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MacLeod, J. (2009) *Offside goals and induced breaches of contract*. Edinburgh Law Review, 13 (2). pp. 278-282. ISSN 1364-9809

<http://eprints.gla.ac.uk/45812/>

Deposited on: 03 April 2012

Analysis

EdinLR Vol 13 pp 278-282
DOI: 10.3366/E1364980909001395

Offside Goals and Induced Breaches of Contract

A. *GLOBAL RESOURCES LTD v MACKAY*

In *OBG Ltd v Allan*,¹ the House of Lords radically reformulated the economic delicts. *Global Resources Group Ltd v Mackay*² provided the first opportunity for judicial consideration of this decision's implications for Scotland.

Mr Mackay was an employee of G & D Pallets Ltd (GDP), which contracted to provide his services as a business consultant to the pursuers. His "whole... time, attention and abilities" were to be devoted to the pursuers' business and he and GDP were bound to maintain commercial confidentiality. The pursuers averred that Mr Mackay had worked for a competitor and downloaded commercially sensitive documents on to his laptop, putting GDP in breach of both obligations. By doing so in the knowledge of GDP's contract with the pursuers, they argued, Mr Mackay induced GDP to breach the contract and was therefore liable to them in delict.

The matter was not finally disposed of because Lord Hodge felt that the pleadings as they stood justified neither dismissal for irrelevancy nor a proof. He did, however, make it clear that the facts averred did not disclose an induced breach of contract. In doing so, he produced a summary of Scots law on the point admirable for its clarity and brevity.

Lord Hodge demonstrated that the Scottish courts had developed the delict of inducing breach of contract by extensive reference to English authorities. On that basis, he was content to follow the approach in *OBG*.³ He went on to identify five "characteristics" which appear to be the essential elements of the delict:⁴

- (i) breach of contract;
- (ii) knowledge on the part of the inducing party that this will occur;
- (iii) breach which is either a means to an end sought by the inducing party or an end in itself;
- (iv) inducement in the form of persuasion, encouragement or assistance;
- (v) absence of lawful justification.

1 [2007] UKHL 21, [2008] 1 AC 1. The case has received extensive academic commentary: e.g. J Thomson, "Redrawing the landscape of the economic wrongs" (2008) 12 EdinLR 267; H Carty, "The economic torts in the 21st century" (2008) 124 LQR 641; S Balthasar, "Economic torts – Vermögensschäden und der Schutz relativer Rechte im englischen law of torts" 2008 Zeitschrift für Europäisches Privatrecht 864.

2 [2008] CSOH 148, 2009 SLT 104.

3 Paras 7-10.

4 Paras 11-14.

These might be reformulated as a typical case:

- (a) X has a contract with Y;
- (b) Z encourages, persuades or assists Y to do something which breaches his contract with X;
- (c) Z knows that Y's action will be a breach of contract;
- (d) unless there is some other circumstance justifying Z's conduct, Z is liable to X in delict.

The pursuers fell short on (c). Since Mr Mackay's actions brought the breach about directly, without the need for any further action by GDP, he could not be said to have persuaded, encouraged or assisted GDP's breach.⁵

B. A PARALLEL RULE?

The typical form of induced breach calls to mind the so-called "offside goals rule" in property law.⁶ While the rule's rationale and certain detailed questions of application remain controversial,⁷ the basic concept is clear:⁸

- (a) X has a personal right against Y, binding Y to grant a real right to X;⁹
- (b) Y grants a real right to Z, in breach of his obligation to X;
- (c) Z is in bad faith or the grant to him is gratuitous;
- (d) X may have the Y-Z grant set aside.¹⁰

If Z is in bad faith, the situation looks very similar to inducing breach of contract:

- The rule can only apply if the grant to Z is in breach of a prior obligation.¹¹
- Bad faith requires actual or constructive knowledge of the impending breach.¹²
- Z wishes Y to grant him the real right and in making that grant, Y breaches the contract with X. Thus Y's action is a means to an end which Z seeks.
- Since no-one can force a benefit on another, Y requires Z's consent to effect the transfer. Therefore, Z assists Y's breach.

⁵ Paras 15, 18. See *OBG* at paras 174-180 per Lord Nicholls of Birkenhead.

⁶ See, most recently, *Advice Centre for Mortgages v McNicoll* [2006] CSOH 58, 2006 SLT 591 and *Gibson v Royal Bank of Scotland* [2009] CSOH 14.

⁷ See e.g. S Wortley, "Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right" 2002 JR 291; R G Anderson, *Assignment* (2008) paras 11-04-11-30; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) para 8.31.

⁸ But cf *Gibson v Royal Bank of Scotland* [2009] CSOH 14 at para 43 per Lord Emslie.

⁹ Cf *Gibson v Royal Bank of Scotland* at paras 44-47 per Lord Emslie.

¹⁰ K G C Reid, *The Law of Property in Scotland* (1996) para 695.

¹¹ *Advice Centre for Mortgages v McNicoll* 2006 SLT 591 at paras 47-48. Lord Drummond Young held that there was no such breach where X's right was a mere option to purchase in a lease. It could be argued, however, that a grant to Z in such circumstances is anticipatory breach. See *Synge v Synge* [1894] 1 QB 466; *Omnium d'Enterprise v Sutherland* [1919] 1 KB 618; *Universal Cargo Carriers Corp v Citati (No 1)* [1957] 2 QB 401; W M Gloag, *The Law of Contract*, 2nd edn (1929) 600-601; H Beale (ed), *Chitty on Contracts*, 29th edn (2004) paras 24-028-24-030; G H Treitel, *The Law of Contract*, 12th edn by E Peel (2007) para 17-075.

¹² *Advice Centre for Mortgages* at para 45 per Lord Drummond Young.

For present purposes, the explicit characterisation of assistance as a form of inducement is the most striking element of Lord Hodge's judgment. By extending inducement beyond its everyday meaning, it allows a parallel to be drawn between the two rules.¹³

The parallel is not, however, surprising. Both rules protect contractual rights against third parties,¹⁴ and both are marked by the practical and dogmatic considerations peculiar to this enterprise: lack of public notice of contractual relations and concern that the personal nature of personal rights be maintained.¹⁵ Both attempt to restore the *status quo ante*. This is obvious of offside goals but no less true of inducing breach of contract. Delictual damages attempt to put the pursuer in the position he would have been in had the wrong not been done.¹⁶ If imminent risk of the breach of either rule were demonstrated, interdict would be available.¹⁷

Against this background, setting a bad faith transfer aside as an offside goal begins to look like a special remedy available in some cases of induced breach. However, the literature on offside goals makes little or no mention of inducing breach of contract and the two rules seem to have developed without reference to one another. Although strikingly similar in their modern form, they arose from very different sources. The offside goals rule has a long native history¹⁸ and resembles an equivalent rule in Roman-Dutch law.¹⁹ Located firmly within one of the most Civilian areas of Scots law, there was very little direct English influence on its development.²⁰ The *OBG* rules on inducing breach of contract, on the other hand, are creatures of the Common Law, with roots in the interaction between the action for wrongful retainer of a servant²¹ and an action on the case for procuring desertion by a servant.²² While, as Lord Hodge demonstrated, Scottish courts have referred frequently to English authority on the question, the compliment does not seem to have been returned.²³

13 See *Gibson v Royal Bank of Scotland* [2009] CSOH 14 at para 40 per Lord Emslie.

14 *OBG* emphasised that this, rather than the protection of economic interests, lies at the heart of inducing breach of contract: *OBG Ltd v Allan* [2008] 1 AC 1 at para 8 per Lord Hoffmann.

15 *Global Resources Group* at para 15; *Advice Centre for Mortgages* at para 48.

16 Stair, *Inst* 1.9.2.

17 D M Walker, *The Law of Civil Remedies in Scotland* (1974) 234; D Maxwell, *The Practice of the Court of Session* (1980) 83. Interdict was granted against breach of the South African equivalent of the offside goals rule in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 and *Harley v Upward Spiral* 1196 CC 2006 (4) SA 597.

18 See R G Anderson, *Assignment* (2008) paras 11-06-11-23.

19 G Lubbe, "A doctrine in search of a theory: reflections on the so-called doctrine of notice in South Africa" 1997 *Acta Juridica* 246 and authorities cited therein, particularly at n 4.

20 Lord Shand did make reference to the English rules as Lord Ordinary in *Stodart v Dalzell* (1876) 4 R 236 at 241.

21 Statute of Labourers 1351.

22 G H Jones, "*Per Quod Servitum Amisit*" (1958) 74 LQR 39 (esp at 50-53), cited by Lord Hoffmann in *OBG* at para 4. The action on the case developed out of trespass into a general action for miscellaneous wrongs: see F W Maitland, *The Forms of Action at Common Law*, 2nd edn by A H Chaytor and W H Whittaker (1968) Lecture VI.

23 In *OBG* cases from Australia, Canada and America were among the "[n]early 350 reported decisions and academic writings ... placed before the House" but the only Scottish cases were *Donoghue v Stevenson* 1932 SC (HL) 31 and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* 1942 SC (HL) 1. The latter was decided on the basis of English authorities.

C. DIFFERENCES IN DETAIL

(1) Mental element

In light of that background, it is not surprising that there are divergences on certain points. According to the offside goals rule's *locus classicus*:²⁴

If an intending purchaser is aware of a prior contract for the sale of the subjects, he is bound to inquire into the nature and result of that prior contract, and his duty of inquiry is not satisfied by inquiry of the seller and an assurance by him that the contract is no longer in existence. If he merely obtains such an assurance, he cannot rely on the missives or on a disposition following thereon . . . It is sufficient if the intending purchaser fails to make the inquiry which he is bound to do. If he fails he is no longer *in bona fide* but *in mala fide*.

Thus, if Z knew there had been a contract between X and Y but failed to make proper inquiries as to whether Y was still bound, he would be in bad faith for the purposes of offside goals. However, such a buyer would not necessarily have the "*mens rea*" for inducing breach of contract unless the failure amounted to wilful blindness.²⁵ *Mainstream Properties Ltd v Young* was decided alongside *OBG*. The alleged tortfeasor entered into a joint venture, in which he assisted directors of Mainstream Properties to buy some land. The purchase put the directors in breach of their contractual duties to Mainstream. The alleged tortfeasor knew of the potential breach but contented himself with (incorrect) assurances from the directors that Mainstream had been offered the property and refused. The House of Lords held that such assurances were sufficient, in the circumstances, to exclude liability for inducing breach of contract.²⁶

(2) Justification

While pursuing one's economic interest is not sufficient justification for inducing breach of contract, Lord Nicholls suggested in *OPG* that inducing a breach of contract was permissible "in order to protect an equal or superior right of [one's] own".²⁷ This sits uneasily with recent authority on chronology in offside goals. In *Alex Brewster & Sons v Caughey*,²⁸ Lord Eassie held that Z's knowledge of Y's prior contract with X would render Z's title voidable even if that knowledge was acquired *after* Z had concluded his own contract with Y (but before Z's completion of title pursuant to that contract). Since, all other things being equal, personal rights rank *pari passu* in insolvency, an innocently acquired contractual right (such as Z's against Y) might perhaps be regarded as an equal right and thus a justification for inducing breach.²⁹

²⁴ *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 499 per Lord Jamieson.

²⁵ *OBG* at paras 40-41 per Lord Hoffmann.

²⁶ *OBG* at paras 67-69 per Lord Hoffmann and paras 201-202 per Lord Nicholls of Birkenhead.

²⁷ *OBG* at para 193.

²⁸ 2002 GWD 15-506 at para 73. The text of Lord Eassie's opinion is available at <http://www.scotcourts.gov.uk/opinions/EAS0904.html>.

²⁹ Cf *Harley v Upward Spiral* 1196 CC 2006 (4) SA 597.

D. IMPLICATIONS

The differences mentioned create the potential for voidability where there is no delict and thus present obstacles to development of a unitary doctrine on the protection of contractual rights against third parties. These obstacles do not, however, seem insurmountable and such a development might be considered desirable as we strive for a mixed system which is a coherent synthesis rather than a mere heap. It would certainly be evidence of continuing vitality in the interaction between Common and Civil Law in Scotland.

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The author is grateful to Rebecca Maslin for helpful comments.

EdinLR Vol 13 pp 282-286

DOI: 10.3366/E1364980909001401

Causation, Idiopathic Conditions and the Limits of Epidemiology

The absence of scientific evidence with respect to the cause of damage is one of the most difficult problems faced by courts in determining causation. Occasionally, Scots law is required to resolve such cases.¹ They are essentially about scientific uncertainty, which may arise from limitations in scientific knowledge about a particular biological process (general causation) or from the difficulty in providing a scientific explanation for the sequence in an individual case (individual causation).² Both forms of scientific uncertainty arose in *Smith v McNair*,³ where the difficult legal and medical issue addressed, and deemed to be “at the frontier edge of causation”,⁴ was whether a road accident accelerated the development of Parkinson’s disease in a pursuer already suffering from the condition.⁵

A. THE FACTS

In January 2003, Mrs Smith was involved in a serious road accident. A lorry had come out of a lay-by on the A77, and the pursuer moved into the offside lane to avoid it.

1 See, for instance, *Bonthrone v Millan* [1985] *Lancet* ii, 1137 (Lord Jauncey) (existence of cryptogenic (unknown) causes to eliminate possible causal connection between pertussis vaccine and brain damage); *Kay v Ayrshire and Arran Health Board* 1987 SC (HL) 145 (penicillin overdose not capable of causing or aggravating deafness); *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548 *affd* 2000 SC (HL) 77, discussed below.

2 L Khoury, *Uncertain Causation in Medical Liability* (2006) 48-54.

3 *Smith v McNair* [2008] CSOH 154, 2008 GWD 38-570.

4 Para 16.

5 Para 5. Parkinson’s disease is a neuro-degenerative disorder, the degeneration taking the form of accelerated ageing in areas deep in the brain which control movement. There is presently no cure: para 9.