



Contract

INDUCING BREACH OF CONTRACTS

WHEN IT IS WRONG TO MEDDLE WITH THE BUSINESS OF OTHERS

During an economic downturn, such as the one precipitated by COVID-19 which, sadly, is on a second wave in some parts of the world, it is commonplace for businesses to seek to exit onerous contractual obligations and gravitate towards more favourable contracts, even if such moves entail breaching their existing contract(s). By the same token, some businesses also exploit the situation to expand their reach, by offering better deals to potential counterparties who are already contractually bound to other counterparties.

Whilst moves such as the ones described above are probably justifiable on the ground of economics, they are not without legal consequences. Ordinarily, an action for a breach of a contract lies against only a person that is a party to such a contract, and a non-party can neither sue nor be sued for a breach of that contract because of the principle of privity of contract. However, the reality is that a non-party could contribute to or actively cause

the breach of a contract. Left to the principle of privity of contract alone, the offending non-party, despite its wrongful act towards the innocent contractual party who bears the brunt of the breach, would be immune to any action by that innocent party.

Recognising the above limitation of the principle of privity of contract, the common law tort of inducing breach of contracts was introduced to create legal liability for a non-

party to a contract who contributed to or caused its breach. If Business A, despite knowing that Business B will breach its existing contract with Business C if it accepts a business offer that Business A is making, intentionally induces Business B to accept the deal, then there is a risk that beyond the likelihood of Business B being liable to Business C for breach of contract, Business A may also be liable for inducing breach of contract

The infrequency of actions founded on inducement of breach of contract in Nigeria may be a pointer to the fact that not many businesses who find themselves in the shoes of Business C in our hypothetical case above are aware that they could potentially obtain redress against a meddlesome Business A. This piece, therefore, aims to discuss briefly inducement of breach of contract as a cause of action and highlight what a prospective claimant must show to successfully obtain remedy against a non-party for inducing breach of contracts.

What Constitutes the Tort of Inducing Breach of Contracts?

There is a dearth of Nigerian decisions relating to the tort of inducing breach of contracts. However, the Supreme Court has had occasion to recognise the kindred tort of interference with business (or unlawful interference with contract), when it held that *"the tort of unlawful interference with the business of another consists in one person using unlawful means with the aim and effect of causing damage to another. To constitute the tort the means used must be unlawful otherwise the tort is not established."*¹

The tort of inducing breach of contracts shares some similarity with the tort of interference

with business in the sense that they both relate to acts of interference by a third party to the contract or economic interest of a party. However, the key distinctions between both torts are that: (a) while the act of interference to establish the tort of unlawful interference with business must be unlawful, the acts that will constitute inducement of breach of contract does not necessary need to be unlawful; and (b) the claimant does not need to prove that a breach of contract occurred due to the acts of the third party to establish unlawful interference with business, but will be required to prove breach of contract due to acts of the third party in order to establish the tort of inducing breach of contracts.²

There are several ways through which a non-party can cause a party to commit a breach of contract, such as by inducing, procuring, persuading, pressuring or advising the party to breach the contract. Whatever the manner of causation, a relevant factor is that the manner used must be intentional, wrongful or unjustifiable under the circumstances and that it must have led to a breach of the contract.

Proving Tort of Inducing Breach of Contract

The conceptual description of the tort of inducing breach of contract may appear simplistic but proving that a person is liable for the tort tend to require presentation and consideration of a significant, and mostly circumstantial, evidence. An old English decision offers helpful insight in this regard.

In *Lumley v. Gye*,³ Lumley entered into a contract with Miss Wagner for her to sing exclusively at Lumley's theatre for a period of three months and the exclusivity of the contract meant that she was not permitted to sing or use her talents elsewhere. However,

¹ See *Sparkling Breweries Limited & Ors. v. Union Bank of Nigeria Limited* (2001) LPELR-SC.113/1996; (2001) All N.L.R 575 (2001) 7 S.C (Pt. II) 146.

² See the UK House of Lords (now Supreme Court) decision in *OBG Ltd. & Anor. v. Allan & Ors, Douglas & Ors v. Hello! Ltd. & Ors and Mainstream*

Properties Ltd. v. Young (No. 3) [2007] 4 All E R Rep. 545 which provides illuminating discussions of the torts of inducing breach of contracts and unlawful interference with contract.

³ 3118 Eng. Rep. 749 (K.B. 1853).

Gye, through the offer of a larger sum, entered into another contract with Miss Wagner for her to sing at his own theatre in breach of Miss Wagner's exclusive contract with Lumley. Lumley sued Gye seeking for damages for maliciously interfering with his contract with Miss Wagner by inducing a breach of same. The court held that Gye was liable for the tort of inducing breach of contract because, according to the court: "[i]t is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong" and this is because "he who procures the wrong is a joint wrong doer...".

Apart from establishing the tort, *Lumley v. Gye* explicitly identified the circumstances under which an inducement of breach of contracts will be considered actionable. These circumstances, which are listed below and discussed subsequently, have been further espoused in the cases that were decided after *Lumley v. Gye*.

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- The existence of a valid contract.
- Knowledge and intention of the non-party.
- Lack of any justification for the non-party to induce such a breach.
- Actual breach of the contract occurred due to the interference.
- Damage to the party seeking remedy was caused by the breach.

Existence of a Valid Contract

The existence of a valid contract is critical to establishing a claim of inducement by a non-party to the contract because it goes to reason

⁴ See *Quinn v. Leathen* (1900 – 3) All E R Rep. 1 at 9[H] *British Industrial Plastics Ltd. v. Ferguson* (1938) 4 All E R 504 at 508, *C. Thompson & Co. Ltd. v. Deakin & Ors* (1952) 2 All E R Rep. 361 at 378
⁵ *National Photograph Co. v Edison Bell Co.* (1908) 1 Ch 335, 366, 367, *Goldson v Goldman* [1914] 2 Ch 603, *C. Thompson & Co. Ltd. v. Deakin & Ors* (1952) 2 All E R Rep. 361,

that a person cannot induce the breach of a non-existent or invalid contract.

Initially, the English court, in *Lumley v Gye*, had restricted the tort of inducing breach of contract to contracts for personal services. However, subsequent decisions of English courts confirmed that the tort of inducing breach of contracts applied to all kinds of contract.⁵ Since these decisions declare the common law position in England, they are persuasive and likely to be followed by Nigerian courts, as the common law applicable in England also apply in Nigeria unless they have been superseded by statute.⁶ Hence, once a contract is valid, regardless of the kind of contract, an action can be commenced for the tort of inducing breach of contracts based on that contract.

The validity or otherwise of a contract is proven by reference to the basic elements of a contract such as offer, acceptance, consideration, and intention to enter legal relations. If an outward manifestation of mutual assent can be objectively distilled from the circumstances⁷ and it is shown that parties were in agreement, then a valid contract may be found to be in existence. If there was no valid contract between the claimant and the party alleged to have breached a contract, then the claimant will invariably be unable to prove a third party's liability for the tort of inducing breach of contract.

Knowledge and intention of the non-party

For the tort of inducing breach of contract to be successfully established, it must be shown that the defendant had knowledge of the existence of the contractual relationship and intended to cause a breach of the contract.⁸ In *Lumley v Gye*

⁶ Section 32(1), Interpretation Act, Cap A2, Laws of the Federation of Nigeria, 2004.
⁷ *Asuquo & Ors. V. Eyo & Anor* (2013) LPELR-20199(CA)
⁸ *British Industrial Plastics Ltd. v. Ferguson* (1938) 4 All E R 504

it was proven that the defendant had knowledge of the contract between the plaintiff and Miss Wagner as well as the exclusivity of same but intentionally went ahead to procure the breach of that contract. This was a part of the bases upon which it was held that the defendant was liable for the tort of inducing breach of contract.

Without the knowledge of the existence of the contract and intention to cause a breach of same, a defendant will not be liable for the tort of inducing breach of contract. However, the plaintiff does not necessarily need to show that the defendant is aware of the exact terms of the contract if there is sufficient knowledge of the existence of the contract.⁹

Although knowledge and intention are intimately connected, there is a likelihood that one can exist without the other. Even where knowledge of the existence of the contract is established, an affirmative proof that the non-party did not intend to induce or cause any breach can rescue the non-party from liability even when other elements are present¹⁰. The point was illustrated in *British Industrial Plastics Ltd. v. Ferguson*¹¹ where the defendant, though aware of the contract between the plaintiff and its employee, erroneously believed that the plaintiff's employee could validly obtain a patent for a secret process he claimed to have developed. Based on that belief, the defendant agreed with the employee for the latter to meet the defendant's patent agent who investigated and confirmed that the employee could obtain the patent. The court dismissed the claim against the defendant, holding that the intended result was not to cause the employee to breach its contract of employment with the plaintiff. Similar set of facts also played out in

*Mainstream Properties Ltd. v. Young*¹² and the court held that the appellant company had not proved the intention to induce breach of contract on the part of the respondent. Consequently, the court dismissed the appellant company's claim for inducement of breach of contract.

Lack of any justification for the non-party to induce such a breach

It may not be always necessary to prove the lack of justification on the part of the non-party. However, the non-party may raise the defence that the inducement is justifiable and this defence may totally exculpate the non-party from liability for the tort of inducing breach of contract unless it is shown that there was indeed a lack of justification for the acts of the non-party. The position of the law is that a person inducing a breach of contract commits no actionable wrong if his conduct is justified.¹³

The lines between interferences that are justifiable and the ones that are not are somewhat blurred and it may not be possible to anticipate every single interference that the court will consider justifiable or to make a general rule about the nature of the defence of justification. In fact, the English courts have held that it is not sufficient justification that the non-party who induced the breach of contract did not act maliciously and had no desire to injure the plaintiff.¹⁴ However, the defence of justification has been upheld where the non-party induced a breach of a contract that would have been in breach of a prior contract between that non-party and the party in breach.¹⁵ Also, inducing a breach of a contract which may lead to immorality has been held to be justified.¹⁶

⁹ *JT Stratford & Son Ltd v Lindley* [1965] AC 269

¹⁰ *White v Riley* [1921] 1 Ch. 1, CA

¹¹ (1938) 4 All E R 504

¹² [2007] 4 All E R Rep. 545

¹³ *Quinn v Leathem* [1901] AC 495 at 510, HL, *Crofter Hand Wooven Harris Tweed Co Ltd v Veitch* [1942] AC 435

¹⁴ *South Wales Miners Federation v Glamorgan Coal Co Ltd* [1905] AC 239

¹⁵ *Crofter Hand Wooven Harris Tweed Co Ltd v Veitch* [1942] AC 435

¹⁶ *Brimlow v Casson* [1924] 1 Ch 302

What is clear, however, is that the presence or lack of justification to induce breach of contractual relationships is determined on a case by case basis, depending on the factual circumstances that are at play in relation to that case.

Actual breach of the contract occurred due to the interference

For an action to be maintained for the tort of inducing breach of contract, there must have been an actual breach of the contract in question and the breach must be as a result of the non-party's inducement. It is not enough that a non-party induced a party to a contract if the inducement did not in fact result in a breach by the induced party.¹⁷

In *Palmer Birch (a partnership) v Michael Lloyd, Christopher Lloyd*,¹⁸ the English court clarified that “inducing a breach of contract is a tort of secondary liability. Without primary liability on the part of the contract-breaker, whose breach of contract the defendant has induced or procured, there can be no such secondary, tortious liability on the part of that defendant.”

Damage to the party seeking remedy was caused by the breach

A party suing for inducement of breach of contract does not only need to prove that the inducement led to the breach of the contract but must also prove that damages have been caused to it as a result of the breach.¹⁹ When

damage can be proved or inferred to have been caused by a breach due to the inducement by the non-party, then the plaintiff is entitled to be compensated for the damages which was intended²⁰ or damages which were not intended, but were the reasonable consequences of such a breach and the effect of which was not too remote.²¹

Avoiding Liability

In many cases of inducement of breach of contract, inducing parties are driven by economic considerations without necessarily realising that they are exposing themselves to potential liability or fully grasping the implication of that potential liability. There is also a likelihood that the inducement of breach of contracts occur because of the inducing parties' failure/omission to ask the right questions and seek necessary confirmations before proceeding to lure their prospective counterparties out of their existing contracts.

Against this backdrop, conducting proper due diligence on potential business partners or contractual counterparties is a tried and tested tool for avoiding potential inducement of breach of contracts. Depending on the stakes, one could go a step further to request a statement of declaration (or inclusion of warranties and representations) that the proposed business or contract does not conflict or interfere with prior contractual relationships of a prospective counter-party.

¹⁷ *OBG Ltd. & Anor. v. Allan & Ors, Douglas & Ors v. Hello! Ltd. & Ors and Mainstream Properties Ltd. v. Young (No. 3)* [2007] 4 All E R Rep. 545
¹⁸ [2018] EWHC 2316

¹⁹ *Printers and Finishers v. Holloway* [1965] 1 W.L.R. 1
²⁰ *Lumley v. Gye* [1853] 2 E & B 216 at 233-234
²¹ *British Motor Trade Association v. Salvadori* [1949] Ch. 556, at 568 – 569.

Conclusion

Overall, the tort of inducement of breach of contract, even though it has been recognized by English courts since the 19th Century, has not yet become popular in Nigeria. Nonetheless, it remains relevant to doing business in Nigeria because of the protection it gives to contractual counter-parties from wrongful interference with their contracts by non-parties and the liability it creates against those non-parties who would have otherwise been immune to suits for breach of the contracts based on the principle of privity of contract.

With the impact that COVID-19 has had, and is having, on economies and businesses, and the foreseeable increase in contracts shopping to cushion potential exposures, the risk of liability for inducement of breach of contract may be lurking in the shadows more than before. All that it may take to open the floodgate could be one claimant who, aggrieved enough by the inducement of breach of its contract, successfully sues the party that induced the breach.

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