Neutral Citation Number: [2016] EWHC 230 (Comm)

Case No: CL-2015-000549

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
London EC4A 1NL

Date: 11/02/2016

Before :

MR. JUSTICE TEARE

- -

Between :

JSC BTA BANK	**Claimant**
- and -	
MUKHTAR ABLYAZOV	**First Defendant**
ILYAS KHRAPUNOV	**Second Defendant**

- -
- -

Stephen Smith QC and Tim Akkouh (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Charles Samek QC and Marc Delehanty (instructed by **Hughmans**) for the **Second Defendant**

Hearing dates: 26, 27 & 28 January 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR. JUSTICE TEARE


OFFICE COPY
HIGH COURT
ROLLS BUILDING
OF JUSTICE

Mr. Justice Teare :

1. There has been considerable litigation in this court since 2009 between the Kazakhstan bank, JSC BTA Bank ("the Bank"), and its former chairman, Mr. Mukhtar Ablyazov ("Mr. Ablyazov"). Much of the litigation has concerned attempts by the Bank to enforce the worldwide freezing order ("the WFO") granted by the court against Mr. Ablyazov in 2009 which attempts culminated in contempt proceedings against Mr. Ablyazov. The Bank established that Mr. Ablyazov breached the terms of the WFO and that certain individuals assisted him in doing so; see *JSC BTA Bank v Ablyazov (No.8)* [2013] 1 WLR 1331. The Bank now considers that Mr. Ablyazov's son-in-law, Mr. Ilyas Khrapunov ("Mr. Khrapunov") also assisted Mr. Ablyazov in breaching the WFO. In 2009, when the Bank says that Mr. Khrapunov conspired with Mr. Ablyazov to breach the WFO, Mr. Khrapunov was 25 years old. He had married Mr. Ablyazov's daughter in 2007.

2. The Bank has commenced eleven actions and, following Mr. Ablyazov's flight from the jurisdiction on the eve of being committed to prison for contempt, has obtained judgments in default against Mr. Ablyazov for a total sum exceeding US$4.6 billion. But "the Bank has not succeeded in recovering amounts of a magnitude remotely approaching that sum via its enforcement efforts" (see the first affidavit in this action of Mr. Hardman, the Bank's tireless solicitor at Hogan Lovells International). Notwithstanding the apparent paucity (at least in terms relative to the size of the judgment debt) of the Bank's recoveries and the long and undoubtedly hugely expensive years of litigation, the Bank's desire to litigate appears undiminished. It has now opened up another front by taking proceedings against Mr. Khrapunov. In an action against Mr. Khrapunov commenced in July 2015 the Bank has alleged that since 2009 he has conspired with Mr. Ablyazov to prevent the Bank from making any substantial recovery by breaching the WFO, creating and using false and misleading documents and by taking whatever steps they considered necessary to prevent the Bank from recovering the judgments debts. By so doing it is said that they abused the process of the court and interfered with the administration of justice. The cause of action relied upon is the tort of conspiracy to injure by unlawful means, the unlawful means being serial contempts of court. They are summarised in paragraph 18 of the Particulars of Claim and particularised in paragraphs 27-35. The alleged unlawful dealings concerned assets of Swiss, Belizean and Russian companies. In support of that action the Bank obtained a WFO against Mr. Khrapunov which was granted by Males J. on 17 July 2015. Mr. Khrapunov has so far failed to produce any information as to his assets as required by that WFO.

3. Mr. Khrapunov has responded to this claim in a manner characteristic of defendants in this litigation, namely, with vigour.

Mr. Samek QC has submitted on his behalf that the cause of action relied upon is "wholly unsustainable", "bad in law" and "must fail". The focus of this submission is the question whether a contempt can constitute unlawful means for the purposes of the tort. Further, in circumstances where Mr. Khrapunov is domiciled in Switzerland, the suggestion that this court has jurisdiction to hear and determine the claim against him pursuant to the Lugano Convention is said to be unsustainable. Mr. Khrapunov therefore asks the court to set aside the Claim Form and the WFO which was issued against him.

4. Thus the court must consider two questions of law. The first is whether the Bank has a cause of action known to the law. The second is whether this court has jurisdiction under the Lugano Convention to hear and determine the claim.

5. The Bank's case on the facts is supported by a 40 page affidavit from Mr. Hardman. No evidence in opposition has been filed by Mr. Khrapunov. He has however sworn an affidavit in response to the WFO issued against him in which he has said that since 1 January 2013 (the relevant date specified in the WFO) he has not administered any assets with a value exceeding £10,000 for Mr. Ablyazov or dealt with any such assets in accordance with Mr. Ablyazov's direct or indirect instructions.

The cause of action

6. It is important to note that the Bank does not have to persuade the court on this application that its cause of action will succeed. It only has to persuade the court that it has a good arguable case.

7. The tort of conspiracy to injure by unlawful means "involves an arrangement between two or more parties, whereby they effectively agree that at least one of them will use "unlawful means" against the claimant, and, although damage to the claimant need not be the predominant intention of any of the parties, the claimant must have suffered loss or damage as a result" (see *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174 at paragraph 213 per Lord Neuberger). The only element of that definition which is in dispute on this application is whether at least one of the defendants used unlawful means.

8. Mr. Smith QC, on behalf of the Bank, submitted that it is "at least eminently arguable that a conspiracy to breach court orders and/or to create and use misleading documents and/or to abuse the process of the court and/or to intentionally interfere with the administration of justice constitutes unlawful means."

9. In support of that submission he relied upon the decision of the Court of Appeal in *Surzur Overseas Limited v Koros* [1999] 2 Lloyd's Rep. 611. In that case a freezing order was granted against Mr.

Koros and others. Mr. Koros failed to disclose his interest in three shipowning companies. Later he sought to transfer the vessels to third party buyers but on terms which enabled the sellers to retain control over the vessels. Surzur became aware of possible dealings in the vessels and obtained a variation to the freezing order which covered the shares or other legal or beneficial interests in the three vessels. MOAs on the Norwegian Saleform, which were said to be false, were placed before Surzur seeking consent to the sale of the vessels. Surzur refused to consent and an application was made to the court. Rix J. refused to vary the freezing order. Further material, said to be false, was produced and another application was made to the court. Moore-Bick J. permitted the sale in accordance with the MOAs. Subsequently Surzur claimed damages from Koros and the other defendants. The cause of action relied upon was conspiracy to cause harm by unlawful means, namely, the creation of false documents, the making of fraudulent and misleading statements and the deploying in court of false evidence. At first instance the claim was held to have no prospects of success because the defendants were immune from suit on the basis of the witness immunity rule pursuant to which no action lies against parties or witnesses for anything said or done, even if falsely, in the course of proceedings in a court of justice. The Court of Appeal, basing itself on the speech of Lord Morris in *Roy v Prior* [1971] AC 470 at p.477, held that if an action is not brought simply in respect of false evidence but is brought in relation to some broader objective during the currency of which the false evidence was given the witness immunity rule does not apply. Thus, since the conspiracy was one to hide assets and cheat Surzur by the manufacture of false documents, the witness immunity rule did not apply. Waller LJ (with whom Aldous and Hirst LJJ agreed) added that:

> "Abuse of process can very arguably be the unlawful means on which a conspiracy can be founded. .....a conspiracy which had its aim and objective of defeating an order of the court and obtaining the release from a Mareva of assets by persons who were not, I emphasise, parties to the original action, must be a conspiracy to abuse the process very akin to the malicious arrest which was the subject of *Roy v Prior*. There is no logic in creating an exception for malicious arrest, and not a conspiracy to abuse the process entailing the defeating of something very close to an arrest a Mareva injunction."

10. *Surzur v Koros* is, it seems to me, authority for the proposition that there is a good arguable case that a conspiracy to injure, by procuring the variation of a freezing order removing certain assets from it by creating false documents and giving false evidence, is actionable, the unlawful means being the creation of false

documents and the giving of false evidence. However, the case did not decide that there is a good arguable case that a conspiracy to cause harm by procuring breaches of a freezing order is actionable because those were not the facts of the case. However, the terms in which the court's decision was expressed, "a conspiracy to abuse the process entailing the defeating of …a Mareva injunction", would appear apt to cover a conspiracy to cause harm by procuring breaches of a freezing order. *Surzur v Koros* therefore suggests but does not decide that breaches of a freezing order can amount to unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

11. Mr. Smith also relied upon certain of the observations in *Total Network* in which case the House of Lords considered whether criminal conduct could amount to unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. The House of Lords held that (some) criminal conduct could amount to unlawful means. Mr. Smith noted that Lord Scott said at paragraph 56 that "the circumstances must be such as to make the conduct *sufficiently reprehensible* to justify imposing on those who have brought about the harm liability in damages for having done so". Mr. Smith said that breaches of a WFO were also "sufficiently reprehensible" to justify imposing on those who have brought about the harm liability in damages for having done so. Mr. Smith next noted the approach of Lord Walker to the question whether criminal conduct amounted to unlawful means. Lord Walker observed at paragraph 90 that the man in the street, if asked, would say that a crime was an unlawful act and, at paragraph 91, that the reaction of a lawyer would be more informed but not essentially different. Lord Walker further observed at paragraph 93 that "all the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means …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)." Mr. Smith said that contempt was no less serious than crime or tort and so should also be held to constitute unlawful means. Mr. Smith also referred to the judgment of Lord Mance at paragraph 120. Lord Mance, in reaching his conclusion that the offence of cheating the revenue amounted to unlawful means, relied upon the circumstance that the offence existed to protect the Revenue and therefore, where its commission is intentionally targeted at and injurious to the Revenue, there would be a lacuna in the law if the law did not recognise a civil liability. Mr. Smith said that the WFO issued against Mr. Ablyazov was made to protect the Bank and that the breaches of it which were procured by Mr. Ablyazov and Mr. Khrapunov were intended to and did cause harm to the Bank. He said that, adopting the reasoning of Lord Mance, the law should recognise a civil liability for

such conduct. Finally, Mr. Smith relied upon the similar approach of Lord Neuberger at paragraph 221.

12. Were matters to rest there it would seem to me that Mr. Smith had established a strong case for saying that breaches of a WFO can constitute unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. However, Mr. Samek QC, on behalf of Mr. Khrapunov, submitted that breaches of court orders cannot amount to unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. He submitted that this follows from the judgment of Morgan J. in *Digicel (St. Lucia) Limited v Cable & Wireless* [2010] EWHC 774 (Ch) and also from *Total Network*.

13. Mr. Samek submitted that in *Digicel* Morgan J. held that non-actionable breaches of a non-criminal statute or regulation do not constitute unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. Since the unlawful means alleged by the Bank are not torts, are not actionable and are not criminal the Bank's cause of action must fail. I am unable to accept this submission as to the effect of *Digicel*. Whilst it is true that Morgan J. held that non-actionable breaches of a non-criminal statute or regulation do not constitute unlawful means for the purposes of the tort of conspiracy to injure by unlawful means, Morgan J. was not considering the question whether breach of a court order could constitute unlawful means. His extensive and careful judgment on the question whether non-actionable breaches of a non-criminal statute can constitute unlawful means (see Annex I to his judgment paragraphs 4-62) does not assist, and was not intended to assist, on the question whether breaches of a court order can constitute unlawful means.

14. Mr. Samek submitted that there was no right to damages for contempt and that *Total Network* established that breaches of a court's order could only be dealt with by way of the penalties available for contempt such as committal. To allow an action for damages based upon contempt being unlawful means would subvert that basic rule. He submitted that "the reason why the alleged wrongdoing in this case is not actionable by the Bank is because of the positive rule precluding actionability for damages in the case of breaches of court orders. Accordingly, it further follows that an unlawful means conspiracy based on such alleged wrongdoing would circumvent that positive rule." He also submitted that it would be unprincipled to allow an award of damages against Mr. Khrapunov for conspiracy based upon breaches of the WFO in circumstances where the other party to the alleged conspiracy, Mr. Ablyazov, could not be made liable in damages for his breaches of the WFO. Finally, he submitted that expanding the categories of unlawful means to include contempt would be too great an extension of the law which can only develop by incremental steps.

15. In response Mr. Smith said that there was no positive rule that the court had no power to order the payment of damages for contempt. He said that statements in the authorities in support of the suggested positive rule were mistaken and that other authorities supported the proposition that orders for the payment of damages could be made in contempt proceedings.

16. It is therefore necessary to consider whether there is or is not a positive rule of the common law excluding an order for damages where a court order is breached. I was taken to a number of authorities on this matter which I have reviewed. Rather than lengthen the body of this judgment I have set out my review of those authorities in an appendix to this judgment.

17. The law of contempt is concerned with maintaining and defending the authority of the court in the public interest. As Pearson LJ stated in *Chapman v Honig* [1963] 2 QB 502 at p. 522 "the jurisdiction exists and is exercised ...for the protection of the administration of justice and not for the protection of individuals". Those who disobey orders of the court may be punished for their contempt. Although it is usually an individual who instigates proceedings for contempt and although he hopes that by doing so the contemnor will decide to respect his rights the law of contempt is not focussed upon compensating litigants who have suffered loss as a result of failures to obey orders of the court. That is the concern of the private law of obligations, typically contract and tort. The law of contempt is focussed upon punishing those who fail to obey orders of the court with the aim of thereby maintaining the authority of the court in the public interest. Principle would therefore suggest that the court, when exercising its contempt jurisdiction, does not have power to compensate individuals by an order for damages.

18. The absence of a power to order the payment of damages is also suggested by the rules of court governing contempt proceedings. Thus CPR Part 81.2 refers to the power of the court to order committal, sequestration or fines for contempt. No mention is there made of the availability of an order for the payment of damages.

19. In *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181 the House of Lords had to consider whether a bank which had been informed of a freezing order but which had failed to prevent payments out of the account owed a duty of care to the claimant who had obtained the freezing order. The House of Lords held that no duty of care was owed. In the course of explaining why there was no duty of care, the judges emphasised that the court's orders were only enforceable by its power to punish for contempt; see the Appendix for the observations of Lords Bingham, Hoffmann and Rodger in this regard. Had an order for the payment of damages been available for contempt the availability of such an order would have been very relevant to the issue in *Customs and Excise*

Commissioners v Barclays Bank and the judges would have expressed themselves very differently. Only one made reference to compensation but did so in tentative terms, see the Appendix for Lord Mance's observation. But if there had been a well-recognised jurisdiction to order the payment of damages to compensate for loss Lord Mance would have expressed himself rather differently.

20. Some authorities suggest that there is jurisdiction to award damages for contempt. They are *Couling v Coxe* (1848) 6 CB 703, *Fairclough v The Manchester Ship Canal* (1897) 41 Sol. Journal 225, *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* [1966] 1 WLR 1137 and *The Messiniaki Tolmi* [1983] 1 Lloyd's Rep. 666. (These case were perhaps what Mr. Collins QC had in mind in *Parker v Rasalingham* (unrep.,3 July 2000) when he referred to there being "some authority" for the proposition that the court had jurisdiction to award damages for breach of an injunction.) But none of these authorities grapples with the principle that the law of contempt is concerned with the public interest and not with private compensation. That principle is reflected in both the CPR and in the relatively recent observations of the House of Lords on the law of contempt in *Customs and Excise Commissioners v Barclays Bank.* However, the House of Lords did not consider the authorities listed at the beginning of this paragraph.

21. The decision which I must make is difficult for a first instance judge. Having reflected upon principle and the authorities I find the argument from principle compelling (buttressed as it is by the CPR and the recent observations in the House of Lords) and to be preferred to the contrary argument based upon the several cases marshalled by Mr. Smith (one very old case, two *obiter* observations and one in which it was accepted that it is arguable that damages can be awarded for contempt). I have therefore concluded that the court does not have power to order damages for contempt. I have expressed my conclusion shortly in this judgment but my further comments upon the authorities can be found in the appendix to this judgment.

22. The next stage in Mr. Samek's argument is that "the alleged wrongdoing in this case is not actionable by the Bank ...because of the positive rule precluding actionability for damages in the case of breaches of court orders ...it further follows that an unlawful means conspiracy based on such alleged wrongdoing would circumvent that positive rule." However, all that the "positive rule" does is provide that the court's powers to punish for contempt do not include or extend to a power to order the payment of damages for loss caused by contempt. Where reliance is placed on another tort such as conspiracy to injure by the use of unlawful means it does not appear to me to follow from the "positive rule" that a contempt cannot amount to unlawful means for the purposes of that tort. Allowing a contempt to amount to unlawful means for the purposes

of the tort of conspiracy to injure by the use of unlawful means would not circumvent the "positive rule". The "positive rule" simply means that where reliance is placed on contempt alone as a reason for ordering the payment of damages the court will not order the payment of damages. Where, however, reliance is placed on a conspiracy to injure by the use of unlawful means, namely a contempt, the "positive rule" has no role because reliance is not being placed on contempt alone as reason for ordering the payment of damages. The significance of being able to rely upon a recognised tort was mentioned by Pearson LJ in *Chapman v Honig* at p.520 and by Stuart-Smith LJ in *Nunes v Agrawal* at paragraph 12.

23. Mr. Samek said that the approach of the House of Lords in *Total Network* supported his argument. The House of Lords held that there was no intention in the Value Added Tax Act to bar the Commissioners from recovering damages for conspiracy. But had there been, said Mr. Samek, such intention would have been analogous to the "positive rule" of common law which precluded the recovery for damages for contempt. I do not accept the suggested analogy. Had there been discerned in the Value Added Tax Act an intention to bar the Commissioners from recovering damages for conspiracy the courts would give effect to that intention because it was the intention of Parliament that the Commissioners could not rely upon the tort of conspiracy. But the "positive rule" of common law on which reliance is placed is not concerned with the tort of conspiracy. For this reason I do not accept Mr. Samek's submission that the decision in *Surzur* "does not survive" the reasoning in *Total Network.*

24. The decision in *Customs and Excise Commissioners v Barclays Bank* was that a third party with knowledge of a freezing order was not liable in the tort of negligence for damages caused by his failure to obey its terms. I have considered whether, by parity of reasoning, a third party with knowledge of a freezing order who conspires with the defendant against whom the freezing order has been issued to breach the terms of the order is not liable in the tort of conspiracy to injure by the use of unlawful means. The claim failed in *Customs and Excise Commissioners v Barclays Bank* because the circumstances of the case did not give rise to a duty of care owed by the third party to the claimant in the action. Thus a cause of action could not be established. However, liability in the tort of conspiracy to injure by unlawful means arises from intentional conduct and not from an omission to exercise care where there was a duty to exercise care. The Bank clearly has an arguable case that there was a conspiracy to injure. The only question is whether the injury was to be caused by means which, for the purposes of the tort, are properly to be regarded as unlawful. I do not consider that the reasoning of the House of Lords in *Customs and Excise Commissioners v Barclays Bank* precludes the court from regarding

a contempt as unlawful means for the purposes of the tort of conspiracy.

25. For the reasons given by Mr. Smith and which I have summarised above, the reasoning of the House of Lords in *Total Network,* when deciding that the crime of cheating the revenue amounts to unlawful means, provides strong support for concluding that a contempt also amounts to unlawful means. Mr. Samek submitted that to allow contempt to qualify as unlawful means was too great an extension of the law. However, I regard it as a principled incremental step justified by the reasoning of the House of Lords in *Total Network*. Morgan J. in Digicel refused to extend unlawful means to embrace non-criminal breaches of regulations but in my judgment contempts of court, certainly those as serious as the contempts alleged in this case which amount to a very serious interference with the administration of justice, and in particular with the WFO which was issued to protect the Bank, and are punishable by committal to prison, sequestration of assets or fines, are sufficiently reprehensible to justify treating them as unlawful means. The man in the street would agree.

26. I have therefore concluded that the Bank has established by its pleading and the evidence adduced in support of that pleading a good arguable case that Mr. Khrapunov has committed the tort of conspiracy to injure by unlawful means.

27. The question arose during argument whether it was unprincipled to have a situation in which Mr. Ablyazov could not be ordered to pay damages for his contempt whereas Mr. Khrapunov could be made liable in damages for conspiring to injure the Bank by unlawful means, namely, assisting Mr. Ablyazov to act in contempt of court by breaching the WFO. However, I consider this to be a false contrast. Both Mr. Ablyazov and Mr. Khrapunov are alleged to have been party to the conspiracy to injure the Bank by the use of unlawful means. If that conspiracy is established they are both liable in damages for the tort. It is true that Mr. Ablyazov would not be liable in damages simply as a result of acting in contempt. But as was established in *Total Network* means can be unlawful even though those means are not in themselves actionable. Where there is a conspiracy to injure the liability stems from the conspiracy. “It is in the fact of the conspiracy that the unlawfulness resides” (per Lord Hope in *Total Network* at paragraph 44). “The gist of conspiracy is damage intentionally inflicted by persons who combine for that purpose” (see Lord Walker in *Total Network* at paragraph 100).

The jurisdiction issue

28. It is common ground that Mr. Khrapunov is domiciled in Switzerland. Article 2 of the Lugano Convention therefore provides that he shall be sued there. Mr. Smith relied upon Articles 5 and 6 of the Lugano

Convention as giving this court "special" jurisdiction to hear and determine the claims against Mr. Khrapunov. The Bank must establish that in relation to these articles it has much the better argument as explained in *Canada Trust v Stolzenberg (No.2)* [1998] 1 WLR 547 at pp.555-557 and *Lady Brownlie v Four Seasons* [2015] EWCA Civ 665 at paragraphs 17-24.

29. In his oral submissions Mr. Smith dealt first with Article 6 which he suggested was the "shorter answer".

Mr. Ablyazov's domicile

30. The Bank claimed that this court has jurisdiction because Mr. Ablyazov is domiciled in England and accordingly Mr. Khrapunov may be sued here pursuant to Article 6 paragraph 1 which provides:

> "A person domiciled in a State bound by this Convention may also be sued:
>
> 1. 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."

31. Mr. Smith submitted that Mr. Ablyazov is domiciled in England. Mr. Samek submitted that Mr. Ablyazov is not domiciled in England. Mr. Samek submitted that the matter fell to be tested as at the date on which proceedings were commenced against Mr. Khrapunov, namely, July 2015. That was not disputed. This common ground is consistent with the decision in *Petrotrade Inc. v Smith* [1999] 1 WLR 457 in which Thomas J. held at pp. 462-466 that the relevant date for the purposes of Article 6 is the date on which the proceedings were issued. In this case the proceedings alleging the tort of conspiracy against both Mr. Ablyazov and Mr. Khrapunov were issued in July 2015. There was also no dispute that the claims against Mr. Ablyazov and Mr. Khrapunov were so closely connected that it is expedient to hear and determine them together.

32. The meaning of domicile for the purposes of the Lugano Convention is set out in section 41A(2) of the Civil Jurisdiction and Judgments Act 1982. A person is domiciled in the UK if he is resident in the UK and the nature and circumstances of his residence indicate that he has a substantial connection with the UK. Residence was explained by the Court of Appeal in *Bank of Dubai v Fouad Haji Abbas* [1997] ILPr. 308 as denoting a settled or usual place of abode. It connoted some degree of permanence or continuity; see Saville LJ at

paragraphs 10-11. In *R v Barnet LBC ex p. Shah* [1983] 2 AC 309 Lord Scarman said at p. 344 B-D:

> "The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is. .....Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

33. The circumstances in which the court must consider the place of Mr. Ablyazov's residence and hence his domicile are, to the say least, unusual. Mr. Smith submitted that Mr. Ablyazov cut off all ties with Kazakhstan when he fled to London from that country in 2009. He bought properties here, settled here and was granted asylum here. I accept that from 2009 until February 2012 he was resident and therefore domiciled here. However, fearing (correctly) that he was about to be imprisoned for contempt, Mr. Ablyazov fled the jurisdiction in February 2012. He was "on the run to avoid his sentence" but continued to instruct his lawyers "from some safe, but unknown, haven"; see *BTA v Ablyazov* [2013] 1 WLR 1331 at paragraph 107. His appeal against his committal was dismissed by the Court of Appeal in November 2012. In July 2013 he was found in the south of France and was arrested on 31 July. Since then he has been held in custody in France fighting extradition to Russia. I was informed by Mr. Smith that Mr. Ablyazov's application for permission to appeal the contempt judgment to the Supreme Court was dismissed in the spring of 2014.

34. As at July 2015 Mr. Ablyazov had been in a French gaol for 2 years. He had fled from England. Until he was apprehended in the south of France in July 2013 he was on the run and in a real sense had no settled place of abode. He would flee to wherever he felt that he would be safe from arrest and detention. But it appears to me to be arguable that he had not abandoned England as his place of residence and domicile so long as his appeal against his committal for contempt remained to be finally determined. Had that appeal been successful he would, I suppose, have returned to England. However, well over a year before July 2015 that appeal had been finally determined. Mr. Ablyazov had demonstrated by his flight from England that he had no wish to remain in England if he was liable to be arrested and imprisoned. It had once been a safe haven for him but was no longer. In July 2015 he was in a French gaol

awaiting extradition, not to England, but to Russia. He was appealing against extradition but if that appeal had been successful he would no doubt have wished either to remain in France or to go to whichever country in which he felt safe from arrest and detention. He would not have been safe from arrest and detention in England because of his own choice to act in contempt of the English court.

35. In these unusual circumstances the question which must be determined is, it seems to me, whether as at July 2015 Mr. Ablyazov had abandoned England as his country of residence and hence domicile. No doubt it can be said of some fugitives from justice that their ties and connections with England are such that, although they are presently abroad and on the run, they have not abandoned England as their place of residence and hence domicile. But Mr. Ablyazov has no ties or connections with England. He fled to England from Kazakhstan. When his refusal to obey orders of the court led to his being sentenced to imprisonment for contempt he chose to flee from England. He appears to be financially able, notwithstanding the Bank's efforts to seize his assets in satisfaction of their judgments, to live where he pleases. Whilst it is, I suppose possible, that if he were not extradited to Russia he would choose to return to England and submit to imprisonment here that appears to me to be unlikely. No evidence was adduced by the Bank to suggest that this was likely.

36. I have therefore concluded that the Bank is unable to establish the necessary good arguable case that as at July 2015 Mr. Ablyazov had not abandoned England as his country of residence and hence of domicile so that he remained resident in and hence domiciled in England. On the contrary it seems to me likely that Mr. Ablyazov has abandoned England as his place of residence and hence of domicile. I am certainly unable to say that the Bank has much the better argument on the application of Article 6.

37. Mr. Smith said that Mr. Ablyazov cannot take advantage of his own wrong in fleeing from the jurisdiction in breach of a court order that he remain within the jurisdiction. In this regard he relied upon the following observation of Lord Scarman in *R v Barnet LBC ex p. Shah* at pp.343 H – 344 A: “It was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could [not] have been obtained if he had acted lawfully.” But it is not Mr. Ablyazov who is seeking to rely upon his flight from the jurisdiction. It is Mr. Khrapunov. In my judgment Mr. Khrapunov is entitled to rely upon the facts as they were in July 2015 when the Bank commenced proceedings against him and Mr. Ablyazov claiming damages for conspiracy and to submit that as at that date Mr. Ablyazov had ceased to reside in England and thereby to be domiciled in England.

<u>The place where the harmful event occurred</u>

38. Article 5 paragraph 3 provides that a person may be sued in matters relating to tort "in the courts for the place where the harmful event occurred or may occur". The Bank relies upon this "special" jurisdiction in order to say that Mr. Khrapunov may be sued in England.

39. The meaning of "the place where the harmful event occurred" has been considered by the European Court of Justice in *Handelskwekerij GJ Bier v Mines de Potasse d'Alsace SA* [1978] 1 QB 708. That phrase was held to cover both the place of the event giving rise to the damage and also the place where the damage occurred. Mr. Smith submitted that England was both the place of the event giving rise to the damage (because the conspiracy was said to have been hatched in England) and the place where the damage occurred (because the Bank's cause of action, the WFO and its judgment against Mr. Ablyazov were in England and had been damaged). Mr. Samek said that the place of the event giving rise to the damage was the place where the conspiracy was put into action (which was not England) and that the damage occurred in the place where the assets which had been dealt with in breach of the WFO were located (which was not England).

Place where the damage occurred

40. The meaning of the "place where the damage occurred" has been considered by the European Court of Justice in several cases since *Bier*. Fortunately for me they have recently been reviewed by the Court of Appeal in *AMT Futures Ltd. v Marzillier* [2015] QB 699 at paragraphs 17-34. Christopher Clarke LJ summarised the effect of the authorities at paragraph 54 by asking the following "questions (i) what is "the place where the event giving rise to the damage … directly produced its harmful effects upon" AMTF (the *Dumez France* case [1990] ECR I-49)"; (ii) where was the "actual damage" which "elsewhere can be felt" or the "initial damage" suffered (the *Marinari* case [1996] QB 217); and (iii) what was "the place where the damage which can be attributed to the harmful event …by "a direct and causal link" (the *Réunion Européenne* case [2000] QB 690) was sustained". I consider that I should ask those questions in order to determine the place where the damage occurred. In answering those questions I am mindful of the approach of Popplewell J. at first instance in *AMT Futures* which was approved by the Court of Appeal at paragraph 32:

> "The search will be for the element of damage which is closest in causal proximity to the harmful event. This is because it is this causal connection which justifies attribution of jurisdiction to the courts of the place where damage occurs: see the *Bier* case [1978] QB 708, paras 16-17 and the *Dumez France* case [1990] ECR I-49, para 20."

41. What is the place where the event giving rise to the damage directly produced its harmful effects upon the Bank? It is arguable that that place is England because that is where its chose in action, its WFO and its judgment are to be found and they have all been reduced in value as a result of the alleged actions of Mr. Khrapunov. However, I am not persuaded that that is the right answer to the question. In a real sense the Bank suffered "harmful effects" in the place where the asset was wrongly dealt with in breach of the WFO. The assets were variously located in Switzerland, Belize and Russia; see paragraphs 19-26 of the Particulars of Claim. As a result of wrongful dealings with those assets the Bank's opportunity to seize those assets in execution of the judgment was either lost or impeded. Indeed, the Bank's own pleading of its loss and damage includes its inability to enforce against those assets; see paragraph 36 of the Particulars of Claim. That is the element of damage which is closest in causal proximity to the harmful event. It occurred not in England but in one or more foreign jurisdictions As Mr. Samek observed, if one asks what would have happened had the alleged conspiracy not been committed, the answer is that the assets of Mr. Ablyazov would have been available for the Bank to execute against in the foreign jurisdictions where they were located. It is unrealistic to suppose that Mr. Ablyazov would honour the judgments against him in England. That indicates that the alleged conspiracy "directly produced its harmful effects upon the Bank" in those foreign jurisdictions and not in England. Mr. Smith suggested that equitable execution receivers would have realised the relevant assets and then used the net proceeds of sale to discharge the judgment debts in England. But again, the Bank's loss is the receivers's inability to realise the assets abroad.

42. Where was the "actual damage" which "elsewhere can be felt" suffered? Where was the "initial damage" suffered ? For the reasons which I have just given the initial damage was suffered in one or more foreign jurisdictions. That damage was felt by the Bank in England because its chose in action, WFO and judgments were reduced in value.

43. What was the place where the damage which can be attributed to the harmful event by "a direct and causal link" sustained? Again, for the reasons which I have given the damage which can be attributed to the conspiracy by a direct and causal link was sustained in the foreign jurisdiction where the Bank's opportunity to execute its judgments was lost or hindered.

44. I have therefore concluded that if the court applies, as it must, the Community construction of "the place where the damage occurred", the Bank's damage did not occur in England.

<u>The place of the event giving rise to the damage</u>

45. Mr. Smith has submitted that the place of the event giving rise to the damage was the place where the conspiracy was hatched and that that place was England. The Bank has not pleaded that the conspiracy was hatched in England. It has merely pleaded that Mr. Ablyazov and Mr. Khrapunov conspired together "in about 2009". But in his skeleton argument Mr. Smith has submitted that "it is appropriate to infer" that they did so in England on the grounds that Mr. Ablyazov will have been the driving force with Mr. Khrapunov being a willing participant, that Mr. Ablyazov lived in England between late January/early February 2009 and February 2012 and that Mr. Ablyazov's suggestion of a conspiracy will have been made from England and that Mr. Khrapunov would have either visited England and agreed to the conspiracy or would have communicated his assent by phone or email, such assent being received by Mr. Ablyazov within the jurisdiction. No evidence has been given by Mr. Khrapunov in response to the Bank's allegation of conspiracy. In those circumstances and having regard to the Bank's evidence I accept that the Bank has a good arguable case that the alleged conspiracy was hatched in England though it does not appear to me to be certain that it did. Mr. Samek has cautioned against determining the question of jurisdiction on "uncertain factors" (see *Marinari v Lloyd's Bank* [1996] QB 217 at paragraph 19) but that is an unattractive submission where his client has chosen to say nothing in response to the allegation of conspiracy.

46. However, the question remains whether the event which gave rise to the damage was the hatching of the conspiracy in England or the implementation of that conspiracy by dealing abroad with foreign assets. Whilst Mr. Khrapunov would not have caused damage to the Bank had he not entered into the conspiracy, in a real sense the event which gave rise to the damage was the implementation of the alleged conspiracy.

47. Mr. Smith has relied upon the approach of Rix J. in *Domicrest v Swiss Bank Corpn.* [1999] QB 548 which concerned a claim for negligent misstatement. Rix J. held (at p.567 H) that in such a case the place where the harmful event gave rise to the damage is the place where the misstatement originates.

> "…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." (see p.568 B)

48. The decision and reasoning in *Domicrest* have been followed in two cases involving the tort of conspiracy. In *ABC1 v BFT* [2003] EWCA Civ 205 at paragraph 41, Mance LJ applied the approach of Rix J. to the tort of conspiracy but it appears that in that case not only was the conspiracy hatched in Tunisia but the fraudulent accounts were also prepared there and sent from there. The decision does not

therefore assist in resolving the dispute in this case. Similarly, in *Sunderland Marine Mutual Insurance v Wiseman* [2007] 1 CLC 989 the conspiracy to defraud underwriters by scuttling a vessel was hatched in Scotland and put into effect when the vessel sailed from Scotland. Thereafter, fraudulent misrepresentations that the sinking was accidental were also made in Scotland; see paragraphs 9, 11, 34 and 36. So, again, the decision of Langley J. in that case does not assist in resolving the dispute in the present case.

49. I am not persuaded that because the place of the event giving rise to the damage in a misstatement case is the place from which the misstatement originates so the place of the event giving rise to the damage in a conspiracy is the place in which the conspiracy was hatched. Whereas a misstatement causes damage when it is made a conspiracy only causes damage when it is implemented.

50. Mr. Smith also relied upon *Shevill v Presse Alliance* [1995] 2 AC 18 at paragraphs 24-29, a defamation case. But I was not persuaded that a helpful analogy could be drawn between the tort of defamation and the tort of conspiracy to injure by unlawful means. They are different torts with different elements.

51. In my judgment it is necessary to keep well in mind that the court is seeking to identify the place of the event which gave rise to the damage, not the tort. The damage, for the reasons which I have given, occurred in the places where the assets, which were the subject of wrongful dealing, were located. The place of the event giving rise to that damage seems to me to be the place in which the conspiracy was implemented. It is the implementation of the conspiracy which gave rise to that damage.

52. But where was the conspiracy implemented? Mr. Smith submitted that at least until February 2012 the conspiracy will have been implemented by instructions given by Mr. Ablyazov in London. This submission, as I understood it, was based upon the same circumstances which made it appropriate to infer that the conspiracy had been hatched in London. There is force in this submission. At any rate I consider that the Bank has much the better argument on this point. It is likely that the necessary decisions and instructions to implement the conspiracy were taken in and issued from Tower 42 in the City of London. But after 16 February 2012 Mr. Ablyazov cannot have given any further instructions from London.

53. The Particulars of Claim identify the dates on which the various assets are alleged to have been wrongly dealt with by Mr. Khrapunov. The dates on which the necessary decisions and instructions were taken and issued can be inferred from them. Thus, the court has jurisdiction against Mr. Khrapunov in relation to the allegations concerning the Swiss Assets (see paragraph 28 of the

Particulars of Claim) and Green Life, so far as concerns payments made before 16 February 2012 (see paragraph 30). But the dealings with the shares in and assets of Pyshma occurred after 16 February 2012 (see paragraph 32) and so the court cannot assume jurisdiction over Mr. Khrapunov in relation to them. The dealings in the shares in Paveletskaya and Cosmos which took place on 17 February 2012 and 16 February 2012 were probably instigated before that date and so the court has jurisdiction in relation to them but not in relation to the later dealings or in relation to any dealings in Marine Gardens, all of which post-dated 16 February 2012 (see paragraph 34).

Conclusion

54. The Bank has a good arguable case against Mr. Khrapunov in damages for the tort of conspiracy to injure by unlawful means. The Bank is able to establish that this court has jurisdiction over him pursuant to Article 5(3) of the Lugano Convention with regard to the damage caused by the wrongful dealing in assets of Mr. Ablyazov before 16 February 2012. I must therefore dismiss the application to set aside the claim form and the WFO issued against Mr. Khrapunov, though both may require to be amended so as to conform with this judgment. For example, in the light of my decision on jurisdiction it is not clear to me that the injunction against future dealings with Mr. Ablyazov's assets can be maintained or that the obligation to provide disclosure of assets of Mr. Ablyazov in which Mr. Khrapunov has dealt with since January 2013 can be maintained. These matters (and perhaps others) will have to be debated when judgment is handed down.

55. The Bank has also applied for permission to cross-examine Mr. Khrapunov as to his purported compliance with paragraphs 7 and 8 of the WFO (disclosure of his assets and of those assets of Mr. Ablyazov which he has administered since 1 January 2013). The circumstances in which it is appropriate to make such an order have been set out in *Jeningon v Assaubayev* [2010] EWHC 2351 (Ch) by Vos J.

56. Although the order sought appears to relate both to Mr. Khrapunov's own assets and those of Mr. Ablyazov in which he has dealt since January 2013 the debate before me primarily concerned the latter. I would therefore prefer to deal with this application after it is clear in what terms the injunction and disclosure obligations are to continue.

Appendix

The authorities concerning contempt and orders to pay damages

57. The first authority is the case of *Couling v Coxe* (1848) 6 CB 703. In that case damages were sought against a defendant who had failed to obey a witness summons as a result of which the plaintiff had been compelled to pay costs in the action in which the summons had been issued. The defendant denied that the plaintiff had a good cause of action. At the Surrey Summer Assizes in 1846 Parke B. found for the defendant. The following Michaelmas term the plaintiff obtained a ruling calling upon the defendant to show cause why the judgment should not be entered for the plaintiff. Counsel argued the matter at length and with extensive reference to authority in the Trinity term of 1847 and resumed their argument in the Michaelmas term. On December 7, 1848 Wilde CJ delivered the judgment of the court. It appears to have been held that the plaintiff had a good cause of action for damages where the defendant had disobeyed a witness summons so long as there was proof of actual damage or loss (see p.719). Certainly, judgment was entered for the plaintiff (see p.721). It was accepted by Mr. Samek that this case was authority for the proposition that damages could be awarded for breach of a witness summons (though he submitted that this was an exception to the suggested rule that damages were not available for breach of a court order).

58. In *Fairclough v The Manchester Ship Canal* (1897) 41 Sol. Journal 225 an injunction had been issued and it was determined that the defendant had breached the injunction. An order of sequestration was issued against the assets of the defendant. The defendant appealed and it was held on appeal that there had been no breach of the injunction. Lord Russell CJ added, *obiter*, that an order of sequestration was only appropriate where the court's order had been "contumaciously disregarded". Where the breach of the order was accidental the court "might visit the offending party with costs and might order an inquiry as to damages". Thus Mr. Smith submitted that this authority recognised, albeit *obiter*, that a breach of a court order could result in an order of damages.

59. In *Chapman v Honig* [1963] 2 QB 502 a tenant had given evidence in an action by a former fellow-tenant against their landlord for trespass and conversion of goods. The fellow tenant was awarded damages. The next day the landlord served notice to quit on the tenant. The tenant brought an action against the landlord alleging trespass and breach of the covenant for quiet enjoyment. The judge held that the landlord had served the notice to quit to punish and

victimise the tenant for giving evidence. The judge said that was a contempt and awarded damages of £50. On appeal the landlord succeeded in having the award set aside. The headnote records that by a majority the court of appeal decided that the notice to quit was valid and that the landlord's vindictive motive in serving it was irrelevant. Lord Denning MR was in the minority and would have dismissed the appeal on the grounds that the service of the notice to quit was unlawful because it was a contempt. Pearson LJ held that the notice to quit was valid because motive was irrelevant to the exercise of a contractual right and because the same act cannot be both a lawful exercise of a contractual right and at the same time unlawful as being tortious. Accordingly the appeal had to be allowed; see pp.520-521 and p.522. Pearson LJ referred at pp.521-522 to the question whether damages could be awarded for a contempt of court. He identified an argument for suggesting that they could not (the jurisdiction exists for the protection of the administration of justice and not for the protection of individuals) but said in terms that "it is not necessary, however, for the determination of the present case, to decide as a general proposition that there can never be a right of action for damages for contempt of court." Davies LJ agreed with Pearson LJ that since the notice to quit was valid it was "extremely difficult" to see how there could be a civil remedy; see p.524. He noted that damages could be awarded against a person who fails to attend court in response to a subpoena, "not altogether dissimilar from that alleged to exist here"; see p.525. However, he concluded that such an action was "quite different" because the witness had no right to absent himself from court whereas the landlord in the instant case had done "no more than exercise his legal rights"; see p.525. "What the position might be in a case where the act of contempt was without any legal justification whatsoever it is not necessary to decide"; see p.527.

60. Thus *Chapman v Honig* decided that where a defendant has a legal right to commit the act which was said to be a contempt no civil wrong had been committed. *Chapman v Honig* did not decide, because it did not arise for decision, that contempts of court cannot result in an order for the payment of damages. Pearson LJ identified an argument that might support such a proposition and Davies LJ identified an argument that might detract from such a proposition.

61. *In re Hudson* [1966] 1 Ch. 209 concerned an order pursuant to which a husband agreed to pay a third of his income to his divorced wife. There was no recital indicating that the undertaking was part of a contractual bargain between the parties. Upon the husband's death the divorced wife sought an account in respect of arrears of maintenance. Buckley J. said at p.214 E that the only sanction for breach of an undertaking was committal, sequestration or a fine on the grounds of contempt. An undertaking conferred no personal right or remedy unless it has "some collateral contractual operation between the parties concerned". There was no evidence that the

undertaking in the case was the consequence of a bargain between the parties and so the claim failed.

62. *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* [1966] 1 WLR 1137 was a case in the Restrictive Practices Court. Certain restrictions in the Agreement had been declared to be contrary to the public interest and appropriate undertakings were given to the court. However, the companies in question were held to have breached their undertakings. The Registrar of Restrictive Trading Agreements applied for an order for the sequestration of the companies' assets. In the event the court fined the companies. In the course of its judgment the court referred to *Fairclough v Manchester Ship Canal Co.*, held that the companies were in contempt and stated its opinion that "the court can require, at least, payment of damages, where there has been a breach of an injunction by a party to litigation between two individual citizens…"; see p.1162 per Megaw J. This observation supports Mr. Smith's submission but the case did not concern an award of damages. The fine was ordered as punishment for the contempt. Thus the observation, though considered, was *obiter*.

63. *The Messiniaki Tolmi* [1983] 1 Lloyd's Rep. 666 concerned a dispute between the sellers of a ship and the broker who acted in the sale transaction. One of the heads of claim against the broker was for "damages for wrongfully inducing and/or aiding and abetting [the buyers] to act in contempt of the High Court …" The broker submitted that that head of claim disclosed no cause of action. Mustill J. dealt shortly with that application at p.671 col.1: "It is at least arguable that there exists a civil cause of action to recover damages for an act amounting to a contempt of court." This decision therefore supports Mr. Smith's submission but there was no reasoning in support of the proposition.

64. *Midland Marts v Hobday* [1989] 1 WLR 1143 concerned breaches of an undertaking given to the court as part of a negotiated settlement concerning rights of way. Following breaches of the undertaking the claimants applied for the defendants to be committed to prison for contempt. Vinelott J. held that it was unnecessary to impose punitive sanctions (save as to costs); see p.1144. He considered whether, on an application to commit for contempt, it was open to the court to order that the contemnor recompense the plaintiff for loss suffered as a result of breach of the undertakings. He held that where the breach alleged is both a breach of an undertaking to the court and a breach of contract with the other party damages can be awarded. It would be unjust and give rise to unnecessary multiplicity of proceedings to require the plaintiffs to institute separate proceedings. In the course of his judgment Vinelott J. stated that a contempt of court does not in itself give rise to a claim for damages and as authority for that proposition relied upon *Chapman v Honig*.

With respect to Vinelott J., I consider that he was mistaken in thinking that *Chapman v Honig* was authority for that proposition. That was the very question which the majority of the Court of Appeal in that case said did not arise for decision. Vinelott J. also referred to *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* and said that in that case Megaw J. had recognised the jurisdiction of the court to award damages where the breach of an injunction or undertaking to the court also constituted a breach of contract. However, Megaw J. did not expressly explain his observation in that way. Nor did Lord Russell explain his observation in *Fairclough v Manchester Ship Canal Co.* (to which both Vinelott J. and Megaw J. had referred) on that basis.

65. *Nunes v Agrawal* is an unreported decision of the Court of Appeal delivered on 20 May 1999. It concerned an argument that the defendant, a medical practitioner who had examined the claimant after she had complained of being raped and buggered, owed the claimant a duty of care to take all reasonable steps to provide evidence of that examination and in particular to attend the trial of the person charged with the rape and buggery as a prosecution witness. She had not attended the criminal trial and the judge had held there was no case to answer. The claimant alleged that she had suffered post-traumatic stress disorder following the rape and that the collapse of the trial had exacerbated her symptoms. The Court of Appeal rejected the argument that the defendant owed a duty of care. In the course of his judgment Stuart Smith LJ said that contempt of court does not itself give rise to a cause of action and referred to *Chapman v Honig*. This observation does not appear to have been necessary for the decision. The alleged duty of care was not said to be based upon the defendant's conduct being a contempt. It therefore appears to have been *obiter*. Further, *Chapman v Honig* is not authority for the proposition stated by Stuart Smith LJ. That proposition was expressly not determined by the Court of Appeal in *Chapman v Honig*.

66. *Parker v Rasalingham* is another unreported decision. It was a decision of Mr. Lawrence Collins QC sitting as a deputy judge of the Chancery Division. This was a case where contempt in the form of breaches of a court order had been established. The claimants sought, *inter alia*, damages for breach of an injunction which was a consent order "following intensive discussions between the parties' advisers" (see paragraph 5). Mr. Collins said that there was "some authority" for the proposition that the court had jurisdiction to award damages for breach of an injunction (see paragraph 19). He first mentioned *Chapman v Honig* but noted that the actual decision in that case was much narrower than a decision to the effect, as suggested in *The Law of Contempt* by Arlidge, Eady and Smith 1999, that "damages are unavailable as a remedy in contempt". He then referred, at paragraphs 24-25, to *Fairclough v Manchester Ship*

Canal Co., Re Mileage Conference Group of the Tyre Manufacturers' Conference Agreement and *Midland Marts Limited v Hobday.* Mr. Collins regarded the last mentioned case as establishing that "damages were available where the breach alleged was both the breach of an undertaking to the court and a breach of contract with the other party". He concluded that the order in the case before him was "a negotiated consent order, and it would be wholly contrary to common sense and the justice of the case if the claimants would be entitled to damages if the agreement had been embodied in undertakings or in a Tomlin order but not if it had been embodied in an order of the court. I consider therefore that I have jurisdiction to order an enquiry into damages" (see paragraph 26).

67. *Independiente Ltd. v Music Trading On-Line (HK) Ltd.* [2008] 1 WLR 608 was a case in which proceedings for infringement of copyright were compromised by the defendant giving undertakings to the court which were embodied in a consent order. The court had to consider whether the claimant could bring an action for damages for breach of contract or was restricted to bringing proceedings for contempt. It was held that the claimant could bring an action for damages. I was not persuaded that this case added significantly to the debate.

68. The final authority to which I was referred, though the one on which Mr. Samek placed most emphasis, was *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181. In that case the House of Lords had to consider whether a bank which had been informed of a freezing order but which failed to prevent payments out of the account owed a duty of care to the claimant who had obtained the freezing order. The House of Lords held that no duty of care was owed. In the course of his judgment Lord Bingham noted that the claimant had adduced no comparative jurisprudence to support its argument. He noted that reference had been made to a textbook which ventilated the suggestion that a third party with knowledge of a freezing order may owe a duty of care but also noted that the same author "recognises …that there is no right to sue a contemnor for the contempt alone and acknowledges that there is no civil right to damages and no power for the court to award compensation to the other party for the contemnor's actions, citing *In re Hudson* … and *Chapman v Honig* …". Mr. Samek submitted that this amounted to an acceptance by Lord Bingham that the two cases were authority for the principle there stated. I do not understand Lord Bingham to have done so. He was merely referring to the textbook which had been cited and noted, first, the suggestion which had been ventilated by the author and, second, the principle which had been acknowledged by the author. There was no analysis by Lord Bingham of the proposition which each case established. Any such analysis of *Chapman v Honig* would have shown that it was not authority for the suggested principle. The

most that can be said is that Lord Bingham did not suggest that damages could be awarded for a contempt.

69. However, Mr. Samek also relied upon other observations in that case. Lord Bingham, at paragraph 17, when giving his reasons for not accepting that there was a duty of care, said that "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." Lord Hoffmann, at paragraph 39, when discussing whether the freezing order could generate a duty of care, said that "the order carries its own remedies and its reach does not extend any further". Lord Rodger, at paragraph 63, when discussing the same issue, noted counsel's submission that "the law of tort could usefully supplement the law of contempt by imposing on the bank a duty of care in favour of the party who obtained the freezing order". Lord Rodger said that he would reject that argument. At paragraph 65 he said that "the applicant [for a freezing order] relies on the court ensuring that the bank does not flout its order and punishing the bank for contempt if it does. ...The bank has to act, but merely because the court order compels it to do so – ultimately on pain of punishment". Lord Mance noted, at paragraph 101, that the sanctions for contempt "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." (*In Z Bank v D1* a freezing order was breached and an order for sequestration of a bank's assets was made but execution was stayed for 14 days to give the bank an opportunity to pay a sum equal to the claimant's loss.) Mr. Samek said that it was clear from these passages that there was no right to sue for damages for breach of a court's order. There does appear to me to be force in this submission. If in contempt proceedings an award of damages could be made to compensate for loss the judges who considered the relevance of the contempt jurisdiction to the question whether knowledge of a freezing order could generate a duty of care would surely not have expressed themselves in the way they did.

70. Finally, Mr. Samek referred to *The Law of Contempt* by Arlidge, Eady and Smith 4th ed. at paragraph 14-157 where the authors stated:

> "That damages are unavailable as a remedy in contempt seems clear from the decision of the Court of Appeal in *Chapman v Honig*. The decision was based primarily upon the notion that the court's jurisdiction in contempt is concerned with a wrong against the administration of justice rather than against an individual."

71. With respect to the authors the proposition which it is said "seems clear" from *Chapman v Honig* was expressly not decided by the majority of the Court of Appeal in that case. The basis of the decision in that case was that the notice to quit was valid and therefore could not give rise to a liability in damages. Reference was made by Pearson LJ to the notion that the court's jurisdiction in contempt is concerned with a wrong against the administration of justice rather than against an individual but that was not the basis of his decision.

72. Having summarised the authorities it is necessary to consider what light they cast on the law of England and Wales. The first point to note is that there is no case which appears expressly to have decided that all contempts are (or are not) actionable in damages. The second point to note is that in *Chapman v Honig*, the case wrongly referred to from time to time as deciding the issue, the opposing arguments were identified but not resolved. Thus Pearson LJ said that it could be argued that the jurisdiction exists for the protection of the administration of justice and not for the protection of individuals. If that is so then it would, arguably, be inconsistent for the court to have jurisdiction to award damages for the loss sustained by a contempt. Conversely Davies LJ noted that damages could be awarded against a person who had disobeyed a witness summons. If that is so then why should not damages be available for all other breaches of court orders? Third, there does not appear to be any real dispute that (i) where a consent order or undertaking evidences an agreement between the parties damages can be awarded for breach of the order or undertaking and (ii) that an award of damages can be made in the contempt proceedings so that the claimant does not have to incur the delay and expense of issuing a fresh action. This is recognised by *In re Hudson, Midland Marts v Hobday* and *Parker v Rasalingham.* However, this jurisdiction does not arise on the facts of the present case.

73. The best authorities in support of Mr. Smith's submission that contempt is actionable in damages are *Couling v Coxe* (where it was held that there was a cause of action in damages for breach of a witness summons), *Fairclough v The Manchester Ship Canal* (where it was said, *obiter*, that damages could be awarded for a contempt), *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* (where it was said, again *obiter*, that damages could be awarded for a contempt), *The Messiniaki Tolmi* (where it was held to be arguable that damages could be awarded for aiding and abetting a contempt) and *Parker v Rasalingham* (where it was recognised that there was "some authority" for the proposition that the court had jurisdiction to award damages for breach of an injunction).

74. The best authorities in support of Mr. Samek's submission that contempt is not actionable in damages are *In re Hudson* (where the

court considered that a breach of an undertaking to the court could only result in committal, sequestration or a fine unless the undertaking reflected an agreement between the parties) and *Customs and Excise Commissioners v Barclays Bank* where Lords Bingham, Hoffmann, Rodger and Mance expressed themselves in ways in which they would not have done had they considered that damages could be awarded for a contempt.

75. Although Mr. Smith has the benefit of more authorities than Mr. Samek, Mr. Samek's authorities include recent observations in the House of Lords. It is true that those observations do not address the authorities on which Mr. Smith relies but had the eminent judges in that case considered that an order for the payment of damages could be made in contempt proceedings they would not have expressed themselves in the way they did. Had contempt been actionable in damages so that compensation could be obtained in contempt proceedings that would surely have been relevant to the issue with which they were concerned, namely, whether knowledge of a freezing order gave rise to a duty of care.

76. It seems to me that the observations in *Customs and Excise Commissioners v Barclays Bank* are a very clear indication that damages cannot be awarded for contempt. The observations are of the highest authority and are recent. As a first instance judge I consider that my duty is to follow those observations and to conclude that the contempt jurisdiction is for the purpose of punishing those who have acted in contempt and not for the protection of the individual, notwithstanding that the effect of imposing a penalty might, depending upon the formulation of the order, benefit the individual as in *Z Bank v D1*. As explained in the body of the judgment at paragraphs 17-18 and 21 this conclusion is consistent with principle and the CPR.

77. So far as a failure to obey a witness summons being actionable in damages is concerned Mr. Samek said that such actionability was an exception to the general rule. It is unnecessary to decide whether that is so or whether *Couling v Coxe* should be regarded as being inconsistent with the approach of the House of Lords in *Customs and Excise Commissioners v Barclays Bank.* If it were necessary to decide that issue I would conclude that *Couling v Coxe* was inconsistent with principle, the CPR and the approach of the House of Lords in *Customs and Excise Commissioners v Barclays Bank.*