

Procuring Wrongs

JAMES GOUDKAMP*

I. Introduction

In certain circumstances, private law imposes liability for facilitating wrongs committed by other persons. One illustration of this, found in the law of equity, lies in the rules regarding knowingly assisting a breach of trust. Another example, drawn from the law of torts (or from the law of contract according to some writers), concerns the cause of action recognized in *Lumley v Gye*.¹ Private law is gradually adding to the list of circumstances in which it imposes liability for facilitating wrongdoing. This chapter examines one such extension, which was developed in *Marex Financial Ltd v Sevilleja*.² The wrong recognized in that case consists, in outline, in knowingly and intentionally inducing a violation of rights embodied in a judgment. Its existence was recently confirmed by, in particular, *Lakatamia Shipping Co Ltd v Su*.³ The creation of the *Marex* tort has been heralded as an important development. For example, the Commercial Court in its *Report 2020–2021* singled out the wrong's recognition as one of its 'highlights' for that year.⁴ Similarly, the authors of *Civil Fraud* write that the tort's acknowledgement is a 'significant practical development'.⁵ This chapter examines the process by which the *Marex* tort was recognized (section II) and its scope (section III). It then considers the tort's significance (section IV) before turning, finally, to examine some wider issues that the wrong raises regarding the law of torts (section V).

II. Development of the *Marex* Tort

In *Marex*, the claimant company obtained a US\$5m judgment against two corporate defendants for breach of contract.⁶ A few weeks later, when a freezing order was made against the defendants in support of enforcement, it transpired that they had almost no assets. This prompted the claimant to issue proceedings against their alleged owner, Mr Sevilleja, and to apply for permission to serve him with the claim form out of the jurisdiction. The claimant contended that, following the circulation of the draft judgment as well as after judgment had been entered, Mr Sevilleja had transferred to his own control money that had been

* I am grateful to John Murphy for his comments on a draft of this chapter. I also acknowledge the considerable benefit derived from reading his draft paper 'Inducing Others' Wrongs: A Nascent or Needless Tort?'

¹ *Lumley v Gye* (1853) 2 El & Bl 216; 118 ER 749 (QB).

² *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm), [2017] 4 WLR 105 (hereafter *Marex*).

³ *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) (hereafter *Lakatamia*).

⁴ *The Commercial Court Report 2020–2021* (Judicial Office 2022) 10.

⁵ Thomas Grant and David Mumford, *Civil Fraud: Law, Practice & Procedure* (Sweet & Maxwell 2018) [3.022B] (hereafter Grant and Mumford, *Civil Fraud*).

⁶ *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All ER (Comm) 122.

held in the companies' bank accounts. The claimant said that this prevented the companies from dealing with it in accordance with their obligations and that Mr Sevilleja had hence committed the tort of causing loss by unlawful means. The claimant also contended that Mr Sevilleja had acted tortiously in inducing the companies to violate its rights under the judgment, that is to say, that he had committed what is now known as the *Marex* tort.

For his part, Mr Sevilleja challenged the court's jurisdiction to determine the claims that had been brought against him. He did so on various grounds, including that there was no such wrong as the *Marex* tort. He argued that the non-payment of a judgment debt was not itself an actionable wrong with the result that it was not tortious to induce a judgment debtor to fail to discharge a judgment debt. Various additional points were made, including that it was unnecessary to recognize the *Marex* tort in view of the jurisdiction to make a freezing order post-judgment, which was an unmeritorious submission given that such an order had been made shortly after judgment had been entered but had failed to prevent (some of) the damage alleged. Conversely, the claimant maintained that the *Marex* tort was within the principles that had been established by *Lumley v Gye*.⁷ The basic idea that the claimant advanced was that since it is a wrong intentionally to induce a breach of contract, it must also be a wrong intentionally to induce a breach of rights embodied in a judgment that vindicated the rights that had been created by the contract concerned. It was said, in effect, that a right cannot be made less valuable on account of its having been novated by a judgment.

In brief reasons, Knowles J, drawing on cases concerned with the enforcement of foreign judgments, held that a failure to pay a judgment debt was an actionable wrong.⁸ This led him to conclude that the claimant had 'the better argument for the existence of the tort',⁹ which he seemed to regard, together with the tort of inducing a breach of contract, as a subspecies of a more general wrong of inducing a violation of others' rights.¹⁰ For this reason, as well as for other reasons that are not presently relevant, he rejected Mr Sevilleja's jurisdictional challenge. The Court of Appeal refused Mr Sevilleja permission to appeal as regards whether it was sufficiently arguable that the *Marex* tort existed,¹¹ but granted him permission to appeal on the ground that the claims against him were barred by the doctrine of reflective loss (on the logic that the claimant's alleged loss was simply a manifestation of that which the companies had suffered). The Court of Appeal held that that doctrine barred around 90 per cent of the claim. Its decision was reversed on a further appeal to the Supreme Court.¹² However, neither the Court of Appeal nor the Supreme Court engaged directly with what Knowles J had said regarding the *Marex* tort.¹³ Accordingly, its status was left in a certain amount of doubt. Its existence was supported only by the view that had been expressed at first instance that it arguably formed part of English law.¹⁴ (It is unclear what became of the proceedings following the Supreme Court's decision.)

⁷ *Lumley* (1853) 2 El & Bl 216; 118 ER 749 (QB).

⁸ *Marex* (n 2) [20]. See also at [45].

⁹ *ibid* [28].

¹⁰ *ibid* [18]–[19].

¹¹ *Marex Financial Ltd v Sevilleja* [2018] EWCA Civ 1468, [2019] QB 173 [6].

¹² *Marex Financial Ltd v Sevilleja* [2020] UKSC 31, [2021] AC 39 (hereafter *Marex* (SC)).

¹³ Although see the remarks of Lord Sales at [199] of the Supreme Court's judgment, which seemingly approve of Knowles J's analysis regarding the existence of the *Marex* tort.

¹⁴ While the appeals in *Marex* were unfolding, Knowles J's remarks were the subject of passing comment in *Palmer Birch (a partnership) v Lloyd* [2018] EWHC 2316 (TCC); [2018] 4 WLR 164 [172].

There matters stood for several years until the decision in *Lakatamia Shipping Co Ltd v Su*.¹⁵ In that case, the claimant had obtained two judgments against a Mr Su for breach of contract. The combined sum owed thereunder was around US\$47m,¹⁶ which Mr Su failed to pay. In the course of its enforcement efforts, the claimant discovered that Mr Su had owned two properties and a private airplane. Those assets had been sold and the funds thereby realized transferred to Mr Su's mother, who was known as Madam Su, and dissipated. Bryan J found that Madam Su had thereby committed both the *Marex* tort and the tort of unlawful means conspiracy.¹⁷ The judge said:

The *Marex* tort finds a close, and I consider compelling, analogy with the tort of inducing a breach of contract. There would seem to be no compelling reason why, in circumstances where the law protects against intentional interference by third parties with contractual rights it should not equally protect against intentional interference with rights established by judgments.¹⁸

He added:

I can see no reason why the law should protect against third-party interference with contractual rights but not against such interference with contractual rights that have been novated by judgment. Absent such protection, the law would perversely diminish the protection that it affords to a victim of a breach of contract where the victim has had those rights vindicated by the courts.¹⁹

Accordingly, *Lakatamia* confirmed the existence of the *Marex* tort. It is true, of course, that *Lakatamia* is a first instance decision like the decision in *Marex* itself. The High Court is not bound by it. But as a practical matter, the High Court is very unlikely not to follow the decision, especially given the exceptionally comprehensive nature of Bryan J's judgment and the fact that it was entered, unlike that in *Marex*, following a trial.

Thus, in *Gee v Gee*,²⁰ the court took it as read that that which had been said in *Lakatamia* as regards the *Marex* tort represented the law. The claimant had succeeded in a proprietary estoppel claim against his father and brother in respect of the family farm.²¹ He then alleged that the defendants had breached the order consequent upon the judgment. Specifically, it was said that a lease pertaining to part of the farm had been surrendered to the lessor (Christ Church, Oxford) in contravention of the order. On the basis of these allegations, the claimant applied for further orders. The case raised various procedural issues, some of which are explored below. However, the important point for present purposes is that HHJ Paul Matthews proceeded on the basis that the *Marex* tort had been vouchsafed a position in tort law and that the claimant was entitled to claim in respect of it.²²

¹⁵ *Lakatamia* (n 3).

¹⁶ *Lakatamia Shipping Co Ltd v Su* [2014] EWHC 3611 (Comm); [2015] 1 Lloyd's Rep 216.

¹⁷ *Lakatamia* (n 3) [822].

¹⁸ *ibid* [120].

¹⁹ *ibid* [121].

²⁰ *Gee v Gee* [2022] EWHC 1369 (Ch) (hereafter *Gee*).

²¹ *Gee v Gee* [2018] EWHC 1393 (Ch).

²² *ibid* [14].

A proper understanding of the *Marex* tort requires an appreciation not only of the cases that established its existence but also of the policy context in which it was cultivated. Over the course of the past few decades, the courts have increasingly emphasized the public interest in the enforcement of judgments.²³ This emphasis has catalysed numerous innovations. However, by far the most significant is the development, commencing with the foundational decisions in *Nippon Yusen Kaisha v Karageorgis*²⁴ and *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)*,²⁵ of the power to make freezing orders. That jurisdiction, which exists to protect claimants against the risk that defendants will dissipate their assets with a view to stultifying any judgment that is ultimately obtained against them, has since been steadily enlarged. Thus, freezing orders can be awarded post-judgment and regardless of whether or not one was made pre-judgment.²⁶ They can be made in relation to persons against whom the claimant has no claim but who hold assets for the defendant.²⁷ They can be awarded against foreign defendants who have no assets within the jurisdiction.²⁸ And they can be made in support of claims over which only foreign courts have jurisdiction.²⁹ The advent of the *Marex* tort is very closely connected with the power to grant freezing orders, as is discussed further below. Its recognition is another manifestation of the courts striving to promote the policy in favour of the enforcement of judgments.

III. Scope of the *Marex* Tort

In *Lakatamia*, Bryan J said that the elements of the *Marex* tort 'stand to be identified by analogy'³⁰ with the tort of inducing a breach of contract. He then enumerated the elements of the *Marex* tort as follows:

- (1) The entry of a judgment in the claimant's favour, (2) Breach of the rights existing under that judgment, (3) The procurement or inducement of that breach by the defendant, (4) Knowledge of the judgment on the part of the defendant, and (5) Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment.³¹

Bryan J also made it clear that various rules that govern the tort of inducing a breach of contract extend to the *Marex* tort. Thus, he observed that as is the case with the tort of inducing a breach of contract, '[t]he defendant does not need also to intend . . . to damage the claimant'³² or to have acted maliciously.³³ Similarly, just as it is unnecessary for a defendant

²³ 'It is the policy of English law that English judgments should be paid' (*Touton Far East Pte Ltd v Shri Lal Mahal Ltd* [2016] EWHC 1765 (Comm) [3] (Males J)); 'the policy of the law [is to] weigh . . . heavily in favour of the enforcement of judgments' (*Emmott v Michael Wilson Partners Ltd* [2019] EWCA Civ 219, [2019] 4 WLR 53 [44] (Gross LJ) (hereafter *Emmott*)).

²⁴ *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 (CA).

²⁵ *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213 (CA).

²⁶ Relevant cases are discussed in *Emmott* (n 23) [40]–[44].

²⁷ *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 (Ch D); *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 (CA).

²⁸ *Republic of Haiti v Duvalier* [1990] 1 QB 202 (CA).

²⁹ *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389.

³⁰ *Lakatamia* (n 3) [125].

³¹ *ibid* [126].

³² *ibid* [127(1)].

³³ *ibid* [127(5)].

to a claim for inducing a breach of contract to have known the detailed terms of the agreement, it is inessential, in order for liability to arise in the *Marex* tort, that the defendant have been conscious of the 'contents of the judgment'.³⁴ And as with the rule that a defendant will be taken to know of a contract if they are wilfully blind to its existence, 'blind-eye knowledge is sufficient' for the *Marex* tort.³⁵ Bryan J's judgment in *Lakatamia* thus gives a significant amount of detail regarding the scope of the *Marex* tort. However, several important issues arise regarding its parameters, and it is to these that attention is now turned.

A. The Nature of the Underlying Obligation

In the wake of the decisions in *Marex* and *Lakatamia* it might, perhaps, have been thought that the *Marex* tort was limited to protecting rights in judgments that novate contractual obligations. After all, the underlying judgments in both cases had been entered in respect of contractual duties that had been breached. And in both cases the court considered that the *Marex* tort was an extrapolation from the tort of inducing a breach of contract. However, any such limitation would have been very difficult, if not impossible, to justify.³⁶ Intentionally inducing a violation of rights established by judgments is not any less objectionable simply because the judgment is not based on a breach of contract. Happily, *Gee* confirms that the *Marex* tort is not concerned only with judgments that are entered in respect of a breach of contract. Although the claimant in that case had obtained judgment on a proprietary estoppel claim, HHJ Paul Matthews considered that there was no difficulty with his seeking a remedy for the *Marex* tort. Admittedly, the judge did not specifically engage with the fact that the judgment had not been entered as regards a claim for breach of contract. But the case is nevertheless authority in support of the proposition that the *Marex* tort is not limited to judgments entered in respect of claims for breach of contract. Properly understood, the protection afforded by the *Marex* tort extends to all judgments.

B. Entry of a Judgment

In each of *Marex*, *Lakatamia*, and *Gee*, judgment had actually been entered in favour of the claimant. One interesting issue that arises is whether the *Marex* tort protects (or should protect) rights in claims which have not yet crystallized into a judgment. It might be argued, for at least two reasons, that the *Marex* tort can have no application unless and until a judgment is entered. The first reason is based on an analogy with the tort of inducing a breach of contract. That tort cannot be committed unless a contract has actually been formed.³⁷ Consistent with the general principle of the law of contract that a party can withdraw from

³⁴ *ibid* [127(2)].

³⁵ *ibid* [127(3)].

³⁶ A view apparently shared by Grant and Mumford, *Civil Fraud* (n 5) [3.022].

³⁷ Consider Paula Giliker, 'A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law' (2003) 52 ICLQ 969, 974–75; Jesse Max Creed, 'Integrating Preliminary Agreements into the Interference Torts' (2010) 110 Columbia Law Rev 1253.

pre-contractual negotiations without incurring any liability,³⁸ the *Lumley v Gye* tort provides no protection at all against conduct that causes a party to walk away from such negotiations. By parity of reasoning, it might be suggested that the *Marex* tort similarly requires that the claim have matured into a judgment. However, there is, of course, an crucial difference between a party to pre-contractual negotiations and a party who has a claim against another: the former has nothing but a mere expectation of acquiring rights whereas the latter actually has a potentially valuable asset.³⁹

The second argument builds upon certain remarks that the courts have made concerning freezing orders. It is often said that unless and until a person is restrained from dissipating their assets by an injunction, there is no restriction on their disposing of their assets even if they do so in order to render worthless a claim that has been brought against them. Thus, in *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd*, Sir Thomas Bingham MR said that ‘the defendant violates no legal right of the plaintiff if he makes himself judgment-proof by dissipating his assets before he is enjoined from doing so.’⁴⁰ If it is not wrongful for a person who is not subject to a freezing order to dispose of their assets in order to prevent any judgment that is ultimately entered against them from being enforced, it might be thought that it cannot be a tort to procure a defendant against whom liability has not yet been established to dispose of their assets. However, this thought appears to be incorrect since the inducer may well be liable for (at least) the tort of lawful means conspiracy.

At the bare minimum, there are three pre-judgment situations to which one would expect the *Marex* tort to extend. The first situation concerns the period between the date on which a draft judgment is circulated to the parties’ legal representatives and the date on which judgment is entered. Although judgments only take effect upon their being entered,⁴¹ and although the court retains a discretion to reconsider its judgment until the moment that it is entered,⁴² it is difficult to see why a claimant who has obtained a judgment subject only to the formality of its being entered should not have their position protected. Indeed, the *Marex* tort arguably already extends to this situation. In *Marex* itself, the claimant alleged that the defendant had dissipated the assets of the companies in question including during the period between the draft judgment being made available and judgment being entered,⁴³ and Knowles J considered that it was sufficiently arguable for the purposes of establishing jurisdiction that this amounted to the *Marex* tort.⁴⁴ However, to the extent that this is not already the law, extending the scope of the *Marex* tort so that it protects the claimant’s

³⁸ For discussion, see Ewan McKendrick, ‘Negotiations “Subject to Contract” and the Law of Restitution’ (1995) 3 RLR 100.

³⁹ ‘A claim which is arguably viable, is a potential asset’: *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch); [2018] Bus LR 2303 [65] (Morgan J). The precise nature of the asset is a matter of significant debate among scholars. Some contend that a wrongdoer immediately owes the claimant a duty of repair upon their committing a wrong. Others argue that a wrongdoer is merely subject to a liability and that no duty to repair will arise unless and until the claimant obtains judgment. For discussion, see Stephen A Smith, ‘Duties, Liabilities and Damages’ (2012) 125 Harvard L Rev 1727 (favouring the former view); Sandy Steel and Robert Stevens, ‘The Secondary Legal Duty to Pay Damages’ (2020) 136 LQR 283 (favouring the latter understanding). See also John Murphy’s paper referenced in the opening footnote of this chapter.

⁴⁰ *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd* [1995] Ch 152 (CA) 166 (hereafter *Law Debenture Trust*).

⁴¹ See CPR Part 40.7(1).

⁴² *Prudential Assurance Co Ltd v McBains Cooper (a firm)* [2000] 1 WLR 2000 (CA) 2008.

⁴³ See in particular *Marex* (n 2) [9].

⁴⁴ cf Bryan J’s view of the elements of the *Marex* tort in *Lakatamia*, which identifies entry of a judgment in the claimant’s favour as one of the ingredients of the wrong. See the text accompanying n 33.

position pending the entry of judgment would, it is suggested, be a merely incremental step. The second situation is where the defendant has admitted the claim. If the defendant admits a claim in which the only remedy sought is the payment of money, the claimant would be entitled to enter judgment against them.⁴⁵ It is difficult to see why the protection that the *Marex* tort affords should not be extended to a claimant who has a right to enter judgment without more ado. The third situation concerns default judgment. If a claimant has a right to enter default judgment against the defendant, obtaining judgment is essentially a formality. It might be said that it would elevate form over substance if the *Marex* tort did not secure the position of such a claimant.

What about instances where the entry of judgment in the claimant's favour is not a foregone conclusion? Since tort law protects contractual rights from intentional third-party interference, it would be surprising if it did not protect claims for breach of such rights from such interference.⁴⁶ Why should a person whose contractual rights have been (at least allegedly) violated and who has needed to sue in order to vindicate them be placed into a worse position as concerns third-party interference than one who has not sued? However, if the *Marex* tort should protect claims for breach of contract, it is difficult to see why it should be confined to safeguarding such claims. There is no obvious reason for protecting only claims for breach of contract as opposed to claims for breaches of other obligations. And consistent with this, the *Marex* tort, in the post-judgment universe, secures the judgment creditor's interest in rights established by judgments irrespective of the source of the underlying obligation.⁴⁷

If and to the extent that the *Marex* tort secures rights in claims that have not yet matured into judgments, a question arises as to what, specifically, the defendant's knowledge needs to relate. It might well be that the defendant would simply need to be conscious of the fact that the claimant has a claim against another person. If so, they would not need to know or believe that the claim is well founded or likely to succeed. However, there is, admittedly, no definite authority one way or the other in this regard. If and to the extent that the *Marex* tort extends only to the three specific pre-judgment situations addressed previously, it is doubtful that the defendant would need to know that a draft judgment had been made available, that the claim had been admitted, or that the claimant is entitled to enter default judgment.

⁴⁵ CPR Part 14.1(4).

⁴⁶ cf Sir Thomas Bingham MR's remark in *Law Debenture Trust* (n 40) 165 that 'I would not be willing to hold that interference with a secondary right to a remedy (as opposed to a primary right to performance) could never attract the application of the *Lumley v. Gye* principle. For example, if, following default by the principal debtor, a third party induced a guarantor to dishonour his secondary obligation to pay the creditor, I would need much persuasion that the third party was not liable in tort. But it does not seem to me to follow that a third party is necessarily liable in tort for any interference with any right properly regarded as secondary, particular [sic] where that right is contingent'. For illuminating discussion, see David Foxton, 'How Useful Is Lord Diplock's Distinction between Primary and Secondary Obligations in Contract?' (2019) 135 LQR 249, 268–70. Foxton makes the powerful point that it would be 'unappealing' for tort law to protect primary contractual rights as well as secondary rights that have merged in primary obligations derived from judgments but not the secondary rights prior to such merger.

⁴⁷ See the text accompanying n 41.

C. Type and Status of the Judgment

In *Marex*, *Lakatamia*, and *Gee*, the judgments in issue had been entered following a trial. It might be queried, therefore, whether the *Marex* tort safeguards rights in summary and default judgments. There is no authority on the point but there is no obvious reason why the protection afforded by the *Marex* tort should be limited to particular types of judgment. Further, if a defendant induces a breach of rights established by a judgment, it presumably makes no difference that the judgment concerned was, at the relevant time, being appealed (even if the appeal is subsequently allowed) or subject to a stay of execution. The tort of inducing a breach of contract cannot be committed where the contract breaker has a right to rescind the agreement.⁴⁸ A parallel rule presumably applies to the *Marex* tort. In particular, if, exceptionally, a judgment is rescinded because it was obtained by fraud,⁴⁹ it will be incapable of forming the basis of a claim based on the decision in *Marex*.

D. Orders

One noteworthy feature of the decision in *Gee* is that the judge repeatedly spoke of the *Marex* tort as protecting rights established by orders rather than rights enshrined in judgments.⁵⁰ It might be suggested that nothing turns on this given that the order in issue in *Gee* was an order consequent upon a judgment. However, the distinction between judgments and orders⁵¹ will make a difference for present purposes when, as is typical on *ex parte* applications, the court makes an order without delivering a judgment. Suppose that C applies *ex parte* for an interim injunction against D1 restraining him from carrying out some activity on his land that, if undertaken, would damage property belonging to C. If the court grants the injunction, it is unlikely to hand down any judgment and will simply make an order that sets out what D1 must not do. If D2 procures a breach by D1 of the injunction resulting in C's suffering damage, has D2 committed the *Marex* tort? D2 will, of course, likely be liable for the tort of unlawful means conspiracy.⁵² But whether or not this is so, the question remains whether D2 has committed the *Marex* tort. Given that the courts have recognized the *Marex* tort, it is difficult to identify any compelling reason for restricting it to rights established by judgments. Indeed, it might well be that, properly understood, the *Marex* tort in fact applies only to rights created by orders in circumstances where orders are instruments that require one or both of the parties to do something whereas, strictly speaking, judgments do not themselves oblige anyone to do anything.⁵³

⁴⁸ *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch); [2007] 1 All ER 542 [33].

⁴⁹ Regarding the power to rescind judgments obtained by fraud, see *Takhar v Gracefield Developments Ltd* [2019] UKSC 13; [2020] AC 450.

⁵⁰ *Gee* (n 20) [10]–[15].

⁵¹ As to the distinction, see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) [23.6].

⁵² Contempt of court constitutes unlawful means for the purposes of the tort of unlawful means conspiracy: *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2020] AC 727 [16].

⁵³ Consider Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2020) 21: 'Judgments at Law are not strictly orders, as they do not state that the defendant or anyone else must do something. . . . A Judgment for damages does not say that the defendant has a legal duty to pay a sum of money, or that the defendant owes the claimant a sum of money, or even that the defendant should pay the claimant the sum of money. Nor does it transfer ownership in money or other property to the claimant.'

E. Mere Omissions

In *Marex*, the defendant was alleged to have dissipated the judgment debtors' assets. He argued that this did not constitute the *Marex* tort and that nothing short of steps taken to prevent the judgment debt from being discharged was required. Rightly, Knowles J gave this submission short shrift. He said that 'dissipation and . . . non-payment were two sides of the same coin'.⁵⁴ However, by this he did not mean that a mere failure to take steps to cause a judgment debtor to discharge a debt will suffice to establish liability. Just as mere omissions will not amount to the tort of inducing a breach of contract,⁵⁵ they will not constitute the *Marex* tort. Rather, Knowles J's point was that the dissipation of a judgment debtor's assets which thereby renders the judgment debtor incapable of discharging the liability owing under the judgment is itself a positive step taken to prevent the debt from being discharged. Any such active step will, if done with the requisite mental element, constitute the *Marex* tort.⁵⁶

F. The Need for an Actual Breach

Although none of the cases decided to date regarding the *Marex* tort says so in terms, it is clear that the defendant must procure an actual violation of the claimant's rights established by the judgment in issue in order for liability to arise. This follows by analogy with the tort of inducing a breach of contract. According to the current orthodoxy, that tort, and as Ewan McKendrick explains, 'is an example of accessory or secondary liability'.⁵⁷ That is to say, it is actionable only where there is an actual breach of contract. The logic is that since the tort is a form of derivative liability, there is no possibility of its being committed unless the wrong on which it is parasitic—a breach of contract—exists.⁵⁸

G. The Rule in *Said v Butt*

Pursuant to the rule in *Said v Butt*,⁵⁹ an employee (or director) will not be liable for inducing their employer (or company) to breach a contract provided that the employee (or director) acts *bona fide* within the scope of their authority. In the eponymous case, McCardie J explained the logic on which the rule rests as follows:

[the employee's] acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the

⁵⁴ *Marex* (n 2) [25].

⁵⁵ cf *Union Traffic Ltd v Transport and General Workers' Union* [1989] ICR 98 (CA) 106 (mere presence sufficient).

⁵⁶ *Lakatamia* (n 3) [127(4)].

⁵⁷ Ewan McKendrick, *Contract Law* (14th edn, Red Globe Press 2021) 158. For criticism of the accessory liability theory and doubts regarding the extent to which the law actually embraces it, see John Murphy, *The Province and Politics of the Economic Torts* (Hart Publishing 2022) ch 3.

⁵⁸ '[O]ne cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability': *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1 [44] (Lord Hoffmann) (hereafter *OBG*). See also at [189].

⁵⁹ *Said v Butt* [1920] 3 KB 497 (KBD).

agent under the *Lumley v Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract.⁶⁰

‘Grave reservations’ have been expressed regarding the rule in *Said v Butt*.⁶¹ Doubts about its status are magnified given that the courts have rejected the theory that an employee’s acts are attributed to the employer in the context of vicarious liability,⁶² to which theory McCardie J clearly subscribed. However, as things presently stand, it remains part of the law governing the tort of inducing a breach of contract.⁶³ Does the rule apply also to the *Marex* tort? In *Gee*, HHJ Paul Matthews proceeded on the basis that it does, although he considered that it was well arguable that its requirements were unsatisfied on the facts of the case.⁶⁴

H. Defences

As we have seen, the courts have accepted that the *Marex* tort finds a close analogy with the tort of inducing a breach of contract. The latter tort is subject to the defence of justification. In *Lakatamia*, Bryan J held that the analogy broke down in this regard. He considered that the *Marex* tort is not qualified by that defence. He said:⁶⁵

[w]hilst there may be limited circumstances in which it is reasonable to induce a breach of a contractual right (a right which by its very nature is a right created by contract) in the furtherance of, by way of example, a moral obligation, I cannot see any room for an equivalent defence in relation to rights established by due process and enshrined in a judgment.

The authors of *Civil Fraud* disagree with Bryan J. They write that his claim that justification is not a defence to the *Marex* tort ‘is considered too broad a proposition.’⁶⁶ They then observe that Bryan J’s view entails ‘a judgment elevating the status of the claimant’s right vis-à-vis the inducer beyond that given to him by the contract, a conclusion which is difficult to support’. With respect, however, Bryan J’s position is readily supportable and, indeed, is correct. It is true that it involves elevating rights established by judgments above rights owing under contracts. But this is consonant with authority. Thus, in *Zavarco plc v Nasir* Sir David Richards observed that when judgment is entered, the claim against the defendant merges in and is replaced by ‘an obligation of a higher nature.’⁶⁷ A further significant point in favour of Bryan J’s view lies in the fact that there is an established mechanism for challenging judgments, namely, the appellate process. In view of the system for appeals, it would make no sense to permit persons to induce judgment debtors to disregard their obligations on the basis that doing so is justified. Leaving aside exceptional situations (such as, for example,

⁶⁰ *ibid* 505–06.

⁶¹ *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 (CA) 289 (Dillon LJ).

⁶² See, eg, *Majrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 [15].

⁶³ The rule was recently considered in *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB), [2019] Bus LR 1532 and *Northamber Plc v Genee World Limited* [2023] EWHC 3562 (Ch).

⁶⁴ *Gee* (n 20) [16]–[17].

⁶⁵ *Lakatamia* (n 3) [131].

⁶⁶ Grant and Mumford, *Civil Fraud* (n 5) [3.002A] (footnote omitted).

⁶⁷ *Zavarco plc v Nasir* [2021] EWCA Civ 1217; [2022] Ch 105 [37].

instances in which judgments can be rescinded), the only way in which it is proper to challenge rights established by judgments is for the judgment debtor to appeal.

Before moving on, it is worth considering in more detail precisely why the defence of justification is unavailable as regards the *Marex* tort. Some torts are not subject to a defence of justification because the absence of justification is built into their elements. John Gardner called such wrongs ‘fault-anticipating’.⁶⁸ A good example of such a tort is that of negligence. Since it is an element of that tort that the defendant engaged in unreasonable conduct, it is conceptually impossible for it to be subject to defences that are premised on the defendant’s conduct being reasonable.⁶⁹ The idea of justified negligence is oxymoronic. Another example of a fault-anticipating wrong is that of unlawful means conspiracy. Because the ingredient of unlawful means is satisfied only by conduct that is both unjustifiable and unexcused,⁷⁰ it follows that there is no logical room for any plea of justification. Conversely, a given tort might not admit of any (or certain) justification-type defences not because its elements require proof of unreasonable conduct but because the law simply does not care about the defendant’s reasons (or certain of them) for committing it.⁷¹ They are simply afforded no weight by virtue of the law’s authority.⁷² It appears from Bryan J’s remarks quoted earlier that the *Marex* tort falls into the latter category. The absence of justification is not an ingredient of the tort. Rather, the courts simply refuse to give any weight to reasons that a defendant might have had for committing it, since doing so would be inconsistent with the authority by which judgments are underpinned and incompatible with the existence of the appellate system.

I. Remoteness

What remoteness test applies to the *Marex* tort? Unfortunately, it is not possible to glean any guidance by analogy to the tort of inducing a breach of contract in this regard because it appears, rather surprisingly, that there is no authority as regards the remoteness rule applicable to that wrong.⁷³ Hazel Carty writes with reference to the *Lumey v Gye* tort that ‘[a]ll intended damage will be recoverable, as will non-remote consequences’,⁷⁴ but this simply invites the question when a consequence is non-remote. In considering the position as concerns the *Marex* tort, it is important to observe that it cannot be committed without an intention to induce a violation of the claimant’s rights established by the judgment in issue. This being the case, there is a firm basis for supposing that a claim for the *Marex* tort is not subject to any remoteness restrictions since, as Lord Lindley put it in *Quinn v Leatham*, ‘[t]he intention to injure the plaintiff negatives all excuses and disposes of any question of

⁶⁸ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 151 (hereafter Gardner, *Offences and Defences*).

⁶⁹ This has not deterred some judges from trying to fashion such defences: see James Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 53–54.

⁷⁰ *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2020] AC 727 [10] (hereafter *JSC BTA Bank v Khrapunov*).

⁷¹ This is presumably how Donal Nolan understands the rule in *Rylands v Fletcher* given his view that it is not subject to any justification-type defences: Donal Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’ (2005) 121 LQR 421, 436 (hereafter Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’).

⁷² For discussion in a different context, see Gardner, *Offences and Defences* (n 68) 147–48.

⁷³ Although in *Boxfoldia Ltd v National Graphical Association* (1982) [1988] ICR 752 (QBD) 760 Saville J proceeded on the assumption that the relevant test was one of reasonable foreseeability of the kind of damage.

⁷⁴ Hazel Carty, *The Economic Torts* (2nd edn, OUP 2010) 44.

remoteness of damage.⁷⁵ It is true that an intention to violate rights enshrined by a judgment is not precisely the same thing as an intention to injure. However, for practical purposes a defendant who intends to induce a violation of a claimant's rights in a judgment debt will intend to injure the latter. The two are co-extensive.

J. Remedies

Damages for the *Marex* tort are assessed by reference to the same rules which apply to the tort of inducing a breach of contract.⁷⁶ As concerns injunctive relief, there is no reason why the courts should not be able to injunct a person from procuring a violation of rights embodied in a judgment. Since an injunction can be obtained to prevent a person from inducing a breach of a future contract,⁷⁷ one would expect the same principle to obtain as regards the *Marex* tort.

K. Procedure

Does a claimant who sues in respect of the *Marex* tort need to issue separate proceedings, or can he or she seek a remedy in the litigation in which the judgment was handed down? In *Gee*, HHJ Paul Matthews said that '[i]n principle, I can see no reason why it should be necessary to start a fresh claim in respect of a wrong done by procuring a breach of an order when the court is already seised of the original proceedings and may in any event be asked to make other orders in respect of the execution of that order.'⁷⁸ He considered that the position was *a fortiori* where, as in *Gee*, the persons said to have committed the *Marex* tort were already parties to the original proceedings.⁷⁹ The judge added that the court could make appropriate orders in the extant proceedings regarding pleadings, disclosure, and evidence pursuant to the power to direct an inquiry as to any claim.⁸⁰ He also held that it was no impediment to the claimant advancing a claim in the existing proceedings that the order consequent upon the judgment did not contain a liberty to apply. The logic was that

such a liberty is implied for the purposes of enabling the party having the benefit of the order to complain that the party with obligations to perform under the order has not performed them, and to have the order modified to take account of what the performing party has done or not done since the order was made.⁸¹

⁷⁵ *Quinn v Leatham* [1901] AC 495 (HL) 537. Consider also the remarks of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA) 167. For further discussion of this point, see James Goudkamp and Eleni Katsampouka, 'Punitive Damages and the Place of Punishment in Private Law' (2021) 84 MLR 1257, 1271–77.

⁷⁶ *Lakatamia* (n 3) [949].

⁷⁷ *Union Traffic Ltd v Transport and General Workers' Union* [1989] ICR 98 (CA) 106, 111.

⁷⁸ *Gee* (n 20) [15]. See also [24].

⁷⁹ *ibid* [15].

⁸⁰ See CPR Practice Direction 40A.

⁸¹ *Gee* (n 20) [21].

IV. What Does the *Marex* Tort Add?

What is the practical utility, if any, of the *Marex* tort? Although its arrival on the scene was greeted with a certain amount of fanfare,⁸² it might be thought that it is in fact of little importance. Knowles J seemed to suggest as much in *Marex* itself. He ‘question[ed] whether the facts of the present case are widespread so that the tort would be invoked more widely.’⁸³ Perhaps more significantly, it might be contended that it does not add much to other torts, particularly the torts of unlawful means conspiracy and causing loss by unlawful means. It might also be argued that its goals are already sufficiently secured by the court’s jurisdiction to make freezing orders. Contrary to the foregoing, in this section it is argued that the *Marex* tort has the potential to move the needle.

A. Relationship with Other Torts

In *Marex*, Knowles J’s conclusions regarding the *Marex* tort made no difference to his decision since the claimant also established that the court had jurisdiction to try its claim for the tort of causing loss by unlawful means, which claim was based on the same factual allegations as the claim for the *Marex* tort.⁸⁴ Similarly, the claim in respect of the *Marex* tort added nothing to the proceedings in *Lakatamia*, since the conduct that underpinned that tort also constituted the tort of unlawful means conspiracy. And in *Gee*, although it appears that the claimant only expressed an intention to pursue a remedy in the *Marex* tort, remarks that the court made regarding the coordination between the defendants⁸⁵ leave little room to doubt that the claimant could have also advanced a credible claim for the tort of unlawful means conspiracy. All of this suggests that, as a practical matter, the *Marex* tort does not add anything. Having said that, there are certain ways in which the *Marex* tort has the potential to make a difference.

The *Marex* tort’s sphere of influence is larger than that of the tort of unlawful means conspiracy insofar as the latter, but not the former, requires there to be a combination. A person who induces a judgment debtor to breach rights embodied in a judgment by making threats against the latter will be liable for (at least) the *Marex* tort,⁸⁶ but they will presumably not be liable for the tort of unlawful means conspiracy. The threats made will be inconsistent with the existence of a combination. Relatedly, whereas it might be impossible for the *alter ego* of a company to conspire with the latter,⁸⁷ there is no impediment, subject to possible arguments regarding the rule in *Said v Butt*,⁸⁸ to such a person inducing the company to act contrary to the rights enshrined in a judgment to which it is subject. Similarly, the *Marex* tort’s ambit is wider in certain respects than that of the tort of causing loss by unlawful means.⁸⁹

⁸² See the text accompanying nn 4–5.

⁸³ *Marex* (n 2) [27].

⁸⁴ *ibid* [36].

⁸⁵ *Gee* (n 20) [12].

⁸⁶ Consider the position in this regard as concerns the tort of inducing a breach of contract: see *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) [23.38] (hereafter *Clerk & Lindsell on Torts*).

⁸⁷ The Court of Appeal has left open the question of whether the *alter ego* of a company can conspire with it: *Raja v McMillan* [2021] EWCA Civ 1103.

⁸⁸ See the text accompanying nn 65–70.

⁸⁹ For recent consideration of the boundaries of the unlawful means tort at the ultimate appellate level, see *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24, [2022] AC 959.

The unlawful means tort requires proof that the defendant used unlawful means against a third party which interfered with the latter's ability to deal with the claimant. By contrast, the commission of the *Marex* tort is not conditional upon the inducement constituting unlawful means against the judgment debtor.

B. Freezing Orders

What does the *Marex* tort add to the court's jurisdiction to make freezing orders? Both the *Marex* tort and freezing orders have the same end in view. They are both directed at preventing a claimant from being unjustly deprived of the fruits of a judgment. Freezing orders do this by enjoining respondents, usually before judgment has been entered but sometimes after judgment has been delivered⁹⁰ as in *Marex* itself, from dissipating their assets. The *Marex* tort aspires to protect interests in rights embodied in judgments by preventing third parties from intentionally inducing a violation of those rights. It follows that the *Marex* tort and freezing orders are intimately connected with each other. However, there are also some significant points of distinction. Freezing orders are backed up by the court's power to punish for contempt persons who breach them or who assist others to do so. That jurisdiction is not, however, compensatory.⁹¹ Persons who suffer damage because of a contempt of court, including a breach of a freezing order, cannot, at least as the law presently stands, invoke that jurisdiction to obtain redress for the loss sustained. By contrast, the *Marex* tort sounds, of course, in damages. Another difference lies in the fact that the only conduct that will breach a freezing order, relevantly, is steps taken to dissipate assets outwith the scope of any exceptions to which the order is subject. Although each of *Marex*, *Lakatamia*, and *Gee* concerned the dissipation of assets, the *Marex* tort can be committed wherever rights established by a judgment are violated and regardless of whether the conduct induced involves the dissipation of assets. For example, if C sues D for defamation and obtains a final injunction restraining republication of a defamatory statement and T intentionally induces D to breach that injunction, T will have committed the *Marex* tort.

V. Wider Issues

This section addresses two associated issues. The first is whether the *Marex* tort is in fact a new tort. The second is whether the line of authority that descends from *Marex* supports the recognition of a tort of contempt.

⁹⁰ See the text accompanying n 31.

⁹¹ 'Proceedings for contempt of court are always in a rather special category because they are intended to uphold the authority of the court and to make certain that its orders are obeyed. They are not intended to provide solace or compensation to the plaintiff. If the plaintiff wants compensation, she must seek it in other forms': *Johnson v Walton* [1990] 1 FLR 350 (CA) 353 (Lord Donaldson MR); cf the remarks of Lord Mance in *Customs & Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181 [101], who seemed to consider that compensation is among the purposes of the contempt jurisdiction.

A. Is the *Marex* Tort a Discrete Tort?

To this point, we have assumed, as the foundational cases have generally done, that the *Marex* tort is a novel tort. But is this assumption correct? Perhaps the decisions recognizing the *Marex* tort, properly understood, merely expand the boundaries of the tort of inducing a breach of contract such that that tort also protects against third-party interference with rights established by judgments. Before addressing this issue, it is first worth considering whether anything turns on how it is resolved.⁹² In *Chocosuisse Union des Fabricants Suisse de Chocolat v Cadbury Ltd*, Laddie J asserted that it was ‘a matter of semantics’ whether one is dealing with a ‘separate and new tort’ or ‘merely a new branch of an existing tort.’⁹³ He presumably held this view on the basis that that which ultimately matters is whether the defendant’s conduct concerned is tortious. However, Laddie J’s view is difficult to support for at least two reasons. First, the fact that a tort is novel means that claims in respect of it should be largely impervious to being disposed of without a trial, at least absent its already having been authoritatively decided that the tort does not exist. That is because it is well established that the power to enter summary judgment or to strike out a claim should be exercised sparingly, if at all, where the claim is based on a developing area of jurisprudence.⁹⁴ Of course, it might be said that this principle extends also to a new limb of an extant tort. But one would expect the rule to apply with particular force where one is dealing with a novel tort.

Second, if a particular liability rule is simply an appendage of another tort, rules applicable to the latter will prima facie extend to the former. An excellent but certainly not the only illustration of the courts’ employing this reasoning concerns the rule in *Rylands v Fletcher*. The courts consider that that rule is simply an appendage of the tort of private nuisance.⁹⁵ It is said to be ‘essentially concerned with an extension of the law of nuisance to cases of isolated escape.’⁹⁶ This offshoot thesis⁹⁷ has prompted the courts to hold that at least certain principles that govern the tort of private nuisance extend to the rule in *Rylands v Fletcher*.⁹⁸ For example, because the tort of private nuisance is a tort to land and hence does not afford a remedy for personal injuries, the same has been said to be true of the rule in *Rylands v Fletcher*.⁹⁹ In short, if one is concerned with an offshoot of an existing tort, it is likely that it will inherit at least some of the latter’s traits. Conversely, novel torts are unlikely, or at least less likely, to be subject to certain principles that are peculiar to other wrongs.

Is, then, the *Marex* tort a freestanding head of liability? It is, on any view, very closely associated with the tort of inducing a breach of contract. Its elements are nearly identical to those of the latter. Moreover, the courts have made it clear that the *Marex* tort is extrapolated from that of inducing a breach of contract. These circumstances suggest that the

⁹² The issues here are explored in greater detail in James Goudkamp, ‘New Torts’ in David Rolph, John Eldridge, and Timothy Pilkington (eds), *Australian Tort Law in the 21st Century* (Federation Press 2023) (forthcoming).

⁹³ *Chocosuisse Union des Fabricants Suisse de Chocolat v Cadbury Ltd* [1998] RPC 117 (Ch D) 127.

⁹⁴ See, eg, *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2020] AC 1045 [48].

⁹⁵ ‘The rule in *Rylands v Fletcher* is a sub-species of nuisance’: *Transco plc v Stockport MBC* [2003] UKHL 61, [2004] 2 AC 1 [9] (Lord Bingham) (hereafter *Transco*).

⁹⁶ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL) 304 (Lord Goff).

⁹⁷ For compelling criticism of the view that the rule in *Rylands v Fletcher* is an offshoot of the tort of private nuisance, see John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643 and Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’ (n 71). For argument that the rule in *Rylands v Fletcher* might in fact be an extension of cattle trespass, see Percy Winfield, ‘The Foundation of Liability in Tort’ (1927) 27 Colum L Rev 1, 7.

⁹⁸ See, eg, *Transco* (n 95) [9].

⁹⁹ *ibid.*

Marex tort is not truly a discrete wrong. Consistent with this, in *Marex* Lord Sales repeatedly referred to the cause of action for inducing a violation of rights in the judgment as ‘the *Lumley v Gye* claim.’¹⁰⁰ Similarly, the authors of *Civil Fraud* deal with the *Marex* tort within a chapter concerned with the tort of inducing a breach of contract.¹⁰¹ The authors of *Clerk & Lindsell* likewise address the *Marex* tort within a section of text relating to the latter wrong.¹⁰² Conversely, several of the *Marex* tort’s characteristics support the conclusion that it is in fact a freestanding rule. As we have seen,¹⁰³ liability in the *Marex* tort is not subject to the defence of justification, unlike the tort of inducing a breach of contract.¹⁰⁴ Furthermore, the *Marex* tort has no necessary connection with contractual obligations. It can be committed even though the judgment in issue was entered other than for a breach of contract.¹⁰⁵ Only time will tell, but the better view might be that the *Marex* tort is a discrete wrong.

B. A Tort of Contempt of Court?

The *Marex* tort is, in all but name, a tort of contempt of court. That is because a third party who commits it will have deliberately interfered with the course of justice and hence be in contempt.¹⁰⁶ Since the *Marex* tort cannot be committed without the tortfeasor being in contempt, it might be suggested that its recognition supplies impetus for the establishment of a tort of contempt. In *Chapman v Honig*,¹⁰⁷ a landlord issued a tenant with a notice to quit in retaliation for the latter giving evidence against the landlord’s interests in a case to which the landlord had been a party. That was a contempt of court. A majority of the Court of Appeal held that it was not actionable in tort, principally on the logic that the contemnor had a contractual right to do what he did. Although the majority did not rule out the possibility of recognizing a tort of contempt, they were inclined against the creation of a new wrong in this regard. Subsequent courts have since proceeded on the footing that contempt is not a tort.¹⁰⁸ However, and significantly, in *JSC BTA Bank v Khrapunov*,¹⁰⁹ Lord Sumption and Lord Lloyd-Jones left the door ajar in this regard. It might well be that the recognition of the *Marex* tort will supply the leverage needed for it to be opened.

¹⁰⁰ *Marex* (SC) (n 12) [111], [141], [199] and [213].

¹⁰¹ Grant and Mumford, *Civil Fraud* (n 5) ch 3.

¹⁰² *Clerk & Lindsell on Torts* (n 86) para 23.26.

¹⁰³ See the text accompanying nn 71–77.

¹⁰⁴ For consideration in a different context of whether a distinctive defences regime supports the conclusion that one is dealing with a discrete cause of action, see Lionel Smith, ‘Defences and the Disunity of Unjust Enrichment’ in Andrew Dyson et al (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016).

¹⁰⁵ See the text accompanying n 41.

¹⁰⁶ ‘In general, it is a contempt of court for anyone, whether party to the proceedings or not, deliberately to interfere with the due administration of justice’: *Attorney General v Punch Ltd* [2002] UKHL 50, [2003] 1 AC 1046 [66] (Lord Hope).

¹⁰⁷ *Chapman v Honig* [1963] 2 QB 502 (CA).

¹⁰⁸ See, eg, *Stobart Group Ltd v Elliott* [2013] EWHC 797 (QB) [108] (HHJ Pelling QC): ‘There is no tort of “Contempt of Court”’.

¹⁰⁹ *JSC BTA Bank v Khrapunov* (n 70) [22].

VI. Conclusion

The decision to welcome the *Marex* tort into the hall of wrongs is a testament to the vitality of the law of torts and affirmation of Hoffmann J's remark in *Associated Newspapers Group plc v Insert Media Ltd* that tort law 'is not static' and 'that new forms of tort may develop'.¹¹⁰ It also evinces a growing tendency for private law to attach liability to the facilitation of others' wrongs. This chapter has sought to chart the boundaries of the *Marex* tort and to understand it against the backdrop of the policy in favour of the enforcement of judgments. It is too soon to tell whether it will make a meaningful difference in terms of the outcome of cases. However, the most important consequence of the *Marex* tort's recognition might lie in its supplying impetus for the creation of other civil wrongs.

¹¹⁰ *Associated Newspapers Group plc v Insert Media Ltd* [1988] 1 WLR 509 (Ch D) 514.