20 ESSEX STREET

BULLETIN

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Supreme Court gives green light to damages claims against those helping to hide frozen assets

David Lewis QC and Josephine Davies

The recent decision in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 confirms the power and range of the worldwide freezing order ("WFO"). The WFO claimant need not stop at obtaining quasi-criminal sanctions against those who breach or assist in the breach of a WFO. The WFO claimant can also claim damages for conspiracy against any person who assists the WFO defendant in hiding his assets. The claimant thus gains a new target to recover money using a substantive English law tort claim.

The Supreme Court also left open the door for claims against contemnors themselves for damages.

The jurisdictional aspect of the decision is also of general importance. It is now clear that the English court will have jurisdiction over the tort if the conspiracy is hatched in England (which may be likely if the WFO defendant's passport has also been confiscated).

Essential background

In 2009, the claimant (the Bank) sued Mr Ablyazov for embezzling billions of dollars of the Bank's funds and obtained a WFO against him. Mr Ablyazov breached the WFO, was found to be in contempt of court and sentenced to 22 months in prison. Mr Ablyazov fled the jurisdiction.

The bank made little recovery and, in 2015, began this action. The Bank alleges that in 2009, Mr Khrapunov (Mr Ablyazov's son-in-law) conspired with Mr Ablyazov to hide his assets (i.e. to commit a contempt of court). The questions arising were:

1. Could a conspiracy to commit a contempt of court be an unlawful means conspiracy?
2. Did the English court have jurisdiction (under Article 5(3) of the Lugano Convention) if the only act in England was the conspiratorial agreement?

Helping to breach WFO is an unlawful means conspiracy to injure

The definition of 'unlawful means conspiracy' was confirmed by the Supreme Court as "*conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose*". This is contrasted to the (irrelevant in this case) 'lawful means conspiracy' where the *predominant purpose* must be to injure the claimant.

The court found unlawful means conspiracy by reasoning as follows:

1. A criminal offence could suffice for 'unlawful means' provided it was objectively directed against the claimant – Total Network [2008] AC 1174. (NB this is not true for the economic tort of unlawful interference with economic interests).
2. Criminal contempt of court was thus an 'unlawful means' (even though it was punishable in *civil* proceedings).
3. The predominant purpose of the defendants was to further Mr Ablyazov's financial interests. This would create a matching detriment to the Bank as both men must have appreciated. This was sufficient for the offence to be objectively directed against the Bank.
4. Finally, the court rejected Mr Khrapunov's argument that public policy precluded this conclusion because a contemnor should only be exposed to criminal penalties at the discretion of the court.

An open door to claim damages for contempt of court?

Mr Khrapunov's public policy argument raised the question: 'can a claim be made simply for contempt of court?' - there is no clear answer to this in the authorities. The Supreme Court recognised that there were "*powerful dicta*" suggesting that the answer should be "no" but left the point open for argument saying "*we do not think that the last word has necessarily been said on this subject in this court*."

It appears, therefore, that in a suitable case, the Supreme Court could be willing to consider allowing a civil (damages) remedy for contempt of court.

Conspire in England, implement elsewhere, but still be sued in England

The Lugano Convention governed the jurisdiction issue because Mr Khrapunov was domiciled in Switzerland (but there is identical wording in Article 7(2) of the Brussels Recast Regulation). The Supreme Court held that the general rule that a defendant should be sued in his place of domicile would be displaced. Mr Khrapunov could be sued in England under Article 5 because England was "*the place where the harmful event occurred*."

Article 5(3) is interpreted as covering both "*(a) the place where the damage occurred and (b) the place of the event giving rise to it*" (C-21/76 Bier). The Supreme Court was concerned only with limb (b) (it had refused permission to appeal the decision on limb (a) that the relevant, proximate, damage occurred where the assets against which enforcement was sought were located, rather than in England where the WFO was held).

Reviewing the case law, including the CJEU's analogous decision on cartel damages claims (C-352/13 CDC), the Supreme Court confirmed that the place where the conspiratorial agreement was made is "*the place of the event which gives rise to and is at the origin of the damage*". Jurisdiction was established because "*the harmful event which set the tort in motion*" occurred in England.

Conclusion

This case demonstrates the potential power of the WFO and the strategic advantages for a claimant holding such an order. It remains to be seen, however, whether the Bank will succeed in establishing the conspiracy at trial.

The jurisdictional finding is of general application but, where international or more complex conspiracies are concerned, may not always be easy to apply due to challenges in pinpointing the harmful event which set the tort in motion.

If you require advice on any of the topics discussed in this briefing from David or Josephine, or any member of 20 Essex Street, please contact: clerks@20essexst.com

David Lewis QC

David has been in practice at 20 Essex Street since 2000 and took silk at the age of 36. He specialises in advocacy and advisory work in a wide range of general commercial and private international law disputes. His areas of expertise include energy and natural resources, civil fraud, shipping and commodities.

He has a particular focus on international arbitration and has acted as sole Counsel in arbitrations in London, Singapore, Hong Kong and Dubai. He appears in the High Court, Court of Appeal and Supreme Court and before various arbitration tribunals (including LMAA, LME, LCIA, ICC, SIAC and HKIAC), as well as in mediations.

He is also called to the Bar of the BVI, registered as a practitioner with rights of audience before the DIFC Courts and to appear before the Singapore International Commercial Court.

Read his online biography

Josephine Davies

Josephine has a broad commercial and competition law practice with a significant international element. She has considerable experience of applications related to injunctive relief and non-compliance with court orders and has been involved in important decisions on the meaning of the standard Commercial Court freezing injunction wording, purging of contempt of court and generally in relation to relief from sanctions (e.g. *Lakatamia v Su and Alfa-Bank v Reznik*).

Renowned legal directories describe her as "*An extremely clever barrister…*", "*Responsive knowledgeable and creative, she adds value at every stage*". Moreover, she is "A very strong advocate, very willing to go in to bat hard for her clients". She is equally at ease in court and in arbitration proceedings. Having studied chemistry, geology, physics and maths at Cambridge, to a Masters level, Josephine is comfortable with technical, scientific, financial and economic concepts.

Read her online biography

For further information about this bulletin contact: dking@20essexst.com

LONDON
20 Essex Street London WC2R 3AL
Tel +44 (0)20 7842 1200
Fax +44 (0)20 7842 6770

SINGAPORE
Maxwell Chambers, #02-09
32 Maxwell Road, Singapore 069115
Tel (+65) 62257230
Fax (+65) 62249462

clerks@20essexst.com