Hilary Term
[2018] UKSC 19
On appeal from: [2017] EWCA Civ 40

JUDGMENT

JSC BTA Bank (Respondent) *v* Khrapunov (Appellant)

before

Lord Mance, Deputy President
Lord Sumption
Lord Hodge
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

21 March 2018

Heard on 24 and 25 January 2018

Appellant	*Respondent*
Charles Samek QC	Stephen Smith QC
Marc Delehanty	Tim Akkouh
(Instructed by Hughmans Solicitors)	(Instructed by Hogan Lovells International LLP)

LORD SUMPTION AND LORD LLOYD-JONES: (with whom Lord Mance, Lord Hodge and Lord Briggs agree)

Introduction

1. This is litigation on a large scale. Between May 2005 and February 2009, Mr Mukhtar Ablyazov was the chairman and controlling shareholder of the claimant, a bank incorporated in Kazakhstan. It is alleged that during this period, he embezzled some US$6 billion of the Bank's funds. In February 2009, the Bank was nationalised and Mr Ablyazov was removed from office. He fled to England, where he ultimately obtained asylum. In August 2009, the Bank began proceedings against him in the Commercial Court, alleging misappropriation of its funds. Other proceedings followed, in the Commercial Court and the Chancery Division. Mr Ablyazov was ultimately the defendant in eleven actions brought by the Bank against him, either alone or in conjunction with alleged associates.

2. At the outset of the litigation, the Bank obtained a disclosure order requiring Mr Ablyazov to identify and disclose the whereabouts of his assets and a worldwide freezing order preventing him from dealing with them. Subsequently, in August 2010, the High Court appointed receivers over all of Mr Ablyazov's assets. Later that year, the Bank obtained a number of search and disclosure orders. These yielded a haul of documents revealing a large number of undisclosed assets and a network of undisclosed companies through which Mr Ablyazov had sought to put them out of the reach of the Bank.

3. In 2011, the Bank applied for an order committing Mr Ablyazov for contempt of court. Teare J gave judgment on that application on 16 February 2012. He held that Mr Ablyazov had failed to disclose his assets in breach of the disclosure order, that he had disposed of certain of them in breach of the freezing order and the receivership order, and that he had given false evidence and forged documents in an attempt to cover his tracks. Teare J sentenced him to 22 months imprisonment. However, by the time that the judgment was handed down, the bird had flown. Mr Ablyazov fled the country on receipt of the judge's draft judgment. He spent some time in prison in France pending the resolution of an application by Russia for his extradition, which ultimately failed. His present whereabouts are unknown. On 29 February 2012, Teare J ordered that Mr Ablyazov's defences in the Commercial Court actions should be struck out unless he gave full disclosure of his assets and surrendered himself to the tipstaff. He did neither of these things, and default judgments were subsequently obtained against him in four of the actions for sums

exceeding US$4.6 billion and in a fifth for damages to be assessed. Very little has been recovered.

4. The present proceedings were commenced in July 2015. The defendants are Mr Ablyazov and his son-in-law Mr Khrapunov, who is domiciled in Switzerland. Mr Ablyazov has taken no part in these proceedings, and the present appeal is concerned only with the position of Mr Khrapunov. The Bank's case against him is that he has at all times been aware of the freezing order and the receivership order, and that in about 2009 he entered into a combination or understanding with Mr Ablyazov to assist him in dissipating and concealing his assets. For present purposes, it may be assumed that they entered into it in England where Mr Ablyazov was then living. Teare J found that there was sufficient evidence to that effect, and the point has not been contested before us. It is alleged that both before and after Mr Ablyazov's flight abroad Mr Khrapunov actively participated in the agreed scheme, both on Mr Ablyazov's instructions and from time to time on his own initiative. He is said to have been instrumental in extensive dealings in the assets of Swiss, Belizean and Russian companies controlled by Mr Ablyazov and in laying a trail of false documents to conceal what had become of them. This is relied upon as constituting the tort of conspiracy to cause financial loss to the Bank by unlawful means, namely serial breaches of the freezing order and the receivership order.

5. The present appeal arises out of an application by Mr Khrapunov contesting the jurisdiction of the English court. The application is made on two grounds. The first is that there is no such tort as the Bank asserts, because contempt of court cannot constitute unlawful means for the purpose of the tort of conspiracy. This, Mr Samek QC submits on his behalf, is because means are unlawful for this purpose only if they would be actionable at the suit of the claimant apart from any combination. Contempt of court, he submits, is not actionable as such. There is therefore no good arguable case on which to found jurisdiction. The second ground is that, Mr Khrapunov being domiciled in Switzerland, there is no jurisdiction under the Lugano Convention unless the claim falls within the special jurisdiction conferred by article 5(3) on the courts of "the place where the harmful event occurred". The only event said to have happened in England is the conspiratorial agreement. Mr Khrapunov contends that the event that was harmful was not the conspiratorial agreement but the acts done pursuant to it. They were done outside England.

The cause of action

6. Conspiracy is one of a group of torts which tend to be loosely lumped together as "economic torts", the others being intimidation, procuring a breach of contract and unlawful interference with economic and other interests (sometimes called the "intentional harm" tort). Along with tortious misrepresentation (fraudulent or negligent), passing off, slander of title and infringement of intellectual

property rights, 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. Some of the elements of the torts, notably intention and unlawful means are common to more than one of them. But it is dangerous to assume that they have the same content in each context. In *OBG Ltd v Allan* [2008] AC 1, Lord Hoffmann drew attention to some of the confusions and category errors which have resulted from attempts by judges and scholars to formulate a unified theory on which these causes of action can be explained. Lord Hoffmann was not directly concerned with the tort of conspiracy, but of all the economic torts it is the one whose boundaries are perhaps the hardest to define in principled terms.

7. The modern tort of conspiracy was developed in the late 19th and early 20th century, as a device for imposing civil liability on the organisers of strikes and other industrial action, once the Conspiracy and Protection of Property Act 1875 had provided that combinations in furtherance of trade disputes should no longer be indictable as crimes. It is an anomalous tort because it may make actionable acts which would be lawful apart from the element of combination. The ostensible rationale, that acts done in combination are inherently more coercive than those done by a single actor, has not always been found persuasive, least of all when the single actor may be a powerful corporation. There is much to be said for the view expressed by Lord Walker in *Revenue and Customs Comrs v Total Network SL* [2008] 1 AC 1174, para 78, that an unarticulated factor in the development of the tort was the conviction of late Victorian judges that large-scale collective action in the political and economic sphere by those outside the traditional governing class was a potential threat to the constitution and the framework of society. Nonetheless, the tort of conspiracy has an established place in the law of tort and its essential elements have been clarified by a series of modern decisions of high authority, most of them in contexts far removed from the modern tort's origin in the law relating to industrial disputes.

8. It has been recognised since the decision of the House of Lords in *Quinn v Leathem* [1901] AC 495 that the tort takes two forms: (i) conspiracy to injure, where the overt acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant; and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant

purpose. In *Lonrho Plc v Fayed* [1992] 1 AC 448, Lord Bridge, with whom the rest of the Appellate Committee agreed, reviewed the earlier authorities and summarised the position as follows, at pp 465-466:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."

We shall call these two forms of conspiracy a "lawful means" and an "unlawful means" conspiracy respectively. The terminology is not exact, because a cause of action in conspiracy may be based on a predominant intention to injure the claimant whether the means are lawful or unlawful. But it seems to us to be more satisfactory than using terms which appear to distinguish between "conspiracies to injure" and other conspiracies. As we shall show, all actionable conspiracies are conspiracies to injure, although the intent required may take a variety of different forms.

9. Conspiracy is both a crime, now of limited ambit, and a tort. The essence of the crime is the agreement or understanding that the parties will act unlawfully, whether or not it is implemented. The overt acts done pursuant to it are relevant, if at all, only as evidence of the agreement or understanding. It is sometimes suggested that the position in tort is different. Lord Diplock, for example, thought that "the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement": *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, 188. This is true in the obvious sense that a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort. Secondly, it is clear that it is not a form of secondary liability, but a primary liability. This point had been made by Lord Wright in *Crofter Hand Woven Harris Tweed Ltd v Veitch* [1942] AC 435, 462: "the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides." It was reaffirmed by the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174, paras 102 (Lord Walker), 116 (Lord Mance), 225 (Lord Neuberger). Third, the fact of combination may alter the legal character and

consequences of the overt acts. In particular, it may give rise to liability which would not attach to the overt acts in the absence of combination. This latter feature of the tort was what led Lord Wright in *Crofter*, *loc cit*, to say that it was "in the fact of the conspiracy that the unlawfulness resides." He was speaking of a lawful means conspiracy, but as Lord Hope pointed out in *Revenue and Customs Comrs v Total Network SL* at para 44, the same applies to an unlawful means conspiracy, at any rate where the means used, while not predominantly intended to injure the claimant, were directed against him. There is clearly much force in his observation at para 41 that if a lawful means conspiracy is actionable on proof of a predominant intention to injure, "harm caused by a conspiracy where the means used were unlawful would seem no less in need of a remedy."

10. What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse, which was invoked by Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 QBD 598, 614, by Viscount Cave LC in *Sorrell v Smith* [1925] AC 700, 711-712, and by Viscount Simon LC with the support of his colleagues in *Crofter Hand Woven Harris Tweed Ltd v Veitch* [1942] AC 435, 441-444 (cf Viscount Maugham at pp 448, 449-450, Lord Wright at pp 469-470, and Lord Porter at p 492). 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*.

11. 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. This was the position reached by the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174. The Appellate Committee 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.

12. The facts of *Total Network* were that the Commissioners had sued Total for participating in a number of VAT frauds. They alleged an unlawful means conspiracy, the unlawful means consisting of the commission by some of the other conspirators of the common law offence of cheating the revenue. The question whether such a cause of action existed was considered on the assumption that there was no predominant intention to injure the Commissioners and that the commission of the offence gave rise to no cause of action at the suit of the Commissioners independently of the alleged conspiracy. In the result, the House declined to apply to unlawful means conspiracies the condition which it had held in *OBG Ltd v Allan* [2008] AC 1 to apply to the tort of intentionally harming the claimant by unlawful acts against third parties, namely that those acts should be actionable at the suit of the third party. They held that the means were unlawful for the purpose of founding an action in conspiracy, whether they were actionable or not.

13. The leading speech was delivered by Lord Walker, with whom Lord Scott, Lord Mance and Lord Neuberger agreed. Lord Hope, without agreeing so in terms, proposed an analysis of this point which was consistent with Lord Walker's. The first point to be derived from the speeches concerns intention. The distinction between cases where there is and cases where there is not a predominant intention to injure the claimant, is an inadequate tool for determining liability because it does not exhaust the possibilities. The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. This point had been made, some years earlier, by the Supreme Court of Canada in *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452. After a careful analysis of the (mainly English) authorities, Estey J, delivering the judgment of the Court, concluded at pp 471-472 that

> "whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know

> in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff."

Likewise, in *Total Network*, Lord Walker, at para 82, recognised the

> "clear distinction between the requirement of predominant purpose under one variety of the tort of conspiracy and the lower requirement of intentional injury needed for the other variety."

14. These two varieties of intention were to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant: see paras 93, 95. As an example of the latter situation, Lord Walker cited *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order "was not the instrument for the intentional infliction of harm" (para 95). Lord Mance in *Total Network* (para 119) was, we think, making the same point, by reference to the example 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. Addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that

> "unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)." (para 93, and cf para 95)

He concluded, at paras 94-95:

> "From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort … In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allen* [2008] AC 1, para 159 called 'instrumentality') of intentionally inflicting harm."

Lord Hope arrived at the same conclusion, at paras 43 and 44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the Commissioners, "the means used by the conspirators were directed at the claimants themselves":

> "a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious."

15. 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.

16. The unlawful means relied upon in this case are criminal contempt of court albeit that the offence is punishable in civil proceedings. The Bank does not of course contend that the defendants' predominant purpose in hiding Mr Ablyazov's assets was to injure it. 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. The freezing order and the receivership order had been made

on the application of the Bank for the purpose of protecting its right of recovery in the event of the claims succeeding. The object of the conspiracy and the overt acts done pursuant to it was to prevent the Bank from enforcing its judgments against Mr Ablyazov, and the benefit to him was exactly concomitant with the detriment to the Bank as both defendants must have appreciated. In principle, therefore, we conclude the cause of action in conspiracy to injure the Bank by unlawful means is made out. We say "in principle", because there remains an issue as to whether an action for conspiracy to commit a contempt of court is consistent with public policy. To that question we now turn.

The alleged "preclusionary rule"

17. The Bank argued that contempt of court, at least where it arises from breach of a court order made at the instance of the claimant, is actionable as such, even apart from any element of combination. It relies exclusively on conspiracy, presumably for jurisdictional reasons. The only thing said to have happened in England is the conspiratorial agreement. The overt acts all occurred abroad. But the Bank submits that because contempt of court is actionable as such, it necessarily constitutes unlawful means for the purposes of the tort of conspiracy. The courts below described this submission as "extreme" and rejected it. We do not propose to address it, because it follows from the above analysis that it is irrelevant. The unlawfulness of the means to be used to carry out the conspiracy does not depend on its actionability as an independent tort.

18. However, Mr Samek, who appeared for Mr Khrapunov, raised the issue in support of his own case. He submitted that not only is there no right of action for contempt of court as such, but the absence of such a cause of action reflects a principle of public policy that persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court. He called this the "preclusionary rule". It follows, he says, that even if a non-actionable crime can in principle constitute unlawful means for the purpose of the law of conspiracy, a claim for civil damages founded on a contempt of court is contrary to public policy, however the cause of action may be framed.

19. There is a certain amount of authority to support the existence of a right to recover civil damages for contempt of court. The early cases, which go back to the 14th century, are summarised in *Arlidge, Eady and Smith on Contempt*, 5th ed (2017), paras 14.171-175. However, decisions made before the development of the action on the case are unlikely to be of much assistance in elucidating the modern law. More germane are *Couling v Coxe* (1848) 6 CB 703, where damages were awarded against a witness who declined to comply with a subpoena as a result of which the plaintiff lost his case; *Fairclough & Sons v The Manchester Ship Canal* (1897) 41 SJ 225, where Lord Russell CJ held that there had been no breach of the

injunction relied upon in that case, but considered that an inquiry as to damages might have been ordered had there been one; and *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137, 1162, where Megaw J suggested, obiter, that a penal order against a contemnor might include a direction for the payment of damages. The point was left open in the majority judgments of the Court of Appeal in *Chapman v Honig* [1963] 2 QB 502, and was held to be sufficiently arguable to preclude a striking out order by Mustill J in *The "MESSINIAKI TOLMI"* [1983] 1 Lloyd's Rep 666, 671.

20. The authorities against the existence of a right to damages are *In re Hudson* [1966] 1 Ch 209, *N v Agrawal* [1999] PNLR 939 and *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181. In *In re Hudson* a wife claimed against the estate of her ex-husband an account of sums due pursuant to an undertaking given by him in previous divorce proceedings to pay her a third of his income. There was no evidence that the undertaking gave effect to any underlying contractual settlement. Buckley J refused to order an account because there was no enforceable right. The reason, he held, at p 214, was that

> "the only sanction for breach of an undertaking would be the imprisonment of the culprit or sequestration of his assets or a fine on the ground of his contempt of court. An undertaking given to the court, unless the circumstances are such that it has some collateral contractual operation between the parties concerned, confers no personal right or remedy upon any other party. The giver of the undertaking assumes thereby an obligation to the court but to nobody else."

N v Agrawal was a claim for damages against a medical practitioner by a woman who claimed to have been raped. Her case was that the defendant had failed to appear to give evidence against the alleged rapist at his trial, as a result of which the judge held that there was no case to answer and she suffered psychological injury. The Court of Appeal held that there was no duty of care. In the course of his judgment, Stuart-Smith LJ briefly observed that "contempt of court does not itself give rise to a cause of action". He cited *Chapman v Honig* in support of this statement, although the point had in fact been expressly left open in that case.

21. Much the most significant judicial statements, however, are those made by the Appellate Committee of the House of Lords in *Customs and Excise Comrs v Barclays Bank plc*. Barclays Bank had negligently allowed a payment to be made out of an account in respect of which a freezing order had been made on the application of the Commissioners. The Bank was not in contempt of the order because the payment was inadvertent. The issue was whether, having been notified of the order, it owed the Commissioners a duty of care. The House held that it did

not. Although the point does not appear to have been argued and there was only limited citation of the relevant authorities, three members of the committee drew an analogy with contempt of court, which they considered not to be actionable as a tort. Lord Bingham said, at para 17:

> "… the Mareva jurisdiction has developed as one exercised by court order enforceable only by the court's power to punish those who break its orders. The documentation issued by the court does not hint at the existence of any other remedy. This regime makes perfect sense on the assumption that the only duty owed by a notified party is to the court."

Lord Hoffmann said, at para 39:

> "There is, in my opinion, a compelling analogy with the general principle that, for the reasons which I discussed in *Stovin v Wise* [1996] AC 923, 943-944, the law of negligence does not impose liability for mere omissions. It is true that the complaint is that the bank did something: it paid away the money. But the payment is alleged to be the breach of the duty and not the conduct which generated the duty. The duty was generated ab extra, by service of the order. The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. The statute either creates a statutory duty or it does not. (That is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court. The order carries its own remedies and its reach does not extend any further."

Lord Rodger said, at para 62:

> "Punishment for contempt of court is the remedy which the law provides for the addressee's failure to comply with an injunction such as a freezing order."

Finally, at para 101 Lord Mance, expressing himself in more guarded terms in the context of the Bank's argument that the law of contempt provided sufficient protection for the Commissioners, said this:

> "But contempt requires proof to a standard commensurate with the seriousness of the offence, and the sanctions available to the court are not directed primarily at compensation, but at the imposition of a penalty. It is true that, with sensible ingenuity, a sanction can sometimes be tailored in such a way as to encourage the restoration of an asset which has been improperly released from a freezing order or perhaps even compensation: see eg the order made by Colman J in *Z Bank v D1* [1994] 1 Lloyd's Rep 656, 668. But a civil remedy for breach of a duty of care would be a much more satisfactory and complete protection than potential contempt proceedings for a claimant like the commissioners."

22. These are powerful dicta, but we do not think that the last word has necessarily been said on this subject in this court. It is unnecessary to resolve the question now, because we consider that the case against a right of action for breach of a court order cannot be based on any "preclusionary rule" of public policy. When judges like Buckley J and Lord Bingham, Lord Hoffmann and Lord Rodger say that the "sole remedy" for contempt is a criminal penalty, they are not stating a principle of public policy let alone a "preclusionary rule". They are simply asserting that no private law right is engaged by a contempt. There is a world of difference between the mere absence of a relevant right and a rule of law precluding such a right even if the elements to support it otherwise exist.

23. There are rules of law relating to the conduct of legal proceedings which clearly are based on a public policy precluding claims. A witness, for example, is absolutely immune from civil liability for things said in evidence or in circumstances directly preparatory to giving evidence. An action against him for negligence or defamation would fail. If it were framed in conspiracy, it would still fail, as it did in *Marrinan v Vibart* [1963] 1 QB 234. This is because the objection to such an action is not the absence of the necessary elements of a cause of action, but a special immunity based on a public policy that a witness should be able to give evidence without fear of adverse legal consequences other than prosecution for perjury or perverting the course of justice. The public policy is engaged by any attempt to found a claim on what the defendant did as a witness, irrespective of the legal label applied to it. Mr Samek made a valiant but ultimately unconvincing attempt to bring the present case within these principles. His submission, in summary, was that the principles on which the law of contempt was founded required the Court to have control over the consequences of a contempt, which it would not have if a right of action existed. That was because a right of action would make damages for contempt

a matter of right, and might even lead to a claim for them being heard in a foreign court. We are unmoved by these concerns. It is a commonplace of the law that the same act may give rise to criminal and civil liability. It necessarily follows that in such cases the sentence for the crime will be discretionary but the civil consequences will not. Thus a person may be given immunity in a criminal trial for burglary, for example because he agrees to give evidence against others involved, but that will not protect him against civil liability to the owner of the goods stolen. There is ample authority for the proposition, which is perhaps obvious, that breach of an order of the court is actionable where it gives effect to an underlying private law obligation which is itself actionable, although the result is to produce exactly the result that Mr Samek finds objectionable: see *Midland Marts Ltd v Hobday* [1989] 1 WLR 1148, *Parker v Rasalingham* (Lawrence Collins QC, unreported, 3 July 2000); and *Independiente Ltd v Music Trading On-line (HK) Ltd* [2008] 1 WLR 608. It is conceivable, although not very likely, that if there were a cause of action for contempt of court, it might fall to be heard in a foreign court, but we do not regard that as problematical and even if it were we cannot conceive that the appropriate response is that such a claim should not be entertained even in England. At first sight, there is more to be said for the argument that a right of action for conspiring to breach a freezing order injunction would expose foreigners to liability notwithstanding the standard proviso in such orders that their terms "do not affect or concern anyone outside the jurisdiction of this court". But the proviso is irrelevant to the position of a party in contempt, such as Mr Ablyazov, who is by definition subject to the jurisdiction of the court. A claim in conspiracy will normally allege conspiracy with the respondent to a court order to breach his obligations under the order, as it does in this case.

24. We conclude that the Bank's pleaded allegations disclose a good cause of action for conspiracy to injure it by unlawful means.

Jurisdiction

25. The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007, by which both Switzerland and the United Kingdom are bound, lays down a general rule (article 2) that a person should be sued in his or her state of domicile. However, it provides for special jurisdiction in further provisions including articles 5 and 6.

26. Before Teare J, the Bank sought to rely on article 6 which provides that a person domiciled in a state bound by the Convention may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The judge rejected a submission on behalf of the Bank

that it could rely on article 6 against Mr Khrapunov on the basis that at the relevant date in July 2015 Mr Ablyazov was domiciled in England. The judge held that once Mr Ablyazov had fled this jurisdiction he had no intention of returning and was not domiciled here. There was no appeal against that conclusion. The judge also rejected a submission on behalf of the Bank, founded on *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309, that Mr Ablyazov should, nevertheless, be taken still to be domiciled in England because he was in breach of an obligation under the worldwide freezing order prohibiting him from leaving the jurisdiction. The Court of Appeal rejected an appeal against that ruling and there is no appeal to this court on this point. It follows that we are concerned only with article 5.

27. Article 5 of the Lugano Convention provides so far as relevant:

> "A person domiciled in a state bound by this Convention may, in another state bound by this Convention, be sued:
>
> …
>
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

This provision is substantially identical to those in article 5(3) of the Brussels Convention, article 5(3) of the Brussels Regulation (Council Regulation (EC) No 44/2001) and article 7(2) of the Brussels I Regulation (Regulation (EU) No 1215/2012).

28. In *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA ("Bier")* (Case C-21/76) [1978] QB 708 the Court of Justice held that article 5(3) of the Brussels Convention must be understood as intended to cover both (a) the place where the damage occurred and (b) the place of the event giving rise to it, with the result that the defendant may be sued at the option of the claimant "either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage" (p 731F-G). Before Teare J and in the Court of Appeal the Bank relied on both limbs of article 5(3).

29. The Bank's argument that the damage occurred in England was based on the contention that its worldwide freezing order and its judgments against Mr Ablyazov were located here and had been reduced in value by the alleged conduct in relation to assets in other jurisdictions. The judge rejected this argument. He considered that the element of damage proximate to the harmful event was the Bank's inability or

reduced ability to execute against those assets in the places where they were located. This conclusion was upheld by the Court of Appeal. The Bank did not initially seek to challenge this decision by a cross-appeal. However, following a ruling by Lord Mance on 20 December 2017 that the Bank needed permission to cross-appeal in order to raise arguments based on limb (a) of article 5(3), the Bank sought permission to cross-appeal out of time on 21 December 2017. Mr Khrapunov filed a notice of objection on 3 January 2018. Permission to cross-appeal on this point was refused on 18 January 2018.

30. The Bank submitted that the event giving rise to the damage was the conspiracy itself, which was hatched in England. Teare J rejected this submission, because he considered that the cause of the damage was not the conspiracy but its implementation. He considered that it was likely to have been implemented by the decisions that Mr Ablyazov took and the instructions that he gave. These things occurred in England until 16 February 2012 when Mr Ablyazov fled the jurisdiction, but not thereafter. The Court of Appeal disagreed. They held that the event giving rise to the damage was the conspiratorial agreement in England.

31. It is well established that the special jurisdiction provisions in Brussels/Lugano scheme are derogations from the general rule conferring jurisdiction on the courts of the place of the defendant's domicile. As a result, they must be strictly interpreted. As Lord Hodge recognised in *AMT Futures Ltd v Marzillier mbH* [2017] 2 WLR 853 (at para 13), these heads of special jurisdiction can be justified because they reflect a close connection between the dispute and the courts of a contracting State, other than that in which the defendant is domiciled, and thereby promote the efficient administration of justice and proper organisation of the action: see, generally, *Dumez France SA and Tracoba Sarl v Hessische Landesbank (Helaba)* (Case C-220/88) [1990] ECR I-49, para 17; *Marinari v Lloyd's Bank plc* (Case C-364/93) [1996] QB 217, para 16; *Kronhofer v Maier* (Case C-168/02) [2004] 2 All ER (Comm) 759; [2005] 1 Lloyd's Rep 284; [2004] ECR I-6009, para 15. Moreover, the special jurisdictions, and article 5(3) in particular, have of necessity been the subject of a series of decisions by the Court of Justice, which has developed and illuminated the underlying principles in a way which assists in their application. However, before turning to consider these authorities in relation to article 5(3) it is necessary to say something about the respective roles of the Convention regime and the relevant domestic law.

32. The expression "place where the harmful event occurred" in article 5(3) requires an autonomous interpretation in order to ensure its effectiveness and uniform application (*Coty Germany GmbH v First Note Perfumes NV* (Case C-360/12) [2014] Bus LR 1294, paras 43-45). There is no basis for interpreting article 5(3) by reference to national rules of non-contractual liability, for such an approach would be incompatible with the object of the Convention which is to provide a clear and certain attribution of jurisdiction (*Rosler v Rottwinkel GmbH* (Case C-241/83)

[1986] QB 33, para 23; *Marinari v Lloyds Bank plc* at paras 18, 19. See also *Melzer v MF Global UK Ltd* (Case C-228/11) [2013] QB 1112.). It is against this background that the appellant criticises the Court of Appeal for having focused on acts giving rise to liability as opposed to damage. However, the requirement of an autonomous interpretation does not mean that the component elements of the cause of action in domestic law are irrelevant. On the contrary they have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located for the purposes of article 5(3). In particular, whether an event is harmful is determined by national law. To take an example raised during the hearing of the appeal, if a firearm is manufactured in State A and fired in State B the place of the event giving rise to the damage within article 5(3) is likely to differ depending on whether the basis of the complaint in national law is negligent manufacture of the firearm, or its negligent handling by the gunman. In the same way, the place of the event giving rise to the damage may vary depending on whether the cause of action is an unlawful means conspiracy or a free-standing tortious act.

33. Thus in *Shevill v Presse Alliance SA* (Case C-68/93) [1995] 2 AC 18 the Court of Justice emphasised (at paras 34-41) that the sole object of article 5(3) of the Brussels Convention is to allocate jurisdiction by reference to the place or places where an event considered harmful occurred. It does not specify the circumstances in which the event giving rise to the harm may be considered harmful to the victim or the evidence which the claimant must adduce to enable the court seised to rule on the merits of the case. This is because these are matters for the national court applying the substantive law determined by its own rules of private international law, national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired. Accordingly, in *Shevill*, the fact that damage was presumed in libel actions under the applicable national law, so that the claimant did not have to adduce evidence of the existence and extent of that damage, did not preclude the application of article 5(3) in determining which courts had jurisdiction.

34. From an early stage in the development of the jurisprudence on article 5(3) of the Brussels Convention, the Court of Justice in applying the second limb of the *Bier* test, has emphasised the notion of the originating event. In *Bier* itself the Court observed that liability in tort, delict or quasi-delict can only arise if a causal connection can be established between the damage and "the event in which that damage originates" (at para 16) and went on to formulate the two limbs as permitting the exercise of jurisdiction "either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage" (at para 25). In *Shevill* the Court, having repeated that paragraph from *Bier*, concluded (at para 24) that in the case of a libel by a newspaper article distributed in several contracting states, the place of the event giving rise to the damage can only be the place where the publisher of the newspaper in question is established, "since that is the place where the harmful event originated and from which the libel was issued and put into circulation." Similarly, in *Wintersteiger AG*

v Products 4U Sondermaschinenbau GmbH (Case C-523/10) [2013] Bus LR 150, the Court of Justice held that where a display on a search engine website of an advertisement used a keyword identical to a national trade mark which it was alleged to infringe, it was the activation by the advertiser of the technical process displaying the advertisement and not the display of the advertisement itself which should be considered to be the event giving rise to the alleged infringement of trade mark.

35. In *Hejduk v EnergieAngentur NRW GmbH* (Case C-441/13) [2015] Bus LR 560, the claimant, a professional photographer domiciled in Austria, brought proceedings in Austria against the defendant, a company registered in Germany, alleging infringement of copyright in that it had placed some of her photographs on its website without her consent. The Court of Justice held (at paras 24-25) that where the alleged tort consists in the infringement of copyright by placing photographs online on a website, the activation of the process for the technical display of the photographs on that website must be regarded as the causal event and that, accordingly, the acts or omissions giving rise to the damage were localised where the defendant had its seat, "since that is where the company took and carried out the decision to place photographs online on a particular website".

36. *Kolassa v Barclays Bank plc* (Case C-375/13) [2016] 1 All ER (Comm) 733 concerned proceedings in Austria, where the claimant was domiciled, against Barclays bank alleging breach of obligations relating to a prospectus and information for investors. The Court of Justice observed with regard to limb (b) of article 5(3) that there was nothing to show that the decisions regarding the arrangements for the investments proposed by the bank and the contents of the relevant prospectuses were taken in Austria or that those prospectuses were originally drafted and distributed anywhere other than the member state in which the bank had its seat.

37. Turning to the decisions of domestic tribunals on the point, in *Domicrest Ltd v Swiss Bank Corpn* [1999] QB 548 the claimant, an English company, alleged negligent mis-statement as to the effect of a payment order, made by the defendant bank in Switzerland to the claimant in England. Rix J held that the place of the event giving rise to the damage for the purpose of limb (b) of article 5(3) was Switzerland where the statement originated. Having referred to *Dumez*, *Shevill* and *Marinari*, Rix J observed that each in its own way emphasised that to look to the later consequences would be to run the risk of favouring the *forum actoris*, contrary to the objectives of the Brussels Convention. He considered that he was not free to apply the broad test involving identifying where the substance of the cause of action in tort arose, which had been adopted by Steyn J in *Minster Investments Ltd v Hyundai Precision & Industry Co Ltd* [1988] 2 Lloyd's Rep 621 at p 624, prior to those three decisions of the Court of Justice, but was required to limit himself to "the more structured formula" adopted and applied in those decisions. He continued (at p 567H):

> "Applying that formula, it seems to me that the place where the harmful event giving rise to the damage occurs in a case of negligent mis-statement is, by analogy with the tort of defamation, where the mis-statement originates. It is there that the negligence, even if not every element of the tort, is likely to take place; and for that and other reasons the place from which the mis-statement is put into circulation is as good a place in which to found jurisdiction as the place where the mis-statement is acted on, even if receipt and reliance are essential parts of the tort. For these purposes it seems to me that there is no difference between a written document and an oral or other instantaneous communication sufficient to distinguish between such cases. Although it may be argued that in the case of instantaneous communications and perhaps especially in the case of telephone conversations the mis-statement occurs as much where it is heard as where it is spoken, nevertheless it remains true as it seems to me that it is the representor's negligent speech rather than the hearer's receipt of it which best identifies the harmful event which sets the tort in motion. To prefer receipt and reliance as epitomising the harmful event giving rise to the damage in the case of negligent mis-statement is, I think, to ignore the fact that the plaintiff also has the option of suing in the courts of the place where the damage occurs - which is quite likely to be at the place of receipt and reliance."

This reasoning and conclusion have been expressly approved by the Court of Appeal in *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146, per Mance LJ at para 41. They have also been applied in a series of first instance decisions. (*Alfred Dunhill Ltd v Diffusion Internationale Maroquinerie de Prestige SARL* [2002] 1 All ER (Comm) 950, at p 957; *Newsat Holdings Ltd v Zani* [2006] 1 All ER (Comm) 607 , at paras 41-44; and *London Helicopters Ltd v Heliportugal LDA-INAC* [2006] 1 All ER (Comm) 595 , at paras 28-35).

38. In our opinion, this approach accords with the principles to be derived from the decisions of the Court of Justice. Although the precise terminology employed by Rix J is not derived from the decisions of the Court of Justice, it is an accurate statement of the law. We do not accept that it detracts from the "need to consider the causative impact of the candidate events by improperly focussing on the acts which were first in time". This criticism misrepresents the effect of the decisions of the Court of Justice considered above, which does not require a comparative consideration of the causative impact of different events. On the contrary, the Court of Justice emphasises the relevant harmful event which sets the tort in motion, thereby providing a greater degree of certainty in the application of the Convention. This gives effect to an important policy of the Brussels/Lugano scheme, recognised

in *Bier* at para 21, by promoting "a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage".

39. In *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* (Case C-352/13) [2015] QB 906, the European Commission had decided that several companies had participated in a single and continuous infringement of the prohibition of cartel agreements. It was not possible to point to a single jurisdiction in which the cartel had been formed since it consisted of a number of collusive agreements which had been concluded during meetings at various places throughout Europe. Several customers of these companies alleged that they had suffered loss by reason of the cartel and they assigned their potential claims to the applicant, a Belgian company. The applicant brought proceedings in Germany for damages and disclosure against six of the companies which were incorporated in various member states. The German court referred to the Court of Justice a series of questions, including one relating to jurisdiction under article 5(3), Brussels Regulation. Having observed (at para 39) that the rule of special jurisdiction is based on the existence of a close link between the dispute and the courts of the place where the harmful event occurred or may occur, the Court continued:

> "43. With regard to the place of the causal event, it must be pointed out at the outset that, in circumstances such as those in the present case, the buyers were supplied by various participants in the cartel within the scope of their contractual relations. However, the event giving rise to the alleged loss did not consist in a potential breach of contractual obligations, but in a restriction of the buyer's freedom of contract as a result of that cartel in the sense that that restriction prevented the buyer from being supplied at a price determined by the rules of supply and demand.
>
> 44. In those circumstances, the place of a causal event of loss consisting in additional costs that a buyer had to pay because a cartel has distorted market prices can be identified, in the abstract, as the place of the conclusion of the cartel. Once concluded, the participants in a cartel ensure through action or forbearance that there is no competition and that prices are distorted. Where the place of a cartel's conclusion is known, it would be consistent with the aims outlined in para 39 above for the courts of that place to have jurisdiction."

40. The Court concluded that this reasoning was impossible to apply to a cartel which could not be located in a single jurisdiction. It then stated its conclusion in the following terms.

> "50. It follows that jurisdiction by virtue of article 5(3) of Regulation No 44/2001 to adjudicate, on the basis of the causal event and with regard to all of the perpetrators of an unlawful cartel which allegedly resulted in loss, depends upon the identification, in the jurisdiction of the court seised of the matter, of a specific event during which either that cartel was definitively concluded or one agreement in particular was made which was the sole causal event giving rise to the loss allegedly inflicted on a buyer."

In other words, the Court concluded that it was the formation of the cartel and not its implementation which was the event giving rise to the damage.

41. We consider that the Court of Appeal correctly identified the place where the conspiratorial agreement was made as the place of the event which gives rise to and is at the origin of the damage. As Sales LJ explained (at para 76), in entering into the agreement Mr Khrapunov would have encouraged and procured the commission of unlawful acts by agreeing to help Mr Ablyazov to carry the scheme into effect. Thereafter, Mr Khrapunov's alleged dealing with assets the subject of the freezing and receivership orders would have been undertaken pursuant to and in implementation of that agreement, whether or not he was acting on instructions from Mr Ablyazov. The making of the agreement in England should, in our view, be regarded as the harmful event which set the tort in motion.

Disposal

42. For these reasons, we would dismiss Mr Khrapunov's appeal.