

# A cunning plan

*Susan Rosser and Catherina Yurchyshyn assess a recent decision on conspiracy to breach a court order*



*Susan Rosser (pictured top) is a partner and Catherina Yurchyshyn an associate with Mayer Brown International LLP*

**'An unlawful-means conspiracy occurs where two or more people act together unlawfully, intending to damage a third party, and do so.'**

In the recent case of *JSC BTA Bank v Khrapunov* [2018], the UK Supreme Court has held that contempt of court can constitute an unlawful means for the purpose of the economic tort of conspiracy to injure by unlawful means. The Supreme Court also held that the English court had jurisdiction over this claim because the conspiratorial agreement in question, which was the harmful event setting the tort of conspiracy in motion, happened in England. It did not matter that actions undertaken pursuant to the conspiracy took place abroad.

## Facts

The background to this case is the long-running dispute between JSC BTA Bank, a bank incorporated in Kazakhstan, and its former chairman and controlling shareholder, Mr Mukhtar Ablyazov, who fled to the UK in 2009 when the bank was nationalised. The bank alleged that Mr Ablyazov had embezzled some US\$6bn of its funds and obtained worldwide freezing orders over his assets. In 2011 the bank obtained an order committing Mr Ablyazov to prison for contempt of court for failing to disclose the true whereabouts of his assets. However, Mr Ablyazov fled the country before that judgment was handed down and his current whereabouts remain unknown. As a result, the bank has not succeeded in making significant recoveries of the sums owed to it.

The bank then turned its attention to Mr Ablyazov's son-in-law, Ilyas Khrapunov, a Kazakh national living in Switzerland. Mr Khrapunov was said to have assisted Mr Ablyazov in concealing the assets of Swiss, Belizean and Russian companies controlled by Mr Ablyazov from Mr Ablyazov's

creditors, knowingly in breach of the freezing and receivership orders in place, pursuant to an agreement the pair made in England in about 2009. The bank claimed that this breach of the orders in contempt of court constituted 'unlawful means' by which Mr Ablyazov and Mr Khrapunov had conspired to cause economic loss to JSC BTA Bank by putting Mr Ablyazov's assets outside the bank's reach. Being still in hiding, Mr Ablyazov took no part in these proceedings and the appeal was only concerned with Mr Khrapunov's position.

Unlawful-means conspiracy is one of a group of torts often loosely classified as 'economic torts', which are an exception to the general rule that there is no duty in tort to avoid causing a purely economic loss unless it is linked to some injury to person or property.

Lord Sumption and Lord Lloyd-Jones explained that the reason for the general rule is that (para 6):

... contract apart, common law duties to avoid causing pure economic loss tend to cut across the ordinary incidents of competitive business, one of which is that one man's gain may be another man's loss. The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy.

*Customs and Excise Commissioners v Barclays Bank plc*  
[2006] UKHL 28  
*JSC BTA Bank v Khrapunov*  
[2018] UKSC 19

An unlawful-means conspiracy occurs where two or more people act together unlawfully, intending to damage a third party, and do so. In contrast to lawful-means conspiracy, the claimant does not need to demonstrate that the conspirators' sole or predominant purpose was to injure another person. It is sufficient to show merely that they had an intention to do so – that is, it was one of the defendants' purposes – and that the conspiracy had caused financial loss to the third party.

### Purpose

The predominant purpose of the conspiracy between Mr Khrapunov and Mr Ablyazov had been to further Mr Ablyazov's financial interests, as they conceived them to be, through a dissipation and concealment of Mr Ablyazov's assets. At the same time, the court found that as the object of this conspiracy and the overt acts done pursuant to it was to prevent JSC BTA Bank from enforcing its judgments against Mr Ablyazov, the benefit to Mr Ablyazov was directly linked to the detriment to the bank, as both Mr Ablyazov and Mr Khrapunov must have appreciated.

Mr Khrapunov argued that as a principle of public policy, persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court and that a claim for civil damages could not be founded on a contempt of court. The Supreme Court found, by contrast, that there was a certain amount of authority to support the existence of a right to recover civil damages for contempt of court,

although there were also judgments that suggested otherwise. The Supreme Court did not need to decide this point in *JSC* because it considered that the case against a right of action for breach of a court order cannot be based on any 'preclusionary rule' of public policy. When members of the Appellate Committee of the House of Lords said in *Customs and Excise Commissioners v*

a person should be sued in his or her state of domicile, subject to certain limited exceptions.

In this case the relevant exception to that rule was Art 5(3) of the Lugano Convention, which permits a person domiciled in a state bound by the Lugano Convention to be sued in another state bound by the Lugano Convention:

*Mr Khrapunov argued that persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court and that a claim for civil damages could not be founded on a contempt of court.*

*Barclays Bank plc* [2006] that the 'sole remedy' for contempt is a criminal penalty, they had not been stating a principle of public policy, let alone a 'preclusionary rule'. They had simply been asserting that no private law right is engaged by a contempt. Lord Sumption and Lord Lloyd-Jones said (para 22):

... there is a world of difference between the mere absence of a relevant right and a rule of law precluding such a right even if the elements to support it otherwise exist.

Mr Khrapunov's second argument was that the English court lacked jurisdiction since the general rule in Art 2 of the Lugano Convention – to which the EU member states and Switzerland are signatories – is that

... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

### Decision

The Supreme Court upheld the Court of Appeal's conclusion that the event giving rise to and being the origin of the damage was the conspiratorial agreement in England which set the tort in motion. In entering into the agreement Mr Khrapunov would have encouraged and procured the commission of unlawful acts by agreeing to help Mr Ablyazov to carry the scheme into effect. This was sufficient for the English court to have jurisdiction to hear the claim, even though harmful acts undertaken pursuant to the conspiracy occurred outside England. ■

The  
Practical Lawyer

Saves you both  
time and money

### Monthly updates on:

- Commercial
- Conveyancing
- Crime
- Employment
- Family
- Land
- Landlord and tenant – commercial
- Landlord and tenant – residential
- Personal injury
- Planning and environment
- Procedure
- Professional
- Tax – VAT
- Wills, probate and administration

For a FREE sample copy: call us on 020 7396 9313  
or e-mail [subscriptions@legalease.co.uk](mailto:subscriptions@legalease.co.uk)