Neutral Citation Number: [2018] EWCA Civ 2765

Case No: A4/2017/2824

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
DEPUTY HIGH COURT JUDGE SARA COCKERILL QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE NEWEY
and
THE RIGHT HONOURABLE SIR TIMOTHY LLOYD

- -

Between:

MICHAEL FIELDING WOLFF	**Appellant/ Defendant**
- and -	
TRINITY LOGISTICS USA INC	**Respondent /Claimant**

- -
- -

Mr Michael Collett QC & Mr Oliver Hyams (instructed by **Harold Benjamin Solicitors**) for the **Appellant**
Mr Peter Knox QC (instructed by **DMH Stallard**) for the **Respondent**

Hearing dates: 20th & 21st November 2018

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. It has long been a cardinal principle of the English law of carriage by sea that the carrier should only deliver the goods to a person who presents an original bill of lading. If he delivers to anyone else he is liable for misdelivery. The reason for this cardinal principle is that the bill of lading is a document of title by indorsement and delivery of which the property in the goods can be transferred in return for the price payable to the supplier. The consignee or receiver of the goods can expect that in return for payment he will obtain an original bill of lading which can be presented to the carrier, see Goode Commercial Law (5th ed. 2016) para 36.34 and Barclays Bank v Commissioners of Customs and Excise [1963] 1 Lloyds Rep 81, 89.

2. It is commonplace that payment is made through the banking system and the shipper/seller of the goods will present the original bills of lading to the bank which will then make payment and send or deliver the bills to the consignee or his agent. Often, as in this case, the bank will be the named consignee; if so, the bank will indorse the bills of lading to show that the buyer has paid for the goods and send the bills to the buyer or importer who will present one of them to the carrier or the carrier's agents and thus obtain the goods.

3. The same principles in theory apply to air waybills for carriage by air, although they sometimes have to be modified because an air waybill is not usually a document of title in the same way as a bill of lading and because air carriage is so much speedier than ocean carriage.

4. It is by no means unknown for carriers or their agents to succumb to pressure from the receivers/buyers of goods to release goods without production of an original bill. Any carrier who does so will be in breach of the contract of carriage, see Sze Hai Tong Bank Ltd. *v.* Rambler Cycle Co [1959] A.C. 576. He will therefore hardly ever release the goods without a guarantee or letter of indemnity from the receiver or whoever wants delivery of the goods.

5. This case is a good example of the dangers attaching to early delivery.

Relevant Parties

6. The Fielding Group Ltd ("TFG") was at the material time a company engaged in importing clothing into the United Kingdom ("UK") from Bangladesh. Mr Michael Wolff was a director of TFG and is the appellant in these proceedings. Mr Clifford Barker was the shipping manager against whom the proceedings were dismissed as they were also dismissed against Mr Peter Tuch the non-executive chairman of TFG. TFG went into administration on 24th June 2014.

7. Trinity USA ("TUSA") was a freight forwarder involved in arranging the shipment of clothing products, from suppliers in Bangladesh, to TFG in the UK. It issued bills of lading in its own name for carriage to the UK and arranged air transport on the importer's behalf. Relevant individuals connected to TUSA include Mr Pereira, the president of TUSA. TUSA was the claimant in these proceedings suing for the value of consignments of clothing, for which no payment had been made, on the basis that it

was liable to the suppliers in Bangladesh for allowing TFG to obtain the goods without paying for them before TFG went into administration.

8. Trinity Logistics (Bangladesh) Ltd ("Trinity Bangladesh") was a company that operated as the agent of TUSA in Bangladesh, owned as to 49% by TUSA. Mr Abdul-Razak was an employee of Trinity Bangladesh.

9. Trinity Europe Logistics Limited ("Trinity Europe") was a company incorporated on 2nd October 2013 that operated as the agent of TUSA in the UK, owned as to 60% by a corporate vehicle owned by Mr Goonewardena and his associates. Mr Goonewardena was Managing Director of Trinity Europe and the first defendant in the proceedings at first instance, against whom TUSA's claims succeeded.

Relevant agreements

Agreement with Trinity Bangladesh

10. On 1st January 2012, TUSA and Trinity Bangladesh made a contract pursuant to which Trinity Bangladesh would be the agent of TUSA in relation to sea and air freight business from Bangladesh.

Agreement with Dart/Trinity Europe

11. By a counter-offer dated 30th May 2013 sent by Mr Goonewardena on behalf of Dart Global Logistics Limited ("Dart") to Trinity Bangladesh, subsequently accepted by conduct, Dart and Trinity Bangladesh made a contract whereby Dart agreed to act as the agent of Trinity Bangladesh in the UK, in particular by handling the UK end of carriage from Bangladesh. TUSA was an undisclosed principal to this agreement. The terms of the agreement were recorded in writing and headed "Agency Agreement".

12. Article 2 of this Agency Agreement provided, inter alia:-

> "4. The Receiving Party's responsibility, where shipments are consigned to a bank or custodian, is to advise bank or custodian of arrival … and to release shipments or documents only after receiving written authorisation for such release from said bank or custodian.
>
> …
>
> 10. Release of Shipments: Each of Trinity Bangladesh and Dart agree not to release partially or totally any shipment until:
>
> - Any and all freight charges and/or related charges are paid;
> - Any and all written authorization required by bank is received; and
> - Any and all written instructions and/or terms of release by other documents are satisfied."

13. In the summer of 2013, Mr Goonewardena, at the time an employee of Dart, approached Mr Pereira with a proposal for a joint venture with TUSA, pursuant to which Trinity Europe was incorporated on 2nd October 2013. Mr Goonewardena and Mr Pereira agreed that Trinity Bangladesh would move its business from Dart to Trinity Europe, and that Trinity Europe would secure the TFG business. The judge accepted the submission of TUSA that this agreement gave rise to an agreement between Trinity Bangladesh and Trinity Europe on the terms of the Agency Agreement. Again, TUSA was an undisclosed principal to this agreement.

The operation as envisaged by TUSA

14. In broad terms:-

i) TFG placed orders for clothing goods with suppliers in Bangladesh;

ii) TFG contracted with a UK freight forwarder (initially Dart; from November 2013, Trinity Europe) to arrange carriage of the goods from Bangladesh to the UK; and

iii) Dart/Trinity Europe arranged for such carriage via its counterpart in Bangladesh (Trinity Bangladesh), which would send the goods by sea or air, depending on the urgency with which they were required.

15. This operation was intended to involve the following issue and transfer of documents:-

i) on shipment of the goods, Trinity Bangladesh would issue to the supplier a bill of lading for sea transfer or an air waybill for air transport, referred to by the parties, respectively, as a "house bill of lading" ("HBL") and a "house air waybill" ("HAWB"). In compliance with Bangladeshi law, a Bangladeshi bank was named as the consignee on the bills of lading;

ii) the supplier would send to TFG's nominated bank, namely National Westminster Bank ("NatWest"), a set of documents including (i) an invoice for the goods, and (ii) the HBL or HAWB as applicable;

iii) NatWest would advise TFG of receipt of those documents;

iv) TFG as importer would advise NatWest to transfer payment to the supplier's bank in respect of the invoice;

v) once NatWest had transferred payment to the supplier's bank, it would (a) in respect of shipments by sea, indorse the reverse of the HBL and post it to TFG and (b) in respect of shipments by air, issue a "Bank Release" order (referred to by the parties as a "BRO") on headed note paper; and

vi) TFG would secure release of the goods by presenting to Dart/Trinity Europe (i) the indorsed HBL, or (ii) the BRO.

Release of shipments prior to payment

Arrangements for early release

16. In practice, despite the system outlined above, freight forwarders were willing to release goods to trusted buyers prior to payment. In the early 2000s, while TFG performed well financially, many freight forwarders, including Dart, were willing to offer this service to TFG. This was despite the well-recognised principle that goods should only be released on presentation of the correct shipping documents.

17. By early 2013, TFG was suffering severe financial difficulties, with the result that fewer freight forwarders were willing to operate this early release. Nevertheless, in May 2013, Mr Goonewardena (at that time, an employee at Dart) reached an agreement with Mr Wolff to provide early releases so long as Dart's fees were paid promptly.

18. The terms of this agreement between Mr Goonewardena and Mr Wolff are highly relevant to the dispute between TUSA and Mr Wolff because TUSA claims that Mr Wolff induced Dart and, subsequently Trinity Europe, to breach the Agency Agreement with Trinity Bangladesh/TUSA described in para 11 above. The deputy judge's findings are, therefore, important. She observed that it was common ground that numerous consignments were released by Trinity Europe before payment but "The exact means by which this occurred remains unclear".

19. She continued:-

> "42. A part of this narrative links to the financial position of TFG. Although the clothing market is plainly a competitive one, TFG was doing fairly well in the early years of the millennium. During this period it would seem that more than one forwarder was prepared to accommodate TFG by early releases of goods, and it was at this point that Mr Goonewardena first approached Mr Wolff offering this service so long as the unpaid consignments were tracked and Dart's own fees were paid promptly.
>
> 43. By early 2013 however TFG was suffering considerable financial issues. The causes of this were many and varied and can be traced back to the credit crunch, but the upshot was that TFG's situation was looking, as Mr Wolff said, dire. Investment was sought through a group called Ellestone Apparel LLP, and it was apparently anticipated that financial investment would eventuate in the near future. This did not occur to schedule, creating further difficulties.
>
> 44. TFG's accounts for the year ended March 2013 (completed in early 2014) reported that it was dependent on the continuing support of its shareholder and from the Group's banks. The accountant's report concluded that in the light of these risks, "a material uncertainty exists that may cast significant doubt about the ability of the Company to continue as a going concern". This arose against a picture where TFG had made a loss of £1,316,000 in the year (and £424,000 loss in previous year), the total shareholders' deficit had increased to £2,677,000 from £1,361,000, trade creditors were £2,029,000, and bills of

> exchange [were] payable £3,066,000, as part of £12,342,000 due within one year.
>
> 45. Reflecting this, and the fact that TFG's credit rating was downgraded to poor by DNB, the willingness of forwarders to accommodate early releases appears to have significantly eroded. Thus in 2013 Mr Wolff had to give personal guarantees to the Toll Group to enable early releases. Mr Goonewardena however continued to be willing to provide the accommodation of early release as before. It appears that in around May 2013, while he was at Dart, he discussed this with Mr Wolff and an agreement was reached to continue to provide early releases so long as [Dart's] fees were paid promptly. Mr Wolff told Mr Barker to give Mr Goonewardena such assistance as he needed in relation to future consignments. It was also said by Mr Wolff in cross examination of Mr Goonewardena and in evidence that the agreement which Mr Goonewardena gave for Dart was given with the informed agreement of the owner of Dart, conveyed at a lunch meeting sometime in the summer. I was not convinced by the accuracy of this late recollection.
>
> 46. In mid-2013 – shortly after the agreement with Mr Goonewardena was concluded – issues began to arise. For present purposes the story begins in late June 2013, when a Bangladeshi supplier, EnergyPac Fashions Limited, raised an issue with TFG's Bangladeshi office. A consignment of "636 cartons" had apparently been released to TFG in the UK in early June; but EnergyPac had not yet been paid for that consignment."

Non-payment for released goods and the production of "fake" indorsements

20. On 25th June 2013, Trinity Bangladesh contacted Dart asking for a proof of delivery of documents in respect of the EnergyPac shipment. Mr Goonewardena, having ascertained the applicable HAWB number, instructed Mr Barker to provide copies of the relevant HAWB, superimposed with the stamp of NatWest ("the fake indorsements"). Mr Goonewardena explained to Mr Barker that he needed the documents for his own internal records, in order to keep track of which consignments had been released without the presentation of a bank release. Mr Barker acceded to this request by instructing a TFG employee, Mr Pasha, to produce the indorsed HAWBs. On 19th July 2013, Mr Niranjan, a Dart employee, forwarded this copy of the HAWB by email to Trinity Bangladesh, stating "Please find attached the BRO".

21. Between July 2013 and TFG's insolvency in June 2014 Dart and, from November 2013, Trinity Europe, routinely repeated the practice of (i) releasing goods prior to payment; and (ii) sending Trinity Bangladesh copies of the relevant HBL or HAWB indorsed, by TFG employees, with the seal of NatWest. In total, 49 fake indorsements were sent to Trinity Bangladesh.

22. TFG eventually paid for the majority of the shipments dealt with in this way. However, by the time TFG went into administration on 24th June 2014, eleven shipments remained unpaid, seven shipments by sea and four shipments by air. Fake indorsements had been produced for ten of these eleven consignments. It is the value of these eleven consignments ($591,981.86) which forms the basis of TUSA's claim for damages against Mr Wolff, and also against the other defendants to the action, Mr Goonewardena, Mr Barker and Mr Tuch. Mr Goonewardena was found liable for the torts of procuring breach of contract, conversion, and deceit, but has made no proposal for satisfying the judgment against him. As I have already indicated, the deputy judge dismissed the claim against Mr Barker; this was largely on the basis that as shipping manager he had acted in a ministerial capacity and was not aware of and had not participated in the contractual arrangements. The claim against Mr Tuch the non-executive chairman was also dismissed.

The claims against Mr Wolff

23. TUSA made four claims against Mr Wolff:-

1) procuring a breach of contract (the Agency Agreement) between Trinity Europe and Trinity Bangladesh/TUSA;

2) a claim that he procured Mr Goonewardena's conversion of the goods or was otherwise a joint party to that conversion;

3) deceit; and

4) conspiracy to cause harm by unlawful means (namely either the inducement of breach of contract or conversion).

The judgment

24. The deputy judge dismissed the second, third and fourth claim, but upheld the claim for procuring (or inducing) breach of contract. Mr Wolff represented himself at the trial and the judge had to ensure (and did ensure) that he understood the case against him. Unsurprisingly, however, he did not comprehensively address her on the comparatively sophisticated legal arguments which the counsel, whom he has now been able to instruct, put before this court.

25. In relation to the procurement of breach of contract, the judge held that Mr Wolff did commit a sufficient act of procurement even though it may have been Mr Goonewardena who made the first suggestion of obtaining the goods without presentation of the proper documents. She also held that Mr Wolff had the requisite knowledge of (a) the contract between Trinity Europe and Trinity Bangladesh/TUSA and (b) the fact that it prohibited release of the goods without the correct documents.

26. Mr Wolff's defence to the claim was that Mr Abdul-Razak of Trinity Bangladesh had agreed that the goods could be released without payment or, at least, that he (Mr Wolff) believed that he had. Having heard oral evidence from Mr Wolff (as well as from Mr Goonewardena and Mr Barker) the deputy judge held that no one on behalf of Trinity Bangladesh or TUSA had made any such agreement and that Mr Wolff did not believe that they had, see paras 274-9 of the judgment.

27. She then turned to the elements of the tort of procuring breach of contract and said:-

> "282. As to the elements of the tort the position on procurement or inducement is different to that which pertains for Mr Barker. It appears clear that the agreement in principle as to the provision of early release facilities was one which was concluded between Mr Wolff and Mr Goonewardena. As such, Mr Wolff's actions can properly be regarded as inducing or procuring Mr Goonewardena's actions.
>
> 283. The second element is knowledge of the breach of contract or of the right of Trinity USA which was breached. Trinity USA says that it is immaterial that Mr Wolff did not know of the arrangements between Trinity Bangladesh and Trinity Europe: he must have known that Trinity Bangladesh did not permit releases before payment or he had no reason to suppose otherwise.
>
> 284. Again one must focus tightly on what the authorities say constitutes knowledge for these purposes. Knowledge of a likelihood is not enough. But once knowledge of a contract is established knowledge of the terms may be said to be established if the person must have known the terms or was recklessly indifferent to a means of discovering the truth.
>
> 285. Here it is clear that Mr Wolff knew of the other parties in the chain, since he relies on the knowledge of Trinity Bangladesh and clearly perceived the existence of "freight guys" other than Trinity Europe. He also ultimately accepted in cross examination that he knew of other Trinity entities, although at other points he maintained that he thought of Trinity as one entity. This knowledge is probably to be expected given Mr Wolff's position in the company – being a person with far more familiarity with contracts than Mr Barker would have – and given his years of experience of importing garments.
>
> 286. But Mr Wolff says that even if he knew this he did not know of the contract as a fact or of its terms, in particular as to the prohibition on early release. In some ways it is very similar to what Mr Barker says. The distinction between Mr Barker's position and Mr Wolff's position really lies in two things. The first is Mr Wolff's role in dealing with freight forwarders; he was the person who reached agreements with them. He knew of the terms which they imposed for the concession of early releases when granted. He understood that they were taking a risk, implying a liability, when they did so. The second is the evidence regarding Trinity USA's knowledge to which I have referred above. There the evidence before me is not consistent with a belief by Mr Wolff that Trinity USA had agreed to the early releases; and the flavour of Mr Wolff's correspondence,

> in particular the "encourage" and "worries" emails indicate that he well understood that Mr Goonewardena was arranging a course which was outside the contractual structure and which could lead to claims at a later date. I therefore consider this sufficient to cross what might be termed the "must have known" hurdle.
>
> 287. The third element to consider is that of intent. Intent in the sense of knowing and intending that something would happen, which was contrary to someone's rights is clear and was accepted by Mr Wolff. The question is whether Mr Wolff knew that a breach of contract on the part of Trinity Europe or breach of Trinity USA's rights would result. Here my conclusion as to Mr Wolff's knowledge carries the matter, so that the test is made out."

28. She then proceeded to dismiss the claim for procuring conversion on the basis that Mr Wolff did not know of TUSA's possessory rights as bailee or quasi-bailee of the goods. She likewise dismissed the claims in deceit.

29. She also dismissed the claim for conspiracy on the basis that Mr Wolff did not intend to cause harm to the claimant.

30. The deputy judge then proceeded to give judgment against Mr Goonewardena for wrongful procurement of breach of contract, conversion and deceit. She also gave judgment against Mr Wolff but only for

> "wrongfully procuring breaches of contract"

and made an order in the following terms:-

> "Trinity USA is entitled to an indemnity from Mr Goonewardena and Mr Wolff in relation to claims that may be brought against it by the suppliers of the goods identified in the annex to this Order. Such indemnity is limited to those sums specified in the annex to this Order and does not include claims for consequential losses, costs or interest."

There then followed a somewhat intricate paragraph defining when a claim is to be considered as "brought" and for notice to be given when TUSA accepts the claim or any part of it and other matters.

Grounds of appeal

31. Mr Michael Collett QC now appears for Mr Wolff and submits four grounds of appeal:-

i) the contract between Trinity Europe and Trinity Bangladesh, breach of which it is said Mr Wolff procured, did not come into existence until Trinity Europe had been incorporated on 2nd October 2013; the acts of procurement relied on by the judge preceded that date and could not be the foundation of any liability;

ii) the judge's conclusion that Mr Wolff "must have known" of the contract and its terms was insufficient to prove the mental element of the tort which had to be actual knowledge or blind-eye recklessness;

iii) the acts of Mr Wolff were not procurement at all; and

iv) the deputy judge had no power to order the indemnity she did; alternatively, her exercise of discretion was vitiated by failure to take account of defences which might be available to TUSA against the suppliers of the goods.

32. TUSA has served a respondent's notice saying that the deputy judge should have upheld the claims of procuring conversion and conspiracy against Mr Wolff. There is a debate about whether TUSA need permission to appeal for this purpose.

Relevance of date of contract

33. This is an argument pursued for the first time in this court and it will, therefore, be necessary to set out a little more of the history of the matter.

34. The initial agreement between Mr Goonewardena and Mr Wolff for delivery of the goods before payment and without presentation of bank authorisation by indorsement of the bills of lading and air waybills was described by the judge as having come into existence in May 2013 when it was Dart that was offering the service so long as its fees were paid promptly. The so-called "Non-exclusive Agency Agreement" is itself dated 1st June 2013 and therefore seems slightly to post-date the agreement about the release of the goods made between Mr Goonewardena and Mr Wolff. But all this was an agreement in principle which could only be acted on when TFG (whether by Mr Wolff or other employees such as Mr Barker) called for collection and delivery of the goods.

35. It is apparent that, as TFG's financial position deteriorated, freight forwarders other than Mr Goonewardena of Dart were reluctant to extend credit to TFG. It therefore became essential to route the business through Dart or whatever corporate structure Mr Goonewardena was currently using. On 9th October 2013, Mr Wolff sent an email to TFG's non-executive chairman, Mr Tuch. This is the "encourage" email referred to in para 286 of the judgment. It said:-

> "if the only way to finance is through the ff [freight forwarders] giving us the goods without docs we will have to give harith [Goonewardena] more to do as he is the only one to 'encourage' this arrangement. I know that he is starting his own business soon so will be happy to help us if we help him."

Mr Wolff did indeed 'help' Mr Goonewardena by giving the business to his company Trinity Europe. The deputy judge found that that was on the same terms as the business had been handled by Dart; Trinity Europe had been incorporated on 2nd October 2013 one week before Mr Wolff sent his email and did receive TFG's business; the fact that the original inducement was to Dart to breach the terms of the Agency Agreement with Trinity Bangladesh is now past history; the inducement continues through to October 2013 and occurs every time goods were called for

without documents being presented and indeed up to May 2014, when TFG went into administration.

36. The deputy judge did not make any findings about TFG calling for the eleven specific consignments for which no payment has ever been made. This is unsurprising since the argument about the date of the contract was never made at the trial. But Mr Wolff must have been ultimately responsible for calling for the goods without production of the bills of lading or the air waybills. There is a number of emails in which the arrangement for release of containers without production of documents is referred to culminating with an email from Mr Wolff to Mr Tuch of 13th June 2014 headed "worries":-

> "I am worried about the creditors ganging up on us personally … particularly worried about dodgy releases putting you and I in the frame for action from freight guys … harith is going to go bust in order to avoid the issues with the releases …"

Mr Tuch responded by saying he had no idea the dodgy releases were happening and that he would have stopped it if he had known and Mr Wolff replied:-

> "I knew that we were getting goods released without docs. Everyone knew that we were …"

37. In the light of these emails it is clear that Mr Wolff was getting the goods released without documents and knew that it was, to say the least, "dodgy". The eleven unpaid consignments were the subject of the Agency Agreement between Trinity Europe and Trinity Bangladesh just as much as any of the other consignments. At the time when the goods were called for and released without original documents, the contract existed and was breached.

38. Mr Collett relied on Clerk and Lindsell, Torts, 22nd edition (2018) para 24-20 for the proposition that there must be a intentional inducement "of the breach of an existing and valid contractual obligation". The cases cited in support at footnote 113 support (inter alia) the proposition that it is not a tort to persuade someone not to enter into a contract. But that is irrelevant for present purposes. The fact is that subject to the question whether the acts of Mr Wolff were an inducement at all (ground three of the appeal) there was undoubtedly an "existing and valid contractual obligation" at the time when the goods were delivered without production of the relevant documents. The first ground of appeal must, therefore, be rejected.

39. It is convenient next to consider the third ground of appeal namely whether the acts of Mr Wolff constituted inducement or procurement of the undoubted breach of clauses 4 and 10 of Article 2 of the Agency Agreement.

Acts of inducement/procurement

40. Mr Collett submitted that Mr Wolff could not be liable for procuring breach of contract merely because he (and TFG) had agreed to put the business of receiving the goods in the United Kingdom in Dart or Trinity Europe's way. Nor could compliance with a condition imposed by Mr Goonewardena that Dart's/Trinity Europe's own fees be paid promptly constitute procurement or inducement.

41. He cited Batts Combe Quarry Ltd v Ford [1942] 2 All ER 639 in support of this proposition. In that case the vendor of a quarrying business had sold the business and covenanted that he would not directly or indirectly engage in any quarrying within 75 miles of the quarry being sold. The vendor financed his sons to open a quarrying business in an adjacent quarry and not surprisingly was held to have broken his covenant. The new owner also sued the sons for procuring the father's breach on the basis that they had received £7,200 to enable them to begin the competing business. This claim failed, Lord Greene MR saying:-

> "… that argument is completely misconceived. The tort of procuring a breach of contract requires much more than that. Mere acceptance of a proffered bounty given in breach of covenant cannot, it seems to me, be said to be in any sense a procuring of a breach of contract."

42. But in the present case Mr Goonewardena was not acting benevolently when he agreed to procure (and actually procured) delivery of the goods without production of the original documents. It was a business decision made on the basis that Mr Wolff was giving him the business and promising to pay his fees promptly; that was clearly an important (if not the most important) incentive for Mr Goonewardena to act in breach of the Agency Agreement. The business kept on coming in as a result. That seems to me to be just the sort of conduct which procures or induces a breach of contract and did so in this case.

43. Mr Collett further relied on the fact that the initial offer had been held to have come from Mr Goonewardena not Mr Wolff but, as Roxburgh J pointed out in British Motor Trade Association v Salvadori [1949] Ch 556, 566:-

> "The covenantor who offers a car for sale is not unconditionally ready to break his covenant but only if the price offered is high enough and, accordingly a defendant who offers such a price induces the seller to take the final step … by making his willingness to sell unconditional."

44. Mr Collett also said that the acts must constitute at least "persuasion" to constitute procurement. He relied on the use of the word "persuasion" by the deputy judge when dismissing the parallel claim against Mr Barker (para 247). The deputy judge seems to have relied for this purpose on Lord Hoffmann's speech in para 39 of OBG v Allan [2008] A.C.1. That paragraph is more relevant to the defendant's knowledge but in para 36 Lord Hoffmann did say that "the real question" for procuring breach of contract was whether:-

> "the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability"

45. It seems to me that the conduct of Mr Wolff did constitute at least encouragement and, if it be necessary, persuasion; the fact that he acted in accordance with the "encourage" email of 9th October 2013 speaks for itself. I would therefore reject the third ground of appeal and turn to the second ground, that Mr Wolff did not "know" enough to make him liable.

Knowledge

46. In this context para 39 of Lord Hoffmann's speech is undoubtedly relevant. He said:-

> "To be liable for inducing a breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so."

He illustrated this by reference to the case of British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479 in which the defendant had received information about one of the claimant's secret processes from the claimant's former employee who had invented the process. The defendant knew that the employee had an obligation not to reveal trade secrets but held what Lord Hoffmann called "the eccentric opinion" that if the process was patentable, it would be the exclusive property of the employee; he therefore received the information in the honest belief that the employee was not breaking his contract. Mackinnon LJ had observed of the defendant in the Court of Appeal [1938] 4 All ER 504, 513 that the judge in accepting this evidence "had vindicated his honesty … at the expense of his intelligence" but said the defendant could not be liable. Thus, if Deputy Judge Cockerill QC had accepted Mr Wolff's case that he thought TUSA had agreed that the goods could be released without presentation of the relevant documents she might likewise have vindicated his honesty but she did not and this avenue of defence is no longer open to Mr Wolff.

47. On the simple wording of the judgment (para 286) that Mr Wolff "well understood" that Mr Goonewardena was arranging a course which was outside the contractual structure and would lead to claims at a late date and that that was sufficient to cross what might be deemed the "must have known" hurdle, there appears to be a finding that there was actual knowledge of the Agency Agreement and that Mr Goonewardena was acting in breach of it. That would be an unappealable finding of fact.

48. Mr Collett, however, took us to that part of the judgment (para 252) which dealt with the case against Mr Barker and in which the question of knowledge was dealt with more fully as a matter of law. The deputy judge referred to remarks of Neill LJ in Middlebrook Mushrooms Ltd v TGWU [1993] I.C.R. 612 in which the Court of Appeal discharged an injunction obtained against the TGWU on the grounds that the TGWU did not know of the existence (or terms) of any contracts, between the claimant mushroom producers and the supermarkets acquiring the mushrooms, breach of which the TGWU was allegedly procuring. In the course of his judgment Neill LJ said:-

> "It is clear that in many cases a third party may be deemed to know of the almost certain existence of a contract and indeed of some of its likely terms."

For this proposition The Merkur Island [1983] ICR 490 and the Union Traffic case [1989] ICR 98 were cited, but the learned justice said that that was not the case then before the court.

49. In para 252 the deputy judge said:-

> "In some of the industrial action cases knowledge has been found where actual knowledge did not exist. Those were cases where knowledge of facts or terms which were "almost certain" or "must have" been known: "in many cases a third party may be deemed to know of the almost certain existence of a contract and indeed of some of its likely terms" per Neill LJ in Middlebrook Mushrooms Ltd v TGWU [1993] I.C.R. 612 at 621, and see also per Hoffmann LJ at 622. In OBG the concept of reckless indifference was suggested as a test; but this was not argued here. In any event I consider that this is some way below the kind of case where one could say that Mr Barker was recklessly indifferent to the requisite knowledge or that he must have known of the terms of the contract. Mr Barker was not a freight forwarder. His CV discloses no training in the business or the mechanisms of international trade. He knew that there was probably a contract, and he knew it was likely that its terms precluded early release, but he did not have that critical extra degree of knowledge which would carry him into the "must have known" category. As such I would find the claim against Mr Barker fails on the head of knowledge."

50. Mr Collett submitted that this paragraph shows that the judge used "must have known" not to mean that Mr Barker (and thus Mr Wolff) did know but to mean that they did not actually know but should be deemed to know. He then submitted that in the absence of reckless indifference there was no scope for deemed knowledge and that we should not follow the obiter remarks of Neill LJ in Middlebrook Mushrooms which were inconsistent with para 39 of Lord Hoffmann's speech in OBG v Allan.

51. Attractively as this submission was presented, I cannot accept it. It is not a contradiction to say that knowledge of a contract and its terms is "almost certain" and therefore "must have been known". It would fly in the face of reality to say that it is "almost certain", let alone that (see para 286 of the judgment) Mr Wolff "well understood" that Mr Goonewardena was acting outside the contractual structure in a way that would lead to claims at a later date and then to say that he should not be fixed with that knowledge. Mr Wolff was, at the very least, recklessly indifferent to the question whether Mr Goonewardena was acting in breach of contract. After all the point of the arrangement was that he should so act and in that sense Mr Wolff "must have known" or be deemed, by his reckless indifference, to know the position. Mr Wolff's whole case, after all, was that it had all happened but that he thought Trinity Bangladesh/TUSA had agreed to it. Once that case had been rejected a finding of requisite knowledge was inevitable.

52. I would not therefore accede to the second ground of appeal.

Indemnity: appropriate relief

53. Mr Collett submitted that the court had no power "to order an indemnity" because it only had power to make a once for all award of damages. It turned out that this point was more technical than substantive because he accepted that the court had power in

an appropriate case to make a declaration that TUSA was entitled to recover from Mr Wolff such damages as were due from them to the suppliers and which they might reasonably pay in respect of that liability, see the order made in Household Machines Ltd v Cosmos Exporters Ltd [1947] 1 KB 217. His real complaint was that that was not the order which the judge had made; her order required Mr Wolff to pay, in effect, whatever TUSA decided it was going to pay its suppliers, whether reasonably or not. There is to my mind force in that complaint.

54. Mr Collett also argued that the judge erred in her discretion in making the order by not taking into account possible defences open to TUSA which might make it unreasonable for TUSA to pay the suppliers the full (or any) amount of the claim. He submitted that there were available time bar defences and further that the judge had too readily discounted them on the basis that they were not available because TUSA had waived its right to rely on (or by its conduct was estopped from relying on) the one year time limit in respect of the ocean going shipments or the two year time limit imposed by the Warsaw Convention for the air shipments.

55. We were unable in the time allotted for this appeal to hear full argument on these points but they are to my mind more arguable than they appeared to the judge. We did receive some argument on the point whether it is possible to waive the Warsaw Convention time limit but even that was severely truncated.

56. In all the circumstances, I think it proper that Mr Wolff should have the opportunity of saying that any settlement of suppliers' claims by TUSA has been unreasonably made but that it should be made clear that there has never been any suggestion by either side that the actual value of the consignments is not correctly stated in the Annex to the deputy judge's order and it will not be possible to make any such suggestion hereafter.

57. I would accordingly discharge paragraph 3 and 4 of the deputy judge's order and replace them with a declaration in some such terms as:-

> "Declaration that in the event that TUSA reasonably pays claims made by the suppliers of the goods, TUSA is entitled to recover from the third defendant, Mr Wolff, damages in the amount of such payments up to the limit given for each supplier in the Annex hereto."

The precise wording of this declaration can, within limits, be further debated prior to hand down of the judgment.

58. I have read and agree with Sir Timothy Lloyd's judgment to the effect that TUSA does require permission to appeal in respect of its claim for procuring conversion and conspiracy. We indicated at the close of the argument on this topic that, if we concluded permission was necessary, we would grant it in respect of the procurement of conversion claim but refuse it for the conspiracy claim.

59. Since, however, I consider that the appeal should be dismissed in relation to the procurement of breach of contract claim and no different damages (or relief) is claimed in respect of the conversion claim, it is unnecessary to consider the procurement of the conversion claim any further. Since the mental element required

before a defendant can be said to have procured a conversion may possibly be different from the mental element required for conversion itself, I would prefer not to express a concluded view in a case where resolution of that question is not required.

Lord Justice Newey:

60. I have read the judgments of Lord Justice Longmore and Sir Timothy Lloyd and agree with both of them.

Sir Timothy Lloyd:

61. I agree with Lord Justice Longmore on the issues in the appeal.

62. As he says, TUSA sought to challenge the judge's dismissal of its claims against Mr Wolff for procuring conversion and for conspiracy, in case the appeal were to succeed on procuring breach of contract. The question is not whether that can be done, but whether it can be done without obtaining permission, as for an appeal.

63. From the creation of the Court of Appeal by the Supreme Court of Judicature Act 1873, the court has had statutory jurisdiction to hear and determine appeals from judgments or orders of the High Court: 1873 Act s.19, Supreme Court of Judicature (Consolidation) Act 1925 s.27, and now Senior Courts Act 1981, s.16(1). In Lake v Lake [1955] P 336 the Court of Appeal held that "judgment or order", in this context, means "the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to execute": per Evershed MR at page 343. Hodson LJ said that the section deals with "the formal judgment or order and not the reasons for the decision" (page 346). In that case the husband had petitioned for divorce on the ground of adultery, and the wife defended both by denying adultery and by asserting in the alternative that any adultery had been condoned. The order made, in what was then the usual form, recorded that the petitioner had not sufficiently proved the contents of the petition, and dismissed the petition. The judgment showed that the judge had held that the wife had committed adultery but that the husband had condoned it. The wife wished to appeal against the finding of adultery, but the court held that it had no power to hear such an appeal against matters contained in the reasons for the order, which were not reflected in the order itself.

64. Before 1999, permission was required for appeals in interlocutory matters but (with a few exceptions) not if the appeal was against a final order. The Access to Justice Act 1999 gave power to make rules under which rights of appeal were to be exercised only with permission. That power was used in the Civil Procedure Rules, such that permission to appeal is now required in almost all cases.

65. Often there will be only one party who is dissatisfied with the order made at the end of a case and therefore only one possible appellant. If an appeal is brought by that party, the respondent may be content to argue that the judge was right for the reasons given, but sometimes the respondent's arguments range more widely. The respondent may assert that the judge should have decided in the same way but for additional or different reasons, whether reasons not addressed in the judgment, or points decided against the respondent, and may also contend that the judge should have upheld a distinct claim by the respondent instead of dismissing it. This may arise where the

respondent was either the successful claimant, or was the defendant bringing a counterclaim. The rules have always provided for these possibilities.

66. The present rules are CPR rule 52.13 and Practice Direction 52C, paragraph 8. The rule is as follows:

> (1) A respondent may file and serve a respondent's notice.
>
> (2) A respondent who—
>
> (a) is seeking permission to appeal from the appeal court; or
>
> (b) wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court,
>
> must file a respondent's notice.

67. Practice Direction 52C, paragraph 8, is as follows:

> (1) A respondent who seeks to appeal against any part of the order made by the court below must file an appeal notice.
>
> (2) A respondent who seeks a variation of the order of the lower court must file an appeal notice and must obtain permission to appeal.
>
> (3) A respondent who seeks to contend that the order of the court below should be upheld for reasons other than those given by that court must file a respondent's notice.

68. Thus, three types of case are identified, in two of which the respondent requires permission. One is where the respondent wishes to appeal, the second is where a variation of the order below is sought, and the third is where the respondent contends that the order should be upheld for reasons other than those given below. There is, of course, a fourth case, where the respondent merely argues that the order was right and given for the right reasons. In that case a respondent's notice is not needed.

69. In the present case, TUSA did seek permission to appeal from the judge below, not only against the dismissal of its claims against Mr Barker and Mr Tuch but also against "the form of relief granted against" Mr Goonewardena and Mr Wolff. Those applications were refused by the judge and not pursued as such in the Court of Appeal.

70. Mr Wolff appealed against the judgment given against him for procuring breach of contract and against the remedy granted. TUSA served a Respondent's Notice by which it sought to have the order for an indemnity varied, but only if Mr Wolff were successful in challenging the form of relief in the order. It also sought to uphold the judge's order on additional grounds. Those grounds, identified in a skeleton argument in support, included additional reasons for holding that Mr Wolff had procured breaches of contract (on the questions of intention and knowledge) but also arguments

that the judge had been wrong to reject the claims in procuring conversion and in conspiracy.

71. Mr Wolff's lawyers contended that the challenge to the judge's rejection of the claims in procuring conversion and conspiracy ought to be made, if at all, by way of appeal and therefore required permission. TUSA therefore applied for this to be determined and, if it be held that an appeal and therefore permission was needed, for such permission. The additional arguments on the procuring breach of contract claim were clearly within paragraph 8(3) of PD52C and did not require permission.

72. For TUSA Mr Knox showed us what seems to be the only decision bearing on the point since 1999, namely Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd [2002] EWCA Civ 1142, [2003] 1 WLR 307. In that unusual case, Rix LJ, sitting at first instance, had had to determine whether litigation had been compromised by a settlement agreement. He found that the parties had agreed on a settlement figure but that the agreement was conditional and had not become unconditional, so that there had been no compromise. The claimant was given permission to appeal against the ruling that there had been no compromise. The defendant wished to uphold the judge's order on the additional ground that he had been wrong to find that the settlement figure had been agreed. If the order had provided only that no settlement had been concluded, it was common ground that the defendant would not require permission to contend that the judge's order be upheld for the additional reason that he should not have held the figure to have been agreed, whereas if the judge's order declared his finding that the settlement figure had been agreed, permission to challenge that would be required for a cross-appeal against that part of the order. The judge decided to include such a provision in his order and, though refusing permission to appeal against the substantive provision, he gave permission to appeal against his decision to include it.

73. The Court of Appeal reviewed the position under the rules as they then stood. Waller LJ gave the leading judgment. He referred to Lake v Lake and made the point that there can be an appeal even if no formal order has yet been drawn up. He said this at paragraph 27:

> Lake v Lake [1955] P 336 properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal. That is in my view consistent with In re B. That this is so is not simply by virtue of interpretation of the words "judgment" or "order", but as much to do with the fact that the court only has jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like.

74. Hale LJ agreed in terms with what Waller LJ had said at the beginning of that passage in her judgment in the same case at paragraph 53.

75. The procedural rules then in force were as follows:

> CPR r 52.5
>
> > (1) A respondent may file and serve a respondent's notice.
> >
> > (2) A respondent who-(a) is seeking permission to appeal from the appeal court; or (b) wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court, must file a respondent's notice.
>
> Paragraph 7 of the Practice Direction supplementing Part 52:
>
> > 7.1 A respondent who wishes to ask the appeal court to vary the order of the lower court in any way must appeal and permission will be required on the same basis as for an appellant.
> >
> > 7.2 A respondent who wishes only to request that the appeal court upholds the judgment or order of the lower court whether for the reasons given in the lower court or otherwise does not make an appeal and does not therefore require permission to appeal in accordance with rule 52.3(1).

76. Waller LJ referred to the position as it had been under the Rules of the Supreme Court, which he described in paragraph 35 as follows:

> That rule recognised the difference between a full cross-appeal where the appellant relies on one cause of action and the respondent seeks to uphold the judge on another but different cause of action (rule 6(1)(c)); a situation in which the respondent seeks to vary the decision in the court below (rule 6(1)(a)); and the defensive respondent's notice seeking to affirm on grounds other than those relied upon by the court below (rule 6(1)(b)). It is of passing interest that the distinction between the different types of notice had significance in relation to the court's approach to an extension of time for filing such notice, the practice normally being to extend time unless significant prejudice could be shown where the notice was the defensive rule 6(1)(b), but to be stricter on the rule 6(1)(a) and rule 6(1)(c): see the note in *The Supreme Court Practice 1999*, vol 1, para 59/6/11. This is some recognition of the special position of a respondent simply defending the decision in his or her favour.

77. As Waller LJ said, the provision under the Rules of the Supreme Court dealt with the point in more specific terms. RSC Order 59 rule 6(1) was as follows:

> (1) A respondent who, having been served with a notice of appeal, desires-(a) to contend on the appeal that the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or (b) to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or (c) to contend by way of cross-appeal that the decision of the court below was wrong in whole or in part must give notice to that effect, specifying the grounds of his contention and, in a case to which paragraph (a) or (c) relates, the precise form of the order which he proposes to ask the court to make.

78. We were shown a passage in the notes to Order 59 rule 6 in the Supreme Court Practice 1999, paragraph 59/6/2, to the effect that one of the cases where a respondent's notice by way of cross-appeal should be given is "where there are separate and distinct causes of action (whether both by the same party or one by claim and the other by counterclaim) and the appellant has appealed the decision on one cause of action and the respondent seeks to appeal upon another cause of action". An early case (National Society for the Distribution of Electricity by Secondary Generators v Gibbs [1900] 2 Ch 280) was cited in support of that but that dealt only with the case of claim and counterclaim where each side wished to appeal against the order made on its claim. However, the terms of rule 6(1)(c) were such as to make it reasonably clear that it applied even if both claims had been made by the same party.

79. Waller LJ then drew an analogy with the position under the Arbitration Acts, to which I will return, and derived support from that analogy for the proposition that a respondent who wishes to take a purely defensive line should not require permission to argue that the order should be upheld on grounds other than those on which the judge relied for making the order. Waller LJ said, therefore, at paragraph 39, that

> There is thus no doubt in my mind that the position of a respondent wishing to defend his judgment by reference to grounds different from those of the judge was deliberately, and for good reason, maintained under the CPR.

80. On that basis he held that, but for the inclusion of the reference in the order to the settlement figure having been agreed, the defendants as respondents would not have required permission to argue that the judge should be upheld on the main issue because he had been wrong to find as a fact that the figure had been agreed. He went on to hold that the judge had erred in the exercise of his discretion in including that provision in his order. The other members of the court agreed with him on the law but not on the propriety of the judge's exercise of his discretion.

81. In the present case, TUSA wishes to argue that the judge was wrong to dismiss its claim in procuring conversion and conspiracy. It does not challenge the dismissal of the claim in deceit, and Mr Knox accepts that permission would be required if it had wished to challenge that aspect of the order. He argues that there is no substantive difference of effect between the claims in procuring breach of contract, procuring conversion and conspiracy. The damages would be the same under each of these claims, whereas in deceit the measure of damages would be different and potentially more generous to the claimant. Even if there could be a theoretical difference

between the damages awarded for the other claims, TUSA had only ever claimed the same damages, and he submitted that permission to appeal should not be required for a defensive position on the part of a claimant respondent who wishes to argue that, if the judge was wrong to give judgment in his favour on one cause of action, he was also wrong not to do so on another cause of action for which the damages would be the same.

82. He contended that TUSA could not have appealed at all against the dismissal of the conversion and conspiracy claims. To support that he argued that the "order", against which a party can appeal, is that part of the document which has to be and can be enforced, not the reasons. On that footing he submitted that the reference in paragraph 2 of the judge's order to the particular cause of action is not part of the order for this purpose, and what is relevant is that judgment was given against Mr Wolff, and relief granted in paragraphs 3 and 4.

83. I cannot accept that submission. The order does not in terms record the dismissal of TUSA's other claims against Mr Wolff, but the substance is apparent from the terms of paragraph 2 of the order. If TUSA had wished to do so, it could have appealed (with permission) against the dismissal of any of its other claims against Mr Wolff. In practice, absent an appeal by Mr Wolff, it would not have got permission to appeal against the dismissal of the procuring conversion and conspiracy claims because there would have been no point in such an appeal. But as a matter of jurisdiction, an appeal could have been brought against those dismissals, even though not spelled out in the order, just as it could have been brought against the dismissal of the claim in deceit.

84. As it happens, TUSA's proposed cross-appeal against the dismissal of the procuring conversion and conspiracy claims would have required a variation of the terms of the order, because the order does record the cause of action on which judgment was given, quite properly, and if on appeal it were to be held that judgment should have been given on a different claim, the wording of that part of the order would need to be changed. However, I do not decide the case on that basis. If the circumstances had been different, TUSA's successful claim might have led to an order against Mr Wolff expressed as judgment for damages in the sum of $591,981.86, without recording on what cause or causes of action the judgment was given. If in fact it was based on the procuring breach of contract claim, the judge having rejected the other claims, it seems to me that the position should be the same as regards challenging that rejection even though only defensively, whether or not the cause of action successfully asserted is identified in the order.

85. Mr Knox submits that TUSA is a "respondent who seeks to contend that the order of the court below should be upheld for reasons other than those given by that court", and must therefore serve a Respondent's Notice but does not require permission to appeal, because it is not appealing against the order. In my judgment, however, where a court has dismissed one or more of the party's claims, but has given judgment in its favour on another, and that party wishes to contend that the court was wrong to dismiss the first claims, that is not a case of merely upholding the judgement on other grounds. Whether or not the terms in which the order is expressed require any variation, I regard the contention by a respondent that the judge was wrong to dismiss one or more distinct claims as something that requires and amounts to an appeal. In this respect TUSA is a "respondent who seeks to appeal against any part of the order made by the court below" within the terms of the practice direction.

86. Mr Knox contended that this reading could put a defensive respondent in a difficulty on a second appeal, if the appellant's appeal justified permission on the second appeal test but the respondent's defensive cross-appeal was on a point that would not justify such permission. He argued that the rules should not be construed as limiting the freedom open to a defensive respondent, especially where the respondent was the claimant. If the respondent was the defendant, then absent a counterclaim the respondent will be able to mount a full range of defensive positions, without needing to challenge the dismissal of any claim by it. By contrast the claimant may well (as here) have succeeded only on one or some claim and not on others, and may wish to argue in support of the rejected claims if the defendant appeals on those on which the claimant succeeded. Mr Knox asked, rhetorically, why should the claimant have to obtain permission to challenge those rejections if it wants to defend its position? I accept that the range of defensive positions open to a respondent defendant may be wider than those open to a claimant, because the defendant is less likely to wish to challenge the lower court's ruling against it on a separate cause of action. But it does not seem to me that this makes a significant difference.

87. As it seems to me, the reliance placed by Waller LJ on the analogous position under the Arbitration Act does not carry this particular point in favour of the respondent. I can see that there might be many circumstances in which a respondent would wish to uphold an award on points which had not been found in its favour in the award, or had even been decided against it, but it is perhaps relatively rare that the respondent would wish defensively to rely on a separate cause of action asserted in the arbitration but which had been rejected by the arbitrators.

88. In theory there could be a problem on a second appeal in the circumstances posited by Mr Knox but I question whether that is likely to arise with any frequency in practice, and it seems to me that, if the court considered that there was real merit in the challenge to the rejected claim, it would be likely to allow it to be deployed by the respondent to a second appeal by reference to there being "some other compelling reason" for the appeal to be heard by the Court of Appeal.

89. Thus, in my judgment, if a claimant asserted two claims against the appellant of which one was successful and the other was dismissed (whether or not so stated in the resulting order) and the defendant appeals against the judgment on the first claim, then if the respondent wishes to argue that the court below was wrong to dismiss its other claim against the appellant and that the order below should be upheld on that basis, that assertion amounts to an appeal against the order, and is not within the category of seeking to contend that the order of the court below should be upheld for reasons other than those given by that court, even if the relief sought would be the same on either claim. Such a respondent falls within paragraph 8(1) of PD52C, not within paragraph 8(3), and therefore requires permission to appeal.

90. Accordingly, in the present case, TUSA did require permission to challenge the judge's dismissal of its claims in procuring conversion and in conspiracy. As Lord Justice Longmore says, that being so, permission is refused on conspiracy but granted on procuring conversion, but I agree with him that, in the event, it is unnecessary to rule on the latter claim.

Lord Justice Longmore:

Overall conclusion

91. Grounds 1-3 of appeal will be dismissed, ground 4 will be allowed to extent of substituting a declaration in substitution for paragraphs 3 and 4 of the Deputy Judge's order. The court will also declare that the permission of the court is required for the respondent to advance its claim for procuring conversion and conspiracy in its respondent's notice and that permission is granted for the claim for procuring conversion but refused for the claim for conspiracy. The court asks the parties to draw up the appropriate order.