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INSTRUMENTALITY AND THE SCOPE OF THE UNLAWFUL MEANS TORT

More than a decade on from the landmark cases of the House of Lords in *OBG Ltd v Allan* [2008] AC 1 and *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174, the scope of the unlawful means tort in various jurisdictions, including Singapore, has remained undefined. This article advocates for a wider scope of "unlawful means" to include all criminal and civil wrongdoings against a third party under Singapore law. It further proposes a multi-factorial test to determine whether a particular act is *instrumental* in causing loss to the claimant. This test of instrumentality arguably acts as an appropriate control mechanism and yet is able to strike a good balance between the twin needs of freedom and fairness in economic competition.

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I. Introduction

1 In the past decade, the unlawful means tort and its scope has been in constant flux and, to date, has remained unsettled.[2] In determining the scope of the unlawful means tort, the courts need not address what is fair or unfair, but what is lawful and unlawful. As the House of Lords held in *OBG Ltd v Allan*[3] ("*OBG*"), the role of the court is not to differentiate between "fair and unfair trade" but to "draw the lines that it might be expected to draw: procuring an actionable wrong between the third party

1 The authors would like to express their appreciation to Kiu Yan Yu, Mathea Lim, Queenie Lim and Sean Lee for their comments on an earlier draft of this article.

2 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [113].

3 [2008] AC 1.

and the target or committing an actionable wrong against the third party inhibiting his freedom to trade with the target".[4]

2 In *OBG*, the House of Lords sought to clarify the ambit of the various economic torts and the rationale underlying each economic tort. While the House of Lords managed to articulate the various elements of each tort, several aspects of economic torts still remain unclear.

3 A significant portion of the discussion in *OBG* related to the scope of the unlawful means tort. However, there was no unanimous conclusion on the exact scope of the unlawful means tort. One point of contention during the discussion in *OBG* on the unlawful means tort was "what should count as unlawful means".[5] In Lord Hoffmann's words, this was "the most important question"[6] concerning the unlawful means tort. Another contention was the application of the unlawful means tort to different situations – with Lord Hoffmann stating that applying the unlawful means tort in two-party situations raised "altogether different issues" as compared to three-party situations, and Lord Nicholls cautiously taking a tentative position that he was "far from satisfied" that a court would "decline to give relief" in a two-party situation.[7] As a result, two key questions with respect to the scope of the unlawful means tort remain unanswered. First, what acts should constitute "unlawful means" in the unlawful means tort? Second, should the unlawful means tort apply in two-party or three-party situations? Both questions remain open in Singapore as well.

4 This article addresses these two questions. Part II[8] discusses the history and development of the unlawful means tort in various jurisdictions, including the UK, Australia, Hong Kong and Canada. The authors will tease out the rationale for, and the scope of, the unlawful means tort from this comparative analysis. Part III[9] evaluates the current legal position in Singapore in respect of the different areas that the unlawful means tort and other economic torts cover. Part IV[10] proposes a legal framework for the development of the tort in Singapore and answers the two key questions raised.

5 The conclusion is that the scope of the unlawful means tort should be wider than Lord Hoffmann's test in *OBG*, and the concept of unlawful

4 *OBG Ltd v Allan* [2008] AC 1 at [306].
5 *OBG Ltd v Allan* [2008] AC 1 at [45].
6 *OBG Ltd v Allan* [2008] AC 1 at [45].
7 *OBG Ltd v Allan* [2008] AC 1 at [61] and [161].
8 See paras 6–57 below.
9 See paras 58–69 below.
10 See paras 70–107 below.

means should be wide enough to include all legal wrongs instead of merely wrongs that are both actionable by that third party and unlawful acts that affect the third party's freedom to deal with the plaintiff. While this may raise concerns about the tort "getting out of hand",[11] Lord Nicholls's test of instrumentality in *OBG* and other factors proposed in this article would ensure that the unlawful means tort develops in a principled and incremental manner.

II. History and development of the unlawful means tort in the United Kingdom and other jurisdictions

A. Unlawful means tort in the United Kingdom

(1) Historical development

6 The unlawful means tort existed as early as in the 17th century. In *Garret v Taylor*,[12] the defendant was liable for driving the plaintiff's customers away from Headington Quarry by threatening them with mayhem and vexatious suits. The court held that the defendant was liable for *discrediting* and *depriving* the plaintiff of trade, which resulted in the plaintiff's losses.

7 Similarly, in 1794, in *Tarleton v M'Gawley*,[13] the defendant was held to be liable in tort for depriving a rival British ship of trade by using his cannon to drive away a canoe which was approaching from the shore. In holding that the defendant was liable, the court held that "the natives of the said coast were deterred and hindered from trading … and the plaintiffs lost their trade".[14] The court commented:[15]

> The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will.

8 Although the word "unlawful" was not used in the earliest cases of *Garret v Taylor* and *Tarleton v M'Gawley*, the decisions nonetheless signify the conception of the unlawful means tort with the judicial emphasis on making a defendant liable for improper conduct that impacted the plaintiff's economic interests. The focus of the tort was on

11 *OBG Ltd v Allan* [2008] AC 1 at [266] and [268].
12 (1620) Cro Jac 567.
13 (1794) Peake 270.
14 *Tarleton v M'Gawley* (1794) Peake 270 at 271.
15 *Tarleton v M'Gawley* (1794) Peake 270 at 273.

the protection of economic interests against what the court perceived to be "causing the plaintiff loss by unlawfully interfering with the liberty of others",[16] but neither of these cases delineate what constitutes unlawful conduct *per se*.

9 In 1892, the House of Lords in *Mogul Steamship Co v McGregor, Gow & Co*[17] ("*Mogul (HL)*") held that where traders form a cartel to advance their own interests and injure the business of rival traders, this will not be tortious conduct as long as no unlawful means are used. In doing so, the House of Lords in *Mogul (HL)* affirmed the lower court's decision in *Mogul Steamship Co v McGregor, Gow & Co*[18] ("*Mogul (CA)*"), some of whom adopted the reasons espoused by Bowen LJ in *Mogul (CA)*.[19] In *Mogul (CA)*, Bowen LJ elaborated at great length on what constituted lawful and unlawful conduct in the context of economic torts. The plaintiffs were shipowners who sent ships to a port to receive cargo. The defendants were in the same business and sought to obtain for themselves a monopoly; they did so by forming an association, sending more ships and reducing their freight prices, which led to the plaintiffs losing profits. The plaintiffs claimed damages for a conspiracy to prevent them from carrying on their trade. The House of Lords and Court of Appeal in *Mogul (HL)* and *Mogul (CA)* respectively held that the defendants acted in an effort to protect their own profits and trade, which did *not* amount to unlawful conduct, and consequently dismissed the plaintiffs' claims. In particular, the Court of Appeal in *Mogul (CA)* focused on the protection of one's economic interests, one's "right" to a free course of trade and whether such a right is unlawfully obstructed by another's act that goes beyond the course of trade.[20] The House of Lords (in affirming *Mogul (CA)*) adopted the perspective of the alleged victim and the infringement of his right, rather than the act complained of.

10 The contours of economic torts (which the unlawful means tort is part of) were further shaped by Bowen LJ in *Mogul (CA)*,[21] where he endorsed the decisions of *Garret v Taylor* and *Tarleton v M'Gawley* and

16 See *OBG Ltd v Allan* [2008] AC 1 at [6]–[7], where the House of Lords stated that the defendant's liability in *Garret v Taylor* (1620) Cro Jac 567 and *Tarleton v M'Gawley* (1794) Peake 270 was primary, for intentionally causing the plaintiff loss by "unlawfully interfering" with the liberty of others, and these cases involved the use of "unlawful threats" to intimidate potential customers.

17 [1892] AC 25.

18 [1889] 23 QBD 598.

19 *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 at 43, 51 and 57.

20 *Mogul Steamship Co v McGregor, Gow & Co* [1889] 23 QBD 598 at 607.

21 *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 concerned allegations of lawful and unlawful conspiracy (as elaborated above at para 9), but the court also considered and endorsed the decisions of *Garret v Taylor* (1620) Cro Jac 567 and *Tarleton v M'Gawley* (1794) Peake 270.

formulated the general principle that it is a tort to intentionally do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage, another in that other person's property or trade without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.[22] Bowen LJ further elaborated that no man can justify damaging another in his commercial business by fraud or misrepresentation, and no intentional procurement of a violation of individual rights, contractual or otherwise, should be allowed.[23] Bowen LJ's elaboration supports the finding that economic torts (which the unlawful means tort is part of) should protect these individual rights, "contractual or other[wise]".[24]

11 The subsequent House of Lords decision in *Thomas Francis Allen v William Cridge Flood*[25] ("*Allen v Flood*") in 1898 also focused on the plaintiff's rights and whether there was an invasion or infringement of such a right.[26] In *Allen v Flood*, fellow workers objected to the employment of two employees, Flood and Wright, as they had worked for a rival employer. The defendant, Allen, approached the employers and told them that if Flood and Walter were not discharged, the other employees would strike. Flood and Walter were subsequently discharged and sued the defendant for damages.

12 The House of Lords applied the decision in *Mogul (HL)* and held that the defendant had not violated any of the plaintiffs' rights. This was because there was *no legal right* for them to be employed by the employer, and the defendant had not carried out an unlawful act and had not used any unlawful means in procuring the employee's dismissal. Despite the malicious intent behind the conduct, it was not considered to be an obstruction or disturbance of any right; thus, it was held not to be unlawful. In doing so, the House of Lords in *Allen v Flood* disagreed with Bowen LJ in *Mogul (CA)* and held that "malice" does not render a tort what is otherwise not a tort.[27]

13 However, the next landmark decision of *Quinn v Leathem*[28] in 1901 unravelled what was laid down in *Allen v Flood* and became a cause

22 *Mogul Steamship Co v McGregor, Gow & Co* [1889] 23 QBD 598 at 613.
23 *Mogul Steamship Co v McGregor, Gow & Co* [1889] 23 QBD 598 at 614.
24 *Mogul Steamship Co v McGregor, Gow & Co* [1889] 23 QBD 598 at 614.
25 [1898] AC 1.
26 *Thomas Francis Allen v William Cridge Flood* [1898] AC 1 at 72.
27 *Thomas Francis Allen v William Cridge Flood* [1898] AC 1 at 139–140; see also Lee Eng Beng, "A Perspective on the Economic Torts" [1996] Sing JLS 482 at 485–486.
28 [1901] AC 495.

for "confusion".[29] In *Quinn v Leathem*, the defendants were employees who were part of a union. The defendants had a dispute with their employer, the plaintiff, over the employment of certain non-union employees. The defendants approached one of the plaintiff's customers and forced the plaintiff's customer to stop trading with the plaintiff unless the plaintiff employed union members. The defendants also told the plaintiff's customer that if he did not wish to do so, they would call a strike among the plaintiff's customer's workers. The plaintiff's business suffered as a result, and the plaintiff brought a claim of conspiracy.

14 Despite the principle laid down in *Allen v Flood*, the House of Lords in *Quinn v Leathem* allowed the plaintiff's claim of conspiracy even though there was no wrongful or illegal act *per se*.[30] The decision revealed an underlying rationale of this economic tort as articulated by the law lords at the start of the 20th century: it was driven by considerations of fairness and the need to fill a lacuna in the law. This is seen from Lord Lindley's judgment in granting the relief, where he stated that "[o]ur law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances".[31] It is important to note that in making this statement, Lord Lindley was concerned with evaluating the plaintiff's economic rights in dealing with others, and stated that an infringement of such rights should lead to a remedy for the plaintiff.[32] The remarks of Lord Lindley illuminated the rationale of the decision in *Quinn v Leathem*, that is, to administer fairness and give the plaintiff a remedy when a plaintiff's economic *rights* are infringed.

15 The cases discussed thus far indicate two main aspects of economic torts. First, they are developed and focused on protecting one's economic interests or rights against another's *unlawful* conduct. However, the cases discussed above have not laid down a specific definition of "unlawful conduct", and even the landmark cases only stated that intentionally interfering with the other's free course of trade is an unlawful obstruction of the other's right to a free course of trade. Second,

29 As noted by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, where he stated that he was not sure that it could be said even then with certainty what was decided in *Quinn v Leathem* [1901] AC 495. See also Lord Reid where he stated (at 1170) that "[i]t is exceedingly difficult to determine just what was decided in *Quinn v Leathem*". The House of Lords in *Quinn v Leathem* also sought to distinguish *Thomas Francis Allen v William Cridge Flood* [1898] AC 1 (see Lord Macnaghten at 508–509, Lord Shand at 514–515, Lord Brampton at 525 and Lord Lindley at 538); see also *OBG Ltd v Allan* [2008] AC 1 at [15].

30 *Quinn v Leathem* [1901] AC 495 at 515.

31 *Quinn v Leathem* [1901] AC 495 at 535.

32 *Quinn v Leathem* [1901] AC 495 at 534–535.

these torts ensure fairness in economic competition by filling a lacuna in the law.

16 Considerations of fairness are also important in determining the ambit of the unlawful means tort. In *GWK Ltd v Dunlop Rubber Co Ltd*[33] ("*GWK v Dunlop*"), GWK Ltd ("GWK") made motor cars while Associated Rubber Manufacturers Ltd ("ARM") made tyres. GWK and ARM had contracted to display ARM tyres at GWK's exhibitions but Dunlop Rubber Co Ltd ("Dunlop") employees removed the ARM tyres from GWK cars at the exhibition and substituted them with Dunlop tyres. In *GWK v Dunlop*, Lord Hewart CJ held Dunlop liable as the defendants:[34]

> … knowingly committed a violation of the ARM company's legal rights by interfering, without any justification whatever, with the contractual relations existing between them and the GWK company, and that the defendants so interfered with the intention of damaging the ARM company, and that that company has been thereby damnified.

17 While there was no express reference to the unlawful means tort in *GWK v Dunlop*, the House of Lords in *OBG* noted that *GWK v Dunlop* was "a good example of intentionally causing loss by unlawful means".[35] Their Lordships also noted that *GWK v Dunlop* made no reference to the unlawful means tort as the "only form in which it was then recognised … was Salmond's tort of intimidation".[36] The court in *GWK v Dunlop* thus had to artificially extend the definition of the *Lumley v Gye*[37] tort to administer justice and fairness in *GWK v Dunlop*.[38] Similarly, the Court of Appeal in *DC Thomson & Co Ltd v Deakin*[39] ("*DC Thomson*") could only administer fairness by extending the principle in *Lumley v Gye* since the unlawful means tort was arguably not in existence at that point in time.[40] Lord Hoffmann in *OBG* analysed the decisions of *GWK v Dunlop* and *DC Thomson*, and articulated the courts' considerations of fairness – where a plaintiff's *rights* have been interfered with by unlawful means and the plaintiff has suffered damage, this gives rise to a "compelling case for creating a cause of action" to cover such cases and to give the plaintiff a remedy.[41]

33 [1926] 42 TLR 376.
34 *GWK Ltd v Dunlop Rubber Co Ltd* [1926] 42 TLR 376 at 377.
35 *OBG Ltd v Allan* [2008] AC 1 at [24].
36 *OBG Ltd v Allan* [2008] AC 1 at [25].
37 [1843–1860] All ER Rep 208.
38 *OBG Ltd v Allan* [2008] AC 1 at [25].
39 [1952] Ch 646.
40 *OBG Ltd v Allan* [2008] AC 1 at [28]–[29].
41 *OBG Ltd v Allan* [2008] AC 1 at [28]–[29].

18 As can be seen, the genesis of the unlawful means tort is very much the result of the need for courts to fill a lacuna in the law so that they can better adjudge fairness in the course of trade, when one's economic interests or rights are interfered with by unlawful means and lack a remedy.

19 Having covered the discussion on the rationale and development of the unlawful means tort, the authors will next address the debate on what constitutes unlawful means in the unlawful means tort.

20 The decision of *Sorrell v Smith*[42] in 1925 provides a good starting point, where Lord Dunedin restated the principles of the "three leading cases" on the unlawful means tort and the tort of conspiracy by unlawful means – *Mogul (HL)*, *Allen v Flood* and *Quinn v Leathem*.[43] First, everyone has the right to conduct his own business even though the result may be that he interferes with another's business. Second, an act that is legal in itself will not be made illegal purely because the motive of the act may be bad. Third, one may not interfere with another man's business by illegal means, and illegal means may be means that either are illegal in and of themselves or become illegal because of conspiracy where they would not have been illegal if done by a single individual. Notably, Lord Dunedin in *Sorrell v Smith* (arguably) stated that only tortious acts would be considered illegal and give rise to liability.[44]

21 In 1964, the proposition by Lord Dunedin in *Sorrell v Smith* was discussed by the House of Lords in *Rookes v Barnard*.[45] Lord Evershed clarified that Lord Dunedin was not intending to lay down that only threats of tortious actions would constitute unlawful means and reasoned that there was no difference in principle between a threat to break a contract and a threat to commit a tort,[46] or even threats to do criminal acts.[47] Importantly, Lord Evershed further stated:[48]

> [I]t is not sensible or possible to deny a wrong, at any rate where the illegal acts threatened are criminal or tortious in character and where the threats are sufficiently substantial and coercive to cause real damage to the person against whom they are aimed and directed …

22 Instead, what a person sues for in each case is "loss caused to him by the use of an unlawful weapon against him – intimidation of another

42 [1925] AC 700.
43 *Sorrell v Smith* [1925] AC 700 at 718–719.
44 *Sorrell v Smith* [1925] AC 700 at 730.
45 [1964] AC 1129.
46 *Rookes v Barnard* [1964] AC 1129 at 1186.
47 *Rookes v Barnard* [1964] AC 1129 at 1186.
48 *Rookes v Barnard* [1964] AC 1129 at 1182–1183.

person by unlawful means".[49] In the same decision, Lord Reid held that there is a chasm between what one has a legal right to do and doing what one has no legal right to do, and there is the same difference between threatening what one has a legal right to do and threatening to do what one has no legal right to do.[50]

23 *Sorrell v Smith* and *Rookes v Barnard* are illustrations of the various definitions that the courts accepted as "unlawful means", which included threats to commit criminal or tortious acts.

24 Up to the point of *Rookes v Barnard*, this tort was commonly known as the tort of intimidation. However, in 1965, in *J T Stratford & Son Ltd v Lindley*,[51] Lord Reid finally recognised the general tort of causing loss by unlawful means:[52]

> The respondents' action [in calling a strike] made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed.

25 Lord Reid, however, did not delineate the scope of this tort, which only became clearer later in *Daily Mirror Newspapers v Gardner*.[53] In *Daily Mirror Newspapers v Gardner*, the defendants, who were members of a union representing retail newsagents, had issued stop orders to the wholesalers to inform them not to take supplies of the newspapers from the plaintiff after the plaintiff increased prices which affected the retailers. The plaintiff sought an injunction from the court for the defendants to withdraw the stop order and resume with normal trading. Lord Denning, in allowing the injunction, held that there was "unlawful means" to injure the plaintiff as the defendants' act contravened s 6(7) of the Restrictive Trade Practices Act 1956,[54] and "if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract".[55]

49 *Rookes v Barnard* [1964] AC 1129 at 1168.
50 *Rookes v Barnard* [1964] AC 1129 at 1168–1169.
51 [1965] AC 269.
52 *J T Stratford & Son Ltd v Lindley* [1965] AC 269 at 324.
53 [1968] 2 All ER 163.
54 c 68 (UK).
55 *Daily Mirror Newspapers v Gardner* [1968] 2 All ER 163 at 169.

26 An important aspect of the case is the apparent width given to the meaning of the term "unlawful" in the context of this tort.[56] In granting the injunction, the Court of Appeal in *Daily Mirrors Newspaper v Gardner* recognised that breaches of statutory provisions constituted unlawful means for the purposes of tort liability. This was a "gigantic step" in the development of the unlawful means tort.[57]

27 The 1971 case of *Brekkes Ltd v Cattel*[58] reaffirmed the interpretation of "unlawful means" which was defined in *Daily Mirrors Newspaper v Gardner*.[59] There, the plaintiffs controlled a company that delivered food to members of an association. The members of this association passed a resolution to adopt the exclusive use of a different transport system, and members were not allowed to deal with the plaintiff. The plaintiff alleged that such actions interfered with the plaintiff's prospective contracts with members whom the plaintiff had previously dealt with and sought an injunction. The court granted the injunction as the resolution adopted by the association was contrary to the Restrictive Trade Practices Act 1956 and constituted an "unlawful interference".[60]

28 The definition of "unlawful means" was further expanded in *Acrow (Automation) Ltd v Rex Chainbelt Inc*[61] ("*Acrow v Rex*") in the same year, where Lord Denning held that contempt of court (due to the aiding and abetting of a party to breach an injunction) was unlawful means for the purposes of the unlawful means tort.[62] With *Acrow v Rex*, contempt of court was now added to the already long laundry list of unlawful means, which included tortious acts, criminal acts as well as breach of statutory provisions.

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56 R J Mitchell, "Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and Its Application to Australian Industrial Disputes" (1976) 5 Adel L Rev 428 at 437.

57 R J Mitchell, "Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and Its Application to Australian Industrial Disputes" (1976) 5 Adel L Rev 428 at 437.

58 [1971] 2 WLR 647.

59 R J Mitchell, "Liability in Tort for Causing Economic Loss by the use of Unlawful Means and Its Application to Australian Industrial Disputes" (1976) 5 Adel L Rev 428 at 439.

60 *Brekkes Ltd v Cattel* [1971] 2 WLR 647 at 652.

61 [1971] 1 WLR 1676.

62 *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676 at 1682. Do note that *Acrow (Automation) Ltd v Rex Chainbelt Inc* was decided at an interlocutory stage and the court in *Associated British Ports v TGWU* [1989] ICR 557 at 570 held that such a decision should not have been made since the courts should not attempt to resolve difficult points of law at an interlocutory stage.

29 Controversy surrounding the definition of "unlawful means" further surfaced in the House of Lords case of *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*[63] ("*Lonrho Ltd (No 2)*") in 1982. In that decision, Lord Diplock held that a person who has suffered injury in his business by an act of the defendant which is illegal in the sense of being in breach of a statutory prohibition does not *automatically* entitle the injured person to bring an action within the unlawful means tort to recover damages for the injury. Rather, the complainant *still* has to show that on its true construction the statute which imposed the prohibition gave rise to a civil remedy.[64]

30 It was not easy to discern the meaning and scope of the unlawful means tort at this point. In 1990, the Court of Appeal in *Lonrho plc v Fayed*[65] attempted to summarise some salient features. First, Dillon LJ stated that in light of the existing authorities, such a tort existed.[66] Second, despite acknowledging that such a tort existed as held by previous authorities, Dillon LJ stated that "they cannot be taken as comprehensive definitions of what constitutes that tort".[67] Third, Dillon LJ noted that there were exceptions to the unlawful means tort, even where unlawful means were technically employed – one such example being *Lonrho Ltd (No 2)*.

31 Ralph Gibson LJ in *Lonrho plc v Fayed* also warned that the scope of the unlawful means tort was "comparatively new" and its "precise boundaries must be established from case to case".[68] Crucially, Ralph Gibson LJ listed several requirements before liability should be found. Two requirements are worth noting: first, the "nature of the business interest" by reference to which the plaintiff must prove that he has been damaged; and second, whether there is a "sufficient nexus or directness of impact and consequence" between the unlawful means employed and alleged *loss*.[69]

63 [1982] AC 173.

64 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 187. See also *Lonrho plc v Fayed* [1990] 2 QB 479 at 488.

65 [1990] 2 QB 479 at 493.

66 In *Lonrho plc v Fayed* [1990] 2 QB 479 at 487, the defendants also conceded that such a tort existed. Dillon LJ also made reference to *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 at 609 and *J T Stratford & Son Ltd v Lindley* [1965] AC 269 at 324 and 328 to support the existence of such a tort.

67 *Lonrho plc v Fayed* [1990] 2 QB 479 at 488.

68 *Lonrho plc v Fayed* [1990] 2 QB 479 at 492. Woolf LJ also agreed (at 493) that the tort of unlawful interference was "of uncertain ambit, albeit that its existence is now beyond doubt and certain of its features are clearly defined".

69 *Lonrho plc v Fayed* [1990] 2 QB 479 at 492.

(2) The genesis of "instrumentality" … and lingering doubts

32 In 2008, the House of Lords in *OBG* attempted to clarify generally the law on economic torts and, more specifically, the scope of the unlawful means tort. The House of Lords analysed, amongst others, the history of cases relating to the unlawful means tort. In doing so, it sought to address what counted as unlawful means, which was opined to be the "most important question concerning this tort".[70]

33 Lord Hoffmann (with whom the majority agreed with) held that acts against a third party count as unlawful means *only* if they are actionable by that third party *and* if the defendant's unlawful acts affect the third party's freedom to deal with the plaintiff. Lord Hoffmann reasoned that the focus was on whether the act was "unlawful as against that third party":[71]

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

34 To support his reasoning, Lord Hoffmann relied upon *RCA Corp v Pollard*[72] ("*RCA v Pollard*"), *Isaac Oren v Red Box Toy Factory Ltd*[73] ("*Oren v Red Box*") and *Lonrho Ltd (No 2)*. In *RCA v Pollard*, the plaintiff had exclusive right to exploit records of Elvis Presley. The defendant sold bootleg records made at Elvis Presley concerts without the plaintiff's consent and this was a criminal offence, which would have given Elvis Presley a cause of action. However, the Court of Appeal in *RCA v Pollard* held that it did not recognise an available cause of action since the defendant was not interfering with the liberty of the Presley estate to perform the exclusive recording contract. Further, the bootlegger's conduct "merely potentially reduces the profits which [the plaintiffs] make as the result of the performance by Mr Presley's executors of their contractual obligations".[74]

35 The facts of *Oren v Red Box* are similar. One of the claimants was the exclusive licensee of a registered design and the defendant sold articles that allegedly infringed the design right, which was in breach of a statute. However, only the registered owner had a statutory right to

70 *OBG Ltd v Allan* [2008] AC 1 at [45].
71 *OBG Ltd v Allan* [2008] AC 1 at [51].
72 [1983] Ch 135.
73 [1999] FSR 785.
74 *OBG Ltd v Allan* [2008] AC 1 at [52].

sue and not the exclusive licensee. Jacob J in *Oren v Red Box* held that the tort of causing loss by unlawful means was not made out since the defendant was doing nothing which affected the relations between the owner and licensee.

36 In *Lonrho Ltd (No 2)*, the plaintiff owned and operated a refinery in Rhodesia supplied by a pipeline from the port of Beira. After Rhodesia declared independence in 1965, the UK imposed sanctions which made it unlawful for anyone to supply the country with oil. Lonrho Ltd ("Lonrho") alleged that Shell Petroleum Co Ltd prolonged the regime by unlawfully supplying it with oil while Lonrho's refinery and pipeline stood idle. However, the House of Lords decided that the plaintiff did not have any cause of action.[75]

37 Lord Hoffmann in *OBG* thus concluded that it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law.[76]

38 On the other hand, Lord Nicholls disagreed with Lord Hoffmann, and opined that unlawful means include "all acts a defendant is not permitted to do, whether by the civil law or the criminal law".[77] However, Lord Nicholls qualified that liability should be found *only* where the claimant is harmed through the "instrumentality" of a third party.[78] Hence, a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits will not attract liability under the unlawful means tort since the criminal conduct is not an offence committed *against* the rival company.[79]

39 Lord Walker in *OBG* disagreed with the test of instrumentality, stating that this did not sit well with *RCA v Pollard* since there was no doubt that the bootlegger's acts were the direct cause of the plaintiff's economic loss. Lord Walker proposed that:[80]

> The control mechanism must be found, it seems to me, in the nature of the disruption caused, as between the third party and the claimant, by the

75 See Lord Nicholls's analysis of *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at [162] where he pointed out that the decision did not consider the scope of the unlawful means tort and it did not assist the court in determining the interpretation of "unlawful means".
76 *OBG Ltd v Allan* [2008] AC 1 at [57].
77 *OBG Ltd v Allan* [2008] AC 1 at [162].
78 *OBG Ltd v Allan* [2008] AC 1 at [159].
79 *OBG Ltd v Allan* [2008] AC 1 at [159]–[160].
80 *OBG Ltd v Allan* [2008] AC 1 at [269].

> defendant's wrong (and not in the closeness of the causal connection between the defendant's wrong and the claimant's loss).

40 Other than the requirements that the unlawful means be actionable by the third party and that the defendant's actions must have interfered with the freedom of a third party to deal with the claimant, Lord Hoffmann added a "footnote"[81] to the unlawful means tort – that a two-party unlawful means tort "raises altogether different issues".[82]

41 In *Revenue and Customs Commissioners v Total Network SL*[83] ("*Total Network*"), decided later in the same year, the House of Lords discussed the scope of the unlawful means tort, in particular the scope of unlawful means. Lord Walker (who also sat in *OBG*) was of the view that Lord Hoffmann's formulation of unlawful means was limited to three-party situations in the unlawful means tort where the claimant has been "intentionally struck at through others",[84] especially given Lord Hoffmann's caveat that a two-party unlawful means tort "raises quite different issues".[85]

42 The House of Lords in *Total Network* also discussed the scope of unlawful means in the unlawful means tort and the tort of conspiracy by unlawful means. Lord Walker suggested that "unlawful means" in the unlawful means tort and the tort of conspiracy by unlawful means should *not* have the same meaning.[86] He opined that "unlawful means" in the context of the tort of conspiracy should have a broad meaning to include crimes and tortious acts, and may even extend to breach of contract and breach of fiduciary duties.[87] Lord Walker concluded that criminal conduct can constitute unlawful means in the context of the tort of conspiracy, provided that it is indeed the means of intentionally inflicting harm – this being what Lord Nicholls had suggested as "instrumentality" in *OBG*.

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81 *OBG Ltd v Allan* [2008] AC 1 at [61].

82 *OBG Ltd v Allan* [2008] AC 1 at [61]. Lord Hoffmann did not elaborate on the existence and the requirements to make out the unlawful means tort in two-party situations.

83 [2008] AC 1174.

84 *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174 at [99].

85 Lords Hope and Mance also similarly distinguished the present case from *OBG Ltd v Allan* [2008] AC 1 by relying on Lord Hoffmann's caveat.

86 *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174 at [100]; Lord Mance agreed with Lord Walker's view at [123] since the "two torts are different in their nature, and the interests of justice may require their development on somewhat different bases". This article does not address the issue of whether the definition of "unlawful means" is the same in the unlawful means tort as well as the tort of conspiracy by unlawful means.

87 *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174 at [90]–[91].

43 Separately, in *Total Network*, Lord Hope held that criminal conduct at common law or by statute can constitute unlawful means in the tort of conspiracy by unlawful means. It is, however, unclear if Lord Hope equated the definition of "unlawful means" with respect to the tort of conspiracy by unlawful means, with "unlawful means" with respect to the unlawful means tort.[88]

44 The cumulative effect of *OBG* and *Total Network* is that the scope of unlawful means in the context of the unlawful means tort still remains uncertain in the UK.

45 Finally, in 2021 the UK Supreme Court in *Secretary of State for Health v Servier Laboratories Ltd*[89] ("*Servier Laboratories*") had the occasion to comment on the meaning of "unlawful means". There, the UK Supreme Court, after reviewing the *OBG* judgment in detail, held that the *ratio decidendi* in *OBG* indicated that it was necessary for the unlawful means to have affected the third party's freedom to deal with the claimant. The Supreme Court held:[90]

> The dealing requirement performs the valuable function of delineating the degree of connection which is required between the unlawful means used and the damage suffered. This is particularly important in relation to a tort which permits recovery for pure economic loss and, moreover, by persons other than the immediate victim of the wrongful act. It does so in a straightforward and easily applicable manner. It also captures within an easily defined compass the historical origins from which the unlawful means tort emerged. As with most legal rules which involve the drawing of a line, there may be hard cases which fall outside the operation of the rule, but that is not a good or sufficient reason for dispensing with the rule.

46 It must be noted that the UK Supreme Court did not address directly whether Lord Hoffmann's test or Lord Nicholls's test should be adopted for the unlawful means tort. Rather, the court dealt with interpreting what the *ratio decidendi* was in *OBG*.

47 Through the history and development of the unlawful means tort, it is evident that there is controversy surrounding the scope of unlawful means in the context of the unlawful means tort, and this area of law is not settled.

88 Lord Hope also reserved his position on whether there should be a different test applied to two-party and three-party situations in *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174 at [43].

89 [2021] UKSC 24.

90 *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24 at [94]–[95].

48 However, through the cases analysed above, two major aspects are apparent. First, the unlawful means tort was developed to protect one's rights to a free course of trade against another's unlawful conduct. The focus here is not on the means *per se* but rather the impact on the victim's economic interests. Second, the unlawful means tort functions to ensure fairness in competition and is used to fill gaps in the law.

B. Australia

49 In Australia, the Supreme Court of Western Australia in *Hardie Finance Corp Pty Ltd v Ahern (No 3)*[91] addressed *OBG* and *Total Network* and applied Lord Hoffmann's judgment in *OBG*.

50 However, in applying the majority judgment in *OBG*, the court did caution that there were differing views as to what constitutes unlawful means and, while *OBG* represents a significant development of the unlawful means tort, the elements of the tort "are likely to be subject to further refinement, and possibly in significant respects";[92] in fact, "[s]igns of such further refinement of the elements of the tort may already be discernible"[93] as seen from the judgment of *Total Network*.[94] The High Court of Australia, however, has not decided definitively on this point of law, as noted by the Federal Court of Australia in *State Street Global Advisors Trust Co v Maurice Blackburn Pty Ltd (No 2)*.[95]

C. Canada

51 The Supreme Court of Canada's decision in *AI Enterprises v Bram Enterprises*[96] ("*AI Enterprises*") is similar to the position in *OBG*, in so far as what constitutes unlawful means.[97] In *AI Enterprises*, a group of family members collectively owned a building and sought to sell the same. However, one member was against such a decision and took actions to thwart the sale, which included taking out arbitration and litigation proceedings to stall the sale and denying prospective buyers the opportunity to view the property. After the property was sold, the family members brought an action against the member on the basis of the tort

91 [2010] WASC 403.
92 *Hardie Finance Corp Pty Ltd v Ahern (No 3)* [2010] WASC 403 at [708].
93 *Hardie Finance Corp Pty Ltd v Ahern (No 3)* [2010] WASC 403 at [709].
94 *Hardie Finance Corp Pty Ltd v Ahern (No 3)* [2010] WASC 403 at [709].
95 [2021] FCA 137 at [425]–[427].
96 (2014) SCC 12.
97 The recent Supreme Court decision of *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24 at [99] noted the different positions in *AI Enterprises v Bram Enterprises* (2014) SCC 12 and *OBG Ltd v Allan* [2008] AC 1 with regard to the "dealing requirement".

of unlawful interference, alleging that his conduct had resulted in a lower sale price.

52 In *AI Enterprises*, the court grappled with two different approaches and rationales for the unlawful means tort: first, the "intentional harm" rationale – focusing on the question of whether injury to the plaintiff through unlawful acts to a third party was intentionally inflicted by the defendant, which supports creating new tort liabilities to deter excessive and unacceptable intentional conduct.[98]

53 The second was the "liability stretching rationale" – focusing on extending an existing right to sue from the immediate victim (the third party) of the unlawful conduct to the plaintiff in circumstances where he or she was intentionally targeted by the defendant. This allows those intentionally targeted by already actionable wrongs to sue for the resulting economic injury.[99]

54 The Supreme Court of Canada subsequently held that the second rationale should be adopted for four main reasons. First, tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights.[100] Second, the common law has traditionally been reluctant to develop rules about fair competition.[101] Third, the common law has generally promoted legal certainty for commercial affairs.[102] Fourth, the expansion of liability would undermine legislated schemes favouring collective action in labour relations and interfere with fundamental rights of association and expression.[103] On the contrary, the "intentional harm" rationale would lead to an unwieldy concept of unlawful means and thus to "undue certainty in commercial affairs".[104] Accordingly, Cromwell J in *AI Enterprises* endorsed Lord Hoffmann's narrow approach to unlawful means in *OBG*.

55 It should be noted that the Supreme Court in *AI Enterprises* disagreed with Lord Hoffmann's requirement that the unlawful means employed interferes with the third party's freedom to deal with the

98 Nadia Effendi, Heather Pessione & Olivier V Nguyen, "*A.I. Enterprises Ltd v Bram Enterprises Ltd.*: A Clearer Approach for the Tort of Unlawful Means in Canada" (2014) 42(4) Advoc Q 470 at 473.

99 Nadia Effendi, Heather Pessione & Olivier V Nguyen, "*A.I. Enterprises Ltd v Bram Enterprises Ltd.*: A Clearer Approach for the Tort of Unlawful Means in Canada" (2014) 42(4) Advoc Q 470 at 473.

100 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [30].

101 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [31].

102 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [33].

103 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [34].

104 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [42].

plaintiff.[105] The court held that this requirement was not included in the formulation of the tort adopted by Canadian appellate decisions that otherwise approved of Lord Hoffmann's approach. Further, the court held that this additional requirement is not helpful in "outlining the proper bounds of the unlawful means tort", and the scope of unlawful means tort has already been limited through a narrow approach to both the unlawful means component and the intention component.[106]

D. Hong Kong

56 The Hong Kong courts have not made a decisive pronouncement on the scope of the unlawful means tort. In *Shenzhen Futaihong Precision Industry Co Ltd v Byd Co Ltd*,[107] the Court of First Instance dealt with a striking-out application and noted that although the majority view in *OBG* requires a wrong actionable by the third party, the cause of action is "still developing"[108] and "the reasons of Lord Nicholls in his dissent are indeed powerful".[109] In the circumstances, it was "premature to strike out this claim just on the ground of absence of an actionable wrong to the [third] party". A subsequent case of *AXA China Region Insurance Co Ltd v Lin Kwai Ying Katie*[110] similarly noted the contention between the majority and minority in *OBG* and also decided not to make a finding on the law in the striking-out application.

57 In the 2020 decision of *Joy Capital Ltd v Lau Wing Pui*,[111] while the Court of First Instance stated that the principles of the tort of causing loss by unlawful means have been "definitively stated" in Lord Hoffmann's speech in *OBG*, there was no discussion as to the scope of unlawful means and whether the majority's position in *OBG* was to be preferred.[112] The Hong Kong Final Court of Appeal has not taken a position on this issue.

105 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [87].
106 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [87].
107 [2010] HKCU 1813.
108 *Shenzhen Futaihong Precision Industry Co Ltd v Byd Co Ltd* [2010] HKCU 1813 at [58].
109 *Shenzhen Futaihong Precision Industry Co Ltd v Byd Co Ltd* [2010] HKCU 1813 at [58].
110 [2012] HKCU 853.
111 [2020] HKCU 2820.
112 *Joy Capital Ltd v Lau Wing Pui* [2020] HKCU 2820 at [11]. The Court of First Instance also stated that the "requisite elements" of the tort were found at [45]–[47] of *OBG Ltd v Allan* [2008] AC 1, which did not include the discussion of whether the unlawful means had to be actionable by the third party.

III. Landscape of economic torts in Singapore

58 The unlawful means tort has been most recently discussed in Singapore by the High Court in 2017 in *Wolero Pte Ltd v Lim Arvin Sylvester*.[113] In that case, Tan Lee Meng SJ noted that in two Singapore Court of Appeal decisions which did not concern the unlawful means tort, the tort was nonetheless referred to without any indication that it was not part of the legal landscape in Singapore.[114] In an earlier 2014 decision in *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd*,[115] the Singapore High Court laid down the requirements for the unlawful means tort as follows:[116]

> To establish a claim of wrongful interference with trade, the claimant must show that (a) the defendant has committed an unlawful act affecting a third party; (b) the defendant acted with an intention to injure the claimant; and (c) the defendant's conduct in fact resulted in damage to the claimant.

59 However, the ambit of unlawful means has been a "troublesome aspect" of the unlawful means tort and has remained unresolved in Singapore.[117] It seems to be evolving,[118] and the Court of Appeal in *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd*[119] ("*EFT Holdings*") has left the position of what constitutes unlawful means open.

60 In *EFT Holdings*, Sundaresh Menon CJ considered the English decisions of *OBG* and *Total Network*, and expressed a preliminary view on the issue of unlawful means in the context of the unlawful means tort conspiracy (and not the tort of causing loss by unlawful means), that the scope of unlawful means should not be so limited and may cover criminal acts or means, as well as intentional acts that are tortious.[120]

61 The Court of Appeal also ventured to address the limits that the law should draw in imposing liability for tort of conspiracy by unlawful means based on criminal conduct and opined that Lord Nicholls's test of instrumentality in *OBG* would address concerns that an anomaly would

113 [2017] 4 SLR 747 at [60].
114 *Wolero Pte Ltd v Lim Arvin Sylvester* [2017] 4 SLR 747 at [61], referring to *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 and *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860.
115 [2014] 4 SLR 574.
116 *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd* [2014] 4 SLR 574 at [83], referring to Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 1st Ed, 2011) at para 15.028.
117 *Wolero Pte Ltd v Lim Arvin Sylvester* [2017] 4 SLR 747 at [62]–[63].
118 *Wolero Pte Ltd v Lim Arvin Sylvester* [2017] 4 SLR 747 at [62].
119 [2014] 1 SLR 860.
120 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [91].

arise if a remedy was allowed where the wrongful conduct was a tort but not where it happened to entail the commission of a crime.[121] The recent 2020 decision in *Singapore Shooting Association v Singapore Rifle Association*[122] similarly did not express any definitive view on the issues, but stated that nothing in the parties' submissions had persuaded the court that its view in *EFT Holdings* was incorrectly taken and the scope of unlawful means remains a live question.[123]

62 To determine the role of the unlawful means tort in Singapore, it is helpful to survey the interaction that the unlawful means tort has with other economic torts. Other related economic torts include: (a) the tort of inducing breach of contract; (b) the tort of conspiracy by unlawful means; and (c) the tort of negligence. The unlawful means tort differs significantly from the other torts in terms of its scope and intended effect.

63 The House of Lords in *OBG* articulated the differences between the unlawful means tort and the tort of inducing breach of contract. Among others, the significant differences are that liability under the tort of inducing breach of contract is dependent on the existence of contractual relations, and a breach of contract is of the essence.[124] The unlawful means tort does not depend on existing contractual relations, and it is sufficient that the intended consequence of the wrongful act is damage in any form. A main difference between the two torts is that the unlawful means tort is a tort of primary liability, as compared to the tort of inducing breach of contract, which creates an accessory liability, dependent upon the primary wrongful act of the contracting party.

64 The tort of unlawful means differs from the tort of conspiracy; in the latter, liability stems from the predominant purpose of two or more parties acting in combination to cause loss to the claimant.[125] A single person acting alone cannot be held liable under the tort of conspiracy.

65 The tort of negligence is perhaps more similar to the unlawful means tort: both causes of action (a) may be commenced by a single claimant; (b) do not require the claimant, defendant and third party to have a pre-existing relationship; and (c) at least in Singapore, allow for the recovery of pure economic loss. In *Anwar Patrick Adrian v Ng*

121 This was a concern of the House of Lords in *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174.

122 [2020] 1 SLR 395.

123 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [113].

124 *OBG Ltd v Allan* [2008] AC 1 at [8].

125 See also the comments of Chan Sek Keong CJ in *Beckkett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR(R) 452 at [120].

Chong & Hue LLC,[126] the Court of Appeal cited its decision in *Go Dante Yap v Bank Austria Creditanstalt AG*[127] which laid down the position that pure economic loss may be recoverable under the tort of negligence in Singapore and rejected the English approach of a general exclusionary rule against the recovery of economic loss.

66 A significant aspect of the tort of negligence is the provision of a concurrent civil remedy when a criminal act is committed. This aspect could potentially afford a claimant the appropriate remedy when a criminal act is committed against the claimant, in a typical two-party unlawful means tort scenario. The operation of the tort of negligence, however, is limited in a three-party unlawful means tort situation. Where the criminal act is committed against the third party, it is unlikely that there is a concurrent duty of care owed by the defendant to the plaintiff, especially in respect of pure economic loss.

67 The need to establish a duty of care in the tort of negligence distinguishes it from the unlawful means tort with significant consequences. While Singapore law allows recovery for pure economic loss under the *Spandeck* framework, establishing duty for pure economic loss is a high bar to cross. This is crucial when governing how parties conduct themselves in an economic setting, since a trader generally does not owe a duty of care to its competitors to avoid the latter's loss of business: there is likely to be insufficient proximity, and policy considerations of indeterminate liability will also militate against a finding of duty.[128] Thus, the requirement of a "duty of care", as well as the other elements of breach, causation and remoteness, renders the tort of negligence less appropriate in regulating competitive economic activity, as compared to the tort of unlawful means.

68 The unlawful means tort is useful in regulating competitive economic activity where there are no contractual relationships between the third party and the plaintiff and where it involves a single tortfeasor.

69 Though the unlawful means tort plays an important role in Singapore, the scope of the unlawful means tort is unclear, and a case for a careful and principled expansion will be made below.

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126 [2014] 3 SLR 761. See also David Tan, "Debunking a Myth: A Rejection of the 'Assumption of Responsibility' Test for Duty of Care" (2014) 22 Torts LJ 183.

127 [2011] 4 SLR 559.

128 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 03.012. See also David Tan & Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half A Decade On" (2013) 25 SAcLJ 510 and *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [40].

IV. Proposed framework: Unpacking "unlawful means" in tort of causing loss by unlawful means

70 In light of the history and development of the unlawful means tort, and the various (unsettled) positions taken by the different jurisdictions, this Part analyses the underlying rationales of the unlawful means tort and proposes a principled framework for the unlawful means tort and its development in Singapore.

A. Adopting the rationale of intentional harm

71 One can only determine the scope of the unlawful means tort by clarifying its underlying rationales so that there is a principled definition of "unlawful means".[129]

72 As identified in *AI Enterprises*, there are two main rationales for the tort, namely, the "intentional harm" rationale and the "liability stretching" rationale. The former's focus is to create new tort liabilities to curtail "clearly excessive" and unacceptable intentional conduct, while the latter's focus is on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm, rather than on enlarging the general basis of civil liability.[130]

73 The "intentional harm" rationale was elaborated upon by Lord Nicholls in *OBG* where his Lordship stated that "[t]he law seeks to provide a remedy for intentional economic harm caused by unacceptable means … [and] regards all unlawful means as unacceptable in this context".[131] Such a rationale is also supported by Phillip Sales and Daniel Stilitz, who argue that the aim of harming the plaintiff establishes the essential *nexus* between the defendant's conduct and the loss that the plaintiff suffers. Sales and Stilitz go on to suggest that the requirement of unlawful means delimits which of the defendant's conduct will be regarded as illegitimate, and is the "critical dividing line" between what one has a legal right to do and no legal right to do.[132]

74 It has been argued that if the true import of the tort is to maintain a level competitive field, then market participants should in general be entitled to expect that they can deal with others free from interferences

129 Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd Ed, 2010) at p 102; *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [36].

130 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [37].

131 *OBG Ltd v Allan* [2008] AC 1 at [153].

132 Phillip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411 at 414.

involving *all* types of illegality and a list of exclusion of non-actionable offences "would suggest that the law condones interferences involving such conduct, however egregious they may be".[133] Although the common law has traditionally been reluctant to become involved in devising the rules of fair competition, "this is not to say that in this field of economic rivalry anything goes".[134] Some legal norms are nonetheless desirable.

75 The history and the development of the unlawful means tort further support the "intentional harm" rationale and its aim to curb excessive and unacceptable conduct. As mentioned, the House of Lords in *Mogul (HL)* sought to deal with conduct that infringed upon a plaintiff's right to trade and protect his economic interests.[135] The House of Lords in *Allen v Flood* had the same concerns and inquired whether there was an invasion or infringement of such a right. The focus therefore is on *what* the interference was and the extent that the interference infringed upon the plaintiff's economic interests and rights, as opposed to *how* the interference was carried out.

76 On the other hand, the "liability stretching" rationale sees the tort as extending civil liability without creating new actionable wrongs.[136] As explained by the court in *AI Enterprises*, such a rationale provides a coherent explanation for the expansion of the tort liability in carefully circumscribed circumstances[137] and provides certainty because it establishes a clear "control mechanism" on liability in this area of the law,[138] which is consistent with tort law's reticence to intrude too far into the realm of freedom of competition.[139]

77 While the "liability stretching" rationale does limit the scope of the tort so as not to create new actionable wrongs, such a limitation does seem arbitrary. First, there is no compelling reason to straitjacket economic torts other than the need for certainty and a "control mechanism". Limiting the scope of the unlawful means by ensuring that there are *no* new actionable wrongs is *not* the only way for a control mechanism. In Singapore, as proven by over a decade of case law, the *Spandeck* test for duty of care in the tort of negligence has adequate control mechanisms to be able to function effectively as a universal test for all kinds of harms, unlike the English approach, which is ridden with categorical exceptions

133 Lee Pey Woan, "Causing Loss by Unlawful Means" [2011] SJLS 330 at 340–341.
134 *OBG Ltd v Allan* [2008] AC 1 at [143].
135 See para 9 above.
136 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [43].
137 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [44].
138 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [44].
139 *AI Enterprises v Bram Enterprises* 2014 SCC 12 at [44].

and *ad hoc* rules.[140] Lord Nicholls's "brake of instrumentality"[141] would suffice to operate as a control mechanism without having to limit the scope of the unlawful means in an artificial or rigid manner. Second, the need for a control mechanism should not necessarily mandate drawing a line at only extending civil liability of actionable wrongs. Third, the narrowed scope of the unlawful means tort envisaged under the "liability stretching" rationale appears incongruent with the rationale of the tort to protect a party's economic interests and right.[142] This is especially so since one's economic interest and right can be similarly affected by criminal conduct or a breach of statutory duty. Fourth, limiting the tort as such would post conceptual difficulties since the plaintiff would really be suing for the transgression of another's right and not his own. There is no inherent logic in transferring the third party's right of action against the defendant to the plaintiff.[143] Fifth, the limited scope of the unlawful means tort is inconsistent with previous authorities.[144]

78 Such a limited scope of the unlawful means tort under the "liability stretching" rationale should also not be encouraged for policy reasons. A limited scope of the unlawful means tort accords the potential defendant a luxury of choice on how to harm the plaintiff, and the defendant can now do so by criminal conduct *and* avoid civil liability, conduct which may in fact be more sinister and harmful. Moreover, it would be odd to afford the plaintiff a remedy where the defendant committed a tort against a third party, but not if the defendant committed a crime against the plaintiff.[145]

79 In light of the above, the "intentional harm" rationale, as elaborated in *AI Enterprises* and *OBG* by Lord Nicholls, ought to be supported.

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140 David Tan, "The End of the Search for a Universal Touchstone for Duty of Care?" (2019) 135 LQR 200.

141 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [83].

142 As espoused by the earlier cases of *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 and *Thomas Francis Allen v William Cridge Flood* [1898] AC 1.

143 Lee Pey Woan, "Causing Loss by Unlawful Means" [2011] Sing JLS 330 at 339–340. See also Charles J Hamson, "A Further Note on *Rookes v Barnard*" (1964) 22(2) Camb LJ 159 at 163:

> [If] A by threatening to libel B succeeds in putting an end to B's association with C and C, having thereby suffered damage, sues A for intimidation, C is not in that action seeking to vindicate B's reputation nor, if the libel has been put about, does he recover damages for the injury done to B's good name. C quite simply is not entitled to sue A for A's defamation of B.

144 Simon Deakin & John Randall, "Rethinking the Economic Torts" (2009) 72 Mod L Rev 519 at 544–549.

145 *OBG Ltd v Allan* [2008] AC 1 at [152]; Lee Pey Woan, "Causing Loss by Unlawful Means" [2011] Sing JLS 330 at 336.

B. Instrumentality and the scope of the unlawful means tort – Three-party situations

80 The implication of adopting the "intentional harm" rationale would be that this tort would include all crimes and statutory breaches.[146] Many have expressed concern for the need for certainty and to ensure that the tort has a sufficient "control mechanism".[147] The oft-cited example of a pizza delivery business which obtains more business to the detriment of its competitors, because its drivers regularly exceed the speed limit and jump red lights, is used to illustrate how the tort needs to be controlled lest it becomes overly expansive.

81 To this end, Lord Nicholls's dissent in *OBG* is instructive. Lord Nicholls stated that the function of the tort is to provide a remedy where the claimant is harmed through the "instrumentality" of a third party.

82 Lord Nicholls's test of instrumentality has not been without criticism. In *OBG*, Lord Walker was of the view that the test of instrumentality "does not fit happily with cases like *RCA v Pollard*, since there is no doubt that the bootlegger's acts were the direct cause of the plaintiff's economic loss",[148] while others have raised concerns as to the focus of the test of instrumentality of the third party.[149] The test of instrumentality also does not seem to have been discussed at length

146 Hazel Carty, "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988) LQR 250 at 268.

147 *OBG Ltd v Allan* [2008] AC 1 at [266] and [268]; Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd Ed, 2010) at p 171; Simon Deakin & John Randall, "Rethinking the Economic Torts" (2009) 72 Mod L Rev 519; Roderick Bagshaw, "Can the Economic Torts be Unified?" (1998) 18 OxJLS 729 at 732; John Eekelaar, "The Conspiracy Tangle" (1990) 106 LQR 223 at 224; Phillip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411 at 414.

148 *OBG Ltd v Allan* [2008] AC 1 at [269].

149 Gary Chan, "Unities and Disunities in Economic Torts" (2008) 19 King's LJ 158 at 167.

in either *OBG* or *Total Network*.[150] Further, the test was not consistently applied in *OBG*[151] and has also been subject to different interpretations.[152]

83 However, the authors submit that the test of instrumentality to establish the causal link between the defendant's wrong and the plaintiff's loss would be an appropriate control mechanism for the unlawful means tort. As Lord Devlin held in *Rookes v Barnard*, "it must be proved that [the defendant's] object is to injure [the plaintiff] through the instrumentality of the [third party]".[153]

84 It is also important to delve deeper into the substance of the test of instrumentality and suggest various factors that can be taken into account when deciding if the test has been fulfilled. The factors proposed below have been gleaned from the various cases discussed above.[154] The test of instrumentality ought to be evaluated through a multi-factorial approach, with no singular factor to be determinative of the issue; similar multi-factorial analysis has been observed in other torts, such as in the evaluation of proximity in the duty of care in negligence.[155]

(1) Factor 1: Nexus between the unlawful act and the plaintiff's loss

85 As Ralph Gibson LJ stated in *Lonrho plc v Fayed*, there needs to be "sufficient nexus or directness of impact and consequence between the unlawful means employed and the alleged loss causing effect upon the plaintiffs" for liability to be made out.[156] The House of Lords also highlighted the importance of this nexus in *Total Network* where Lord Mance stated that there is a legitimate objection to make liability depend upon whether "the defendant has done something which is

150 See *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174 at [95], where Lord Walker stated that the test of instrumentality was the notion of "means" in "unlawful means".

151 See *OBG Ltd v Allan* [2008] AC 1 at [159]; Lord Nicholls held that the claimant was not harmed through the instrumentality of a third party in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785 where the facts were similar to *RCA Corp v Pollard* [1983] Ch 135, but Lord Walker disagreed at [269], stating that the test of instrumentality did not "fit happily with cases like *RCA v Pollard*".

152 See *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [93] in the context of two-party tort of conspiracy by unlawful means.

153 *Rookes v Barnard* [1964] AC 1129 at 1208.

154 See paras 6–57 above.

155 See, *eg*, *Anwar Patrick Adrian v Ng Chong Hue LLC* [2014] 3 SLR 761; *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588; David Tan & Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half A Decade On" (2013) 25 SAcLJ 510; and David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459.

156 *Lonrho plc v Fayed* [1990] 2 QB 479 at 492.

wrongful for reasons which have nothing to do with the damage inflicted on the claimant".[157]

86 A paradigmatic illustration of a close nexus between the defendant's unlawful act and the plaintiff's loss is *GWK v Dunlop*, where the defendant was found to *intentionally damage* ARM by replacing its tyres with theirs in an exhibition. Lord Hoffmann noted this as a good example of the unlawful means tort and approved the judgment in *GWK v Dunlop* that the defendant's act was a "violation" of ARM's legal rights.

87 In fact, this factor has been prevalent in almost all cases involving the unlawful means tort. It was mentioned in the earliest case of *Garret v Taylor*, where the court held the defendant's actions sought to discredit and to deprive the plaintiff of trade, and also in *Tarleton v M'Gawley*, where the court held that the defendant's actions intended to hinder and deter the natives from trading for the benefit of the plaintiffs.

88 In some scenarios, however, there may not be a strong nexus between the defendant's unlawful act and the plaintiff's loss. One such example can be found in *OBG* where the House of Lords used the illustration of competing courier services and reasoned that the couriers' conduct was not an offence committed against the rival company "in any realistic sense of that expression".[158] Clearly, the couriers travelling above the legal speed limit (the unlawful act) is not strongly connected to the plaintiff's economic loss.

89 In essence, where there is a closer nexus between the defendant's unlawful act (through the third party) and the plaintiff's loss, the third party's role should be considered to be more instrumental in injuring the plaintiff.

90 While it is true that the test of instrumentality is more likely to be satisfied if an act is committed against the plaintiff, this factor alone is not sufficient to give rise to an actionable cause of action by the plaintiff.[159] Other factors which are elaborated below should be taken into consideration when evaluating the instrumentality of a third party.

157 *Revenue and Customs Commissioners v Total Network SL* [2008] AC 1174 at [119].
158 *OBG Ltd v Allan* [2008] AC 1 at [160].
159 *OBG Ltd v Allan* [2008] AC 1 at [58].

(2) Factor 2: Degree of interference with the relationship between the plaintiff and the wronged third party

91 It is common in a three-party situation for the plaintiff and the wronged third party to have close economic ties with each other, and the defendant's act seeks to interfere with these ties. In fact, the wronged third party often provides the plaintiff with the economic gains it enjoys by being the plaintiff's customer. This economic relationship is therefore one of the reasons why third parties are often the "intermediary" and the "victim" of the wrongful act of the defendant,[160] the defendant's goal being to cause the plaintiff loss through the disruption of economic ties between the plaintiff and the third party.

92 The defendant's *modus operandi* that demonstrates such interference with relationships ranges from physical violence preventing third parties from trading with the plaintiff[161] to psychological or emotional threats of lawsuits to prevent third parties from transacting with the plaintiff;[162] from threatening strikes to prevent third parties from hiring the plaintiff[163] to explicitly and unlawfully ordering third parties to stop trading with the plaintiff.[164]

93 In such situations, whether the third party is instrumental as a medium for the plaintiff to be harmed greatly depends on the degree of interference that the defendant's unlawful act has on the relationship between the plaintiff and the wronged third party. As Lord Hoffmann held in *OBG*, the "essence" of the tort appears to be "a wrongful interference with the action of a third party in which the claimant has an economic interest" and "an intention thereby to cause loss to the claimant".[165] The first limb is the focus of this factor.

94 Conversely, where there is little interference in the relationship between the plaintiff and the *wronged* third party, it is less likely that the plaintiff had suffered harm through the *instrumentality* of the third party. As Lord Hoffmann stated in *RCA v Pollard* when analysing the economic relationship between the plaintiff and the Presley estate, there was no cause of action in *RCA v Pollard* since the defendant "was not interfering with the liberty of the Presley estate to perform the exclusive recording

160 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [71].
161 *Tarleton v M'Gawley* (1794) Peake 270.
162 *Garret v Taylor* (1620) Cro Jac 567.
163 *Rookes v Barnard* [1964] AC 1129.
164 *Daily Mirror Newspapers v Gardner* [1968] All ER 163; *Brekkes Ltd v Cattel* [1971] 2 WLR 647.
165 *OBG Ltd v Allan* [2008] AC 1 at [47].

contract";[166] neither did the defendant's conduct "prevent the Presley estate from doing any other act affecting the plaintiffs".[167]

95 This factor is also useful to sieve out claims for indeterminate liability. This is similar to Lord Hoffmann's test in *OBG* for the unlawful means to have "affected the third party's freedom to deal with the claimant" (also referred to as "the dealing requirement" in *Servier Laboratories*). The dealing requirement, to quote Lord Hamblem in *Servier Laboratories*, "minimises the danger of there being indeterminate liability to a wide range of claimants".[168]

96 The difference between this factor and the dealing requirement is the binary nature of the dealing requirement (the third party's freedom to deal with the claimant is either affected or not), whereas the degree of interference measures the interference on a spectrum: the higher the degree of interference, the more instrumental the third party is. By measuring the degree of interference on a spectrum (as compared to a binary approach), the courts will be able to administer justice on the facts of each case in an incremental approach and not be restricted by any binary requirements.

(3) Factor 3: Degree of interference with the relationship between the plaintiff and other third parties

97 Another relevant factor is the degree of interference that the defendant's act has on the economic relationship between the plaintiff and *other* third parties. Where the defendant's act has a high degree of interference with the economic relationship between the plaintiff and other third parties (apart from the party who has a cause of action against the defendant), the third party who has his or her rights infringed should be considered as instrumental in injuring the plaintiff. This is because the third party is instrumental in preventing the defendant from using the same (unlawful) means as the plaintiff to obtain similar profits. In cases like *RCA v Pollard* and *Oren v Red Box*, the plaintiff (a contractual licensee) would not have been able to sell the records (like the defendant bootlegger) unless the plaintiff had first purchased a licence from the third party.

98 In fact, this was one factor which Lord Hoffmann considered in *OBG*. Lord Hoffmann used this factor to distinguish *RCA v Pollard*

166 *OBG Ltd v Allan* [2008] AC 1 at [52].
167 *OBG Ltd v Allan* [2008] AC 1 at [52].
168 *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24 at [87] and [95].

and *Oren v Red Box*, and noted that the defendant's conduct "merely potentially reduces the profits" of the plaintiffs;[169] the defendant's interference *vis-à-vis* the relationship between the plaintiff and potential buyers was of a low degree (if at all), which was one of the reasons the unlawful means tort was not made out.

99 This factor is an important one since the focus of the unlawful means tort is to *primarily* protect the economic interests of the plaintiff. The focus on the tort is less on the nature of the means by which the plaintiff is harmed. Hence, it is vital to ensure that if the relationship between the plaintiff and other third parties with whom the plaintiff has economic ties is interfered with as a result of the defendant's unlawful act, the defendant should not escape liability simply because a different third party was the victim. Perhaps, in cases such as *RCA v Pollard*, while the economic relationship of the plaintiff and the wronged third party was not interfered with, a greater interference with the plaintiff's economic relationship with the buyer (another third party) could have led to the court holding the defendant liable for his wrongful act.

C. Other issues – The two-party situation

100 One further issue in this area of law is the existence of the two-party unlawful means tort. According to Lord Hoffmann's footnote in *OBG*, a case of two-party unlawful means tort "raises altogether different issues".[170] On the other hand, Lord Nicholls stated that he was "far from satisfied that, in a two-party situation, the courts would decline to give relief to a claimant whose economic interests had been deliberately injured by a crime committed against him by the defendant".[171] Other commentators have also raised concerns regarding the two-party unlawful means tort[172] and the different rationales between the two-party unlawful means tort and Lord Hoffmann's three-party unlawful means tort.[173]

101 It is submitted that the rationale for the two-party unlawful means tort might be different. As academic commentator Hazel Carty noted, Lord Walker's statement in *Total Network* seems to suggest that the rationale for the imposition of liability for two-party harm could be the

169 *OBG Ltd v Allan* [2008] AC 1 at [52].
170 *OBG Ltd v Allan* [2008] AC 1 at [61].
171 *OBG Ltd v Allan* [2008] AC 1 at [161].
172 Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd Ed, 2010) at pp 155–162; R J Mitchell, "Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and Its Application to Australian Industrial Disputes" (1976) 5 Adel L Rev 428 at 435.
173 Lee Pey Woan, "Causing Loss by Unlawful Means" [2011] Sing JLS 330 at 346.

fact that damage is intentionally inflicted.[174] In fact, Carty suggests that the rationale for two-party economic torts may be that they act as "gap-fillers", to provide protection where specific torts fail to provide liability though intentional economic harm has been inflicted.[175]

102 An in-depth discussion of the two-party unlawful means tort is beyond the scope of the article. However, the authors would like to make some parting observations. The two-party unlawful means tort should exist in scenarios where the plaintiff has no legal recourse; for example, where a plaintiff relies on a natural spring for the water to conduct its business and the defendant intentionally destroys the spring through criminal conduct. Seeing how the tort of negligence in the UK precludes recovery for pure economic loss, it may be important for the two-party unlawful means tort to develop and provide a remedy for claimants, in a bid to fill the gap. In Singapore, while the tort of negligence does recognise pure economic loss, its application does not seem to fit well in these scenarios; the victim who has suffered economic harm may not be able to overcome all the hurdles of proving the elements of the tort of negligence. A duty of care may not exist between the plaintiff and defendant in the above scenario. For instance, the defendant might not have voluntarily assumed responsibility or had no control over the natural spring, or the plaintiff did not rely on the defendant to take reasonable precautions. Recovery of damages under the tort of negligence is also subject to the principles of causation and remoteness.

103 Another issue is the scope of unlawful means if Singapore recognises the two-party unlawful means tort. The test of instrumentality that has been proposed can still be applied in the context of two-party situations. As mentioned earlier, the unlawful means tort focuses on protecting the economic interests of a party from interference and is less concerned with how the interference was carried out. In fact, there have been suggestions to apply the test of instrumentality in such a two-party setting.[176]

104 In a two-party unlawful means tort setting where the unlawful means is civil in nature, there is usually already a civil remedy and recourse available to the plaintiff, and recourse to the unlawful means tort should thus not be granted when the unlawful means is civil in nature. However, where the unlawful means is a criminal act, there may not be a

174 Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd Ed, 2010) at p 161.

175 Hazel Carty, An Analysis of the Economic Torts (Oxford University Press, 2nd Ed, 2010) at pp 161–162.

176 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [71] and [86]; *OBG Ltd v Allan* [2008] AC 1 at [61] and [161].

civil remedy for the plaintiff. The two-party unlawful means tort may be employed to fill such a gap only in such scenarios.

105 There is scant case law in this area, but the authors opine that the test of instrumentality in a two-party setting can be modified from focusing on the "instrumentality of a third party" (in a three-party setting) to focusing on the "instrumentality of the defendant's crime". This would provide the required control mechanism to ensure that not all crimes (despite how insignificant they may be) qualify as the unlawful means in a two-party unlawful means tort setting.

106 The modified test of instrumentality in a two-party setting would measure the nexus between the criminal nature of the defendant's act and the plaintiff's economic loss: for example, where a defendant illegally imports goods to undercut the plaintiff's business selling identical goods, as compared to a defendant putting up posters at illegal places to advertise goods that are identical to the plaintiff's. In the latter scenario, the criminal nature of the defendant's act has a weaker nexus to the plaintiff's economic loss than the former scenario – putting up posters illegally at the wrong place has minimal impact on the plaintiff's economic loss when compared to putting up the same posters legally. The criminal nature of the act is insignificant.

107 A modified test of instrumentality in a two-party setting, as proposed in the paragraph above, would likely differ from the test for causation of damage. However, this topic warrants a more comprehensive exploration which is beyond the scope of this article.

V. Conclusion

108 The scope of the unlawful means tort needs further judicial clarification in Singapore. The history and development of the tort reveals that the primary focus of the tort should be on protecting one's economic interest, and less so on the (technical) means by which one's economic interest is affected. This article seeks to serve as a useful guide for how the unlawful means tort should continue to develop in Singapore (and hopefully in other jurisdictions as well).

109 In developing the unlawful means tort and the concept of unlawful means, one should endeavour to strike a balance between the twin needs of freedom and fairness in economic competition. A broad scope of unlawful means can give the courts wider consideration of various unlawful conduct that may result in a legitimate cause of action, and this will also not automatically preclude unlawful criminal conduct which may damage one's economic interests. When coupled with the test

of instrumentality informed by the various factors proposed above, the overall scope of the unlawful means tort is sufficiently circumscribed to ensure fairness for both potential plaintiffs and defendants.
