

TORT

TORT OF INDUCEMENT OF BREACH OF CONTRACT – “TALK TO MY LAWYER”...

In February 2020, the United Kingdom (UK) Court of Appeal clarified what “*knowledge*” or information is necessary in order to fall under the tort of inducing a breach of contract. This case was specifically in relation to a situation wherein an employer recruits an employee and receives legal advice regarding the enforceability of the employee’s post-employment restrictions.

The UK Court of Appeal in the case of *Allen v Dodd & Co Ltd* [2020] EWCA Civ 258 explored how the nature of legal advice received may determine liability exposure.

This article discusses the facts, issues and judgment of the case.

FACTS David Allen, an accountancy firm, was the employer of Mr Pollock. Mr Pollock’s employment contract contained several post-employment restrictive covenants which prevented him from working for competitors for a period of time. Mr Pollock resigned to accept an offer to work with Dodd & Co Ltd, a competitor.

Dodd & Co Ltd was aware that there were restrictive covenants in Mr Pollock’s employment contract with David Allen. Before hiring Mr Pollock, Dodd & Co Ltd sought legal advice about whether the restrictive covenants were enforceable and was aware that if these covenants were indeed enforceable, then Mr Pollock would be in breach of his employment contract by accepting the job in Dodd & Co Ltd.

After receiving legal advice, Dodd & Co Ltd concluded that while the matter was not entirely without risk, it was more likely than not that the covenants were unenforceable against Mr Pollock. After a contested hearing, it was found that the covenants were indeed enforceable.

The question raised on this appeal was whether Dodd & Co Ltd had sufficient knowledge to expose them to liability in tort for inducing a breach of Mr Pollock’s

contract. For the avoidance of doubt, the legal advice received by Dodd & Co Ltd was that it was more likely than not that the covenants would not be enforceable. HHJ Haliwell, the judge at first instance, answered “*no*”.

DECISION

1. The UK Court of Appeal ultimately decided that Dodd & Co Ltd did not have the required knowledge to be found liable for inducing a breach of contract. Sufficient knowledge was determined to be a crucial requirement.
2. If defendants honestly believe that the act that they procure will not amount to a breach of contract, they will not be liable in tort even if their belief is mistaken in law, borne out of their ignorance, or by the incorrect advice they receive from their lawyers.
3. It was further stated that people should be able to act on legal advice, and that it did not matter that the legal advice was not unequivocal. Lawyers rarely give unequivocal advice and even if they did the client must appreciate the risk that the advice may be wrong.
4. However, Lewison LJ noted that if the legal advice went no further than to say that it was only arguable that no breach will be committed, it may not be sufficient to avoid exposure to liability. Having said that, this question does not arise in this appeal, and he expressed “*no opinion one way or the other*”.

THE MALAYSIAN POSITION The tort of inducement of breach of contract is not foreign to Malaysia. The law in relation to the tort was introduced and affirmed in the Federal Court case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd* [1984] 1 CLJ (Rep) 211, or Court of Appeal cases such as *Kelang Pembena Kereta-Kereta Sdn Bhd v Mok Tai Dwan* [2000] 1 MLJ 673 and *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187.

The Malaysian position remains that this tort constitutes a tort for third persons to deliberately interfere in the execution of a valid contract which

has been concluded between two or more parties if the following five conditions are satisfied:

1. there must be direct or indirect interference, coupled with the use of unlawful means;
2. the defendant must be shown to have knowledge of the relevant contract;
3. the defendant must be shown to have the intent to interfere;
4. the plaintiff must show that he has suffered special damages, that is, more than nominal damages; and
5. so far as it is necessary, the plaintiff must successfully rebut any defence based on justification that may be put forward by the defendant.

CONCLUSION

1. While in Malaysia restrictive covenants are generally inapplicable in employment contracts, the broader and equally interesting observation that can be extracted from this case is the potential effect of legal advice from a solicitor on the determination of whether inducement had occurred.
2. Obtaining legal advice that clearly informs the defendant that the action undertaken will **not** amount to an inducement will help demonstrate to a court that the defendant did not have the intent to interfere.
3. As such, one should be prudent by making sure to seek out legal advice before undertaking any action that one suspects may induce a breach of contract. It may make the difference between the court finding the defendant as **intentionally interfering in the contract** or **an honest mistake borne out of ignorance of the law**.
4. Lawyers tasked to provide advice in similar circumstances as the instant case would be well-advised to be cautious with the specific phrases (i.e. arguable, recommended, etc.) utilized when rendering legal advice.

5. At the same time, this also highlights an area of potential liability for legal practitioners. As Lewison LJ noted in this case, lawyers rarely provide unequivocal advice. Lawyers would be prudent to make the necessary disclaimers before and while rendering legal advice as to caution their clients of the risks.

Author



Idza Hajar Ahmad Idzam
Partner

idza.hajar@zulrafique.com.my

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Zul Rafique & Partners
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