



NEW SQUARE

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JSC BTA Bank v Khrapunov & Unlawful Means Conspiracy: The Search for Clarity Continues

Introduction

The Supreme Court handed down its judgment in JSC BTA Bank v Khrapunov [2018] UKSC 19, the latest in a long line of decisions concerning Mr Ablyazov, on 21 March 2018. The decision will now sit on the shelf of economic torts lawyers, next to those of the House of Lords in OBG Ltd v Allan [2008] AC 1 and Revenue and Customs Commrs v Total Network SL [2008] 1 AC 1174. Much like those decisions, it does not mark the last word in this area of the law. It goes some way to elucidating the boundaries of the enquiry as to which acts may serve as “unlawful means”, in an unlawful means conspiracy. However, precisely which acts will so serve remains as open a question as it ever did: quite deliberately so, it would seem from the judgment.

In the more concrete aspects of the decision, the Supreme Court held that:

- 1) Contempt of court constitutes an unlawful means for the purposes of an unlawful means conspiracy.
- 2) In determining jurisdiction for torts under the Lugano Convention (and, by reason of largely identical provisions, the recast Brussels Regulation), the Court should be looking to identify the event which “sets the tort in motion” when ascertaining the place of the relevant “harmful event”. In a conspiracy, that will be the place where the “conspiratorial agreement” was first reached. Here, that was England, and so the English Court enjoyed jurisdiction over the claim.
- 3) The existence of a private law action for damages for contempt of court is, as a minimum, arguable.

Those aspects of the decision are easy enough to follow from a reading of the judgment. The focus of this article is on the potentially more problematic aspects of the decision, and on the implications it may have for claims in unlawful means conspiracy more generally.

The Facts

Mr Ablyazov, the former chairman and controlling shareholder of JSC BTA Bank, fled to England and was granted asylum in 2009. He was promptly sued, the Bank alleging that he had embezzled some \$6bn. It obtained worldwide freezing orders and the usual associated orders for disclosure as to his assets. In 2010 the High Court appointed receivers over his assets. Later, it became clear that

Mr Ablyazov had failed to disclose significant assets, which he had sought to place beyond reach through a web of undisclosed companies. He was sentenced to 22 months' imprisonment for contempt of court, and has since disappeared.

The Bank then brought a claim against Mr Ablyazov and his son-in-law, Mr Khrapunov, who is based in Switzerland. It alleged that the two men were involved in an unlawful means conspiracy, pursuant to which Mr Khrapunov - aware of the freezing and receivership orders - entered into a combination/agreement with Mr Ablyazov to help dissipate and conceal his assets. Mr Khrapunov was said to have played a key role in dealing with assets held by foreign companies, and in concealing what had become of them.

The "unlawful means" relied upon were repeated breaches of the freezing and receivership orders, in contempt of court. The first instance judge held that the agreement to conspire was hatched in England. This entailed that jurisdiction was founded in England, notwithstanding that all other steps taken pursuant to the conspiracy occurred outside England. He further held that contempt of court constituted an unlawful means for the tort of unlawful means of conspiracy. Mr Khrapunov appealed to the Court of Appeal and to the Supreme Court on both points; both times unsuccessfully.

Economic Torts & Conspiracy

The Supreme Court's decision is interesting, both in providing a useful explanation as to the general judicial caution in approaching the economic torts, and in attempting to provide a unifying rationale underpinning the two species of conspiracy.

Lords Sumption and Lloyd-Jones sound the following general cautionary note as to the economic torts:

"the economic torts are a major exception to the general rule that there is no duty in tort to avoid causing a purely economic loss unless it is parasitic upon some injury to person or property. The reason for the general rule is that, 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. The elements of the four established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle."

They then turn their attention to the tort of conspiracy. Observing, that "of all the economic torts [the tort of conspiracy] is the one whose boundaries are perhaps the hardest to define in principled terms", they nevertheless proceed to attempt to give some definition to those boundaries. The key features of that endeavour can be summarised as follows.

- 1) First (at paragraph 8), they deliberately adopt the nomenclature of (i) "lawful means" conspiracy and (ii) "unlawful means" conspiracy. This is helpful, as different commentators and authorities sometimes adopt different terms for these same concepts, which only adds to confusion in this area. It is hoped that these simple terms will be generally adopted in future.

- 2) Second, they stress (at paragraph 9) that:
 - a. either species of the tort is actionable as a distinct tort, and is not simply a particular form of joint tortfeasance;
 - b. liability is not a form of secondary liability, but a primary liability. In the words of Lord Wright in Crofter Hand Woven Harris Tweed Ltd v Veitch [1942] AC 435, a claimant has a right “not [to] be damnified by a conspiracy to injure him”.
- 3) Third, they underline (at paragraph 13) that, whilst both the conspiracy torts are torts of intention, the nature of the intention differs between the two:
 - a. The defining feature of a “lawful means” conspiracy is a predominant intention to injure the claimant.
 - b. An “unlawful means” conspiracy is characterised by the use of unlawful means directed against the claimant so as to advance the defendant’s own interests, with the inevitable and foreseeable (and, in that sense, intended) result that injury will result to the claimant.

None of that is especially novel, but it is helpful to have these tenets gathered in one, authoritative, place. So far, so good.

Absence of Just Cause?

Arguably less satisfactory, however, is the attempt to define what it is that makes both strains of conspiracy actionable as such, by reference to an “absence of just cause or excuse”.

This is explained as follows at paragraph 10:

“A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse for the combination.”

Insofar as it touches on unlawful means conspiracy, that explanation is digestibly expressed in binary, black and white terms: the use of unlawful means necessarily equates to an absence of a just cause or excuse.

However, in the very next paragraph their Lordships appear to contemplate that there can be a “just cause or excuse” for combining to use unlawful means, as follows:

“Conspiracy being a tort of primary liability, the question what constitute 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. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant."

Talk of a cause or excuse capable of justifying the use of *unlawful* means is apt to confuse. Since unlawful acts, by their very nature, constitute an infraction of norms held dear by the law, it is conceptually difficult to consider them as being amenable to "justification".

So when can there be a just cause or excuse for combining to use unlawful means?

The second of the touchstones for determining this enquiry – the "*relationship with the resultant damage to the claimant*", is perhaps the easiest to exemplify. Paragraph 11 of the judgment alludes to the fact that, in Total Network, a criminal offence could be a "sufficient" unlawful means for the purposes of an unlawful means conspiracy. To like effect, at paragraph 14, Lord Sumption alludes to the "instrumentality" requirement, stressed in Total Network. The effect of this is that it is insufficient for the unlawful means to have been used in "*purely incidental*" fashion: the means used must have been intended by the claimant to cause harm to the defendant. They must constitute the "instrument" adopted so as to inflict damage.

By way of example of purely incidental harm is Lord Mance's example in Total Network, of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights. Businesses engaged in VAT fraud with the connivance of their auditors, so as to derive an advantage over their competitors, may provide another one.

So it seems that at least one paradigm situation in which there might be a "*just cause or excuse*" for using unlawful means is where they have been used in "*purely incidental*" fashion. Under that scenario, the necessary relationship between the unlawful means deployed and the resultant damage to the claimant simply does not exist.

Nonetheless, it is difficult to conceptualise jumping red lights, or VAT fraud, as benefitting from a "*just cause or excuse*", in usual language at least.

Unlawful acts: an Open Category

The first of the touchstones for determining when can there be a just cause or excuse for combining to use unlawful means – "*the nature of the unlawfulness*" – is more ephemeral. The Supreme Court is steadfast in refusing to be drawn into setting out a canonical list of the unlawful acts which may or may not suffice as the "means" required for the purposes of an unlawful means conspiracy.

At paragraph 15 Lords Sumption and Lloyd-Jones state:

"The reasoning in Total Network leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may

or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds."

On this analysis, previous authority holding that a particular species of unlawfulness is capable of constituting a relevant unlawful means will not foreclose all argument that, on the facts of the case in question, the unlawful means relied upon are somehow inapt to found the tort.

This aspect of the decision is less susceptible to criticism, but does serve to underline why claims in unlawful means conspiracy present such fertile ground for legal argument. By way of just one particular example, the breadth of the Supreme Court's observations as to the difficulties presented by breaches of civil statutory duties may yet be seized upon to cast doubt upon Mr Justice Morgan's firm finding in Digicel (St. Lucia) Limited v Cable & Wireless Plc [2010] EWHC 774 (Ch) that non-actionable breaches of a non-criminal statute are incapable of constituting unlawful acts for the purposes of an unlawful means conspiracy.

Conclusion

Where unlawful acts are concerned, it seems that the label of a "*just cause or excuse*" may have to be understood as one of art in the context of this tort, meaning only that:

- (i) either the unlawful acts concerned were not chosen by the defendant as the instrument of effecting harm to the claimant, and so can be "*justified*" or "*excused*" in the sense that they did not play a role in the conspiracy alleged; or that
- (ii) the unlawful acts concerned are, by their intrinsic nature and by reason of the particular facts of a given case, inapt to be relied upon as founding a claim in unlawful means conspiracy.

On any view, the promotion of the terminology of a "*just cause or excuse*" for an unlawful act, of all things, is at least a little unfortunate in a judgment intending to bring clarity to this difficult area of law.

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

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