Private action for contempt of court?

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Hogan Lovells

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Introduction

In March, the UK Supreme Court handed down a landmark judgment[1], in which it held that:

(a) contempt of court constitutes unlawful means for the purposes of the tort of unlawful means conspiracy, *giving rise to a private cause of action*; and

(b) where a conspiracy is hatched in England, the English courts have jurisdiction under the Lugano Convention to hear a claim founded in that conspiracy (even if all other elements of the tort take place abroad).

Given the similarity of the law on the economic tort of conspiracy in Hong Kong and England, this decision may provide a new weapon for judgment creditors to bring a civil claim where a defendant fraudulently conspires with a third party to breach a court order in an attempt to avoid enforcement in the Hong Kong courts.

Moreover, the UK Supreme Court expressly left open the possibility that a plaintiff may be able to bring a claim for damages based on contempt alone, ie without having to rely on any other cause of action. It therefore remains to be seen whether this will be relied upon by future plaintiffs to found a damages claim for contempt of court.

The judgment also provides helpful guidance on how to determine the place where a conspiracy occurred for the purposes of establishing jurisdiction. The Lugano Convention rules on jurisdiction in tort claims are similar to the Hong Kong rules on granting permission to serve a tort claim out of the jurisdiction, though plaintiffs in Hong Kong will also need to show that Hong Kong is the *forum conveniens* and that their claim is also actionable under the laws of the foreign country where the tort was in substance committed.

Nevertheless, the decision could potentially encourage Hong Kong courts to assert jurisdiction over conspiracy claims where the conspiratorial agreement was made here.

Background

JSC BTA Bank's (**BTA**) claim in these proceedings arises in the context of the wide-ranging fraud perpetrated by certain members of its former management, in particular its former Chairman, Mr Mukhtar Ablyazov. By multiple sets of proceedings in the English High Court, BTA successfully obtained judgments against Mr Ablyazov and his associates for over US$5 billion, as well as an order to identify and disclose the whereabouts of his assets, a worldwide freezing order and orders appointing receivers over his assets (the **Ablyazov Orders**).

During the course of the proceedings, the courts held that Mr Ablyazov sought to keep his assets away from BTA through the use of nominee arrangements, complex corporate structures and dealings in breach of the Ablyazov Orders. His *modus operandi* has been to distance himself from his assets and instead to put trusted associates forward as their purported beneficial owners, often being family members including, more recently, his son-in-law, Mr Khrapunov.

In July 2015, BTA commenced proceedings against Mr Khrapunov for conspiracy to injure by unlawful means. In particular, BTA alleged that Mr Khrapunov conspired with Mr Ablyazov to breach the Ablyazov Orders in an attempt to prevent BTA from being able to enforce its judgments against Mr Ablyazov's assets. BTA's case is that the conspiracy was hatched in England, albeit that all steps to implement the conspiracy appear to have taken place overseas.

Mr Khrapunov sought to challenge both the validity of BTA's cause of action and the English courts' jurisdiction to hear the claim.

[1] JSC BTA BANK V (1) MUKHTAR ABLYAZOV (2) ILYAS KHRAPUNOV [2018] UKSC 19

Breach of court order constitutes 'unlawful means' for the tort of conspiracy

Mr Khrapunov argued that contempt of court could not constitute unlawful means for the purpose of the tort of conspiracy because, apart from any combination, such contempt would not be actionable at the suit of the plaintiff. He also argued that there is a positive rule of law (the alleged "preclusionary rule"), which precludes a party from relying upon a contempt of court in a private law action for damages.

In essence, he argued that it would be contrary to public policy to allow a private law right of action to be based on contempt, because the principles underlying the law of contempt require that the court has control over the consequences of breach of court orders – whereas a right of action would make damages for contempt a matter of right.

Dismissing those arguments, the Court found that the *correct test in an action for conspiracy is whether there is a just cause or excuse for defendants to combine to use unlawful means*.

This would depend on the nature of the unlawfulness and its relationship with the resultant damage to the plaintiff. For example, a criminal offence which was objectively directed against the plaintiff could constitute unlawful means for the purpose of the tort of conspiracy, even if the conduct in question is not otherwise actionable as an independent tort and the predominant purpose was not to injure the plaintiff.

In dealing with frozen assets, Messrs Ablyazov and Khrapunov acted in contempt of court (a criminal offence) and, whilst their predominant intention may have been to further Mr Ablyazov's financial interests, the court found that the damage caused to BTA was clearly not just incidental, as the object of the conspiracy was to prevent BTA from enforcing its judgment debts. As such, BTA's allegations of contempt were, if proven, sufficient to constitute the unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

The Court also rejected Mr Khrapunov's public policy argument, on the basis that the same act can give rise to both criminal and civil liability and, in such cases, the sentence for the crime will be discretionary but the civil consequences will not. For example, a person may be given immunity in a criminal trial for burglary for testifying against others involved, but that will not protect him against civil liability to the owner of the stolen goods.

Compensation for contempt alone

The Court declined to decide the question of whether damages should be available to a party based on contempt alone. However, the Judges did appear to see some force in the argument that breach of a court order can ground a cause of action for damages, and remarked that "*we do not think that the last word has necessarily been said on this subject in this court*".

Jurisdiction where the conspiracy was hatched or where implementation took place?

The Lugano Convention[2] provides that "*A person… may… be sued… in matters relating to tort… in the courts for the place where the harmful event occurred*", which the Court of Justice of the EU (**CJEU**) has interpreted as giving a plaintiff the option of suing either (a) in the courts for the place where the damage occurred, or (b) in the courts for the place of the event giving rise to the damage[3].

This is similar to the Hong Kong test for obtaining leave to serve a writ out of the jurisdiction[4]; leave to serve out of the jurisdiction can be granted if "*the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction*".

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2 Article 5(3)
3 *Bier v Mines de Potasse*(Case C-21/76) [1978] QB 708
4 Hong Kong RHC O. 11 r. 1(1)(f),

Mr Khrapunov argued that the hatching of the conspiracy was not in itself harmful or the proximate cause of any loss. Instead, the steps taken in furtherance of the conspiracy (ie the alleged dealings) were the relevant "events giving rise to the damage" and, given those took place overseas, he argued that the English court did not have jurisdiction.

The Court observed that the authorities focused on the "*originating event*" of the damage and the "*event which sets the tort in motion*". One such example was the *Akzo Nobel*[5] competition law case in which the CJEU identified the formation of a cartel, rather than its implementation, as the event giving rise to the damage.

In this case, Mr Khrapunov's alleged dealings with frozen assets were undertaken as part of the implementation of his agreement with Mr Ablyazov. It was therefore the hatching of the conspiracy in England which constituted the originating event / the event which set the tort in motion. As such, it was held that the English courts have jurisdiction to hear BTA's claim against Mr Khrapunov.

Comment

The UK Supreme Court's decision is a significant development both in the instant case and in the state of the law more generally: it gives judgment creditors an important weapon to recover losses from third parties who conspire with a defendant to breach court orders in an attempt to avoid enforcement. Under English law (and likely Hong Kong law), victims may now bring a claim for conspiracy based on breach of a court order – and they may even be able to bring a claim for damages based on contempt alone.

As regards the jurisdiction point, this decision emphasises that when looking for the place of the event giving rise to damage, the court should focus on the events which set the tort in motion. This could influence the approach taken by Hong Kong courts when determining whether to grant leave to serve out of the jurisdiction in the context of tort claims. However, in the absence of any treaty analogous to the Lugano Convention, plaintiffs in Hong Kong will still have to grapple with *forum conveniens* principles and the double actionability rule.

Hogan Lovells acts for JSC BTA Bank worldwide in these proceedings.

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5 *CDC Hydrogen Peroxide v Akzo Nobel* (Case C-352/13) [2015] QB 906

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