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Neither contract nor tort: Salomon triumphant?

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NEITHER CONTRACT NOR TORT: *SALOMON* TRIUMPHANT?

Palmer Birch v Lloyd
Gruber v AIG Management France
Bumi Armada Offshore Holdings v Tozzi

The circumstances in which a company director may be tortiously liable for inducing the company's breach of contract have troubled many thinkers. Comparatively less attention has been devoted to the position of a parent or holding company that has allegedly induced its subsidiary company to break a contract. In *Stocznia Gdanska SA v Latvian Shipping Co*,[1] the Court of Appeal did not disagree with counsel's concession that a parent would not be liable if it had merely decided, without more, that its own interests did not recommend the commitment of its resources to the subsidiary company's contracts, or if it had taken a formal decision as shareholder that the subsidiary company should not perform its contracts.[2] This ascendancy of company law offering protection in favour of a parent was unaffected by the streamlining of the economic torts in *OBG Ltd v Allan*,[3] for Males J (as he then was) stated in *Moran Yacht & Ship Inc v Pisarev*[4] that the principle of limited liability ought to preclude finding a beneficial owner of a company liable for inducing the latter's breach of contract even where the owner had known of the specific contractual obligations in question to be performed by the company, which would have acted according to the owner's instructions.[5]

Fuller exposition of the principles in three recent cases has disclosed questions of practical and academic interest. Does the inducement tort permit of what is effectively a broad exemption where company shareholders are concerned? If so, what are the circumstances in which a controlling shareholder could exceptionally be liable for inducing the company's breaches? It will be convenient to refer to these respectively as the first and second questions, the answers to which may not be as easy as believed in some of the authorities.

The thoughtful decision of Andrew Baker J in *Gruber v AIG Management France SA*[6] introduces some of the competing analyses. After referring to Males J's *dictum* in *Moran*, his Lordship opined that, if the law governing the piercing of corporate veils did not say that the parent had assumed responsibility for the breach, then the imposition of liability on the parent by tort law required careful justification, which surely meant something more than that the subsidiary company's breach was the parent's intended and procured outcome.[7] Regarding the first question, therefore, the primacy given to company law principles resulted essentially in the alteration of some of the usual rules governing tortious inducement where controlling shareholders were implicated.

1. [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep 436.
2. *Ibid*, [132].
3. [2007] UKHL 21; [2008] AC 1.
4. [2014] EWHC 1098 (Comm); [2014] 2 Lloyd's Rep 88.
5. *Ibid*, [115].
6. [2018] EWHC 3030 (Comm).
7. *Ibid*, [141].

In relation to the second question, his Lordship raised two alternative approaches to affixing liability upon a parent that had done "something more" than intending for and procuring the subsidiary company to break its contract. The first was to extend the notion of third-party interference into this context, which although not fully explored in the judgment seems to entail modifying or supplementing the elements of tortious inducement in such fashion as would bring errant shareholders within the ring of tortious liability. The second approach (call this the company law analysis) was to pierce the corporate veil in accordance with orthodox company law, if the parent had abused the corporate structure by making a determination for the subsidiary company resulting in a breach of contract. Because his Lordship ultimately viewed any affixation of liability upon the parent to really be grounded in its abuse of the privilege of creating separate corporate identities and sheltering behind the corporate veil when contractual obligees came calling to enforce their rights, the company law analysis—which more accurately reflected the substance of the wrongdoing—was tentatively preferred over the extensionary analysis.[8]

By contrast, *Palmer Birch v Lloyd*[9] is more a case on the first question. Sitting in the High Court, HHJ Russen QC was invited to consider the authority of *Stocznia Gdanska*, which he approached with some caution, given the House's later overhaul of the economic torts. He eventually concluded that, consistent with the basic concept of limited legal liability as set out in *Prest v Petrodel Resources Ltd*,[10] the case remained good for the proposition that a parent was not liable under the inducement tort if, without being under any obligation to do so, it decided not to put its subsidiary company in funds, resulting in the latter's being unable to render contractual performance.[11] Significantly, though, Judge Russen appeared more broadly to see no special rule or exemption governing controlling shareholders in the tortious inducement context. In stating that tort law could not ride roughshod over long-established company law principles "unless factors of inducement … [justified] it doing so"[12]—factors such as a request or instruction from the parent to its subsidiary company to break a contract, or a diversion of funds away from the subsidiary company in an abuse of the privilege of separate corporate personality—the implicit suggestion, on one reading, is that the *normal* rules continue to apply even where it is a controlling shareholder that is alleged to be liable for tortious inducement (see also the judgment's succinct and unembellished discussion of the intention requirement[13]).

The third authority is *Bumi Armada Offshore Holdings Ltd v Tozzi Srl*.[14] Lord Neuberger of Abbotsbury, delivering the sole judgment in the Singapore Court of Appeal, said:[15]

"As a matter of principle, the mere fact that the parent could have prevented the subsidiary from breaching its contract, ie, mere inaction, would plainly not be enough to render the parent liable for

8. *Ibid*, [142].
9. [2018] EWHC 2316 (TCC); [2018] 4 WLR 164.
10. [2013] UKSC 34; [2013] 2 AC 415.
11. *Palmer Birch* [2018] EWHC 2316 (TCC); [2018] 4 WLR 164, [169], [173] and [350].
12. *Ibid*, [169], [360], [361] and [363].
13. *Ibid*, [174].
14. [2018] SGCA(I) 5; [2019] 1 SLR 10; noted P Koh, "Holding Company's Liability for Inducing Its Subsidiary's Contractual Breach" (2020) 136 LQR 30.
15. *Ibid*, [43] and [47].

the tort of inducing a breach of contract. Quite apart from that, if the law was otherwise, it would impermissibly undermine the fundamental principle of independent corporate identity laid down in [*Salomon v A Salomon and Co Ltd*[16]] … the mere fact that a shareholder with a controlling interest acts in such a way as to induce a company to breach its contract as a matter of fact, is not enough to render the shareholder liable for inducing the breach of contract as a matter of law: something more is required."

This passage seems to suggest according controlling shareholders a distinct position within the tortious inducement framework. As his Lordship put it, whether the circumstances were such that a parent could properly be held liable for inducing its subsidiary company's breach of contract constituted a *further* issue to be examined *in addition to* the staple procurement, knowledge and intention elements.[17]

So far this rather echoes *Gruber* on the first question, but on the second question—the circumstances in which shareholders were exceptionally liable under the inducement tort—it is the extensionary analysis that Lord Neuberger espouses instead. In an apparent modification of the elements of the tort, he stated that a shareholder in a company was not liable for inducing the company's breach of contract if the actions said to give rise to liability merely involved the shareholder pursuing in good faith its own interest in its capacity as a shareholder in the company; even a controlling shareholder's summoning of a general meeting or suasion of the company's directors to breach a contract would *not* make it liable for tortious inducement, if it believed that the company was ultimately better off breaching the contract (resulting in the company's shares being worth more).[18] On the basis of the present case, his Lordship viewed any finding of liability as requiring the controlling shareholder to have acted in a way other than in good faith when pursuing its own interest as an owner of shares in the company, or to have pursued an interest unrelated to (or possibly in addition to) its capacity as shareholder.[19] This portion of the judgment is cautious not to tender an exhaustive list of circumstances in which liability might attach to a controlling shareholder, so these could differ yet further from the grounds for piercing the corporate veil under the company law analysis preferred by Andrew Baker J. It can be debated also whether Lord Neuberger's open-textured approach provides commercial parties the relative certainty they might seek in this area of the law.

In summary, on the question whether the usual constituent elements of tortious inducement apply without supplement or modification to controlling shareholders, *Palmer Birch* seems to suggest a positive answer, while *Bumi* and *Gruber* impose additional requirements to be satisfied before any such shareholder may be found liable. On the second question it follows, not unexpectedly, that *Palmer Birch* does not spell out any particular circumstance in which a controlling shareholder will exceptionally be liable for tortious inducement; the other two cases do, but impose different requirements that claimants must further satisfy. *Bumi* asks at least for a showing that the shareholder acted

16. [1897] AC 22.
17. [2018] SGCA(I) 5; [2019] 1 SLR 10, [41].
18. *Ibid*, [45].
19. *Ibid*, [47–48].

without good faith or to further a collateral interest, whereas *Gruber* would utilise the orthodox grounds for piercing the corporate veil.

It should be mentioned that at least three other reported cases in England and Wales broach this issue, although their resolution is inconclusive. In *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd*,[20] *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd*[21] and *Meretz Investments NV v ACP Ltd*,[22] it was either assumed or undisputed that a controlling shareholder had committed tortious inducement simply by intending and procuring the company to break its contract; without reading overly into omissions for which detailed submissions may not have been received, no judge came close to saying that the rules governing the tort were to be applied more restrictedly to controlling shareholders. In *Law Debenture Trust Corp* there was a remark by Sir Thomas Bingham MR (as he then was) regarding the piercing of corporate veils, but that was directed only at unmade (speculative) causes of action rather than the inducement tort itself.[23] A fourth case, *Marex Financial Ltd v Sevilleja*,[24] may have certain implications, although it is not directly on point. The Court of Appeal there held that the rule against reflective loss barred a judgment creditor from suing the judgment debtor's ultimate beneficial owner—who had allegedly divested the debtor's assets to frustrate enforcement of the judgment—in the tort of inducing or procuring the debtor to act in violation of the creditor's rights under the judgment. The decision has attracted trenchant criticism;[25] with the Supreme Court expected to rule on the appeal soon, it suffices to say here that the Court of Appeal's ruling, if ever extended to apply in the context of a breach of contract, would have the unprecedented effect of generally precluding any and all persons who contract with a company from claiming for tortious inducement of breach of contract against the controlling shareholders of the company.

Thus, for the moment the field appears relatively open, and the English senior courts have the opportunity to set the law right at the first try. They will also have the benefit of Lord Neuberger's opinion in *Bumi*. Upon closer consideration of his views, it is suggested, with respect, that they ought not to be adopted unqualifiedly in England and Wales.

Consider these alternative scenarios. In the first, supplier X persuades Company A to break its existing contract with Y, with the aim of Company A executing a fresh agreement with X. In the second, the controlling shareholder of Company A persuades it to break that very same contract with Y, which contract is causing Company A to incur losses and denting the value of its shares, and instead to execute a fresh agreement with X.

Taking Lord Neuberger's approach in *Bumi*, it would be acceptable to find X liable for inducing a breach of contract in the first scenario, but not the shareholder in the second. This anomalous result is down to the special status of that shareholder *vis-à-vis* Company A; invoking *Salomon v A Salomon and Co Ltd*,[26] his Lordship said that a

20. [1974] QB 142.
21. [1995] Ch 152.
22. [2007] EWCA Civ 1303; [2008] Ch 244.
23. *Law Debenture Trust Corp* [1995] Ch 152, 164E–H.
24. [2018] EWCA Civ 1468; [2019] QB 173.
25. S Gee, "Asset Stripping Reflective Loss and Injunctions" [2019] JBL 89; A Tettenborn, "Creditors and Reflective Loss—A Bar Too Far?" (2019) 135 LQR 182.
26. [1897] AC 22.

shareholder pursuing in good faith its own interest *qua* shareholder could not be held liable, as otherwise it would "effectively have to choose between sacrificing [its] right of pursuing [its] self-interest *bona fide* as a shareholder or finding [itself] liable for the company's breach of contract".[27] It is hard to understand this reasoning. The "self-interest" of a shareholder has hitherto not encompassed the arrogation of any legitimate entitlement to frustrate or interfere with the performance of binding agreements, whether entered into by the company or other persons. The law allows shareholders to extract a solvent company's assets (such as through dividend distributions or capital reductions) but providing inducements to break a contract hardly seems an appropriate method for doing so. No amount of good faith assists, for the question does not even arise. If the principle of separate legal personality is relevant, it is that the creation and observance of the company's contractual obligations are matters primarily for the company and its directors, free from the undue interference of anyone else (including its shareholders) unless otherwise required by its constitution or by statute.[28] Lord Neuberger's approach, it may be thought, gives too little moment to these considerations and the position of those who deal with companies. It also tends to ignore the unhappy asymmetry it creates when one compares this with the case where a controller has made misrepresentations about its subsidiary company to induce a third party to *enter* into a contract with the company, something which Lord Neuberger had indicated in a previous decision *would* ordinarily give rise to a direct cause of action (in misrepresentation) by the third party against the controller.[29]

Why, it may be asked, should a person's right to thwart third parties from inducing a breach of its contract—a right generally available against the world—be defeated merely because the inducer happens to be a shareholder of its counterparty? Why would one willingly deal with a company if its shareholders could muscle in and encourage breaches of contract with unpunished alacrity?[30] To allow commercial expectations to fluctuate so readily depending on the incorporation status of the breaching party and the identity of the inducer is not consistent with either the broad sentiment throughout English contract law that agreements freely entered into should be performed and not broken, or the commercial spirit of the principles established in favour of persons dealing with companies, of which the best known is probably the rule in *Royal British Bank v Turquand*,[31] now functionally replaced by the Companies Act 2006, s.40. It would be a matter of regret if the corporate vehicle, designed principally as an engine of enterprise, were to become a source of hesitance by commercial parties in their transactions.

In *Bumi*, Lord Neuberger also supported the more generous rule favouring controlling shareholders by citing the "practical difficulties" that could ensue should a shareholder be

27. *Bumi* [2018] SGCA(I) 5; [2019] 1 SLR 10, [45].
28. See also A Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (Dartmouth, Aldershot, 1996), 129 ("It is the exercise of the latent power of control to the extent of a direct interference in the internal decision-making function of the subsidiary which will make the holding company the actor in the tort").
29. *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 1 Lloyd's Rep 466, [139].
30. *Cf* R Bagshaw, "Inducing Breach of Contract", in J Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, Oxford, 2000) 132.
31. (1856) 6 E & B 327.

made to choose between sacrificing its interests *qua* shareholder and taking on liability for the company's breach of contract.[32] The nature of these difficulties was not elaborated upon, but just before this passage his Lordship wrote permissively of a controlling shareholder which would go about persuading the company's directors to breach a contract binding upon the company, if that were done to give effect to its view that the company was better off breaching the contract (with the consequence that the company's shares were worth more). This vignette is rendered less startling once the reader appreciates that his Lordship appears to be approving of the theory of efficient breach. Leaving aside the uncertain extent of its reception in this area of English law,[33] it may be questioned why the theory—and its promotion of overall economic efficiency—would not as formulated be potentially applicable to *all* acts of inducement and, at a snap, eliminate tortious liability therefor. There is, quite simply, no reason to stop at company shareholders. This part of the judgment yields little hint on whether Lord Neuberger intended to challenge an existential underpinning of the inducement tort or only to grant partial immunity to a limited class (ie, controlling shareholders). On either selection, it is doubtful that a shareholder has any relevantly unique characteristics that set it apart.

A parent having shareholding control over a subsidiary company cannot, without more, be liable for inducement, and nothing should cast doubt on that. But if a parent and its subsidiary can be joint tortfeasors,[34] then a parent is capable of undertaking such action as might constitute a tortious inducement of the subsidiary's breach of contract. One illustration takes the apparent conundrum where the company's breach is requested and authorised by unanimous agreement or resolution of its shareholders;[35] the solution becomes clearer once the internal dimension is distinguished from the external.[36] Shareholder approval, however resounding or absolute, is a means of conferring internal authority for the company to act in the manner desired. To the outside world the resultant act (the breach of contract) is, and always will be, the *company's* act. It may sometimes be convenient to say that the act of the shareholders is the act of the company, but to suggest that the shareholders' liability for interfering with the contract dissipates for that reason is a *non sequitur*, one that passed unidentified at first instance in *Stocznia Gdanska SA v Latvian Shipping Co*.[37] The shareholders have never merged in any way with the company; their respective assets and liabilities remain separate and free from unlawful appropriation; they continue, in other words, to be entities apart. In such circumstances it would in my view be unprincipled to treat the shareholders as having dropped out of the picture for the purposes of tort law.

Generally, therefore, no special place should be reserved for controlling shareholders where liability for tortious inducement is otherwise to be found. *Palmer Birch*, it is

32. *Bumi* [2018] SGCA(I) 5; [2019] 1 SLR 10, [45].

33. See further PS Davies, *Accessory Liability* (Hart, Oxford, 2015), 168–170.

34. *Sandman v Panasonic UK Ltd* [1998] FSR 651.

35. J O'Sullivan, "Intentional Economic Torts, Commercial Transactions and Professional Liability" (2008) 24 J of Professional Negligence 164, 178.

36. See further the discussion in R Grantham, "The Unanimous Consent Rule in Company Law" (1993) 52 CLJ 245, 266–271.

37. [2001] 1 Lloyd's Rep 537, [239–244]. For a contrary view, see M Christie, "Breaches of Contract by Corporations—Potential Liabilities of Directors and Controllers for Inducing Breach" (2013) 28 Aust J Corp Law 304, 320–321; Koh (2020) 136 LQR 30, 33–34.

respectfully suggested, got it correct. Those who contract with a company do not reasonably assume the risk that the company's parent might direct it to break that contract without repercussions. It often also ignores reality, as many commercial lawyers know, to say that the contractor could always have obtained a guarantee from the parent. All this is far from saying that a shareholder's interests are to be disregarded; it is only that the constituent elements of the tort should be analysed in the usual way. Some will nevertheless want to characterise this as a limitation on the exercise or protection of those interests, but even that in truth has not been viewed as an absolute entitlement, as witnessed by the law's having necessarily to mitigate the unfair consequences which occasionally result.[38] It follows, in my opinion, that the extensionary analysis in *Bumi* needs reconsideration so far as it would impose additional requirements a claimant must satisfy before tortious inducement can be made out.

We should still reflect carefully on Andrew Baker J's concern for tort law not to intervene unduly if the law governing the piercing of corporate veils did not say that the parent had assumed responsibility for the breach,[39] matched by Lord Neuberger's warning that tort law is not to be invoked to blur the principle that a company was a separate legal personality.[40] To address these properly, two points should be untangled. Liability in tort and under company law may obviously arise in different circumstances and further different purposes. The inducement tort constitutes liability of a secondary nature, predicated on an actual breach of contract, and is intended to protect the claimant's interest in seeing the counterparty perform its bargain. The limited situations in which the corporate veil is pierced commonly feature misuse of the corporate structure, which may or may not involve incitation or assistance of a contract breach. A case might therefore involve liability only in tort, or only under company law, or both in tort and under company law; whichever obtains is determined by the freestanding rules of each claim. It cannot appear right that the mere interposition of a corporate form *prima facie* immunises, by default, an entire subset of potential tortfeasors, given that the causes of action actually target different types of conduct.[41] This is an instance where, in relation to shareholders, company law rules should *not* necessarily have primacy over tort rules.[42] Concurrent liability ought not to be outwith the realm of possibility even in the case of a sole shareholder of a company who is also its sole director; on this particular application English law should complete its escape from, or at base re-evaluate, the difficult reasoning in *Said v Butt*.[43]

38. Such as through the creation of a rule that a company in insolvency has to take into account the interests of its creditors (and not just those of its shareholders) when acting.

39. *Gruber* [2018] EWHC 3030 (Comm), [141].

40. *Bumi* [2018] SGCA(I) 5; [2019] 1 SLR 10, [42].

41. See also *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74, [98].

42. See further R Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can Bar Rev 247, 261; *contra* R Grantham and C Rickett, "Directors' Tortious Liability: Contract, Tort or Company Law?" (1999) 62 MLR 133, 139; N Campbell and J Armour, "Demystifying the Civil Liability of Corporate Agents" (2003) 62 CLJ 290, 296; More recently, Lord Briggs seemingly accepted that a parent was to be considered as separate from its subsidiary when analysing whether it owed a tortious duty of care to a third party in respect of that subsidiary's activities (*Lungowe v Vedanta Resources Plc* [2019] UKSC 20; [2019] 2 WLR 1051; [2019] 2 Lloyd's Rep 399, [54]; noted W Day, "Piggyback Jurisdiction and the Corporate Veil" (2019) 135 LQR 551; A Sanger, "Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries" (2019) 78 CLJ 486).

43. [1920] 3 KB 497. *Cf Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB); [2019] Bus LR 1532, [112–130]; R Stevens, "Why Do Agents 'Drop Out'?" [2005] LMCLQ 101, 107–108.

The second point is that a shareholder's right or interest *qua* shareholder could still possibly be accounted for without upsetting the overall schema of tortious inducement. On present understanding, if an inducer can point to its superior right it may raise a defence of justification. Such a superior right could be a right in personal property. There might even be a role for a private interest in forming the exculpatory element.[44] *Pace* Edmundson,[45] is it then open for a controlling shareholder's right or interest *qua* owner of shares in a company to fall within this definition, so that its actions in inducing the company's breach of contract may at least be weighed against or in the light of that right or interest? Even so there might have to be some reconsideration of the defence; for example, do shareholders ever have an interest in profiting from their shareholdings[46] or any "enforceable financial interest in the affairs of the person who is persuaded to break the contract"[47]? Cane once stated that a justification defence would probably fail if the inducer's only interest was the furtherance of its own commercial well-being.[48] Whether that is indeed the case, or whether the tort will be re-imagined for shareholders, awaits further clarification.

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EXTRATERRITORIALITY: ENFORCEMENT JURISDICTION ABROAD

R (on the application of Jimenez) v First Tier Tribunal

It is trite that, under international law, a government will not seek to confer powers upon its organs of state which would result in those institutions exercising enforcement jurisdiction over either property or persons present within the territories of another state.[1]

44. H Carty, *An Analysis of the Economic Torts*, 2nd edn (OUP, Oxford, 2010), 67–68. Some have further argued for the widening of the justification defence; see, eg, D Howarth, "Against *Lumley v Gye*" (2005) 68 MLR 195.

45. P Edmundson, "Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract" (2006) 30 Melb ULR 62, 83.

46. *Cf Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 224.

47. JD Heydon, "The Defence of Justification in Cases of Intentionally Caused Economic Loss" (1970) 20 UTLJ 139, 164. *Cf* the US position in, eg, *Felsen v Sol Cafe Mfg Corp* 24 NY 2d 682, 686–687 (1969); *Boulevard Associates v Sovereign Hotels Inc* 72 F.3d 1029, 1036–1037 (1995); *White Plains Coat & Apron Co Inc v Cintas Corp* 8 NY 3d 422, 426–427 (2007). See also M Izzo, "The Limits of *Lumley v Gye*: Commercial Disputes and the Tort of Interference with Contractual Relations" (2005) 13 Torts LJ 188, 196; Koh (2020) 136 LQR 30, 34.

48. P Cane, *Tort Law and Economic Interests*, 2nd edn (Clarendon, Oxford, 1996), 121.

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1. See *Government of India v Taylor* [1955] AC 491, 503, *per* Viscount Simonds: "I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign State to recover a tax. For at any time since I have had any acquaintance with the law I should have said, as Rowlatt J said in *King of the Hellenes v Brostron* (1923) 16 Ll L Rep 190, 193: 'It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.' That was in 1923. In 1928 Tomlin J in *In re Visser, Queen of Holland v Drukker* [1928] Ch 877, 884 … added: '… there is a well-recognised rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain'." Viscount Simonds went on (at