

## UK Supreme Court Unanimously Upholds Judgment in Favor of Servier in “Unlawful Means” Case

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On July 2, 2021, an extended panel of seven UK Supreme Court Justices handed down a unanimous [judgment](#) in the case of Secretary of State for Health (the Appellants) and another v. Servier Laboratories Ltd and others (the Respondents) [2021] UKSC 24. They upheld the ruling of the High Court and Court of Appeal in confirming that the Respondents could strike out the Appellants’ claim based on the tort of “causing loss by unlawful means.” The Supreme Court rejected the Appellants’ attempt to expand the scope of the unlawful means tort to encompass allegations of fraud in the patent office, known as the doctrine of “inequitable conduct” in some jurisdictions — a concept that does not exist in UK and EU law. The judgment represents a major win for patentees in the UK as the Supreme Court judgment rightly leaves the patent system undisturbed and serves as a highly important clarification for patentees and stakeholders in the UK and beyond.

The Respondents developed and manufacture perindopril, which (like several similar drugs of the same class that were available at the time) is used to treat patients with high blood pressure. The Appellants, responsible for funding the cost of National Health Service (NHS)-dispensed drugs, alleged that the Respondents acted deceitfully in obtaining, defending, and enforcing one of its perindopril patents with the European Patent Office (EPO) and/or the English Court. In particular, it was contended that the Respondents knew or should have known that the patent lacked novelty. The Appellants argued that due to the Respondents’ conduct, generic perindopril manufacturers were delayed or prevented from entering the market, which would have driven down the price of perindopril, causing the NHS to pay higher prices for perindopril than otherwise. These allegations were (and remain) refuted by the Respondents; however, for the purpose of the strikeout application, these were assumed to be true. As a result, the appeal was based on a tort claim for causing loss by unlawful means.

The unlawful means tort, an economic tort, involves intentionally causing loss to the claimant by unlawfully interfering with a third party’s freedom, the so-called “dealing requirement.” The relevant third party in this appeal was the European Patent Office and/or the English Court, and it was undisputed between the parties that there were no dealings between the Appellants and the third party. The appeal therefore rested on the issue of whether this dealing requirement was a necessary element of the tort. The Appellants contended that this requirement should be disregarded in this case and claimed that the loss was caused by the Respondents intentionally and unlawfully misleading the EPO and the English Court. They essentially sought to expand the scope of the tort to cover allegations of fraud in the patent office, thereby introducing through the back door the “doctrine of equitable conduct,” which does not currently exist at the European level nor in the UK. This, however, had been unsuccessful at both the High Court (2017) and the Court of Appeal (2019). Indeed, Mr. Justice Roth in the former noted that a patent was a creation of statute, and the statutory regime governing patents prescribed rights and remedies in a manner that reflected the legislative assessment of the policy issues involved (see paragraph 44 of the High Court [judgment](#)). He

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noted that if those who suffered economic loss by reason of a patent being obtained by dishonest or reckless misrepresentations as to novelty or obviousness could use the unlawful means tort at common law to claim damages, that would circumvent the careful legislative balance. In its judgment, the Court of Appeal also noted procedures available at the patents Court and with the English Court of which the Appellants had not made use (namely seeking an undertaking for damage — see paragraph 77 of the Court of Appeal [judgment](#)).

Both courts applied the House of Lords precedent of *OBG Ltd v. Allan* [2008] 1 AC 1 (*OBG*) to conclude that the dealing requirement is an essential element of the unlawful means tort. A central concern of the majority in *OBG* was keeping the tort “within reasonable bounds,” reducing the tort’s scope and reflecting the policy consideration of leaving regulation to Parliament, such as the regulation and protection of intellectual property rights created and governed by statute. Lord Hoffmann concluded that this should be achieved by construing “unlawful means” narrowly.

In its unanimous judgment, the Supreme Court dismissed the appeal on the basis that the dealing requirement is an essential ingredient of the unlawful means tort and the Appellants had not shown sufficient reason to convince the Supreme Court to depart from the jurisprudence of the House of Lords in *OBG* and extend the scope of the unlawful means tort to allegations of fraud in the patent system. The patent system therefore rightly remains undisturbed.

Servier Laboratories Ltd are represented by Marie Manley and Chris Boyle from Sidley with counsel Marie Demetriou QC and Daniel Piccinin from Brick Court Chambers.