ESSEX COURT CHAMBERS

BARRISTERS

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ABLYAZOV, CONTEMPT, DAMAGES AND PRIVILEGE

- *Ablyazov* litigation has prompted the Courts to reconsider the question of civil remedies in damages against those who assist parties subject to asset freezing injunctions in evading the restrictions imposed by the Courts.

- In addition, it has also led to the Courts considering the extent to which the iniquitous intention and activities of a party subject to an asset freezing injunction means that his exchanges with his lawyers are not subject to legal professional privilege.

THIRD PARTIES AND INJUNCTIONS TRADITIONAL POSITION

- An injunction binds the party to whom it is directed and breach of any injunction is a contempt of court and punishable by the panoply of powers available to the Court including imprisonment and sequestration of assets.

- What about effect on third parties?

- *Z Ltd v A-Z and AA-LL* [1982] QB 558, 578 per Eveleigh LJ :
- (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he willfully assists the person to whom it was directed to disobey it.
- For the third party to be liable for contempt, it has to be shown there was an intention on his part to interfere with or impede the administration of justice. This is an essential ingredient, and it has to be established to the criminal standard of proof

- In these circumstances, the third party is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted.

NEGLIGENCE BY 3RD PARTY

- But what if a third party negligently assists breach of injunction e.g. bank wrongly but not knowingly obeys instruction of Defendant to make payment out of jurisdiction.

- Is there a duty of care? Are damages available?
- In *Customs and Excise Comrs v Barclays Bank plc* [2007]1 AC 197 HL decided that a bank, notified by a third party of a freezing injunction granted to the third party and affecting an account held by one of the bank's customers, owed no duty to the third party to take reasonable care to comply with the terms of the injunction.
- Accordingly no damages were payable by the bank to the Claimant

DAMAGES FOR KNOWINGLY ABETTING CONTEMPT

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- Although third party who knowingly abets breach of injunction is guilty of contempt, whether there was a civil remedy in damages was an open question
- *JSBTA Bank v Ablyazov* Supreme Court [2018] UKSC 19
- Decided that contempt of court could constitute "unlawful means" for the purposes of the tort of conspiracy to injure by unlawful means. Also pursuant to the Lugano Convention 2007 art.5(3)(b), the making of the conspiratorial agreement in England should be regarded as the harmful event which set the tort in motion and accordingly the English courts had jurisdiction.

JSBTA BANK V ABLYAZOV

- A bank incorporated in Kazakhstan, had obtained a worldwide freezing order and a receivership order against its former chairman (A) who had been granted asylum in the UK. The bank established that A had breached the orders, but when it sought his committal for contempt he fled to France. The bank obtained judgments in default against him and began proceedings against the appellant, his son-in-law who lived in Switzerland, on the basis of the tort of conspiracy to injure by unlawful means.
- Bank claimed that, in breach of the orders, C and the appellant had conspired to prevent it from making any substantial recovery. The judge found that they had entered into an understanding, in England where C was then living, to dissipate and conceal his assets abroad.

- Can contempt of court constitute the required "unlawful means" for the tort of conspiracy to cause loss by unlawful means?
- Yes.
- SC held that the "unlawful means" relied on was contempt of court, which was a criminal offence punishable in civil proceedings. Although damage to the bank was not the predominant purpose of the concealment, the damage was more than incidental. The object of the conspiracy, and the overt acts done pursuant to it, were to prevent the bank from enforcing its judgments against C. Thus, in principle, the cause of action in conspiracy to injure the bank by unlawful means was made out.
- There was no "preclusionary rule" of public policy stipulating that persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court.

- In *Revenue Customs Comrs v Total Network SL* [2008] AC 1174. HL held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him.
- The unlawful means relied upon in this case were criminal contempt of court albeit that the offence is punishable in civil proceedings. The defendants' predominant purpose in hiding Mr Ablyazov's assets was not to injure the bank. Their predominant purpose was clearly to further Mr Ablyazov's financial interests as they conceived them to be. At the same time, damage to the Bank was not just incidental to what they conspired to do. It was necessarily intended.
- Cause of action in conspiracy to injure the Bank by unlawful means was made out.

- Next question: whether an action for conspiracy to commit a contempt of court is consistent with public policy?
- Defendant argued that public policy required that that persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court.
- Rejected by SC

SO DISCUSSIONS WITH LAWYER SACROSANCT?

- LPP a fundamental legal right
- Cannot be overridden by some supposedly greater public interest or weighed in the balance against other interests.
- B v Auckland Building Society [2003] 2 AC 736 §§46-55, Three Rivers District Council v Bank of England (No 6) [2005] 1 AC 610 §25 per Lord Scott.
- Even in case where disclosure might achieve acquittal of party accused of serious crime (Regina v Derby Magistrates Court ex parte B [1996] AC 487)
- But not absolute. Rule in R v Cox and Railton

- if a person consults a solicitor in furtherance of a criminal purpose, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract LPP.

- Not Just crime. Principle has been held to extend to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice.

- Williams v Quebrada [1895] Ch 751 , 755; Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] Ch 554 , 565, Barclays Bank v Eustice [1995] 1 WLR 1238, 1249; and BBGP v Babcock [2011] Ch 296 at [62].

- But see Kerman v Akhmedova [2018] EWCA Civ 307

BUT DEFENDING A CHARGE OF FRAUD MUST BE DIFFERENT?

- Applicant need not prove fraudulent or criminal purpose on balance of probability. Prima facie or strong prima facie case enough.
- Said that there is a fundamental difference between consulting a lawyer about how to commit a fraud and seeking legal advice after a fraud has been committed when advice is needed in respect of the defence.
- In the latter case, there is no loss of privilege. Otherwise no person faced with an allegation of fraud could safely ask for legal advice.
- But can clients charged with fraud safely ask for legal advice to defend proceedings and resist asset freezing injunctions?
- After all defences may be bogus and disclosure pack of lies?

- Authority that to lie to lawyer and, consequently, mislead Court does not bring Cox and Railton principle into play.

- *"…the common law principle of legal professional privilege cannot be excluded, by the exception established in R v Cox and Railton 14 QBD 153 in cases where a communication is made by a client to his legal adviser regarding the conduct of his case in criminal or civil proceedings, merely because such communication is untrue and would, if acted upon, lead to the commission of the crime of perjury in such proceedings."*

- Lord Goff in R v Central Criminal Court Ex p. Francis and Francis [1987] AC 346, 397

- But this is not the final word

KUWAIT AIRWAYS AND ABLYAZOV

- In Kuwait Airways (No.6) [2005] 1 WLR 2734 LPP was lost because

"…there was a widespread conspiracy to deceive the English court which was acted upon and has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale…."

Noteworthy that there had been previous findings of perjury (Kuwait) or contempt (Ablyazov) before the applications for disclosure of prima facie LPP documentation

In JSC BTA Bank v Ablyazov 2014 EWHC 2788 (Comm), Popplewell J sought to draw a distinction where LPP was present and those where it was not present because of an iniquitous purpose i.e. between ordinary and extraordinary perjury:

"…It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service falling within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The "ordinary run of cases" involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case….."

- Popplewell J struggled to formulate a test to distinguish those cases where there is LPP and where there is not in cases of alleged perjury.

- Was the solicitor acting in the ordinary course of the professional engagement of a solicitor?

- *"..In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question…"*

- *"But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege"*

COX AND RAILTON AND THIRD PARTIES

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- Cox and Railton and third parties
- What if prosecution authorities sought production of LLP documents produced in civil litigation as a result of R v Cox and Railton ruling, or one of the parties sought to hand over documents to police or prosecuting authorities.
- What weight if any would be given to the civil judgment declaring that there was no LPP? Is it conclusive?
- Tsang v Li (STL third party) HK Divorce case. Complicated background
- When the matter was raised the first instance judge (Ng J) said that the DPP could obtain privileged documents from the Court.
- Secretary For Justice v. FTCW And Others [2014] HKCA 9 (10 January 2014) HKCA

- STL contended that the DPP could not rely upon the earlier decision, relying on principle in Hollington v Hewthorn see e.g. Caylon v Irene Michailaidis [2008] UK PC 2008. DPP not party or privy to earlier decision.
- DPP argued that for STL to rely upon the absence of res judicata was an abuse of the process of the court.
- CA rejected this argument. It was not manifestly unfair to require the Director to establish the Cox and Railton exception before access of LPP materials is granted to him.
- But when CA turned to Wife's application for release from implied undertaking to hand over documents it went off rails.

- *"…We are of the view, vis-à-vis the Wife, the Husband and STL are bound by the rulings of Saunders J and they could no longer assert any LPP against her in respect of documents disclosed pursuant to the order of Saunders J."*
- *"Further, once the documents are in the hands of the police, it is permissible for them to make derivative use of the same irrespective of the admissibility of the same at the criminal trial but would need success in C&R application to use in evidence..."*
- So although DPP could not obtain LPP documents directly from STL or Court documents, it could obtain them indirectly through Wife and study for purpose of investigation even though contained LPP material.

CFA DECISION

- CA decision reversed in November 2014 by Court of Final Appeal.
- Court said impossible to give proper consideration to the Court's exercise of discretion regarding release of W from her implied undertaking without taking into account what the effect of doing so would be on H's and STL's claim to LPP as against the DPP.
- Court reiterated LPP fundamental human right and is absolute.

- *...it would not be proper for the DPP to gain access to any documents denied him by the Court by the simple expedient of receiving them from W. There can be no question of releasing W from her implied undertaking to enable her to achieve that purpose. Nor is there any question of the DPP being permitted to make derivative use of documents which are protected by LPP in his hands, the privilege being absolute.*
- *…If and to the extent that the DPP succeeds in bringing the documents concerned within the Cox and Railton rule, there would be no impediment to him using those documents in the criminal investigation. He could discuss them with W without her having to be released from her undertaking. It is appropriate that the availability of such documents for use in a criminal investigation should depend on the DPP establishing his entitlement to such use and not on W being relieved of her implied undertaking, regardless of the outcome of the DPP's application…"*