

# UK Supreme Court Asserts Jurisdiction Because Conspiracy Was Hatched in England

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The UK Supreme Court has decided that the English courts have jurisdiction to try a claim for unlawful conspiracy to injure where the conspiratorial agreement was “hatched” in England, even though the overt acts implementing the conspiracy occurred abroad. This important decision was made in the long-running litigation between the Kazakh BTA Bank and Mukhtar Ablyazov, its former Chairman and majority shareholder.

BTA Bank is attempting to bring claims in England against Mr Ablyazov and his son-in-law, Mr Khrapunov, arguing that they conspired to dissipate and conceal Mr Ablyazov’s assets in breach of a worldwide freezing order issued against Mr Ablyazov by the English court.

Mr Khrapunov, who is domiciled in Switzerland, argued that the English court has no jurisdiction to hear the claim. However, the Supreme Court held that the place where the conspiracy was hatched, thereby “*setting the tort in motion*” is the place where jurisdiction should be founded. In this case, this was “*the making of the agreement in England*”.

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## Background

BTA Bank brought claims against Mr Ablyazov in 2009 and obtained a worldwide freezing order against him, at the time when Mr Ablyazov was domiciled in England. Mr Ablyazov was ordered to identify and disclose the location of his assets. The claims concerned allegations that he had embezzled over USD 6 billion in assets from BTA Bank. Following subsequent receivership, search and disclosure orders, the English court found that Mr Ablyazov had not disclosed all of his assets as he was required to do and a large network of undisclosed companies controlled by Mr Ablyazov was uncovered, through which he had sought to put his assets beyond the reach of BTA Bank.

In February 2012, Mr Ablyazov was sentenced to 22 months imprisonment for contempt of court. By then Mr Ablyazov had fled England. The High Court has since granted default judgments against Mr Ablyazov in the total sum of over USD 4.6 billion. BTA Bank has recovered “*very little*”<sup>1</sup> of this amount.

BTA Bank commenced proceedings against Mr Ablyazov and his son-in-law Ilyas Khrapunov in July 2015, on the basis that Mr Khrapunov, being aware of the worldwide freezing and receivership orders, assisted his father-in-law in dissipating and concealing assets. BTA Bank claims that in about 2009, while Mr Ablyazov was living in England, Mr Khrapunov entered into a “*combination or understanding*”<sup>2</sup> with Mr Ablyazov to help him hide assets. BTA Bank claims that following this “*conspiratorial agreement*”,<sup>3</sup> Mr Khrapunov was instrumental in dealing with Mr Ablyazov’s assets in Switzerland, Belize and Russia, both on instruction from Mr Ablyazov and on his own initiative, in breach of the worldwide freezing and receivership orders against Mr Ablyazov. Mr Khrapunov is also said to have helped by laying a trail of false documents to conceal what happened to the assets.

## The Claim

BTA Bank’s claim is for the English law tort for conspiracy to injure by unlawful means. It argued that Mr Khrapunov conspired with Mr Ablyazov to breach the worldwide freezing order and the subsequent receivership, search and disclosure orders, including by dealing with Mr Ablyazov’s assets, to cause financial loss to BTA Bank. An unlawful means conspiracy in English law requires:

- i. An agreement or understanding between two or more parties;
- ii. Concerted action using unlawful means;
- iii. Intention to cause harm to the claimant (even where harm is not the predominant purpose); and
- iv. Damage to the claimant.

BTA Bank argued that “*unlawful means*” are the serial breaches of the orders which constitute contempt of court and for which Mr Ablyazov has been sentenced to imprisonment, albeit *in absentia*.

Mr Khrapunov, who is domiciled in Switzerland, did not at this stage deny any of the factual allegations against him. However, he contested the jurisdiction of the English court arguing that:

- i. Pursuant to Article 2 of the Lugano Convention a person must be sued in the jurisdiction where he or she is domiciled unless an exception applies. The exception under Article 5(3) which allows a claimant to bring a tort claim in the jurisdiction where “*the harmful event occurred or may occur*” does not apply, because the relevant harmful event as alleged by BTA Bank is the implementation of the agreement to hide assets and not the fact of the agreement itself; all relevant actions alleged by BTA Bank were committed not in England but elsewhere; and
- ii. The underlying “*unlawful means*” on which BTA Bank relies, *i.e.*, contempt of court, is not “*unlawful means*” for the purpose of a conspiracy

<sup>1</sup> *JSC BTA Bank v Khrapunov* [2018] UKSC 19, paragraph 3

<sup>2</sup> *Ibid.*, paragraph 4

<sup>3</sup> *Ibid.*, paragraph 5

claim because contempt of court (which is a criminal matter) does not allow a claimant to sue the defendant on a standalone basis. The only recourse against a party in contempt is at the discretion of the court to impose a sanction, including *e.g.*, imprisonment.

It should be noted that the Lugano Convention is for these purposes identical to the recast Brussels Regulation, which governs jurisdiction where a defendant is domiciled in the EU. We expect that the Supreme Court decision would therefore apply equally where a defendant is domiciled in the EU.

## The Supreme Court's Decision

### *Jurisdiction*

The Supreme Court noted previous case law of the European Court of Justice that decided the place where the harmful event occurs can be both: (i) the place where the damage occurred; and (ii) the place of the event giving rise to the damage.

It is the second limb of that test that was under scrutiny in this case: BTA Bank submitted that “*the event giving rise to the damage*” was the hatching of the conspiracy. Mr Khrapunov argued that the event giving rise to the damage is not the conspiracy but its implementation, *i.e.*, all acts to implement the scheme which, he argued, took place abroad and therefore have no link to England.

The Supreme Court emphasised the importance of identifying the event which “*sets the tort in motion*”.<sup>4</sup> On that basis, the Supreme Court found that the event giving rise to the damage is the “*place where the conspiratorial agreement was made*”. This was “*the making of the agreement in England*”<sup>5</sup> and the English court therefore had jurisdiction.

### *Conspiracy to Injure by Unlawful Means*

The Supreme Court also clarified existing case law on conspiracy claims. Under English law there is no

general duty in tort to avoid causing a purely economic loss to others and commercial self-interest “*necessarily entails the risk of damaging the commercial interests of others*”.<sup>6</sup> However, where a person seeks to advance their interest by unlawful means he or she “*transgresses the legitimate bounds*”<sup>7</sup> and therefore loses the right to advance their own interest. The same is true where the means used are lawful but the “*predominant intention*” is to injure the claimant. The Supreme Court held that “*the real test is whether there is a just cause or excuse for combining to use unlawful means*”.<sup>8</sup>

The Supreme Court also rejected Mr Khrapunov’s argument that contempt of court is not “*unlawful means*” for the purposes of a conspiracy claim. The Court said that compliance with criminal law is universal, and “*the unlawfulness of the means to be used to carry out the conspiracy does not depend on its actionability as an independent tort*”.<sup>9</sup> Contempt of court is therefore “*unlawful means*” for the purposes of a conspiracy claim.

The Supreme Court also held that the alleged damage to BTA Bank was not “*just incidental*” but was “*necessarily intended*”,<sup>10</sup> because the orders which had been breached by Mr Abyazov had been made for the purpose of protecting BTA Bank’s right to recovery if it succeeded in its claim against Mr Abyazov.

## Implications

This case represents an important decision for parties involved in, or considering fraud claims in the English courts. The English courts hear many claims involving international fraud allegations, and this decision reasserts the long arm of the English court and its readiness to assume jurisdiction in cases involving international fraud allegations.

It also represents a clarification of the law of conspiracy through the decision that a claim lies where a conspiracy involves a contempt of court, and adds a

<sup>4</sup> *Ibid.*, paragraph 38

<sup>5</sup> *Ibid.*, paragraph 41

<sup>6</sup> *Ibid.*, paragraph 6

<sup>7</sup> *Ibid.*, paragraph 6

<sup>8</sup> *Ibid.*, paragraph 11

<sup>9</sup> *Ibid.*, paragraph 17

<sup>10</sup> *Ibid.*, paragraph 16

further option for claimants seeking to pressure a defendant, or enforce judgments, through their families or assistants. Overall, the decision will be welcomed by claimants as a further demonstration of the breadth and effect of the English court's approach to allegations of fraud.

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