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Damage awards for conspiracy to breach a freezing order and contempt of Court: new and important innovations or damp squibs?

Introduction

On 21st March 2018 the Supreme Court gave judgment in ***JSC BTA Bank v Khrapunov* [2018] UKSC 19**. It held that the breach of a court order, amounting to a contempt of court, would constitute the unlawful means necessary for the economic tort of conspiracy to injure by unlawful means and, therefore, give rise to a claim for damages against the conspirators. This development in the law was greeted with considerable excitement, but three years on the question that I have been asked to consider is whether this development was a "new and important innovation" or just "a damp squib".

JSC BTA Bank v Khrapunov

It is useful to remind ourselves of the factual background to the decision of the Supreme Court. Between 2005 and 2009 Mukhtar Ablyazov had been the chairman and controlling shareholder of JSC BTA Bank in Kazakhstan. In 2009 he was removed from office when the bank was nationalised and he fled to England, where he obtained asylum. The bank brought claims against him in England alleging that he had embezzled US$6 billion of its funds. In support of those proceedings the bank obtained a worldwide freezing order and an order requiring Mr Ablyazov to disclose the whereabouts of his assets. In 2010 the High Court appointed a receiver over Mr Ablyazov's assets.

It later transpired that Mr Ablyazov had failed to disclose a very large amount of his assets, which he had sought to conceal using a network of undisclosed offshore companies. In 2011 the bank obtained an order committing Mr Ablyazov to prison for 22 months for contempt of court, but by the time the order was made he had fled the country. Default judgments in the sum of US$4.6 billion were obtained against him but very little was recovered.

In 2015 the bank commenced fresh proceedings against Mr Ablyazov and Ilyas Khrapunov, who is Mr Ablyazov's son-in-law and was resident in Switzerland. The bank obtained a worldwide freezing order over the assets of Mr Khrapunov and claimed damages for conspiracy to injure by unlawful means. That claim was made on the basis that,

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despite Mr Khrapunov having been aware of the freezing and receivership orders, he had entered into a "combination" or understanding with Mr Ablyazov to help him to dissipate and conceal his assets.

Mr Khrapunov applied to set aside service of the claim form and discharge the freezing order on the grounds that (a) the conspiracy claim had no foundation in law and (b) article 5(3) of the Lugano Convention did not provide a basis for the jurisdiction of the English court.

The Supreme Court held that the question of what constituted unlawful means for the purposes of the tort of unlawful means conspiracy

did not depend on whether the use of those means would give rise to a different cause of action independent of conspiracy. Rather, the issue was whether there was a just cause or excuse for combining to use unlawful means, the answer to which depended on the nature of the unlawful means used and the relationship between those means and the resultant damage.

On the bank's pleaded case, Mr Khrapunov had conspired with Mr Abliazov to commit contempt of court, by breaching the freezing and receivership orders, with the intention of damaging the claimant bank and benefitting Mr Abliazov. The Supreme Court noted that the benefit to Mr Abliazov had been exactly concomitant with the detriment to the claimant bank and concluded that, if the alleged facts were proved at trial, they would amount to the tort of conspiracy to injure by unlawful means.

As far as jurisdiction was concerned, the Supreme Court noted that article 5(3) of the Lugano Convention was in near identical terms to article 5(3) of the Brussels Regulation and article 7(2) of the Brussels I Regulation. It noted that the European Court of Justice had made clear that "*the place where the harmful event had occurred*" meant either (a) the place where the damage occurred or (b) the place of the event giving rise to the damage and had emphasised the relevant harmful event which set the tort in motion. Having regard to this jurisprudence, the Supreme Court held that the relevant event which had set the tort in motion had been the actual agreement to conspire and not the implementation of the conspiracy. Since that agreement had been concluded in England, the English court had jurisdiction under article 5(3) of the Lugano Convention to hear the claim.

The key questions

The fact that a breach of a court order, amounting to contempt of court, can constitute unlawful means for the purposes of the tort of unlawful means conspiracy, is clearly a matter of considerable academic interest and a welcome clarification of the law of tort. However, for pragmatic fraud lawyers, what is particularly important about this development is the ability to hold a third party liable for any loss occasioned by the breach of the freezing order.

I would suggest that, whether or not this development amounts to a new and important innovation or a just a damp squib, depends on the answers to the following key questions:

- Does this development enable fraud lawyers to do something that they could not previously do? and
- Can such a claim be easily and effectively prosecuted?

Conspiracy to injure by unlawful means

However, before addressing those questions, we need to look at what is involved in prosecuting a claim for unlawful means conspiracy where there has been a breach of a freezing order. One often hears it referred to as damages for breach of a freezing injunction, but merely being able to point to the breach of a freezing order is not enough.

A claimant must prove that:

- Two or more persons (the conspirators);
- Entered into a combination, agreement or arrangement to use unlawful means:
- With the intention of causing damage to the claimant; and
- The claimant has suffered loss as a result.

Looking in turn at each of those elements of the claim.

Two or more persons

First and foremost, for there to be a conspiracy there needs to be an agreement or understanding between two or more persons. It is important to bear in mind that, for the purposes of a conspiracy claim, a company, being a separate legal person, can conspire with its directors.

Combination, agreement or arrangement

It is not necessary to show the existence of an express agreement. The agreement may be tacit

Unlawful means

The means used by the conspirators must be unlawful, but, as the Supreme Court made clear in ***JSC BTA Bank v Khrapunov***, it is not necessary that those means would give rise to a different cause of action independent of conspiracy. The important point is that the breach of a freezing order will constitute the necessary unlawful means.

Intention

It is not necessary for a claimant to prove that causing him damage was the main or predominant purpose of the combination, but he must prove that it was part of the conspirators' intention. The Supreme Court held that this requirement was satisfied by the breach of the freezing order, because the object of the conspiracy was to prevent the bank from enforcing its judgment and the benefit derived by the defendants is exactly concomitant with the detriment suffered by the claimant.

Causation

As far as causation is concerned, the unlawful means must be the intended instrument by which harm was inflicted on the claimant.

Knowledge

There had been conflicting first instance decisions as to whether it was necessary to prove that the conspirators knew that the means used to inflict harm on the claimant were unlawful, However, in ***Racing Partnership Ltd v Sports Information services Ltd*** **[2021] FSR 2** the Court of Appeal held that is not a requirement of the tort of unlawful means conspiracy that the conspirators have knowledge of the unlawfulness of the means employed.

Personal or proprietary claims

The first of the key questions I posed above is whether this development in the law enables fraud lawyers to do something that they could not previously do. When addressing this question, it is important to bear in mind the distinction to be drawn between freezing orders granted in support of personal claims for damages and freezing orders granted in support of proprietary claims.

Where a freezing order is granted in support of a damages claim, the purpose is to ensure that, if judgment is ultimately obtained, there will still be assets against which that judgment can be enforced. In the context of fraud, this will generally be the situation where a claim is brought for damages in the tort of deceit.

In contrast, where an injunction is granted in support of a proprietary claim, its purpose is to prevent the defendant disposing of or concealing property that actually belongs to the claimant. In the context of fraud, proprietary claims are extremely common because the proceeds of fraud and theft are impressed with a trust in favour of the victim.

In this context the existence of a proprietary claim is relevant because it will give rise to a range of equitable remedies, which are not available in the case of a personal claim for damages. In particular, it will give rise to claims that impose liability on third parties who are accessories to a breach of trust. The claims in question are dishonest assistance and knowing receipt, but in this context we are specifically concerned with the claim for dishonest assistance.

Proprietary claim - dishonest assistance

In order to make good a claim for dishonest assistance in a breach of trust the following must be established:

- There is a trust;
- There is a breach of that trust by the trustee;
- The defendant to the dishonest assistance claim assists the trustee in that breach of trust; and
- The defendant acts dishonestly in providing such assistance.

Whilst the ingredients of a dishonest assistance claim are different to those of a claim for unlawful means conspiracy, there is a degree of overlap. This is particularly so where the act of the defendant, which is complained of, is assisting a fraudster to breach a freezing order.

Where the proceeds of a fraud are held by the fraudster there will inevitably be a trust and any dealing with the trust property with a view to concealing it or putting it beyond the reach of the beneficiary will constitute a breach of trust. It follows that dealing with trust property in breach of a freezing order granted in support of a claim by a beneficiary will constitute a breach of trust. If someone assists the trustee to breach the freezing order, that person will be assisting in a breach of trust and, providing it can be established that that person acted dishonestly, he or she will be liable for dishonest assistance.

There will inevitably be an agreement (tacit or express) to assist with the breach of trust and this will mirror the combination, agreement or arrangement in an unlawful means conspiracy claim.

In unlawful means conspiracy the breach of the freezing order is both the unlawful means and the instrument causing the damage to the claimant. In a dishonest assistance claim, the breach of the freezing order would be the breach of trust which would give rise to a loss by the claimant. Whilst the terminology is different the result is the same.

Dishonest assistance requires a claimant to prove that the defendant acted dishonestly. However, following the decision of the Supreme Court in ***Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67** and the decision of the Court of Appeal in ***Group Seven Limited v Notable Services LLP* [2019] EWCA Civ 614** it is clear that the test of dishonesty in a dishonest assistance claim is objective. It is not necessary to establish that a defendant to a dishonest assistance claim knew that what he was doing was dishonest, just as it is not necessary to establish that a defendant to an unlawful means conspiracy claim subjectively knew that his conduct was unlawful.

The conclusion must be that, where there is a proprietary claim for fraud, the ability to bring an unlawful means conspiracy claim against someone who assists a defendant to breach a freezing order does not enable fraud lawyers to do something they could not previously have done. In these circumstances the innovation probably does not constitute a particularly significant addition to the fraud lawyer's armoury. Indeed, since the relief that can be granted on a dishonest assistance claim is wider than just equitable compensation, one could argue that a claim for dishonest assistance is a more flexible remedy.

In the context of proprietary fraud claims, it is not uncommon for dishonest assistance claims and unlawful means conspiracy claims to be brought alongside each other. An example of this is the case of ***CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230**. In that case the two claims were brought alongside each other and HHJ Waksman (as he then was) found it convenient to deal with those two claims at the same time in his judgment. On the facts, he found both to be made out.

Whilst these matters are always fact sensitive, it does not appear that bringing an unlawful means conspiracy claim would be any easier than bringing a dishonest assistance claim where the wrongdoing is assisting in the breach of a freezing order.

Thus, whilst it may be a little harsh to refer to it as a damp squib, in the context of a proprietary claim, the innovation does not appear to be particularly important from a practical perspective.

Personal claim for damages – deceit

The position is different in the case of a personal claim for damages for deceit. In the absence of a proprietary claim, there is no alternative claim or other means of

imposing liability on a third party for assisting a defendant to breach a freezing order. Very specific facts may bring into play remedies such as section 423 of the Insolvency Act 1986, but, in the normal case, a claim for unlawful means conspiracy will be the only weapon in the armoury of a fraud lawyer to impose liability on a third party for assisting a defendant to breach a freezing order.

It follows that, in this specific context, being able to bring a claim for unlawful means conspiracy is an important innovation, since it provides a remedy where there previously wasn't one.

In ***JSC BTA Bank v Khrapunov*** HHJ Waksman ultimately gave judgment against Mr Khrapunov for damages for conspiring to injure the bank by unlawful means (i.e. breaching the freezing order and receivership order granted against Mr Ablyazov). The judgment was granted on a default basis when Mr Khrapunov failed to come to England to be cross-examined. It is clear from paragraph 6 of the judgment of HHJ Waksman that the loss arose from an inability to enforce money judgments rather than any proprietary remedy:

"Unsurprisingly, the losses claimed, inter alia, against Mr Khrapunov in this respect consist of the monies which had been illicitly transferred in this way on the footing that, if those monies had not been transferred, they would now be available for execution in respect of several very large judgments which have been awarded against Mr Ablyazov."

However, notwithstanding the decision in the Khrapunov case, there does not seem to have been a glut of reported cases in respect of claims for unlawful means conspiracy following breaches of freezing orders.

Jurisdiction

I don't intend to say very much about jurisdiction in the limited time that is available as it is complex and very fact sensitive.

The decision of the Supreme Court on jurisdiction in ***JSC BTA Bank v Khrapunov*** was based on article 5(3) of the Lugano Convention and it is material that a claim for dishonest assistance would also have been governed by that provision, although the ingredients of a dishonest assistance claim are different and may that have produced a different outcome.

From 1st January 2021 the UK has not been a party to the Lugano Convention. It has applied to re-join the Convention and Iceland, Norway and Switzerland have stated their support for this application, but the EU has yet to respond.

Unless and until the UK re-joins the Lugano Convention, service of proceedings out of the jurisdiction in the case of unlawful conspiracy claims, will be with the permission of the Court under Rule 6.36 of the CPR and paragraph 3.1(9) of Practice Direction 6B.

Conclusion

The question that I have been asked to address provides for two possible answers: "new and important innovation" or "damp squib". The answer is probably a little more nuanced than that.

The Supreme Court's development of the law in confirming that assisting in the breach of a freezing order constitutes unlawful means for the purposes of an unlawful means conspiracy claim is undoubtedly an innovative and interesting development of the law.

In the context of a proprietary claim, it is not particularly important from a practical perspective, because a claim for dishonest assistance provides an alternative means by which liability may be imposed on a person who assists in the breach of freezing order. In contrast, in the context of a personal claim for damages, the innovation is important as, in the ordinary case, there is no obvious means of imposing liability on a person who assists in the breaching of a freezing order. Having said all this, as with any litigation, the overriding consideration will be whether a defendant is worth the powder and shot.