Alleslev-Krofchak v. Valcom Ltd., [2010] O.J. No. 3548

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

S.T. Goudge, J.L. MacFarland and H.S. LaForme JJ.A.

Heard: March 29-30, 2010.

Judgment: August 24, 2010.

Docket: C50673

[2010] O.J. No. 3548 | 2010 ONCA 557 | 266 O.A.C. 356 | 322 D.L.R. (4th) 193 | 76 C.C.L.T. (3d) 163 | 2010 CarswellOnt 6085 | 192 A.C.W.S. (3d) 684

Between Leona Alleslev-Krofchak and Temagami Outfitting Company Canada Inc., Plaintiffs (Respondents), and Valcom Limited, Brian Lewis and Greg Poulin, Defendants (Appellants)

(112 paras.)

Case Summary

Damages — For torts — Affecting the person — Defamation — Method of publication — Internet — Email — Interference with economic relations — Appeal by corporation and two managers from damages award to former consultant and her company for defamation dismissed — Defamation award of $100,000 was reasonable, given malice exhibited by corporation and managers in circulating email messages within small professional community, calling into question consultant's integrity, honesty and trustworthiness — Award for intentional interference with economic damages was not duplicative of defamation award.

Tort law — Interference with contractual relations — Elements of tort — Breach of — Inducing breach — Appeal by corporation and manager from judgment in favour of respondent former consultant and her company for inducing breach of contract dismissed — Appeal by corporation and two managers from judgment in favour of respondent for intentional interference with economic damages dismissed — Appellants had knowledge from relationship with respondent that their conduct aimed at removing her from position as project manager would result in losses to her company — Judge had basis to conclude unlawful means employed by appellants to end relationship with respondent's employer constituted element of tort, independent of any direct claim respondent might have in defamation or conspiracy.

Tort law — Interference with economic relations — Elements of tort — Use of unlawful means — Appeal by corporation and manager from judgment in favour of respondent former consultant and her company for inducing breach of contract dismissed — Appeal by corporation and two managers from judgment in favour of respondent for intentional interference with economic damages dismissed — Appellants had knowledge from relationship with respondent that their conduct aimed at removing her from position as project manager would result in losses to her company — Judge had basis to conclude unlawful means employed by appellants to end relationship with respondent's employer constituted element of tort, independent of any direct claim respondent might have in defamation or conspiracy.

Appeal by Valcom, Lewis and Poulin from a judgment finding them liable to Alleslev-Krofchak and her company, Temagami, for defamation, intentional interference with economic relations and inducing breach of contract. Thanks to her experience with the military, specifically in the area of performance-based contracting, Alleslev-

Krofchak was able to assist Valcom in securing a lucrative contract from the Department of National Defence. Valcom would not have secured the contract had it not been for Alleslev-Krofchak's ability to attract an experienced US company to act as subcontractor to Valcom on the project. Alleslev-Krofchak's company was to provide services to this subcontractor. Alleslev-Krofchak herself was designated the primary project manager. Shortly after Valcom hired a secondary project manager, Lewis, Valcom's manager Poulin instructed the subcontractor to remove Alleslev-Krofchak from the project, based on concerns with employee departures and Alleslev-Krofchak's management style. The subcontractor refused to do so in the absence of evidence of Alleslev-Krofchak's deficiencies. Valcom then suspended the subcontract, locked Alleslev-Krofchak out, and gave her position as primary project manager to Lewis. The subcontractor subsequently terminated its relationship with Valcom over concerns with inappropriate, defamatory emails messages circulated about Alleslev-Krofchak, as well as the rash and unprofessional decision to lock out Alleslev-Krofchak and suspend the subcontract. Alleslev-Krofchak ultimately never obtained work in the field again. The appellants challenged the award to Alleslev-Krofchak of $100,000 to compensate her for the loss of reputation she sustained from the circulation of defamatory emails by Poulin and Lewis. They also challenged the judge's findings of and awards for intentional interference with economic damages and inducing breach of contract to Alleslev-Krofchak of $129,504 and to Temagami of $373,552.

HELD: Appeal dismissed.

Deficiencies in Alleslev-Krofchak's pleadings with respect to the tort of intentional interference with economic relations were noted by the judge, who properly assessed them to determine if the deficiencies would render it unfair for her to consider the issues raised by the pleadings. The judge came to a reasonable factual finding in determining that Poulin and Valcom knew they would be harming Temagami by taking steps to remove Alleslev-Krofchak from the project, based on their past dealings with Alleslev-Krofchak through her company. The judge was precluded from finding in favour of Alleslev-Krofchak or Temagami on the issue of interference with economic relations where the unlawful acts of the parties, specifically defamation and conspiracy, were directly actionable by Alleslev-Krofchak and Temagami. However, because of her finding that the appellants also conspired to harm the subcontractor in its bid to become a player in the Canadian aerospace industry, the judge was able to find in favour of Alleslev-Krofchak and Temagami on their claims of intentional interference. This conspiracy was not directly actionable by them. Similarly, Valcom's breach of its contract with the subcontractor also provided a basis upon which Alleslev-Krofchak and Temagami could found their claim of intentional interference with economic relations. There was no basis to interfere with the judge's award for defamation. She considered the relevant factors including the attack on Alleslev-Krofchak's honesty, integrity and trustworthiness, the deviousness of the appellants and their lack of remorse, and the wide circulation of the libel within a small community. The damage award to Alleslev-Krofchak for intentional interference with economic relations was not duplicative of the defamation award. The appellants raised no arguable issues with respect to the other damage awards.

Appeal From:

On appeal from the judgment of Justice Catherine D. Aitken of the Superior Court of Justice, dated May 25, 2009, with reasons reported at *2009 CanLII 30446* (ON S.C.).

Counsel

Peter K. Doody, Craig M. Bater and Jonathan M. Richardson, for the appellants.

Ronald G. Slaght and Yashoda Ranganathan, for the respondents.

The judgment of the Court was delivered by

S.T. GOUDGE J.A.

INTRODUCTION

1 After a four week trial, the appellants, Valcom Limited (Valcom), Brian Lewis (Lewis) and Gregory Poulin (Poulin), were found liable to both respondents and ordered to pay significant damages. The trial judge concluded that all three appellants were jointly and severally liable for defamation of the respondent Ms. Alleslev-Krofchak (AK), and for intentionally interfering with her economic relations. The appellants Poulin and Valcom were held jointly and severally liable to the respondent Temagami Outfitting Company Canada Inc. (Temagami) for intentionally interfering with its economic relations and for inducing breach of contract.

2 On appeal, the appellants raise six issues, focusing mainly on the trial judge's treatment of the torts of intentional interference with economic relations and inducing breach of contract. Although I agree with the ultimate conclusions of the trial judge, my reasons differ somewhat from hers. I would dismiss the appeal.

THE FACTS

3 The trial judge's findings of fact occupy some sixty-seven pages. The following is a brief summary, sufficient to set the broad context for her disposition of the issues.

4 In the late 1990s, the federal Department of National Defence (DND) decided to change the basis upon which it contracted out the maintenance of its air fleet from contracts for time and materials to performance-based contracts which would specify what DND required, and the overall price, and leave it to the contractor to deliver as it saw fit.

5 AK left the Canadian Forces in 1996 and, for the next seven years, worked predominantly as a consultant to DND. She was recognized as a leader in managing change to performance-based contracting.

6 Temagami was started when AK retired from the military. She and her husband were equal shareholders. All the services she provided that are relevant to this litigation were contracted through Temagami.

7 The appellant Valcom was a consulting company whose business was to contract with the federal government to provide it with the services of engineers and other consultants.

8 The appellant Poulin was a manager at Valcom responsible for its aerospace contracts, including the one at issue in this litigation. That contract, which Valcom was awarded in May 2002, was for the provision of professional services to assist DND to move to its new method of contracting for the servicing of its air fleet.

9 The contract resulted from a Request for Proposals (RFP) issued on behalf of DND in January 2002. The RFP required that the successful bidder have experience with the new method of contracting. Because of AK's expertise, Valcom retained her services to assist with the preparation of its bid in response to the RFP.

10 Valcom had no experience with performance-based contracting in the aerospace industry. However, AK facilitated an arrangement between Valcom and ARINC, a much larger American company that had been involved for years with US military contracts of this kind. Valcom and ARINC entered into an agreement pursuant to which Valcom would be the prime contractor with DND and ARINC would be Valcom's subcontractor.

11 As part of its bid, Valcom submitted AK's name as the project manager of the contract (the SPM#1). At AK's insistence, her services were to be provided to the project by ARINC pursuant to its subcontract with Valcom, not directly as a Valcom resource. This reflected the fact that ARINC had advised her that it would like to have a corporate office in Canada, and that there would be an opportunity for her in the future to help it develop its capability in the Canadian aerospace sector. Thus, when the Valcom bid succeeded, ARINC entered into a subcontract with Temagami for the services of AK. However, because AK's involvement as an ARINC resource would have resulted in ARINC providing more resources to the project than were contemplated by its own subcontract with Valcom, it agreed that AK would initially assume the SPM#1 position as a Valcom resource, but only until her second in command (the SPM#2) was hired. In the main, therefore, AK's work on the project was to be as an ARINC resource, not a Valcom resource.

12 This way of supplying AK's services to the project left Valcom and Poulin frustrated and angry, but they needed both ARINC and AK to win the bid.

13 The appellant Lewis was recruited by Valcom to serve as the SPM#2 and began work on July 21, 2003 as an employee of Valcom.

14 The events central to this litigation began to come to a head on August 11, 2003, when Poulin directed ARINC to remove AK from the project. He asserted that there was serious concern about potential departures of project staff because of dissatisfaction with her management approach - a claim that the trial judge ultimately concluded was without foundation.

15 When ARINC refused to remove her, given the absence of any evidence of her deficiencies, on August 13 Poulin purported to suspend the Valcom/ARINC subcontract and locked AK out of the project. On August 25, Lewis took over as the acting SPM#1.

16 ARINC considered a number of Valcom's actions to be rash and unprofessional, including e-mails about AK circulated by Poulin and Lewis that the trial judge determined to be defamatory, and Valcom's peremptory actions on August 13. ARINC was concerned that its efforts to develop a relationship with DND could be negatively impacted as a consequence. It immediately began to consider how to extricate itself from its relationship with Valcom and, in due course, terminated its subcontract with Valcom.

17 Following her termination as SPM#1, AK never again obtained military or aerospace consulting work.

THE TRIAL JUDGE'S DISPOSITION OF THE ISSUES

18 After dealing with the facts, the trial judge addressed the claims advanced by the respondents, specifically the torts of defamation, intentional interference with economic relations and inducing breach of contract.

a) Defamation

19 In the statement of claim, three e-mails were particularized as defaming AK. The first was sent by Lewis to Poulin on July 27, 2003, and subsequently forwarded by Poulin to ARINC and others at Valcom. The second and third were sent by Poulin to ARINC on August 11 and 12, 2003. These e-mails asserted that AK had lied to Lewis, lacked integrity, was not trustworthy and was so lacking in management skills that some members of the project team would leave if she was not removed from the project.

20 The trial judge found that all three e-mails were defamatory and could not be justified as being truthful. If qualified privilege applied, it was negated by malice on the part of Lewis and Poulin. The trial judge held that, since both were acting as employees of Valcom, all three appellants were liable for the defamation, and were jointly and severally responsible for the resulting damage to AK's reputation, which the trial judge assessed at $100,000. She

did not award damages for economic loss for this tort, finding that the loss of income AK suffered from being peremptorily terminated from the SPM#1 position was planned by Valcom before the e-mails were sent and, in that sense, was not caused by the defamation.

21 In this court, the appellants do not contest the defamation findings. They challenge only the quantum of general damages assessed for lost reputation due to the defamation.

b) Intentional interference with economic relations

22 The trial judge then turned to the claim for intentional interference with economic relations. She found that all three appellants intended their actions to result in AK being removed from the project as SPM#1, thereby causing her injury. The trial judge concluded that, since Poulin and Valcom knew AK contracted her services to ARINC through Temagami, they also intended their actions to cause Temagami economic loss.

23 However, the trial judge found no evidence that Lewis knew Temagami existed, and thus there was no evidence to support the conclusion that he intended to cause it economic loss. The trial judge therefore dismissed Temagami's claim against Lewis for intentional interference with economic relations.

24 The trial judge then addressed the requirement that the interference be by unlawful means. She identified three that were applicable on the facts: defamation, conspiracy, and breach of contract.

25 The defamation identified by the trial judge as unlawful means included the three e-mails referred to earlier, but also Poulin's e-mail to ARINC and others at Valcom dated June 20, 2003, and his letter to the federal government explaining Valcom's actions in terminating AK from the project, dated September 23, 2003. As with the three other e-mails, the trial judge found these two communications to be defamatory of AK, untruthful, and motivated by malice. She held that all these defamatory statements resulted in ARINC terminating its subcontract with Valcom because it did not want to continue dealing with a company that handled itself in such an unprofessional manner, and that this severely interfered with AK's livelihood. She therefore concluded that all three appellants interfered with AK's economic relations by means of their defamatory statements and that Poulin and Valcom did the same to Temagami's business by defaming its principal, AK.

26 The trial judge also found the unlawful means requirement to be satisfied by the tort of conspiracy. She concluded that there was an agreement among Poulin, Valcom and Lewis to defame AK in order to achieve their goal of getting rid of her. All three knew that this would cause her injury and would likely cause ARINC to withdraw from the project, thereby thwarting its plans to expand into the Canadian aerospace market and become a competitor for Valcom. The trial judge concluded that all three appellants interfered with AK's livelihood through this conspiracy, and that Poulin and Valcom did the same to Temagami on that basis.

27 Finally, the trial judge relied on breach of contract as unlawful means. In particular, she found that Valcom breached the ARINC subcontract by purporting to suspend that contract on August 13, 2003, and by subsequently locking AK, an ARINC resource, out of the project site. This breach contributed to the economic loss suffered by AK and Temagami. The trial judge also found these actions by Valcom to be a breach of Valcom's primary contract with DND and held that this breach provided additional support for her conclusion that Valcom used unlawful means to intentionally interfere with the business or livelihood of AK and Temagami.

28 For this tort, the trial judge assessed the general damages for injury to reputation, self-esteem and feelings at $100,000. She declined to award general damages to Temagami, concluding that the evidence did not establish that it had a reputation in the Canadian aerospace sector distinct from the reputation of AK. However, she found that both AK and Temagami suffered economic loss due to this intentional interference with their economic relations and set out the principles upon which damages for this loss should be calculated. Counsel were then able to agree on quantum: $129,504.27 inclusive of prejudgement interest in favour of AK, and $373,552.00 inclusive of prejudgment interest in favour of Temagami. All three appellants were jointly and severally liable to AK, while only

Poulin and Valcom were jointly and severally liable to Temagami.

c) Inducing breach of contract

29 Finally, the trial judge turned to the tort of inducing breach of contract. She found that Poulin and Valcom knew that ARINC and Temagami had a subcontract for the provision of AK's services to the project. Moreover, she concluded that both these appellants knew that, by forcing ARINC to keep AK away from the project and cease her role as the SPM#1, ARINC would be in breach of its subcontract with Temagami and that they intended this result. She held that their conduct in locking AK out of the project not only put ARINC in breach of its contractual obligation to Temagami, but also had the effect of frustrating the performance of that subcontract. She declined to award general damages to Temagami for want of evidence that it had suffered any such loss. But she assessed Temagami's economic loss due to this conduct on the same basis as for its economic loss due to the intentional interference tort. Thus, the $373,552 for which Valcom and Poulin were held jointly and severally liable to Temagami was founded on both intentional interference with economic relations and inducing breach of contract.

30 Save for the finding of defamation, the appellants appeal from all these findings.

ANALYSIS

31 The appellants raise six arguments, the first four of which address aspects of the trial judge's treatment of the intentional interference tort. The appellants argue that:

1) The trial judge erred when she relied on the additional two acts of defamation, conspiracy and breach of contract as the unlawful means for the intentional interference tort. The appellants submit that none of these were pleaded.
2) The trial judge erred in finding, as part of her intentional interference analysis, an intent on the part of Poulin and Valcom to injure Temagami.
3) The trial judge erred in finding intentional interference with AK's economic relations based on the unlawful means of defamation and conspiracy since both were actionable by her directly.
4) The trial judge erred in using Valcom's breach of its contracts with ARINC and DND as unlawful means to find Valcom liable to the respondents for the tort of intentional interference with economic relations.
5) The trial judge erred in holding Poulin and Valcom liable for inducing breach of the ARINC/Temagami subcontract on the basis of mere frustration of that contract.
6) The trial judge erred in a number of respects in her assessment of damages.

Issue 1: The Pleadings Issue

32 The appellants submit that the trial judge considered causes of action not pleaded by relying on two acts of defamation that were not particularized, conspiracy and breach of contract as unlawful means for the tort of intentional interference with economic relations.

33 I would not give effect to this argument. The cause of action at stake was not defamation. It was the tort of intentional interference, which was clearly and expressly pleaded.

34 Although only three acts of defamation were particularized in the statement of claim, that was in the context of pleading defamation as a separate cause of action. However, the statement of claim also pleaded "a variety of defamatory statements" made by the appellants, not as separate causes of action to which the strict specific pleading requirement would apply, but as unlawful means for the purposes of the intentional interference tort. The appellants did not seek particulars of this allegation, and the two additional acts of defamation were the subject of

considerable evidence at trial. In these circumstances, no injustice was caused by not pleading the particulars of these two acts of defamation, as would have been required had they been advanced as separate causes of action. In my view, where the pleadings do not impair a fair trial, there is no need to extend the highly structured code for pleading defamation as a separate cause of action to a circumstance such as this.

35 The statement of claim also pled conspiracy, even if obliquely, by alleging a pattern of conduct by the three appellants to remove AK as the SPM#1. The claim asserted that the defamatory statements they made about her were for the purpose of interfering with her economic relations. This is, in essence, what the trial judge ultimately found: an agreement between the appellants to defame AK in order to achieve their goal of getting rid of her.

36 Finally, Valcom itself put the breach of the Valcom/ARINC subcontract in issue by arguing, in its statement of defence, that the contract entitled Valcom to deal with AK as it did. Accordingly, it was open to the trial judge, in rejecting this argument, to find that Valcom breached the contract and to use that in her analysis of unlawful means.

37 All these issues were canvassed by both sides in the evidence called at trial. Counsel for the appellants essentially acknowledged as much in her closing submissions. In this court, appellants' counsel (different from trial counsel) did not point to any prejudice said to arise from any pleading deficiency.

38 Most importantly, the trial judge was alive to the weaknesses in the pleadings. However, because the matters now raised by the appellants were the subject of evidence called by both sides, she exercised her discretion to deal with them "in an effort to secure the just determination of the real matters in dispute in this litigation." This was a four week trial involving a significant amount of detailed evidence on these matters. The trial judge was best placed to determine whether any deficiencies in the respondents' pleading made it unfair for her consider them in addressing the unlawful means question. In all the circumstances, I see no basis to interfere with her exercise of discretion.

Issue 2: The Intention to Injury Issue

39 An essential element of the tort of intentional interference with economic relations is that the defendant intend to cause loss to the plaintiff: see *Correia v. Canac Kitchens* *(2008), 91 O.R. (3d) 353* at para. 100.

40 The appellants challenge the trial judge's factual finding that Poulin and Valcom were aware AK was contracting her services to ARINC through Temagami. They submit that Poulin and Valcom had no such knowledge and thus could not have intended to harm Temagami. They also argue that even if Poulin and Valcom knew that terminating AK's involvement with the project would cause loss to Temagami, that only constitutes foreseeability of consequences and does not permit the trial judge to find that they intended that result. Hence they say Valcom and Poulin could not properly be found liable for this tort.

41 In making this argument, the appellants challenge findings of fact by the trial judge and must therefore show a palpable and overriding error. In my opinion, they have failed to do so. At the beginning of the project, AK's services were supplied through a contract between Valcom and Temagami. Poulin and Valcom were clearly aware of this. When this changed, and AK became an ARINC resource to the project, it was entirely open to the trial judge, even without direct evidence on the point, to infer that Poulin and Valcom knew this arrangement would be done by means of a contract between ARINC and Temagami, because of their own prior arrangement with Temagami for the same services.

42 The appellants do not challenge the finding that Poulin and Valcom deliberately took steps to bring about AK's termination from the project. That finding is more than amply supported in the evidence. It was entirely open to the trial judge to conclude that, because of this, Poulin and Valcom intended to cause loss to Temagami, given its contract with ARINC for her services. They intended the natural consequences that they knew would arise from their deliberate actions.

43 This ground of appeal fails.

Issue 3: The Defamation and Conspiracy as Unlawful Means Issue

44 The appellants argue that neither the defamation nor the conspiracy used by the trial judge as "unlawful means" can serve that purpose for AK's claim against Poulin and Lewis for intentional interference with economic relations, because both unlawful means were directly actionable by her against these two appellants.

45 This argument does not address Temagami's right to recover for this tort, nor does it affect AK's right to recover against Valcom for using the unlawful means of breach of contract to intentionally interfere with her livelihood.

46 The trial judge began her analysis of this issue by expressing uncertainty about whether recent jurisprudence from this court was intended to modify or replace the tort's essential elements as set out in earlier cases such as *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (leave to appeal refused [1998] S.C.C.A. No. 608), *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 and *Drouillard v. Cogeco Cable Inc.* (2007), 86 O.R. (3d) 431.

47 She proceeded on the basis that this court's recent jurisprudence did not do so, and that the proper analysis required answering three questions. First, did the appellants intend to injure the respondents? Then, did the appellants interfere with the business or livelihood of the respondents by illegal or unlawful means? And, finally, did the respondents suffer economic loss as a result? She found that each occurred here. It is her treatment of "unlawful means" - the second step in her analysis - that the appellants challenge in this ground of appeal.

48 If there was any uncertainty about the elements of the tort of intentional interference with economic relations, I think recent jurisprudence has provided much clarity. The most important case is *OBG v. Allan,* [2008] 1 A.C. 1 ("*OBG*"), which was issued on May 2, 2007 by the House of Lords. The three earlier cases from this court that the trial judge referred to all precede this judgment.

49 In *OBG*, the House of Lords provided a detailed analysis of the two intentional torts of inducing breach of contract and intentional interference with economic relations. Its express purpose was to clarify the confusion that seemed to have developed in defining the elements of both torts. In *Correia,* this court described *OBG* this way at para. 97:

> In OBG, the House of Lords determined to clarify and specifically define the elements of each tort. In doing so, the Lords corrected and, where necessary, overruled formerly precedential cases that, in hindsight, had introduced confusion and error into the definition of the two torts. The result is a clear definition of the two torts and their elements. The Lords were unanimous in all aspects of their definition of the two torts except one - Lord Nicholls disagreed on the scope of the concept of "unlawful means" in the tort of intentionally causing loss by unlawful interference with economic relations.

50 Apart from the debate about the scope of "unlawful means", the Lords agreed that intentional interference with economic relations requires that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself. If the loss suffered by the plaintiff is merely a foreseeable consequence of the defendant's actions, that is not enough. Moreover, there must be a causal connection between the unlawful means and the loss suffered by the plaintiff. Neither of these components are new to the jurisprudence in Ontario. In *Lineal*, for example, the absence of an intention to harm the plaintiff was fatal to the successful assertion of the tort. Both of these components were addressed by the trial judge in this case.

51 The debate in *OBG* was about the scope of "unlawful means". That is also central to the appellant's argument in this case. The protagonists were Lord Hoffmann, with whom a majority of the House of Lords agreed, and Lord Nicholls.

52 Lord Hoffmann began his discussion at para. 46, by adopting Lord Lindley's rationale for the tort as being, in Lord Nicholls phrase describing his position, the defendants seeking to harm the plaintiff's business "through the

instrumentality of a third party":

> The rationale of the tort was described by Lord Lindley in *Quinn v. Leathem* [1901] AC 495, 534-535:
>
> > "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact - in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified - the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done." [Emphasis added.]

53 He set out his view of the essence of the tort at para. 47:

> The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.

54 Then, critically for the appellant's argument, Lord Hoffmann specified, at para. 49, that the tort must be actionable by the third party, subject to one exception:

> In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss.

55 Finally, he offered this helpful summary definition of the tort at para. 51:

> 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.

56 Lord Nicholls' contrasting view was, as this court described it at para. 103 of *Correia*, that "unlawful means" encompassed any conduct by the defendant that intentionally harmed the plaintiff and was in violation of an obligation under either civil or criminal law. Lord Nicholls did not consider actionability by the third party as a prerequisite. Although his opinion is less clear on this point, it appears that he also would not require the unlawful means to be directed at the third party, but would be satisfied if it were directed at the plaintiff.

57 In my view, this court has now opted for the Lord Hoffmann side of the debate. It did so expressly in *Correia*, relying on his statement of the elements of the tort, his definition of the tort, and his rationale for it, namely, to provide otherwise unavailable recovery for harm intentionally inflicted by unlawful means through the instrumentality of a third party. See *Correia* at paras. 99-103.

58 In *Correia*, the unlawful means alleged was the negligent investigation of the plaintiff by the defendant Aston. Although the court found it unnecessary to fully define the scope of "unlawful means", it dismissed the claim in part because the unlawful means were directly actionable by the plaintiff. The court said this at para. 107:

> ... Aston's alleged negligence is directly actionable by the appellant, based on duty of care and foreseeability principles. There is no need to interpose the tort of intentional interference to obtain redress against Aston. The intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.

59 Lord Hoffmann's description of the essence of the intentional interference tort was also cited with approval by this court in *O'Dwyer v. Ontario (Racing Commission)* (2008), 293 D.L.R. (4th) 559.

60 In my view, therefore, it is now clear that to qualify as "unlawful means", the defendant's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff.

61 This is not inconsistent with the three earlier cases from this court referred to above, all of which involved defendant actions directed at a third party for which the plaintiff could not sue the defendant directly.

62 The only contrary suggestion is by way of obiter in *Drouillard*, where defamation (presumably by the defendant of the plaintiff) was postulated as satisfying the unlawful means requirement. However this was clearly not necessary to the decision in that case. Moreover, at that time this court did not have the benefit of the detailed debate in *OBG*. As I have described, any suggestion that the tort might apply where the conduct is directly actionable by the plaintiff has been displaced by subsequent jurisprudence.

63 Like the court in *Correia*, I would say that there may be aspects of the concept of "unlawful means" yet to be fully defined. In particular, the extent of actionability by the third party, or whether, as Lord Hoffmann suggests, this requirement is subject to any qualifications, need not be fully defined in this case. The unlawful means relied on by the third party - defamation, conspiracy and breach of contract - are all clearly actionable under private law.

64 Applying this analysis to the appellants' argument, it is apparent that the trial judge erred in finding that the appellants' five acts of defamation against AK could satisfy the unlawful means requirement for the tort of intentional interference with economic relations. These claims were all directly actionable by AK based on the tort of defamation. Indeed, she did so successfully in respect of three of the acts of defamation.

65 However, the appellant's argument that, for the same reason, AK cannot rely on conspiracy as unlawful means requires a more detailed analysis.

66 The trial judge found a civil conspiracy involving Poulin, Valcom and Lewis. She concluded that they reached an agreement, which they then executed, to defame AK in order to achieve their goal of getting rid of her, thereby causing her harm. Although the trial judge was unable to find that the predominant purpose of this agreement was to injure AK, that was one of its purposes. Since it succeeded by using the unlawful means of defaming her, this constituted the actionable tort of conspiracy using unlawful means.

67 The appellants accept this finding, but argue that this conspiracy cannot serve as the unlawful means necessary to allow AK to establish the intentional interference tort because AK could have sued directly for this conspiracy.

68 For the reasons I have given concerning defamation as unlawful means, I agree with this argument insofar as it relates to the conspiracy to harm AK.

69 That is not the end of the matter, however. An actionable conspiracy exists if the defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others) and the likelihood of injury to the plaintiff is known to the defendants or should have been known: see *Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959* at pp. 985-86. In this case, the appellants acted unlawfully by defaming AK, an ARINC resource. The trial judge found that the appellants recognized the consequences of their actions - the destruction of AK's reputation in the Canadian military aerospace community - would effectively undermine ARINC's involvement in the project and prevent it from becoming a competitor in the Canadian aerospace market. The respondents argue that this

constitutes a conspiracy against ARINC and that this conspiracy can be properly used by AK to meet the unlawful means requirement needed to establish the intentional interference tort.

70 I agree with the respondents.

71 The trial judge concluded that the agreement between Poulin, Valcom, and Lewis was intended to harm AK, but that the appellants were also aware that their actions would likely harm ARINC by undermining its role in the project and thwarting its expansion into the Canadian aerospace market, using AK's excellent connections and credibility. She found that the appellants recognized that their success in defaming AK and peremptorily removing her as the SPM#1 of the project would result in ARINC's withdrawal. This is exactly what transpired.

72 These findings are amply supported by the evidence and are not contested. They constitute the tort of "unlawful means" conspiracy against ARINC. The unlawful means was the defamation of AK. It was directed by the appellants at ARINC through AK, an ARINC resource, with knowledge that ARINC would be harmed as a result. That is sufficient for the "unlawful means" conspiracy against ARINC. The unlawful means need not be directly actionable by ARINC, provided the means were directed at ARINC, as was the case here: see *Total Network SL v. Her Majesty's Revenue and Customs,* [2008], U.K.H.L. 19 at para. 104.

73 This conspiracy to harm ARINC would obviously be actionable by ARINC, but not by AK. It caused ARINC to terminate its relationship with Valcom on this project, and curtailed its expansion plans in Canada, actions in which AK had an economic interest and which harmed her. In my view, therefore, this conspiracy can properly serve as the unlawful means required for AK to establish the intentional interference tort against Poulin, Valcom and Lewis.

74 The trial judge ultimately concluded that conspiracy by the appellants met the "unlawful means" requirement to permit AK to recover for this tort. While much of her discussion concerned the conspiracy as it intended to harm AK, the trial judge described in some detail the plan both as it targeted AK and as it affected ARINC. In my view, while the plan targeting AK cannot serve as the unlawful means permitting AK to recover, the plan's harmful impact on ARINC is sufficient to ground a separate conspiracy that does so.

75 Therefore, while I do so for rather different reasons than did the trial judge, I would dismiss the appellants' argument that conspiracy cannot serve as unlawful means to permit AK to recover from Poulin and Lewis for the intentional interference with her economic relations. While AK cannot recover against these appellants based on defamation as unlawful means, it can do so on the basis of the unlawful means of conspiracy against ARINC.

Issue 4: The Breach of Contract as Unlawful Means Issue

76 The appellants argue that Valcom's breach of its contracts with ARINC and DND cannot serve as unlawful means in finding Valcom liable to AK and Temagami for intentional interference with economic relations because neither breach caused economic loss to AK or Temagami.

77 As it relates to the Valcom/ARINC contract, I would dismiss this argument.

78 There is no doubt that to establish this tort there must be a causal connection between the unlawful means and the harm suffered by the plaintiff. To reiterate the passage adopted by this court in *Correia* at para. 102, Lord Hoffmann offered this description of "unlawful means" in *OBG*:

> 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.

79 In the context of this argument, there is no debate that Valcom breached its contract with ARINC on August 13, 2003, when it purported to suspend the contract and terminate AK's role in the project. As the trial judge found, that

contract gave Valcom no right to suspend it, or to terminate the engagement of AK on the project, without 15 working days notice. These acts would have been actionable by ARINC.

80 The appellants do not contest that Valcom intended that these actions cause injury to AK and therefore to Temagami.

81 Subsequently, on August 26, 2003, Valcom gave ARINC the written notice referred to in the contract, which arguably would have entitled Valcom to terminate AK's role as the SPM#1 on the project 15 days later. However, it had already acted in breach of its contract with ARINC, effectively locking AK out of the project on August 14, 2003 in a way that interfered with AK's economic interests. By August 26, ARINC had already been firmly prevented from keeping AK on the project.

82 The trial judge completed the analysis by finding as a fact that Valcom's sudden removal of AK caused economic loss to AK and Temagami. There was ample evidence to support this finding, which the trial judge put this way at paras. 353 and 354 of her reasons:

> It was only on August 26, 2003 that Valcom gave ARINC the formal notice required under section 12A of the Subcontract. By then, Alleslev-Krofchak's livelihood and Temagami's business interests had already been interfered with to the extent that damage ensued. Due to Valcom's breach of its Subcontract with ARINC and its unprofessional handling of matters relating to Alleslev-Krofchak, ARINC had understandably and predictably decided to terminate its relationship with Valcom, thereby reducing the opportunities available to Temagami and Alleslev-Krofchak through ARINC.
>
> ... I find without hesitation that Valcom's sudden suspension of Alleslev-Krofchak and its effectively locking her out of the OWSM project, standing alone, had an impact on Allesley-Krofchak's subsequent marketability, and therefore contributed to Alleslev-Krofchak's (and Temagami's) economic loss. [Emphasis added.]

83 Accordingly, I agree with the trial judge that the breach by Valcom of its contract with ARINC serves as unlawful means for the purposes of establishing Valcom's liability for this tort.

84 By contrast, I would not reach the same conclusion about Valcom's contract with DND. Accepting the trial judge's finding that the peremptory removal of AK from the project was a breach of that contract, I do not think that this could be said to interfere with the actions of DND in which AK had an economic interest. She was not being provided to the project by DND but by ARINC. The breach of contract did not cause DND to act in a way that adversely affected AK economically. However, given my agreement with the trial judge about Valcom's breach of its contract with ARINC, this is of no moment. Valcom's liability for this tort could properly rest on that breach alone.

85 This argument of the respondents must therefore be dismissed.

Issue 5: The Inducing Breach of Contract Issue

86 The trial judge concluded that Temagami established all of the essential elements of the tort of inducing breach of contract against Poulin and Valcom and held them jointly and severally liable for damages for the resulting economic loss suffered by Temagami.

87 She found that: (i) Temagami had a contract with ARINC to provide AK's services as SPM#1; (ii) Poulin and Valcom knew about this contract; (iii) ARINC breached this contract by immediately removing AK from her role as the SPM#1 on the project; and (iv) these appellants intended to cause this breach by locking AK out of the project. The trial judge also concluded that the actions of Poulin and Valcom "had the direct effect of frustrating the performance of the contract." She held that either causing an actual breach of the contract, or frustrating its performance, was sufficient to satisfy the requirements of this tort.

88 Except for the first step, the appellants challenge each of these steps in the trial judge's reasoning.

89 First, they say that the trial judge erred in finding that the appellants knew of the Temagami/ARINC contract and knew that their actions would cause ARINC to breach that contract. I do not agree. These are findings of fact that were open to the trial judge on the record. The appellants knew how AK's services had been supplied to the project as a Valcom resource and could easily infer that the same arrangement would be used when those services were supplied to the project through ARINC. And, since the fundamental purpose of the Temagami/ARINC arrangement was to provide AK to the project as the SPM#1, it was not unreasonable to conclude that these appellants knew that by forcing ARINC to stop doing so, ARINC would be put in breach of its contract with Temagami. The trial judge could properly conclude that the appellants knew this about the contract whether or not they knew all of its precise terms.

90 Second, the appellants argue that the trial judge erred in finding that they intended that ARINC breach its contract with Temagami. However, this too is a finding of fact that was open to the trial judge on the evidence. Poulin and Valcom deliberately required AK to immediately stop working as the SPM#1, barred her from the project, and purported to immediately suspend Valcom's contract with ARINC. They did so knowing that ARINC would have to immediately cease having AK supply her services to the project, and knowing that it had no cause for doing so. This was contrary to ARINC's contract with Temagami. The trial judge properly found that the appellants intended the natural consequences of these actions.

91 There is also no basis for the appellants to argue that there was no actual breach by ARINC of its contract with Temagami. By precipitously suspending Valcom's contract with ARINC through which AK's services were supplied, as well as locking her out of the project, Poulin and Valcom forced ARINC to remove AK from the project, without notice, contrary to its contractual obligation to Temagami.

92 However, I agree with the appellants that the trial judge erred in finding that frustrating ARINC's contract with Temagami could satisfy the requirements of the inducement tort. In my view, the tort of inducing the breach of contract requires that there be an actual breach.

93 Although at one time the jurisprudence may have been ambiguous on this point (see *Drouillard* at para. 34), *OBG* and *Correia* have brought clarity to the elements of this tort. In *OBG*, the House of Lords unanimously held that the tort of inducing breach of contract requires an actual breach. Lord Hoffmann stated this proposition with simple and stark clarity at para. 44: "... I think that one cannot be liable for inducing a breach unless there has been a breach."

94 Lord Nicholls made the same point in his speech. He explained that the underlying rationale for the inducement tort is that the one who procures the wrong - in this case, the breach of contract - ought to be held responsible, along with the one who actually commits the wrong. But there must be a wrong committed. Lord Nicholls put it this way at para. 172:

> With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability.

95 In *Correia,* this court cited with approval the approach to the inducement tort taken in *OBG* and, in particular, the requirement that there be an actual breach of contract: see *Correia* at para. 99.

96 In my view, therefore, not only is the Ontario jurisprudence now clear, but the policy it reflects is also sound, particularly when the tort is considered along with the tort of intentional interference with economic relations.

97 If the defendant induces a third party to breach its contract with the plaintiff, the defendant ought to be liable to the plaintiff as an accessory to the unlawful conduct, namely the breach of contract, suffered by the plaintiff. That is the role of the inducement tort. If the third party does not breach a contract with the plaintiff, but instead interferes with the plaintiff's economic relations as a result of unlawful means used by the defendant against that third party, the defendant ought to be liable to the plaintiff because unlawful means were employed by the defendant to intentionally harm the plaintiff. That is the role of the intentional interference tort.

98 This leaves to the marketplace those competitive practices that, though they may be aggressive, are otherwise lawful. In a case, where the defendant has interfered with the third party's performance of its contract with the plaintiff, but without the use of otherwise unlawful means and without inducing the third party to actually breach that contract, the court is not well placed to determine what sorts of otherwise lawful competitive practices should attract liability. That is a task better left to parliament.

99 I therefore conclude that the trial judge erred insofar as she relied on conduct of the appellants that fell short of causing an actual breach of ARINC's contract with Temagami. However, since she also found that the appellants caused ARINC to actually breach that contract, and since I would dismiss the appellants' other arguments on this issue, I would uphold the trial judge's ultimate conclusion that Temagami established all the required elements of the tort of inducing breach of contract against these appellants.

Issue 6: The Damages Issue

100 The appellants raise three challenges to the damages awarded by the trial judge.

101 First, they challenge the general damages award of $100,000 for defamation. They say it is too high given comparable awards, and does not reflect a consideration of the limited extent of the publication, the fact that ARINC rejected the allegations against AK and the positive references she received after her removal. They also say that the award does not reflect differing levels of blameworthiness amongst the appellants, given that all were held jointly and severally liable for the award.

102 I do not agree. Each defamation case is unique and there is little to be gained by a detailed comparison with other awards: see *Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130* at para. 187. The trial judge was clearly aware of the various mitigating factors pointed to by the appellants, but also of the attack being directed to AK's honesty integrity and trustworthiness, the appellant's deviousness and lack of remorse and the wide circulation of the libel within a relatively small community. In fixing the quantum, the trial judge exercised her discretion in light of these factors and found the appellants equally blameworthy. There is no basis to interfere with her award

103 Second, the appellants challenge the award of general damages to AK for intentional interference with economic relations. They say it is duplicative of the general damage award for defamation.

104 The simple answer to this submission is that the general damage award for the intentional interference tort was not for the damage caused to AK by the defamation, but rather for the damage to her reputation and self-esteem caused by her peremptory removal from the SPM#1 position and being locked out of the project. The trial judge found that this harmed her in the small Canadian aerospace community independent of whether that community had all learned of the defamation or not. She did not err in making a second general damages award.

105 Third, the appellants challenge the award for economic loss suffered by AK for intentional interference with her economic relations and by Temagami for both intentional interference with its economic relations and inducing breach of contract. They do so on several bases.

106 They say that the trial judge erred in awarding economic loss damages to AK for what were, in effect, Temagami's economic losses. I disagree. The trial judge was careful not to duplicate awards. Temagami recovered for the period September 2003 to May 2005, when the trial judge found AK would likely have moved on to become

directly employed by ARINC. AK was not awarded economic loss damages for that period. Beyond that date, AK recovered for what she would have received from ARINC. Temagami did not recover for anything beyond May 2005. There was no duplication.

107 The appellants also argue that AK should not have recovered up to May 2007 because Valcom would have lawfully terminated her from the project well before then. However the trial judge's award of economic loss damages to AK up until May 2007 was not based on her continuing service on the project until that date, but on the finding that she would have been working at ARINC on other projects until that date. This argument must be rejected.

108 Finally, the appellants say that Temagami's award for economic loss insufficiently reflects reductions for contingencies. This is the only attack made on this award in favour of Temagami. In my view it also fails. Reductions for contingencies are necessarily case-specific and their calculation is very much an exercise of judicial discretion. The appellants point to no error in principle by the trial judge and I see no other basis to interfere with her award.

109 I would therefore dismiss all the appellants' challenges to the damage awards made by the trial judge.

CONCLUSION

110 In the end, although I differ with some of the reasoning of the trial judge, I agree with her ultimate conclusions. I would uphold the trial judgment and dismiss the appeal.

111 The parties should, within thirty days of the release of these reasons, exchange and file their submissions of no more than eight pages on the costs consequences that should flow from this decision.

112 Finally I express my thanks and that of my colleagues for the able assistance of counsel throughout.

S.T. GOUDGE J.A.
J.L. MacFARLAND J.A.:— I agree.
H.S. LaFORME J.A.:— I agree.

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