

INDUCING A BREACH OF CONTRACT
Allen v Dodd & Co Ltd [2020] EWCA Civ 258

An employer is not liable for inducing a breach of contract where it receives legal advice that it is “more probable than not” that a restrictive covenant is unenforceable.

This is the finding of the Court of Appeal in an important decision that clarifies what “knowledge” is required for the tort of inducing a breach of contract. The question frequently arises where an employer recruits an employee and receives advice as to the enforceability of the employee’s covenants. The advice is rarely unequivocal. How firm must the advice be for the employer to escape liability for inducing a breach of contract?

The facts

Mr Pollock was employed by David Allen, an accountancy firm, as a business service specialist. His contract contained non-solicitation and non-dealing covenants. Pollock resigned to take up a job with Dodd & Co Ltd, a competitor. Before Pollock took up his new job, Dodd obtained legal advice from their solicitors about whether the restrictive covenants were enforceable. Based on the advice received, Dodd took the view that while the matter was not entirely without risk, it was more likely than not that the covenants were unenforceable against Pollock. In fact it turned out, after a contested hearing, that subject to some severance, the covenants were enforceable after all; and that, by working for Dodd as he did, Pollock was in breach of them.

The question raised on the appeal was whether Dodd had sufficient knowledge to expose them to liability in tort for inducing a breach of Pollock’s contract. The judge at first instance answered “no”. Dodd didn’t turn a blind eye to Pollock’s contractual obligations. Neither was it indifferent to them because it went to the trouble of obtaining early legal advice; upon which it honestly relied. The fact that the legal advice turned out to be wrong was not enough. Allen appealed with the permission of Leggatt LJ.

The tort of inducing a breach of contract

There are 5 elements to the tort of inducing a breach of contract, each of which must be satisfied to establish liability:

- (1) there must be a contract;
- (2) there must be a breach of that contract;
- (3) the defendant must procure or induce that breach;
- (4) the defendant must know of the existence of the relevant term in the contract or turn a blind eye to its existence;
- (5) the defendant must actually realise that the conduct, which was being induced or procured, would result in a breach of the term.

See *Aerostar v Wilson* [2010] EWHC 2032 (Ch) per Morgan J at [163].

Knowledge that a breach would result

This case concerns element (5): the defendant must realise that a breach would result.

The seminal modern case is *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1. In that case, Lord Hoffmann said at [39]:

“To be liable for inducing breach of contract, you must know that you are inducing a breach. 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 realise that it will have this effect. Nor does it matter that you ought reasonably to have done so.”

At [41] he went on to say:

“...a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact.”

In *Allen v Dodd*, the only judgment was given by Lewison LJ (with whom David Richards and Rose LJ agreed). He noted that the recent tide of authority has been to restrict rather than to expand the scope of the economic torts. As everyone knows, lawyers rarely give unequivocal advice; and even if they do the client must appreciate that there is always a risk that the advice will turn out to be wrong: [34].

In [36], Lewison LJ noted that it may be the case that if the legal advice goes no further than to say that it is arguable that no breach will be committed, that would not be enough to escape liability. That question did not arise in this appeal, and he expressed no opinion one way or another. He then said (which is the *ratio* of the case):

“...if the advice is that it is more probable than not that no breach will be committed, that is good enough.”

Lessons from the case

The following lessons may be drawn from this important case:

- (i) An employer should ask a potential recruit about the restrictive covenants in his existing contract of employment.
- (ii) An employer should seek legal advice on the enforceability of any covenants.
- (iii) If the legal advice is that it is more probable than not that no breach will be committed, and the employer honestly relies on that advice, it will escape liability for inducing a breach of contract.
- (iv) This is so even if the advice turns out to be wrong and the covenant is both enforceable and breached by the employee.
- (v) However, if the advice is that it is arguable that no breach is committed, that may not be enough to escape liability. This point remains to be decided in a future case.

The full judgment can be read [here](#).

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