

Tort of conspiracy and jurisdiction: Supreme Court of the United Kingdom clarifies legal principles in *JSC BTA Bank (Respondent) v Khrapunov (Appellant)*

Summary

In *JSC BTA Bank (Respondent) v Khrapunov (Appellant)* [2018] UKSC 19, the Supreme Court found that Mr Khrapunov's actions, namely entering into and acting upon an agreement to assist his father-in-law Mr Ablyazov to dissipate and conceal Mr Ablyazov's assets in contempt of court, constituted the tort of conspiracy to cause financial loss to BTA Bank by unlawful means. The Court also held that it had jurisdiction since the conspiratorial agreement, which was the harmful event setting the tort of conspiracy in motion, happened in England.

Accordingly, Mr Khrapunov's arguments, namely that (a) contempt of court could not constitute "unlawful means" in the context of the tort of conspiracy and (b) the English Court lacked jurisdiction given that the harmful events were acts done outside England pursuant to the conspiratorial agreement, were unanimously dismissed.

Background to the dispute

The long and colourful background to the case involves Mr Khrapunov's father-in-law, Mr Mukhtar Ablyazov, formerly chairman and controlling shareholder of Kazakhstan's BTA Bank, and subsequently UK fugitive, defending multiple proceedings brought by BTA Bank alleging misappropriation of its funds.

The present claim was brought by BTA Bank against Mr Ablyazov and Mr Khrapunov in 2015, the former's whereabouts being presently unknown, the latter domiciled in Switzerland. BTA Bank alleged that Mr Khrapunov, being aware of freezing and receivership orders over Mr Ablyazov's assets previously granted by the English Courts, entered into a "combination" or understanding with Mr Ablyazov to help to dissipate and conceal his father-in-law's assets. Mr Ablyazov took no part in these proceedings, and the appeal was only concerned with Mr Khrapunov's position.

Tort of conspiracy and contempt of court

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.

Conspiracy takes two forms: (i) conspiracy to injure, where the acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant ("lawful means" conspiracy) and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, but injury to the claimant is not the predominant purpose ("unlawful means" conspiracy). In either case, there is no just cause or excuse for the "combination" with others.

Since conspiracy is a form of primary liability, rather than simply a form of joint liability, the question of what constitutes unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means.

The Court found that the unlawful means relied upon in this case were the criminal contempt of court albeit that the offence was punishable in civil proceedings. 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, as the object of this conspiracy and the overt acts done pursuant to it was to prevent BTA Bank from enforcing its judgments against Mr Ablyazov, the benefit to Mr Ablyazov was directly linked to the detriment to BTA Bank, as both Mr Ablyazov and Mr Khrapunov must have appreciated.

Further, Mr Khrapunov's Counsel submitted that the existence of a claim for civil damages arising from conspiracy to commit contempt of court would be inconsistent with public policy because persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court. The Supreme Court was satisfied that there was no such public policy.

Tort of conspiracy and jurisdiction

Mr Khrapunov's second argument was that the English Court lacked jurisdiction since the general rule in article 2 of the Lugano Convention is that 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 article 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 "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

Article 5(3) of the Lugano Convention is substantially identical to articles 5(3) of the Brussels Convention and Brussels Regulation (Council Regulation (EC) No 44/2001), and as such the Supreme Court considered case law emanating from the Court of Justice of the European Union ("CJEU") in its decision. In particular, the CJEU had interpreted article 5(3) of the Brussels Convention as intending to cover both (a) the place where the damage occurred and (b) the place of the event giving rise to it.

In this case, 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. Therefore, the English Court possessed the requisite jurisdiction.

Conclusions

The case provides useful guidance both on the development of the modern tort of conspiracy, and its present conclusions in that "contempt of court" could constitute the required "unlawful means" for the tort of conspiracy to cause loss by unlawful means to be made out.

Further, in considering jurisdiction in tort claims under the Lugano Convention, the place where the relevant harmful event which set the tort in motion takes place is significant insofar as it provides an exception to the general rule of suing persons in their countries of domicile.

If you have any questions or comments in relation to the above, please contact Susan Rosser or Catherina Yurchyshyn, or your usual Mayer Brown contact.

Susan Rosser

Partner, London
srosser@mayerbrown.com
T: +44 20 3130 3358

Catherina Yurchyshyn

Associate, London
cyurchyshyn@mayerbrown.com
T: +44 20 3130 3962

Americas | Asia | Europe | Middle East | www.mayerbrown.com

MAYER • BROWN

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and private clients, trusts and estates.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown is a global services provider comprising legal practices that are separate entities, including Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated (collectively the "Mayer Brown Practices"), and affiliated non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website.

"Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2018 Mayer Brown. All rights reserved.

Attorney advertising. Prior results do not guarantee a similar outcome.