracy to injure by unlawful means, despite not having the necessary intention?



Or is A's intention a "fact" of which B must be aware, even though he has no such intention himself?

234. Third, I do not think that Buckley LJ's uncompromising statement that ignorance of the law is no excuse is universally valid. As Lord Westbury explained in *Cooper v Phibbs* (1867) LR 2 HL 149, 170:

"It is said, "*Ignorantia juris haud excusat*;" but in that maxim the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

235. Fourth, although ignorance of the criminal law is no defence to a criminal charge, ignorance of the civil law may be. Sometimes this is expressly provided by statute. Thus it is a defence to a charge of theft that the defendant has appropriated property belonging to another if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person: Theft Act 1968 s 2 (1). In other cases it is the common law that reaches that conclusion. In *R v Smith* [1974] QB 354 the tenant of a flat made structural alterations to it with the landlord's consent. After the termination of the tenancy, the former tenant damaged the flat in trying to remove some of the alterations. He had not appreciated that, because of the law relating to fixtures, the structural alterations had become the landlord's property. When interviewed by the police, he said: "Look, how can I be done for smashing my own property. I put the flooring and that in, so if I want to pull it down it's a matter for me." The Court of Appeal held that that was a lawful excuse; and hence a defence to a charge of criminal damage.

236. In the case of a criminal conspiracy there are cases which suggest that the mental state required is more than simply agreeing to do something which will amount to a crime. In *R v Saik* [2007] 1 AC 18 Mr Saik pleaded guilty to a charge of conspiracy to launder money, although the basis of his plea was that that he did not know the money was the proceeds of crime. He only suspected that was so. Having referred to the statutory definition of a criminal conspiracy, Lord Nicholls (with whom Lord Steyn agreed) said at [4]:

"Thus under this subsection the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily involve commission of the crime in question by one or more of the conspirators. The conspirators must intend to do the act prohibited by the substantive offence. The conspirators' state of mind must also satisfy the mental ingredients of the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with

the prescribed intent. A conspiracy to wound with intent to do grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 requires proof of an intention to wound with the intent of doing grievous bodily harm. The position is the same if the prescribed state of mind regarding the consequence of the prohibited act is recklessness. Damaging property, being reckless as to whether life is endangered thereby, is a criminal offence: Criminal Damage Act 1971, section 1(2). Conspiracy to commit this offence requires proof of an intention to damage property, and to do so recklessly indifferent to whether this would endanger life.”

237. Mr Saik’s conviction was quashed.
238. Fifth, in the case of a strict liability offence whether the defendant knew that he was committing an offence may have no bearing on his guilt, but it will be a factor (sometimes a powerful factor) in the sentence that the court passes: see Overarching Sentencing Guidelines M9. Accordingly, ignorance of the law has a part to play in a criminal case, but at a different stage. In the case of a civil conspiracy, by contrast, if liability is established the quantum of damage is in effect fixed by law. If ignorance of the law has any part to play, it can only be at the stage of deciding liability.
239. Sixth, the prohibition that was contravened in *Belmont* was a statutory prohibition. What has been contravened in this case are private rights.
240. Seventh, in *OBG Ltd v Allan* the House of Lords decided that in order to commit the tort of inducing a breach of contract, the inducer had to know that there would be a breach of contract. Lord Hoffmann said at [19]:
- “To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so.”
241. I find it difficult to envisage a case of inducing a breach of contract in which there is only one actor. There must be at least two: the contract breaker and the inducer. If a lesser state of mind applies to a case of conspiracy, the limitations on the tort of inducing a breach of contract will always (or almost always) be outflanked by reframing the case as one in conspiracy. Suppose that Mr Gye had not appreciated that to lure Miss Wagner away from Mr Lumley would have amounted to a breach of her contract. He would not have been liable for inducing a breach of contract. But since there was only one Miss Wagner, Mr Gye’s gain would inevitably entail Mr Lumley’s loss. In those circumstances it appears that Mr Gye would have had the requisite intention to injure Mr Lumley. As Lord Nicholls put it at [167]:

“Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is

the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

242. The actions of both Mr Gye and Miss Wagner were concerted actions. Both must have agreed that she would leave Mr Lumley and transfer her talents to Mr Gye. The agreement involved an unlawful act; namely Miss Wagner's breach of contract. Had the claim been pleaded in conspiracy to injure by unlawful means, it is difficult to see why it would not have succeeded. Indeed, it seems to me that Lord Hoffmann was of the same opinion in the way in which he dealt with the Douglas's claim against Hello!: see [134].

243. Or consider *Mainstream Properties Ltd v Young* (which was one of the appeals heard with *OBG*). Two directors of Mainstream diverted a development opportunity from Mainstream to a joint venture consisting of themselves and Mr De Winter. That was a breach of their contractual and fiduciary duties to Mainstream. Mr De Winter was not liable in tort for inducing the two directors to break their contracts, because he honestly believed that there would be no breach. Lord Hoffmann added at [69]:

"Nor is there any question of his having caused loss by unlawful means. He neither intended to cause loss to Mainstream nor used any unlawful means."

244. In one sense it is true that he did not intend to cause loss to Mainstream. His intention was to benefit himself. Earlier in his speech Lord Hoffmann said at [62]:

"Finally, there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. 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."

245. But in *Mainstream* since there was only one development opportunity, the benefit to Mr De Winter can only have come at the expense of Mainstream. So far as unlawful means are concerned, there was unlawfulness involved: namely the two directors' breaches of contractual and fiduciary duties. It is true that in *OBG* Lord Hoffmann recognised that there was a substantial overlap between the two torts; which he

described at [21] as intersecting circles which cover common ground. He repeated that thought at [37].

246. Eighth, as I said in *Allen (t/a David Allen Chartered Accountants) v Dodd & Co Ltd* [2020] EWCA Civ 258, [2020] 2 WLR 1070 at [34] the recent tide of authority has been to restrict rather than to expand the scope of the economic torts. This court made the same point in *Secretary of State for Health v Servier Laboratories Ltd* [2019] EWCA Civ 1160, [2019] 3 WLR 938 at [75].

247. Ninth, a number of the cases stress the need for blameworthiness on the part of the conspirators. In *OBG* at [166] Lord Nicholls said that a “high degree of blameworthiness is called for”. In *Total* at [56] Lord Scott said that the circumstances must be such as to make the conduct “sufficiently reprehensible” to justify imposing on those who have brought about the harm liability in damages for having done so. It is not immediately obvious why making a mistake about one’s legal rights is blameworthy or reprehensible. In *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 Toulson LJ said of one alleged conspirator at [170]:

“By ordinary standards of commercial probity [he] had a perfectly legitimate reason for acting as he did. It would therefore be wrong to classify such conduct as founding an action for an unlawful means conspiracy.”

248. Tenth, there is a well-known cause of action for assistance in a breach of trust. But in order to succeed on that basis it is necessary to prove that the assistance was dishonest: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. It is notable that in that case Lord Nicholls at 387 adverted to the close analogy with breach of contract; and said that the underlying rationale was the same. It seems to me to be clear from his discussion at 390 that action under a mistake made in good faith about what is authorised by the trust instrument is not dishonesty, even if in fact it turns out to be unauthorised. If breach of an equitable obligation counts as unlawful means for the purposes of the tort of conspiracy, the way lies open to allege conspiracy to commit a breach of trust without having to prove dishonesty on the part of the non-trustee conspirators. It would, I think, not generally be regarded as dishonest to act in accordance with a mistaken view of one’s own legal rights. I do not consider that this is affected by the reformulation of the test of dishonesty in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391. The example given by Lord Hughes at [60] is of the man who gets off the bus without paying, because he does not realise that public transport is not free. He, says Lord Hughes, would not be regarded as dishonest. But that is because he has made a mistake about his legal liability to pay for his bus ride. Lord Hughes went on to say:

“The same would be true of a child who did not know the rules, or of a person who had innocently misread the bus pass sent to him and did not realise that it did not operate until after 10.00 in the morning.”

249. In each of these cases there has been a mistake about legal rights.

250. Eleventh, there is at bottom a policy choice to be made. There had been a number of civil cases in which it was held that if a person knew all the facts, then a mistake

about their legal consequences would not amount to a defence: *Greig v Insole* [1978] 1 WLR 302; *Pritchard v Briggs* [1980] Ch 338 (Goff LJ). The latter case was a case of conspiracy to injure by unlawful means. But in *Mainstream Properties Ltd v Young* [2005] EWCA Civ 861, [2005] IRLR 964 Arden LJ disapproved that argument on the ground that the law had moved on. She pointed out that the distinction between money paid under a mistake of law and money paid under a mistake of fact was no longer the law; and that a common mistake of law was capable of vitiating a contract. She said at [85]:

“... this court must ask whether the policy behind the tort of interference with contractual relations would be furthered if a defendant to a claim based on this tort were to be prevented from relying on a mistake he made on the law to explain why he took the action he did. In my judgment there is nothing in the policy of this tort that requires this bar. It is clearly important that the law should provide proper incentives to parties to familiarise themselves with the law, but if the bar under consideration does not now apply to the recovery of money paid under a mistake, it is difficult to see why it should apply to the economic tort of interference with contractual relations.”

251. In *Meretz* she repeated that view at [118] and [119]. Both Pill and Toulson LJ agreed with her. Toulson LJ also said at [174]:

“Although my conclusion on the issue of unlawful means makes it unnecessary to decide the point, I would support Arden LJ's view, at para 127, that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did. Just as the tort of conspiracy to induce breach of contract is not committed if the defendant believes that the outcome sought by him will not involve a breach of contract (the *Mainstream* case [2005] IRLR 964), so a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing. This is consistent with Lord Hoffmann's comment in the *OBG* case [2008] 1 AC 1, para 56, when considering the tort of causing injury by unlawful means, that the common law in this area is designed only to enforce basic standards of civilised behaviour.”

252. I cannot see that there is a radically different policy underpinning the tort of an unlawful means conspiracy. And as Lord Nicholls said in *Tan*, the same rationale underpins dishonest assistance in a breach of trust. It is true, as Phillips LJ points out, that Toulson LJ did not himself refer to *Belmont* in the passage I have quoted, although he did refer to *Churchill* later in the same paragraph. But paragraph [127] of Arden LJ's judgment, with which he agreed, was her conclusion after summarising the parties' submissions on the point, including a reference to *Belmont* at [118] which was cited to the court. Toulson LJ cannot, therefore, have been unaware of *Belmont*.

253. Toulson LJ's view finds some support from the speech of Lord Porter in *Crofter Hand Woven Harris Tweed Company Ltd v Veitch* [1942] AC 435. He said at 495-6:

“The true position is, I think, that some proceedings are not actionable because neither the end nor the means are wrongful but there are others in which *either the end or the means are wrongful and yet those acting in combination are excused because they have just cause for what they have done*. To induce the breach of a contract which may lead to immorality..., or of a contract which is an infringement of the right of the breaker ... , has been held to be justified. These however are only examples, and afford little assistance in determining the circumstances which will constitute sufficient justification. I doubt whether it is possible to define what those circumstances are. Perhaps one cannot safely go further than the statement to be found in *Glamorgan Coal Co v South Wales Miners' Federation*, and *Conway v Wade*, per Lord Loreburn, that they are not matters for definition but for a consideration of the individual circumstances of each case. Whatever the limits within which just cause or excuse are confined, this class of case is, I think, an exception to the general rule that a combination to do what is unlawful or to do what is lawful by unlawful means is actionable, and is not an alternative expression of the principle itself. It may indeed be more meritorious to induce the breach of a contract *contra bonos mores* than merely to pursue one's own selfish ends, but the one requires justification in law and the other does not.” (Emphasis added)

254. It is also true that in the passage to which Toulson LJ referred at [127], Arden LJ was discussing inducement of a breach of contract. But she had set out at [125] and [126] passages from *OBG* in which Lord Nicholls and Lord Hoffmann were discussing what amounted to an intention to cause injury for the purposes of the unlawful means tort. She then went on to say:

“But these propositions do not, in my judgment, apply where the causative act is something which the party doing it believes he has a contractual right to do as against the relevant person, notwithstanding that the act would coincidentally cause that person detriment or loss.”

255. The important point is that she said that a belief in a contractual right to do something meant that there was no intention to “cause harm”. I take “cause harm” to be equivalent to “cause injury”; which in my judgment is borne out by what she said at [146] in the context of causing loss by unlawful means:

“The *OBG* case did not concern liability for conspiracy but no counsel suggested that any distinction could be drawn between what was held in the *OBG* case about intention to cause loss by unlawful means and conspiracy. It follows therefore that it is not enough that there is an intention to do an act which in fact

causes loss. That act must be done with the intention that it will cause loss. In the present case Mr Hawkins gave advice that the leaseback option would be overreached. That advice was inconsistent with an intention to cause harm to Britel.”

256. That was one of the reasons why the claim in conspiracy to injure by unlawful means failed. It is, I think, part of the *ratio*.
257. In *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch) Morgan J undertook a comprehensive review of the authorities, contained in Annex 1 to his judgment. He concluded at [117]:

“It is probably the case that the statements in the Court of Appeal in *Meretz* on this present point were obiter. But for the decision of the Court of Appeal in *British Industrial Plastics Ltd v Ferguson*, I might have been prepared to hold that I was bound by the ratio of Belmont and I should follow that ratio notwithstanding the obiter dicta in *Meretz*. However, in view of what was said by the Court of Appeal in *British Industrial Plastics Ltd v Ferguson* together with the dicta in the Court of Appeal in *Meretz*, my conclusion is that a judge at first instance ought to follow what is clearly stated by Toulson LJ in *Meretz* at [174].”

258. Morgan J’s analysis has since been widely (though not universally) applied at first instance: see, for example *Lictor Anstalt v Mir Steel Ltd* [2014] EWHC 3316 (Ch) at [262] (Asplin J); *Brent LBC v Davies* [2018] EWHC 2241 (Ch) at [284] (Zacaroli J); *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [95] (Cockerill J). I note, also that both *Digicel* and *Meretz* were cited to the Supreme Court in *Ablyazov*. Had the Supreme Court thought that they were wrong, I would have expected them to have said so.
259. It is right to say, however, that in *First Subsea Ltd v Baltec Ltd* [2014] EWHC 866 (Ch), although Norris J was attracted to the views expressed in *Meretz*, he felt bound to follow *Belmont*; as did HHJ Pelling QC in *Capital for Enterprise Fund Ltd v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch).
260. In *Stobart Group Ltd v Tinkler* [2019] EWHC 258 (Comm) HHJ Russen QC discussed the ingredients of an unlawful means conspiracy. He rejected the submission that an alleged conspirator had to know that the means were unlawful. At [555] he said:

“To go arguably further than what the Lords Justices had in mind in *Meretz*, and add knowledge of unlawfulness to the third element of an unlawful means conspiracy, would also appear to detract from the fundamental point that it is in the fact of the conspiracy (with the requisite intent to injure) that the unlawfulness resides. It is that fact (*conspiracy being reprehensible in any context*) that distinguishes this tort from the tort of unlawful interference.” (Emphasis added)

261. I find this a puzzling observation. In the context of the tort now under consideration, “conspiracy” could just as easily be replaced by “collaboration” or “co-operation” which would not carry the pejorative associations of “conspiracy”. Moreover, as Lord Diplock famously observed in *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173, 189:

“But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II.”

262. That is why Lord Walker in *Total* (in the passage I have quoted) also doubted the first reason given by Bowen LJ for justifying the tort of conspiracy. I do not, therefore, consider that the mere fact of collaboration or co-operation can be justified as of itself reprehensible. HHJ Russen also said that practical difficulties would arise if knowledge that the means were unlawful were to be an ingredient of the tort. No doubt there is some truth in that. But that did not deter the House of Lords in *OBG* from deciding that knowledge that there would be a breach of contract was an essential element of the tort of inducing a breach. That, too, might involve an investigation into what legal knowledge a defendant had.

263. At [279] and [280] the judge pointed out that there are fine distinctions between knowledge of facts, and knowledge that those facts amount to unlawfulness; and that many such questions could equally well be posed as questions of fact or questions of law. He also pointed out at [287] that since conspiracy catches those who have merely agreed to or collaborated in a course of action, the wider view of the ambit of the tort risks imposing liability on one who has done nothing unlawful and did not intend to agree to anything unlawful.

264. It may be that there is a difference between contravening the criminal law on the one hand and infringing private rights on the other. Criminal offences are created for the benefit of society as a whole, and their enforcement may be described as enforcing basic standards of civilised behaviour. Everyone is expected to obey the criminal law. But even this cannot be pushed too far; as the frequently cited example of the pizza delivery business instructing its drivers to jump red lights and ignore speed limits shows. Private rights, on the other hand, are created to protect the right holders and do not have the same societal effect.

265. I would hold, therefore, that where the unlawful means consist of a violation of some private right, knowledge of unlawfulness is an ingredient of the tort of intention to injure by unlawful means; and of conspiracy to commit that tort. Knowledge for this purpose would, of course, include “blind-eye” knowledge.

266. On the basis of the judge’s findings of fact, I do not consider that anything turns on the burden of proof.



267. SIS accepted that it knew that it had infringed the terms and conditions of the Exchanges. It knew, therefore, that in that respect it was using unlawful means. So the question arises: were they relevant unlawful means?

**Were breaches of the Exchanges' terms relevant unlawful means?**

268. The starting point for this issue is the judge's finding at [251] which Arnold LJ has quoted at [148]. On the face of it, that was an evaluative judgment with which an appeal court should be reluctant to interfere.
269. I agree with Arnold LJ that the real question is whether the example of the pizza delivery business (which everyone agrees is not liable simply because of road traffic offences) is distinguishable. As Lord Walker explained in *Total* at [96] it is not enough that there is unlawfulness somewhere in the story. Arnold LJ distinguishes the case of the pizza business because the loss is caused by customers choosing to place their orders with that business, rather than with its rivals. But that is not the hypothesis on which the judges concerned based their discussion. In *OBG* Lord Nicholls said clearly at [160] that the courier service gained an unfair and illicit advantage over its rivals "because" its cyclists ignored speed limits and jumped red lights. Lord Walker used the same language at [266], substituting pizza delivery business for couriers. In *Total* at [119] Lord Mance used exactly the same language as Lord Nicholls and Lord Walker. In *Ablyazov* in the passage quoted by Arnold LJ at [150], Lords Sumption and Lloyd-Jones described the example as the pizza business obtaining more custom "by instructing" its drivers to ignore speed limits. In all these cases something more than "but for" causation is required.
270. Put in terms of the distinction that Arnold LJ draws at [156], it is all about selling pizzas. The pizza delivery business instructed its drivers to break the speed limit in order to sell more pizzas to its customers. Breaking the speed limit enabled it to do so. Its rival suffered loss because it was competing to supply the same commodity. I do not see a valid ground of distinction here, such that we can say that the judge's evaluative judgment was wrong.
271. Accordingly, I would have dismissed TRP's cross-appeal.