Neutral Citation Number: [2017] EWCA Civ 40

Case No: A3/2016/1136 & 1141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (QBD)
THE HONOURABLE MR JUSTICE TEARE
[2016] EWHC 230 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2017

Before:

LADY JUSTICE GLOSTER DBE
LORD JUSTICE BEATSON
and
LORD JUSTICE SALES

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Between:

Ilyas Khrapunov	**Appellant**
- and -	
JSC BTA Bank	**Respondent**

And Between:

JSC BTA Bank	**Cross-Appellant**
- and -	
Ilyas Khrapunov	**Cross-Respondent**
Mukhtar Ablyazov	**Interested Party**

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Charles Samek QC & **Marc Delehanty** (instructed by **Hughmans Solicitors**) for Ilyas Khrapunov
Stephen Smith QC & **Tim Akkouh** (instructed by **Hogan Lovells International LLP**) for JSC BTA BANK

Hearing dates: 19 & 20 December 2016

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Judgment Approved

Lord Justice Sales:

1. This is an appeal and cross-appeal from a decision by Teare J on issues of jurisdiction in relation to a new front in the long-running saga of litigation between JSC BTA Bank ("the Bank") and its former Chairman, Mr Mukhtar Ablyazov, and associates of his. The present proceedings relate to a claim by the Bank against Mr Ablyazov's son-in-law, Mr Ilyas Khrapunov, for the tort of conspiracy to injure the Bank by unlawful means. It is alleged that Mr Khrapunov conspired with Mr Ablyazov to hide Mr Ablyazov's assets from the Bank or dissipate them, in breach of a worldwide freezing order against Mr Ablyazov and a receivership order made against him. The unlawful means relied on are breaches of that freezing order and that receivership order.

2. Mr Ablyazov lived in England between February 2009 and 16 February 2012, when he fled the jurisdiction to avoid being committed to prison for contempt of court. He is currently in France. Mr Khrapunov lives in Switzerland. The Bank wishes to sue him in England.

3. The Bank issued the claim form in the present proceedings against Mr Ablyazov and Mr Khrapunov on 17 July 2015. The judge had to decide whether at that date there was a proper basis for this under the terms of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Official Journal L 339/3 of 21.12.2007), known as the Lugano Convention ("the Convention").

4. The judge held that the Bank has a good arguable case in conspiracy against Mr Khrapunov to the requisite standard on the basis of his and Mr Ablyazov's alleged breaches of the freezing order and the receivership order, which the judge held qualify as relevant unlawful means for the purposes of the tort. The judge rejected the Bank's submission that as at 17 July 2015 Mr Ablyazov was domiciled in the United Kingdom, so as to provide a foundation for jurisdiction against Mr Khrapunov under Article 6 of the Convention. The judge also rejected the Bank's submission, based on Article 5(3) of the Convention, as interpreted by the ECJ in Case 21/76 *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A.* [1978] QB 708 ("*Bier*"), at paras. [19] and [26], that the English courts could assume jurisdiction for the dispute on the basis that "the place where the damage occurred" (which I will refer to as "limb (a) of Article 5(3)") was England. However, the judge held that the English court has jurisdiction on the basis of Article 5(3) of the Convention on its other limb as interpreted in *Bier*, namely that "the place of the event giving rise to" the damage in question ("limb (b) of Article 5(3)") was England. But the judge held that this was only for the period to 16 February 2012, when Mr Ablyazov fled from the United Kingdom.

5. Mr Khrapunov and the Bank each appeal, to contest different parts of the judge's ruling. Mr Khrapunov contends that (i) the judge erred in holding that there was a good arguable case against him as a matter of law, in that breaches of a court order cannot qualify as relevant unlawful means for the purposes of the law of conspiracy, and (ii) the judge was wrong to hold that there was a basis for any assertion of jurisdiction under limb (b) of Article 5(3). In other respects, Mr Khrapunov seeks to support the judge's ruling to the extent it was in his favour.

6. Mr Khrapunov has not filed any evidence to deny that he has indeed assisted Mr Ablyazov in seeking to avoid the effect of the worldwide freezing order against him and the receivership order in the ways alleged by the Bank. The judge therefore proceeded on the basis that the Bank has a good arguable case that he has done the acts or assisted Mr Ablyazov in the ways alleged, and there is no challenge to this on appeal. Mr Khrapunov's argument under point (i) above is an argument of law, regarding what types of unlawful actions are capable of qualifying as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

7. The Bank contends that (i) the judge erred in rejecting its case for jurisdiction based on limb (a) of Article 5(3), because the damage which it suffered directly from the tort relied upon was a diminution in the value of its cause of action, worldwide freezing order and judgments obtained in England against Mr Ablyazov; (ii) the judge erred in limiting the jurisdiction of the English court under limb (b) of Article 5(3) to acts in furtherance of the conspiracy in the period to 16 February 2012: the acts pursuant to the conspiracy for which the Bank could sue in England should not have been time-limited in this way; and (iii) the judge was wrong to reject its claim to establish jurisdiction under Article 6 of the Convention. The Bank also contends, under a respondent's notice, that the judge should have held that a cause of action in damages arises where a court order is breached and was wrong to reject the Bank's argument to this effect; and that accordingly there is this further basis on which the judge should have found that the alleged breaches of the freezing order and the receivership order constitute unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

8. In addition, the Bank sought on the appeal to raise a new argument, to the effect that even if it could not establish a good arguable case against Mr Khrapunov for conspiracy to injure by unlawful means of the requisite kind, it could establish a good arguable case against him for the tort of conspiracy to injure the Bank by lawful (or, perhaps more accurately, non-unlawful) means as established by the decision of the House of Lords in *Quinn v Leathem* [1901] AC 495.

9. In my view, this last point should be disposed of at the outset of this judgment to clear the ground for what is really in issue on this appeal. Mr Smith QC for the Bank expressly disavowed reliance on the *Quinn v Leathem* form of conspiracy in argument at first instance. He needs permission from this court to raise it as a new point on appeal. In my judgment permission to take this new point on appeal should be refused.

10. For the *Quinn v Leathem* form of the tort of conspiracy, it has to be established that the predominant intention of the conspirators was to inflict injury upon the claimant, rather than to promote their own interests: see *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch* [1942] AC 435; *Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)* [1982] AC 173; *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19; [2008] [2008] 1 AC 1174 ("*Total Network*"), [56] (Lord Scott), [66] and [72]-[76] (Lord Walker). But it has not been pleaded by the Bank that Mr Ablyazov and Mr Khrapunov acted with such a predominant intention; nor has any application been made to amend the Bank's particulars of claim to allege that they did so; nor is it asserted in the evidence filed by the Bank for the purposes of resolving the issues on jurisdiction that it can be inferred that they did in fact act with such a predominant purpose. In the course of his submissions at first instance, Mr Smith explained to the

judge that the Bank was not relying on the *Quinn v Leathem* form of conspiracy precisely because it accepted that Mr Ablyazov and Mr Khrapunov acted with the predominant purpose of serving their own interests (particularly Mr Ablyazov's) by removing Mr Ablyazov's assets from control by the Bank pursuant to the freezing order so as to prevent the Bank from having recourse to them to enforce any judgment obtained against Mr Ablyazov. Indeed, it seems obvious from the evidence and pleadings filed so far that this was indeed the predominant purpose of Mr Ablyazov and Mr Khrapunov in acting as they are alleged to have done.

11. Accordingly, it can be seen at once that the Bank has no pleaded and no good arguable case in reliance on the *Quinn v Leathem* lawful means form of conspiracy, and it would be inappropriate to give it permission to introduce this new point on appeal. The passage in the speech of Lord Neuberger in *Total Network* on which Mr Smith sought to rely, at [228]-[230], is an insufficient foundation to support a contrary view. It was not the basis of Lord Neuberger's judgment in that case and was expressly obiter; no other member of the appellate committee agreed with it; it referred to a submission which had been abandoned by the Revenue (see [228]) and hence was not the subject of full argument; it is specifically referable to the different context of that case; it elides in that particular context predominant purpose to injure with predominant purpose to serve one's own interests, whereas in general terms as a matter of logic they are different and the leading cases affirm that they are; and it does not explain in detail how the idea floated by him might be reconciled with other high authority in this area. In the event, Mr Smith made no attempt to support Lord Neuberger's discussion at [228]-[230] by detailed submissions and argued only faintly for permission to rely on this new point on appeal.

Factual background

12. In May 2005 Mr Ablyazov became Chairman of the Bank, which was registered in Kazakhstan. In February 2009 he was removed from office on the basis of charges of misconduct of the Bank's affairs and diversion of its assets and he promptly fled from Kazakhstan and moved to live in London. He cut off all ties with Kazakhstan.

13. In August 2009, the Bank instituted proceedings against Mr Ablyazov in England and obtained a worldwide freezing order against him and others. The freezing order is in standard personal form, i.e. what used to be known as a *Mareva* injunction, without any proprietary element based on assertions by the Bank that it is the true owner in equity of the assets covered by the order. The order included an obligation on Mr Ablyazov to give disclosure of his assets. As originally made, the freezing order was limited in amount to assets up to a value of £175 million, but we were told by Mr Smith that by December 2009 the Bank was able to show that it had a good arguable case against Mr Ablyazov for very large sums indeed and at the end of that month the limit on the value of Mr Ablyazov's assets frozen by the order was removed.

14. The order contained a proviso, derived from the case of *Babanaft International Co. S.A. v Bassatne* [1990] Ch 13, that persons outside England and Wales would not be affected by it unless certain conditions were fulfilled. Those conditions were not fulfilled in the case of Mr Khrapunov.

15. The Bank has claims in an amount in excess of US$4.6 billion against Mr Ablyazov in relation to the alleged misconduct of the Bank's affairs by him. Judgments have

now been entered against Mr Ablyazov in England in respect of those claims. A summary of the proceedings against Mr Ablyazov and persons associated with him is contained in the judgment of Popplewell J of 8 August 2014: [2014] EWHC 2788 (Comm).

16. The disclosure given by Mr Ablyazov pursuant to the freezing order of assets owned or controlled by him was inadequate. On 6 August 2010 Teare J made an order appointing receivers to control such assets as had been disclosed by Mr Ablyazov: see [2010] EWHC 1779 (Comm). It contained a similar *Babanaft* proviso in relation to persons outside England and Wales.

17. The Bank has adduced evidence which suggests that since 2008 Mr Khrapunov has been a trusted associate of Mr Ablyazov, charged with helping him administer his assets around the world and in keeping them away from the Bank's attempts to enforce against them. It is not necessary to go through this material in detail, because Mr Khrapunov has not sought to put in evidence to explain or to deny these charges against him. The judge proceeded on the footing that there was a good arguable case on the facts against him of involvement in these alleged activities and there is no appeal in relation to this part of the case.

18. The assets alleged to have been the subject of concealment or removal by Mr Ablyazov in breach of the freezing order and the receivership order, as part of the conspiracy with Mr Khrapunov, comprise certain assets located in Switzerland, a company called Green Life International SA incorporated in Belize and various companies and other assets located in Russia.

19. In July 2011 Mr Ablyazov obtained asylum in the United Kingdom.

20. In May 2011 there was an application by the Bank to Teare J to commit Mr Ablyazov to prison for breaches of the freezing order, including for failing to give proper disclosure as required under that order. The judge's draft judgment, indicating that he proposed to sentence Mr Ablyazov to a significant term in prison for contempt of court, was seen by Mr Ablyazov and on about 16 February 2012 he fled from the United Kingdom.

21. The judge accepted that from 2009 to 16 February 2012 Mr Ablyazov was resident and domiciled in England. Thereafter, Mr Ablyazov's whereabouts were unknown for some time. He was "on the run to avoid his sentence" but continued to instruct his lawyers "from some safe, but unknown, haven": see *JSC BTA Bank v Ablyazov (No 8)* [2012] EWCA Civ 1411; [2013] 1 WLR 1331, [107]; and para. [33] of the judgment below. His appeal against committal was dismissed by this court in November 2012. His application to the Supreme Court for permission to appeal was dismissed in the spring of 2013.

22. Meanwhile, in July 2013 Mr Ablyazov was found in the south of France and on 31 July 2013 he was remanded in custody pending resolution of an application by Russia for his extradition to face criminal charges. At the hearing before us we were told that the extradition request has recently been refused by the Conseil d'État and Mr Ablyazov has been released from custody. He has not returned to England and shows no sign of wishing to do so, as he would be imprisoned if he did return.

23. The Bank's case is that Mr Khrapunov has at all times been aware of the freezing order and the receivership order and the obligations imposed on Mr Ablyazov thereunder. The Bank pleads that in about 2009 Mr Ablyazov and Mr Khrapunov entered into a combination or understanding with each other with an intention to injure or cause financial loss to the Bank by the use of unlawful means comprising actions to deal with, dissipate, reduce in value and conceal assets of Mr Ablyazov in breach of the freezing order against him and in breach of the receivership order. The Bank says that Mr Khrapunov has acted on instructions from Mr Ablyazov and also on his own initiative to do these things, with his role increasing and becoming more important once Mr Ablyazov went on the run in February 2012 and it became more difficult for him to conduct his own affairs.

The elements of the cause of action: conspiracy to injure by unlawful means

24. The judge rejected the opposing extreme positions adopted by each party. He rejected the Bank's submission that damages are available for breach of a court order such as the freezing order and receivership order in this case. He also rejected Mr Khrapunov's submission that there is a positive rule of law which says that damages can never be awarded for breach of a court order, including where breaches of an order are deliberately employed as the means to inflict harm on a claimant pursuant to a conspiracy to injure him. Instead, the judge held that breaches of a court order do qualify as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. In that regard, the position is the same in relation to them as it is in relation to simple crimes (i.e. criminal conduct which does not constitute a separately actionable tort in private law) and private law wrongs (in particular, torts and breaches of contract), which so qualify: see *Total Network*.

25. In my judgment, the judge was correct on all these points, essentially for the reasons he gave. It is sufficient to focus on the principal authorities cited to us in oral argument, since the proper analysis is evident from them.

26. I start with the extreme submission presented by Mr Smith for the Bank, that damages are recoverable for breach of a court order. The short answer to this is that damages are not recoverable, because simple breach of a court order does not in itself constitute a cause of action in private law. In my view, this is made abundantly clear by the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181 ("*Barclays Bank*").

27. It is true that in that case the House of Lords was addressing the distinct question of whether a duty of care arose on the part of a third party bank with notice of a freezing order not to do anything in violation of the order which would cause loss to the claimant, and in particular should not release funds which had been frozen by the order. But the reasoning of the House in answering that question in the negative was based on fundamental points of general application, all of which are contrary to Mr Smith's argument:

    i) the *Mareva* jurisdiction to impose freezing orders has developed as one exercised by court order "enforceable only by the court's power to punish those who break its orders" ([17], per Lord Bingham). It is implicit in this formulation that simple breach of a freezing order does not constitute a cause of action in damages in itself;

ii) it cannot be suggested that the defendant who is the third party bank's customer owes a duty to the claimant who obtains the freezing order, since they are opposing parties in litigation and no duty is owed by a litigating party to its opponent ([18], per Lord Bingham). It is explicit in this formulation that the defendant does not owe the claimant a simple duty in private law to abide by the terms of the order, and hence it is plain that simple breach of the order does not constitute a cause of action in damages in itself;

iii) Lord Bingham accepted at [19] that in principle a duty of care to the claimant in tort could co-exist with a duty of compliance with the order owed to the court, but he knew of no instance in which a non-consensual court order, without more, had been held to give rise to a duty of care owed to the claimant who obtained the order and he regarded the Commissioners' case as involving a radical innovation which should not be adopted. Two points should be made about this. First, the premise for this part of Lord Bingham's reasoning is that, as he had said in [18], the order itself does not create a duty owed by the defendant to the claimant in private law (and hence simple breach of the order does not constitute a cause of action). That is why Lord Bingham discusses the matter in terms of whether a duty of care (i.e. a duty owed to the claimant in private law) can be found to co-exist with the duty to comply with the order itself, which is a duty owed to the court. Secondly, Lord Bingham's view was that no co-existing private law duty of care should be found to exist;

iv) Lord Bingham referred at [20] to the discussion by a single commentator who had suggested that a third party with knowledge of a *Mareva* order might owe a duty of care to the party in whose favour the order is made, but dismissed it on the basis that even that commentator "recognises" that (i) "there is no right to sue a contemnor for the contempt alone" and (ii) "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* [1966] Ch 209 and *Chapman v Honig* [1963] 2 QB 502." I will refer to these authorities below, because Mr Smith contends that the commentator, and through him Lord Bingham, misunderstands their effect. If they were intending to say that those authorities express a rule that damages can never be awarded where breach of a court order constitutes part of the cause of action, that might be so; but I do not think that is what they were saying. The point being made is merely that a simple breach of a court order does not in itself constitute a cause of action in private law, and certainly those cases do not say that it does. In fact they have a strong tendency to indicate that it does not. Lord Bingham's discussion in this paragraph of his speech again emphasises, echoing paras. [17] and [18], that it is his view that simple breach of a court order does not constitute a cause of action, and the commentator was right to "recognise" this (i.e. as something which is true);

v) At paras. [21]-[22], Lord Bingham distinguished other authorities where a duty of care congruent with an obligation in a court order had been found to exist on the footing that there had in those cases been an added element of a voluntary assumption of responsibility by the person with notice of the order. Again, it is implicit in his reasoning that but for that additional element there

would have been no cause of action: simple participation in breach of the court order was insufficient to create one;

vi) The other members of the appellate committee gave their separate reasons for rejecting the Commissioners' claim rather than adopting Lord Bingham's reasons, but in each case their reasoning was consistent with his and the underlying premise for all of them was that a simple breach of a court order does not constitute a cause of action in private law. Clearly, in view of Lord Bingham's speech, if they had thought it did they would have said so. In fact, they all emphasised the need to find the added element of a voluntary assumption of responsibility: [35]-[40] (Lord Hoffmann); [52] and [65] (Lord Rodger); [73]-[77] (Lord Walker); and [82]-[83], [93]-[94] and [109] (Lord Mance).

vii) Lord Hoffmann also gave positive reasons at [39] why the Commissioners' claim should fail:

> "… the payment [of monies by the third party bank out of the bank account of the person subject to the order] 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 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."

In this passage, as I read it, Lord Hoffmann was explicitly saying that a court order does not create private law duties; consequently, a simple breach of a court order does not in itself constitute a cause of action in private law;

viii) Similarly, Lord Rodger said at para. [62] that:

> "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. Liability is strict and so he may be guilty of contempt even where he did not deliberately flout the order, the degree of his fault being relevant in determining the appropriate punishment …"

That is to say, punishment for contempt of court is the only remedy for a simple breach of a court order; it does not constitute a cause of action in itself (see also para. [65]). Since liability on the part of an addressee of an order for breach of the order is strict, as Lord Rodger observes, it would indeed be extraordinary if simple breach of an order constituted a cause of action in

damages where no feature of the pre-existing relationship between claimant and defendant gave rise to any private law duty or cause of action and the order imposes a relationship *ab extra*, to use Lord Hoffmann's expression.

28. In *In re Hudson* [1966] Ch 209 a court order was made in divorce proceedings in 1935 including an obligation for the husband to pay the wife maintenance at a specified rate. Later, the husband said he was unable to pay at that rate and asked for the order to be varied to an obligation to pay one third of his income, which was done in 1939. The judge found that although the court order was varied by consent, this did not reflect an underlying contract between the parties (p. 215B-E). The husband died and the wife brought a claim against his estate for payment of arrears of maintenance. Buckley J, as he then was, rejected the claim on the basis that breach of the order did not constitute a cause of action on which the wife could sue. Whilst I would wish to reserve my opinion on whether in fact a court order to pay a certain sum could be sued upon as giving rise to a cause of action in debt, this case is authority in line with Lord Bingham's analysis in the *Barclays Bank* case.

29. In *Chapman v Honig* [1963] 2 QB 502 the tenant of a flat in a tenement house gave evidence under subpoena for a former tenant in his action against the landlord for trespass and conversion of goods. The day after judgment was given against the landlord, and as a punishment, he gave notice of about a month for the tenant to quit. The tenant claimed against the landlord for damages in tort for loss of his tenancy. In this court Lord Denning MR, in the minority, would have held that damages should be paid, saying "I find some help from the cases which hold that a witness who wilfully disobeys a subpoena may be liable to an action: for they show that a contempt of court may on occasion give rise to a civil action" (p. 514).

30. However, this court held by a majority (Pearson and Davies LJJ) that even if the landlord's action constituted a contempt of court, he had an express contractual right to give the tenant notice to quit which was exercisable whatever the landlord's motive might be for giving notice; and since the landlord had validly exercised his contractual right there could be no liability against him in tort: pp. 520-522 (Pearson LJ) and pp. 524-527 (Davies LJ). Pearson LJ stated at p. 522 that "[t]he main reason is that the same act as between the same parties cannot reasonably be supposed to be both lawful and unlawful – in the sphere of contract, valid and effective to achieve its object, and in the sphere of tort, wrongful and imposing a tortious liability". Davies LJ agreed with the relevant part of Pearson LJ's judgment, pointed out that not all crimes give rise to a cause of action (p. 523) and emphasised that proceedings for contempt of court are concerned with preservation of the inviolability of the administration and course of justice and its proper conduct, rather than to create a cause of action in damages "in all cases" for the individual damaged by the contempt (p. 524). Both Pearson LJ (pp. 521-522) and Davies LJ (pp. 523-524) drew a similar analogy with claims for damages for breach of statutory duty to that drawn by Lord Hoffmann in *Barclays Bank* at [39], quoted above. Pearson LJ said, "It is not necessary … 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" (p. 522) and Davies LJ also reserved his opinion on that question (p. 527).

31. In view of the latter comments by Pearson LJ and Davies LJ, Mr Smith is right to say that *Chapman v Honig* is not authority for the proposition that damages can never be awarded for contempt of court, including in respect of breach of a court order. Rather,

the essence of the reasoning of the majority in *Chapman v Honig* is that the landlord had an express contractual right to give notice as he did, and this contractual right excluded any possibility of liability in tort which would negative that right: contract trumped tort. Nonetheless, I think the reasoning of the majority is supportive of the general view, made explicit by Lord Bingham and other law lords in the *Barclays Bank* case, that no cause of action arises simply by virtue of a civil contempt of court being committed by a defendant.

32. Davies LJ at pp. 525-527, like Lord Denning MR, made reference to authorities which indicate that a party to an action who has obtained and served a subpoena to compel a witness to attend trial to give evidence may bring an action for damages against that witness if he fails to attend upon the subpoena. Davies LJ cited *Roberts v J. & F. Stone Lighting and Radio Ltd* (1945) 172 LT 240; an old authority to similar effect, particularly relied upon by Mr Smith, is *Couling v Coxe* (1848) 6 CB 703. However, Davies LJ seems to have regarded these cases as falling within a special category and the damages recoverable as being limited, requiring proof of special damage and probably only extending to costs thrown away by the non-attendance. See too the discussion of these authorities in *Arlidge, Eady & Smith on Contempt*, 4th ed., Sir David Eady and Professor A.T.H. Smith, paras. 14-161 to 14-166, which also indicates that these cases are anomalous and in a special category. I think it is also significant that Lord Denning MR considered that damages would only be recoverable if a witness wilfully disobeys the subpoena. That qualification again indicates that these cases do not support the general proposition that a simple breach of a court order constitutes a cause of action.

33. In the present case, the judge said that it is unnecessary to decide whether *Couling v Coxe* is in a special category or should be regarded as being inconsistent with the decision of the House of Lords in the *Barclays Bank* case; but if it were necessary to decide that issue he would conclude that it was inconsistent with principle, the Civil Procedure Rules and *Barclays Bank*. I agree with the judge on both points, save that I do not think that reference to CPR Part 81 (which lays down an exclusive procedural code for applications to commit for contempt of court, i.e. for a party to invoke the court's *penal* jurisdiction) assists one way or the other on the question whether and in what circumstances it might be possible to rely on breach of a court order in support of a claim in private law for compensatory damages. I consider that *Couling v Coxe* is far too flimsy as a basis for the extreme argument presented by Mr Smith.

34. I also agree with the judge that none of the other authorities particularly relied upon by Mr Smith below and in this court show that damages are recoverable for a simple breach of a court order such as the freezing order or receivership order in this case: *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; *The Messiniaki Tolmi* [1983] 1 Lloyd's Rep. 666; and *Parker v Rasalingham* [2000] All ER (D) 912 (Lawrence Collins QC, as he then was, sitting as a judge of the Chancery Division). Either the comments in these cases relied upon by Mr Smith were obiter or, as in *The Messiniaki Tolmi*, they were only directed to the question whether there might be an arguable case to that effect. All these cases precede the House of Lords decision in *Barclays Bank*. In the light of that authority it cannot be said that the Bank has shown that it has a good arguable case that simple

breach of the freezing order or the receivership order constitutes in itself a cause of action in damages.

35. I turn then to the extreme opposing submission by Mr Samek QC for Mr Khrapunov, to the effect that there is a positive rule of law that damages can never be awarded where a necessary element of the cause of action is a breach of a court order, as it is in this case. This is linked to Mr Samek's further submission that a breach of a court order, as alleged in this case, cannot qualify as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. I reject both these submissions.

36. In my judgment, there is no positive rule of law as alleged by Mr Samek. If, on application of the general principles governing the tort of conspiracy to injure by unlawful means, deliberate breaches of a court order qualify as unlawful means, there is no supervening rule of law which prevents that from being permissible. The real question is whether, by application of those general principles, the breaches of the freezing order and the receivership order alleged in this case do qualify as relevant unlawful means - or, at any rate, may so qualify, to the standard of there being a good arguable case for the Bank to that effect for the purposes of establishing jurisdiction for the English courts.

37. Before dealing with that issue, however, I will first explain why I do not accept Mr Samek's positive rule of law argument. There is no authority in favour of it; there is authority which contradicts it; and it is unsupported by, and indeed is contrary to, principle.

38. The authorities on which Mr Samek particularly relied for this part of his argument were *In re Hudson* and the *Barclays Bank* case. But neither of these authorities supports the proposition that there is a positive rule of law that breach of a court order can never be relied upon as an element in a cause of action in tort. They only support the proposition that simple breach of a court order does not in itself constitute a cause of action in damages. In neither case did the court address the wider question whether, for example, contempt of court (whether by breach of a court order or arising in other ways, such as in *Chapman v Honig*) can constitute unlawful means for the tort of conspiracy to injure by unlawful means or the tort of intentional infliction of harm by unlawful means (i.e. before the law was changed in *OBG Ltd v Allan* [2008] 1 AC 1 to say that for the latter tort the unlawful means must be independently actionable in private law, albeit not necessarily at the instance of the claimant relying on the unlawful means tort). As Lord Walker points out in *Total Network*, at [93], in the authorities prior to *OBG Ltd v Allan* the statements of general principle assumed that relevant unlawful means were the same for both these torts, and included both crimes and torts.

39. There is authority which is contrary to Mr Samek's argument. In *Acrow (Automation) Ltd v Rex Chainbelt Inc.* [1971] 1 WLR 1676, CA, this court held that acting to aid or abet a breach of a court order, in circumstances giving rise to liability for contempt of court on the part of the person aiding or abetting the breach under the principle in *Seaward v Paterson* [1897] 1 Ch 545, CA, constituted unlawful means for the purposes of a species of the tort of intentional infliction of harm by unlawful means: see in particular pp. 1682G-1683B per Lord Denning MR, with whom Phillimore LJ agreed. In my view this shows that the positive rule for which Mr Samek contends does not exist. Indeed, I think it goes further, and is authority which tends to show

that Mr Samek's wider argument about what does or does not qualify as unlawful means is also wrong. It is true to say that the reasoning and result in *Acrow (Automation)* might not survive the reformulation in *OBG Ltd v Allan* of the law in relation to the tort of intentional infliction of harm by unlawful means, since the unlawful means in question were not independently actionable. But as an expression of what counts as unlawful means given at a time when the unlawful means for that tort and for the tort of conspiracy to injure by unlawful means were taken to be the same, and in circumstances where the old position continues to apply so far as the tort of conspiracy is concerned, as has been confirmed in *Total Network*, I think that *Acrow (Automation)* indicates that contempt of court based on violation of a court order does qualify as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

40. Further, so far as concerns authority contrary to Mr Samek's alleged rule of positive law, in *Parker v Rasalingham* Mr Collins QC held that in an appropriate case the court has jurisdiction to award damages for breach of an injunction and made such an award, on the basis that the order in the case was a negotiated consent order and it was just to do so. Having reviewed a range of authorities, at para. [26] he said:

> "In this case the order 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."

41. This shows that there is no rule of law which prevents a claimant from relying on breach of a court order, provided he can show that he has some recognised cause of action and relies on such breach as part of that cause of action. In that case, the order embodied a contractual agreement and it was legitimate to rely on breach of the order as a breach of the agreement. In fact, *In re Hudson* is to the same effect, since Buckley J would have allowed the claim if he had been persuaded that the court order in that case had embodied a contractual agreement between the parties: see [1966] Ch 209 at pp. 214E-F and 215B-C.

42. There is also no principled basis for the alleged rule of law proposed by Mr Samek. There is no reason of public policy why such a rule should be identified. The position may be contrasted with that in relation to witness immunity from action in relation to evidence given in court, where there is a strong public interest in favour of such a rule to promote the giving of truthful evidence without fear of litigation: see *Marrinan v Vibart* [1963] 1 QB 528, CA, and *Roy v Prior* [1971] AC 470. There is no similar public policy reason to justify a rule to the effect that breach of a court order may never be relied upon as an element in a recognised cause of action in tort. In fact, *Roy v Prior* makes it clear that even the strong public policy underlying the witness immunity rule does not prevent reliance on the giving of evidence by the defendant as one element of a wider cause of action for malicious arrest: see pp. 477E-478A in the speech of Lord Morris of Borth-y-Gest. In the present context there is nothing to set against the policy reflected in the principles underlying the tort of conspiracy to injure by unlawful means, which indicate that breach of a court order *should* qualify as relevant unlawful means, as explained below.

43. Mr Samek took us to a well-known passage in the speech of Lord Scarman in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280. The case concerned a breach of an undertaking by Ms Harman to treat documents disclosed in litigation as confidential, by showing them to a journalist. At p. 310C-E Lord Scarman said:

> "In the traditional classification of the law her contempt would be described as a 'civil' contempt, being a non-compliance with an order of the court (or its substitute, an undertaking given to the court), by a party to legal proceedings or his solicitor: *Supreme Court Practice* (1982) notes 52/1/4-6. The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the differences between on the one hand contempts such as 'scandalising the court', physically interfering with the course of justice, or publishing matter likely to prejudice fair trial, and on the other those contempts which arise from non-compliance with an order made, or undertaking required, in legal proceedings. The former are usually the business of the Attorney-General to prosecute by committal proceedings (or otherwise): the latter, constituting as they do an injury to the private rights of a litigant, are usually left to him to bring to the notice of the court. And he may decide not to act: he may waive, or consent to, the non-compliance."

44. However, I do not think this assists Mr Samek in his argument. If anything, Lord Scarman's account of how civil contempt by breach of a court order constitutes an injury to the private rights of a litigant tends to show that there is no good policy reason why such a litigant may not rely upon such a breach, if it is relevant as part of some recognised cause of action in damages. So, in the present case, there is no valid argument in favour of the alleged positive rule of law asserted by Mr Samek which would forbid the Bank from relying on breaches of the court orders obtained by it to protect its private rights as relevant unlawful means for the purposes of the tort of conspiracy to injure by unlawful means.

45. I come, then, to the real point at issue, which is whether contempt of court in the form of breaches of court orders as alleged in this case qualifies as unlawful means for the purposes of that tort. In my judgment, it does and the judge was right so to hold. At the very least, the Bank has a good arguable case that it does for the purposes of the argument on jurisdiction.

46. The scope of what counts as unlawful means for the purposes of the tort of conspiracy was considered by the House of Lords in *Total Network*. The House declined to apply across to the tort of conspiracy to injure by unlawful means the recent reformulation of the law in respect of unlawful means in relation to the tort of infliction of harm by unlawful means in its decision in *OBG Ltd v Allan*. Instead, in *Total Network* it confirmed that the previous law regarding the wider ambit of unlawful means in the context of the tort of conspiracy to injure by unlawful means would continue to apply. Under that law, relevant unlawful means include simple crimes (i.e. crimes which are not independently actionable by anyone in private law), as well as torts and breaches of contract. On the facts in *Total Network*, liability for conspiracy to injure by unlawful means was established on the basis that the defendants conspired to cheat the Revenue, which was a simple criminal offence not independently actionable in

private law: see in particular paras. [44]-[45] (Lord Hope), [56] (Lord Scott), [89]-[95] (Lord Walker), [116]-[122] (Lord Mance), and [221] (Lord Neuberger).

47. The concept of unlawful means, as used in the tort of conspiracy to injure by unlawful means, marks the boundaries within which hostile action taken by combinations of persons who intend to inflict harm on a claimant will be regarded as legitimate and lawful, despite their hostile intention. As Lord Walker says of a crime, the man in the street would recognise that as a paradigm case of unlawful means and a lawyer's reaction would not be different: [90]-[91]. In other words, the criminal law provides a particularly strong and easily recognised marker for the boundaries of legitimate hostile action by persons in combination. Torts and breaches of contract are included as well, as lesser, but still relevant, objective and sufficiently clear markers of the appropriate boundaries, and these also qualify as unlawful means on the narrower test for the tort of infliction of harm by unlawful means set out in *OBG Ltd v Allan*.

48. In my judgment, within this scheme civil contempt of court by breaching court orders qualifies as unlawful means for the purposes of the tort of conspiracy. I agree with the judge that *Total Network* provides strong support for this view. As the judge said at para. [25]:

> "… 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 [worldwide freezing order] 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."

49. I consider that this reasoning is correct. The judge described the recognition of contempts of court of this character as a principled incremental step justified by the reasoning of the House of Lords in *Total Network*, and in a certain sense that is true, since there has not been a decision since *OBG Ltd v Allan* and *Total Network* to confirm that this is the position. But in another sense, I would say it is not even an incremental extension of the principle in *Total Network*¸ because I think that a lawyer and the man in the street alike would regard the deliberate flouting of court orders in order to harm the interests of the Bank as is alleged in this case as being clearly wrongful and illegitimate means, ranking in the scale of reprehensibility below some crimes but rather above others, and above simple torts and breaches of contract. That civil contempts of court do qualify as unlawful means for these purposes had already been recognised prior to *Total Network*: see the discussion of *Acrow (Automation)* above and the observations of Beldam LJ in *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 170, making it clear that he would have followed *Acrow (Automation)* on the question of breach of a court order constituting unlawful means, if one had been in place in that case.

50. This conclusion is also strongly supported by the decision of this court in *Surzur Overseas Ltd v Koros* [1999] 2 Lloyd's Rep 611. That case concerned a claim of conspiracy to injure by unlawful means, being the procuring and deploying in court of false evidence to deceive the court into varying a *Mareva* to release assets, with the result that the claimant suffered loss. This court held that there was a serious issue to be tried: the matters complained of went wider than the giving of evidence in court,

constituted a conspiracy to abuse the process of the court and the claim was not to be struck out on the basis of the witness immunity rule. Waller LJ, with whom the other members of the court agreed, held that it was arguable that the unlawful means alleged for the purposes of the complaint in conspiracy do not have to be actionable at the suit of the claimant (p. 617; a point confirmed in *Total Network*), and that "a conspiracy which had as its aim and objective defeating an order of the Court and obtaining the release from a *Mareva* of assets by persons who were not … 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*" (p. 620). The persons alleged to have conspired with the person subject to the order (Mr Koros) were located outside the United Kingdom, but the court found it unnecessary to decide whether the *Babanaft* proviso included in the *Mareva* injunction precluded them from being found to be in contempt of court even if they assisted Mr Koros to defeat the order (i.e. on the basis that the proviso exempted them from liability to the penal contempt jurisdiction under the accessory liability principle articulated in *Seaward v Paterson*). Waller LJ considered that it might well be that no contempt would have been committed by them, "but if [they] are shown to have deliberately assisted Mr Koros in defeating the injunction by the production of false documents that would seem to me to be unlawful means without any reliance on a contempt having been committed" (p. 620), that is to say, *by them* (Mr Koros would have committed a contempt, since he was directly bound by the order and did not have the benefit of the *Babanaft* proviso).

51. In other words, if Mr Koros and the other conspirators agreed that actions should be taken involving deliberate provision of assistance to him to breach a court order which imposed obligations on him, but not them, they would all be taken to have agreed to participate in a conspiracy to injure by unlawful means sufficient to impose civil liability on each conspirator. In my view this makes sense. Although it might not be right to subject a person located abroad who benefits from the *Babanaft* proviso to personal penal sanctions equivalent to those involved in enforcement of the criminal law, they should not be permitted to participate in deliberate unlawful action to undermine the court's order and defeat the rights of a claimant without being exposed to civil liability to pay compensation. It should be noted that in our case the same point, with which I agree, covers the position of Mr Khrapunov as alleged co-conspirator with Mr Ablyazov, who is the person who is subject to the worldwide freezing order and the receivership order.

52. *Surzur Overseas Ltd v Koros* was noted by Lord Walker in *Total Network* at [88] and [94]. Lord Walker reached a conclusion in line with Waller LJ's observation at p. 617 and did not suggest that other parts of the reasoning in the case could not stand.

53. In answer to all this, Mr Samek sought to rely on the judgment of Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch), a case involving allegations of conspiracy to injure by unlawful means consisting of non-actionable and non-criminal breaches of regulatory obligations under applicable competition statutes in various jurisdictions. Morgan J reviewed the guidance in *Total Network* and other authorities. In the light of these he inclined to the view that all crimes are unlawful acts for the purposes of the tort of conspiracy to injure by unlawful means, though in the event he did not have to decide the issue (para. [54] of Annex I to his judgment), and he concluded that non-actionable breaches of a non-criminal statute

are not "unlawful acts" for the purposes of the tort of conspiracy to injure by unlawful means: see, in particular, paras. [55]-[62] of Annex I.

54. In my view, *Digicel* does not assist Mr Khrapunov. It simply decides that not all unlawful acts will qualify as unlawful means for the tort of conspiracy to injure by unlawful means and identifies non-actionable non-criminal breaches of regulatory statutes as being in the category which will not. The first point had been adumbrated in *Total Network* as had at least the possibility of the second: see in particular the speech of Lord Walker at [96]. But *Digicel* leaves untouched the question at issue in our case, which is whether civil contempt of court in the form of breach of a court order qualifies as relevant unlawful means for the purposes of the tort. If anything, it seems to me that Morgan J's view that all crimes constitute unlawful means has a tendency against Mr Samek's submission, since the reprehensibility of deliberate action to perpetrate, procure or assist in a violation of a court order is at a level equivalent to participation in many crimes and may be more serious than in relation to some crimes.

55. Finally, Mr Samek submitted that recognition of civil contempt of court as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means would open the floodgates to liability and should be discounted on that ground. I do not agree. Looking first at the person who is subject to a court order, no floodgates issue arises, since typically either the court order will directly reflect some underlying private law right of the claimant in relation to that person (e.g. where a final injunction is issued to protect such a right) or in the case of a freezing order will only protect the claimant to the extent that he can establish his underlying claim in damages against that person which the freezing order was issued to protect. If civil contempt is recognised as unlawful means for the purposes of the tort of conspiracy, it has only a duplicative rather than a floodgates effect.

56. Turning to the position of a co-conspirator who is not himself subject to the court's order, again I do not think that there is any floodgates objection to imposition of liability. The co-conspirator will only become liable if, with knowledge of the obligations imposed by the order on the addressee of the order, he deliberately counsels, procures or assists in the violation of those obligations by the addressee. This means that, unlike in the situation addressed by the House of Lords in the *Barclays Bank* case, civil liability is imposed on a narrow basis and only in circumstances broadly equivalent to those in which the co-conspirator would himself be liable for contumacious breach of the court order under the principle of accessory liability in *Seaward v Paterson* (subject to the *Babanaft* proviso, if it applies): see, in that regard, the contrast emphasised in *Barclays Bank* between the negligence claim in that case and the circumstances in which a third party bank would be liable in contempt for breach of the freezing order at paras. [29]-[30] (Lord Hoffmann) and [63]-[64] (Lord Rodger). As I have observed, if the *Babanaft* proviso applies, that may well be a good reason why the co-conspirator should be exempt from personal penal sanction for contempt of court, but it does not follow that he should be immune from civil action for compensation for his participation in what has been done, which is so obviously unlawful vis-à-vis the claimant. In the case of a freezing order, if a co-conspirator has indeed deliberately helped the addressee of the order to hide his assets covered by that order or in some way render them immune from execution, thereby inflicting loss on the claimant, I consider that it is strongly arguable that justice is in

favour of the imposition of civil liability on the co-conspirator to be liable to pay compensation to the claimant.

Article 6 of the Lugano Convention

57. The United Kingdom and Switzerland are both bound by the Convention. The general rule under the Convention is that a person should be sued in their state of domicile: Article 2. However, provision is made for special jurisdiction on different grounds in Articles 5 and 6, among others. In order to rely on those grounds, the Bank must establish that it has much the better of the argument on those grounds 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; [2016] 1 WLR 1814 at paras. [17]-[24].

58. Article 6 provides in relevant part as follows:

> "A person domiciled in a State bound by this 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. …"

59. Article 59(1) provides:

> "In order to determine whether a party is domiciled in the State bound by this Convention whose courts are seised of a matter, the court shall apply its internal law."

60. The relevant provision of English law is section 41A of the Civil Jurisdiction and Judgments Act 1982, which determines for the purposes of the Convention whether an individual is domiciled in the United Kingdom. Subsection (2) provides:

> "An individual is domiciled in the United Kingdom if and only if-
>
> (a) he is resident in the United Kingdom; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom."

A similar formula is used in the Act to govern determination of domicile in other situations as well: see section 41A(7) (domicile of an individual in a state not bound by the Convention), section 41(2) (domicile of an individual for the purposes of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), section 41(7) (domicile of an individual in a non-Contracting State).

61. The Bank sought to rely on Article 6 against Mr Khrapunov by maintaining that at the relevant date in July 2015 Mr Ablyazov was domiciled in England. The judge found that once Mr Ablyazov fled the United Kingdom, and certainly after the Supreme

Court rejected his application for permission to appeal against his committal to prison for contempt of court in Spring 2013, he had no intention of returning to the United Kingdom and was not resident there. There is no appeal against this part of the judgment.

62. The judge also rejected an argument by the Bank, in reliance on *R v Barnet London Borough Council, ex p. Shah* [1983] 2 AC 309, that despite having left the country Mr Ablyazov should be taken still to be domiciled in England because he had violated an obligation under the worldwide freezing order in leaving the jurisdiction. In *ex p. Shah* at pp. 343G-344A Lord Scarman, in interpreting the meaning of "ordinarily resident" in the Education Acts, held that it meant abode in a particular place or country which the individual has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, but subject to an exception that if a man's presence in a particular place or country is unlawful, he cannot rely on his unlawful residence; "… I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted unlawfully." The judge declined to apply this statement in relation to Mr Khrapunov's right to rely on the terms of section 41A(2), since there had been no relevant wrongful conduct by him: para. [37]. The Bank submits that the judge erred on this point.

63. In my judgment, the judge was correct to apply section 41A(2) as he did and to reject this argument by the Bank. The question whether what appears to be a clear statutory provision is in fact subject to implied disapplication by reference to the principle that a man should not be allowed to benefit from his own wrong is a matter of statutory interpretation, and such implication may be rejected as being inconsistent with the scheme and object of the statute in issue: see *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17; [2016] QB 23. In my opinion, there are two reasons why the Bank's argument cannot be accepted.

64. First, I consider that the scheme and object of the relevant part of the 1982 Act is against any qualification being read into section 41A(2) by implication. The Act is concerned to set out clear criteria for determination of domicile of individuals in various situations, so that litigants (both those suing and those being sued, including those sued by reference to the domicile of another person under Article 6 of the Convention) may understand with reasonable certainty at the outset of litigation what is the proper place for it, so that they can know where to sue and when to contest jurisdiction. In my view, this object militates strongly against any such unclear and contestable implied qualification as that contended for by the Bank. The criterion of residence is reasonably clear and easy to check, but it may often be very difficult for a litigant to tell whether someone is absent in breach of another legal obligation to which they may be subject. I do not think that Parliament intended section 41A(2) (and the other similar provisions in the 1982 Act) to be read as subject to such a qualification, which would so undermine the intended clarity of effect of that provision. The context and object of this statute is very different from the Education Acts in issue in *ex p. Shah*.

65. Secondly, even if I am wrong about interpreting section 41A(2) as free of *any* implied qualification, I would agree with the judge that the relevant qualification is to prevent the person seeking to rely on the provision (here, Mr Khrapunov) from taking advantage of an unlawful act of their own. This limited effect of the qualification both

reflects the need for reasonable certainty in operation of the provision (a third party such as Mr Khrapunov may be unable to tell whether someone else has breached a legal obligation not to leave a jurisdiction, but would be better placed to assess the effect of legal obligations to which he himself is subject) and justice as between claimant and that third party - if the third party has done nothing wrong, there is no reason in justice why he should not be permitted to rely on section 41A(2) according to its express terms, and the principle stated by Lord Scarman does not indicate otherwise. In fact, these points tend to reinforce the first reason given above, since the coherence of the scheme under the Act and the Convention requires that jurisdiction by reference to the domicile of one person, which may also govern jurisdiction in relation to others, should be stable in such situations and not variable as between defendants.

Article 5 of the Lugano Convention

66. Article 5 provides in relevant part:

> "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"

67. As noted at para. [4] above, as interpreted in *Bier* this provision permits exercise of jurisdiction by the English courts if England is "the place where the damage occurred", under limb (a) of Article 5(3), or if England is "the place of the event giving rise to" the damage in question, under limb (b) of Article 5(3). I address limb (a) and limb (b) in turn.

Limb (a) of Article 5(3): the place where the damage occurred

68. The judge accurately summarised the law to be applied at [40], taking his guidance primarily from the decision of this court in *AMT Futures Ltd v Marzillier* [2015] QB 699 which itself reviewed and summarised the effect of relevant European authority, as follows:

> "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."

69. The judge rejected the Bank's argument that it suffered direct damage in England because that is where its chose in action, its worldwide freezing order and its judgments against Mr Ablyazov are to be found, and they have all been reduced in value by the alleged actions of Mr Khrapunov in putting (or assisting to put) Mr Ablyazov's assets in other jurisdictions (Switzerland, Belize and Russia) beyond the ability of the Bank to execute against them in order to satisfy the judgments it has obtained against Mr Ablyazov, or in seeking to impede such execution. Rather, the judge's assessment was that the element of damage which is closest in proximity to the harmful event is the Bank's inability or reduced ability to execute against those assets in the places where they are located, not in England: [41]. It was in those other places that the "initial damage" was suffered, for the purposes of the analysis under limb (a) of Article 5(3), and the loss felt by the Bank in England as a diminution in the value of its chose in action, worldwide freezing order and judgments merely reflected that damage: [42]. The place where the damage which can be attributed to the conspiracy by "a direct and causal link" was sustained in the relevant foreign jurisdiction where the Bank's opportunity to execute its judgments was lost or hindered: [43].

70. In my view, the judge's application of limb (a) of Article 5(3) cannot be faulted. I agree with it. In my judgment it is particularly strongly supported by the judgment of the ECJ in the *Marinari* case [1996] QB 217, at paras. [12]-[15]. At para. [14] the ECJ was concerned to limit the element of jurisdictional choice imported into Article 5(3) under limb (a), and did so by focusing its application on the place where damage was suffered first or most immediately (limb (b) "cannot ... be construed so extensively as to encompass any place where the adverse consequences of an event that *that has already caused actual damage elsewhere* can be felt" – my emphasis); and hence at para. [15] the ECJ again emphasised a distinction between the state where the "initial damage" arises (which will on that ground, if it is a contracting state, have jurisdiction under limb (a)) and the contracting state where "financial damage consequential" on that initial damage arises (which will not have jurisdiction under limb (a)). In the present case, the steps allegedly taken to hide assets in other jurisdictions disabled the Bank from getting its hands on those assets in those jurisdictions and using them to satisfy its judgments against Mr Ablyazov, and accordingly it is in those jurisdictions that actual damage was suffered first or most immediately by the Bank, even though it was reflected consequentially as damage in the form of a diminution in the financial value of the judgments and orders in its favour.

71. I think that this is a situation in which the judge's assessment regarding the application of limb (a) of Article 5(3) is the only proper assessment which could be made in the circumstances. However, I would also emphasise that analysis under limb (a) of Article 5(3) may sometimes call for a choice to be made by a judge where there is a rational basis for more than one view as to what is the relevant damage for the purposes of limb (a) of Article 5(3), so that the judge has to make an evaluative judgment which option to choose. On an appeal which proceeds in the usual way as a review, as this one has, this court will respect the choice made by the first instance judge who has correctly directed himself as to the test to be applied and has made a rationally defensible evaluative judgment in applying that test. Even if it could be said here that more than one choice could rationally have been made by the judge, he has directed himself correctly as to the relevant test and the evaluative judgment he has made in applying limb (a) of Article 5(3) cannot be said to have been wrong.

Limb (b) of Article 5(3): the place of the event giving rise to the damage

72. The Bank submitted to the judge that the place of the event giving rise to the damage was the place where the conspiracy was allegedly hatched in about 2009, which (it was to be inferred) was in England. That inference was justified by the fact that Mr Ablyazov will have been the driving force in the conspiracy with Mr Khrapunov being a willing participant; that Mr Ablyazov lived in England at that time and through to February 2012; and that Mr Ablyazov's suggestion of a conspiracy will have been made from here and Mr Khrapunov will have either visited England and entered into the combination here or would have communicated his assent by phone or email, with such assent being received by Mr Ablyazov here. Mr Khrapunov has not filed evidence to answer the Bank's case against him and having regard to the evidence of the Bank the judge held that it has a good arguable case that the alleged conspiracy was hatched in England: [45]. This is plainly an assessment which was open to the judge to make on the evidence. The Bank has much the better of the argument on this point.

73. However, the judge held that the event which gave rise to the damage was not the hatching of the conspiracy in England, but rather the implementation of that conspiracy by dealings abroad with foreign assets: [46]-[53]. He rejected an analogy pressed on him by the Bank with cases involving negligent misstatement (in particular *Domicrest v Swiss Bank Corp.* [1999] QB 548) in which the event giving rise to the damage has been held to be the making of the negligent misstatement, on the basis that a negligent misstatement causes damage when it is made whereas a conspiracy only causes damage when it is implemented: [47]-[49]. He also rejected an analogy with defamation (*Shevill v Presse Alliance* [1995] 2 AC 18) in which the event giving rise to the damage has been held to be the making of the original defamatory statement, as the tort is different and has different elements: [50]. The judge focused on identifying the place of the event which gave rise to the damage, distinguishing that sharply from the place of the tort: [51]. In the judge's view, the implementation of the conspiracy occurred by way of instructions given by Mr Ablyazov (on which Mr Khrapunov would then act), but it was only in the period until Mr Ablyazov fled from the United Kingdom on 16 February 2012 that limb (b) of Article 5(3) was satisfied so as to establish jurisdiction for the English court.

74. Mr Samek for Mr Khrapunov contends that the judge erred in his application of limb (b) of Article 5(3) because he should have focused on the essence of the complaint,

which Mr Samek says is the dealing with the assets of Mr Ablyazov in jurisdictions other than England in order to remove them from the Bank's ability to have recourse against them in execution of the judgments it obtained against him. Mr Smith for the Bank, on the other hand, submits that the judge erred by focusing on the giving of instructions by Mr Ablyazov pursuant to the alleged conspiracy rather than the original alleged agreement between him and Mr Khrapunov which is said to be the foundation of Mr Khrapunov's liability to the Bank, which was made in England.

75. I reject Mr Samek's criticism, for the reasons which follow. I do not consider that it is supported by the authorities on which he sought to rely, in particular *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] EWHC 716 (Comm), [2009] 1 All ER (Comm) 473; *AMT Futures Ltd v Marzillier*; and *Actial Farmaceutica LDA v De Simone* [2016] EWCA Civ 1311 (to which Mr Samek drew our attention in written submissions after the oral hearing had finished). The passages in the judgments relied on by Mr Samek were focused on limb (a) of Article 5(3) and do not provide guidance on the application of limb (b) in the present case. However, with respect to Teare J, I think that he has fallen into error in rejecting the submission made on behalf of the Bank.

76. In my view, so far as concerns Mr Khrapunov, the relevant event giving rise to the damage in question is that which is the legal foundation for the Bank's claim against him, namely the alleged agreement between him and Mr Ablyazov made in about 2009, in all probability (on the available evidence) in England, either at one or more personal meetings here or by Mr Khrapunov communicating to Mr Ablyazov in England (by telephone or email) his assent to a proposal by Mr Ablyazov that he should help him to remove assets located abroad covered by the worldwide freezing order from the reach of the Bank in seeking to execute its judgments against Mr Ablyazov. It was the making of the alleged agreement which is the foundation for the Bank being able to claim that Mr Khrapunov now shares responsibility for the unlawful means used to effect the object of the conspiracy, namely the breaches by Mr Ablyazov of the worldwide freezing order and the receivership order made against him. By reason of the alleged agreement Mr Khrapunov is made jointly liable for Mr Ablyazov's unlawful acts, since the Bank has a good arguable case (so as to have by far the better of the argument on this issue) that Mr Khrapunov thereby encouraged and procured their commission by agreeing to help Mr Ablyazov to carry the scheme into effect and it was by reason of the agreement that Mr Ablyazov looked to Mr Khrapunov for assistance in that regard and gave him instructions how to dispose of assets located abroad. As a result of his alleged agreement to the conspiracy Mr Khrapunov would be liable for Mr Ablyazov's acts in pursuit of its object even if he (Mr Khrapunov) had not received any instructions and simply remained on standby to help, while Mr Ablyazov used other means to hide his assets. Moreover, it was by reason of the alleged agreement that Mr Khrapunov took such actions on his own initiative in pursuance of the conspiracy as may be found to have occurred without his receiving further detailed instructions from Mr Ablyazov. It may have been sufficient for Mr Ablyazov and Mr Khrapunov to agree at the outset on the general objective, with Mr Ablyazov sometimes giving instructions or making suggestions what to do to hide assets and Mr Khrapunov at other times deciding himself what actions to take without needing to wait for further instructions. Mr Ablyazov would be liable for acts taken by Mr Khrapunov in furtherance of their conspiracy even if done without instructions being given by him.

77. The ECJ in its judgment in *Marinari* at paras. [9]-[19] emphasised that Article 5(3) is to be given an autonomous interpretation, independent of applicable national law governing civil liability. However, limb (b) of Article 5(3) ("the place of the event giving rise to [the damage]") must refer to the relevant legal event giving rise to liability under applicable national law, since it is only where such an event occurs that there is any connection to the damage which could constitute "a particularly close connecting factor between the dispute and the courts other than those of the state of the defendant's domicile" as required to justify attribution of special jurisdiction under the Convention to those courts: see *Marinari*, para. [10]; also *Bier*, para. [21].

78. In order for a cause of action to arise under national law there may, of course, be a requirement for a number of elements to be in place, and these may occur in different jurisdictions. Thus, in English law, for a cause of action to arise for negligent misstatement, the claimant would typically have to prove that the defendant made a misstatement in circumstances where he owed a duty of care, that he did so negligently, that the claimant relied on the misstatement and that he thereby suffered loss. In such a case, what counts as the relevant legal event giving rise to liability for the purposes of limb (b) of Article 5(3)?

79. In the negligent misstatement case of *Domicrest Ltd v Swiss Bank Corporation* [1999] QB 548 Rix J, as he then was, after reviewing the European case-law, gave the answer at p. 568B-C that:

> "it is the representor's negligent speech rather then 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 misstatement 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"

80. Rix J's approach was approved by this court in *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205; [2003] 2 Lloyd's Rep. 146 at para. [41]. It has been followed in authorities at first instance: *Alfred Dunhill Ltd v Diffission Internationale Maroquinerie de Prestige SARL* [2002] 1 All ER (Comm) 950, 957 (Kenneth Rokison QC, sitting as a judge of the High Court); *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm); [2006] 1 All ER (Comm) 607, [41]-[44] (David Steel J); *London Helicopters Ltd v Heliportugal LDA-INAC* [2006] EWHC 108 (QB); [2006] 1 All ER (Comm) 595, [28]-[35] (Simon J). In my view, in common with the views expressed in all these cases, Rix J's approach in *Domicrest* correctly states the position.

81. A further indication that Rix J is correct is that one can imagine a situation in which one negligent misstatement is contained in an email sent to a number of recipients in different jurisdictions (or is made orally in a conference call involving a number of people in different jurisdictions) and relied on by them in those jurisdictions. In such a case, it accords with the object of the Convention in conferring special jurisdiction on the courts of the place of the event giving rise to the damage "for reasons relating to the sound administration of justice and the efficacious conduct of proceedings" (*Marinari*, para. [10]) that all the recipients of the email or participants in the call should be able to sue the defendant in one place for the same negligent misstatement, thereby minimising legal costs and delays and avoiding the risk of irreconcilable

judgments being produced by different courts in different places. See also *Dumez France* at para. [18], emphasising the objective of the Convention of avoiding "the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions …".

82. Rix J's approach seems to me to be fully in line with the guidance given in the European authorities. The ECJ in *Bier* explained at para. [21] that interpreting Article 5(3) to include limb (b), rather than just limb (a), would avoid "excluding a helpful connecting factor with the jurisdiction of a court particularly near to the cause of the damage". In *Dumez France* at para. [10] the ECJ stated that limb (b) of Article 5(3) means that "the defendant may be sued … in the courts for the place of the event which gives rise to and is at the origin of that damage." This is reflected in the focus by Rix J on "the harmful event which sets the tort in motion". Treating the relevant originating event as the wrongful conduct of the defendant which is the principal foundation for his liability under rules of national law also provides reasonable certainty in the application of the Convention, enabling claimants to identify clearly a jurisdiction in which they are permitted to sue him: see *Marinari*, para. [19], explaining that interpretation of Article 5(3) of the Convention should accord with its objective "to provide for a clear and certain attribution of jurisdiction", avoiding reference to "uncertain factors such as the place where the victim's assets suffered subsequent damage and the applicable rules on civil liability."

83. In the defamation case of *Shevill* the ECJ held at para. [24] that the place of the event giving rise to the damage for the purposes of limb (b) of Article 5(3) "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". This emphasises the relevance of the place where the principal acts of the defendant which give rise to liability under the applicable rules of national law occurred and again indicates that Rix J's focus on "the harmful event which sets the tort in motion" is in line with the guidance given by the ECJ.

84. Applying the approach to limb (b) of Article 5(3) set out in the European and domestic authorities to the present case, in my judgment it is clear (to the standard that the Bank has by far the better of the argument on this issue) that the place of the relevant event giving rise to the damage for which it is sought to hold both Mr Khrapunov and Mr Ablyazov liable is the making of their agreement in England in about 2009 that they would do what they could to defeat the worldwide freezing order against Mr Ablyazov by disabling the Bank from or impeding it in executing its judgments against Mr Ablyazov's assets located abroad. As I have explained at paragraph [76] above, this is the critical or principal event involving action by each of them which is the legal foundation for their liability which is sought to be established in these proceedings. It is also the harmful event which set the tort in motion.

85. Contrary to the view of the judge, the giving of instructions by Mr Ablyazov at later times is not the principal foundation of the liability of Mr Khrapunov; the making of the original agreement is. Hence it is the making of the original agreement, not the giving of later instructions by Mr Ablyazov, which is the place of the event giving rise to the damage for the purposes of limb (b) of Article 5(3).

86. In my view, with respect, the judge's reasoning at para. [49] for distinguishing the tort of conspiracy from a negligent misstatement case, on the footing that "a misstatement

causes damage when it is made", whereas "a conspiracy only causes damage when it is implemented", is not persuasive. A misstatement only causes damage when it is relied on, which as explained above may occur in a jurisdiction different from that in which the misstatement was made. In terms of English law, damage is the gist of the cause of action, which only arises once loss has been suffered. The position is in fact similar to that in relation to the tort of conspiracy to injure by unlawful means, which likewise is an action on the case where damage is the gist of the cause of action, so that the cause of action in damages only arises where the conspiracy has been implemented and loss has been suffered. These technicalities of English law are not relevant to application of the autonomous concepts in Article 5(3), but the basic point is that the wrongful action of the defendant in the negligent misstatement case which sets the tort in motion can readily be identified as the making of the misstatement in much the same way that the wrongful action of the defendant in the conspiracy case which sets the tort in motion can readily be identified as the making of the agreement to use unlawful means to injure the claimant.

87. I consider that a further difficulty with the judge's analysis is that by focusing on later instructions given by Mr Ablyazov pursuant to the original conspiracy he divides up the elements of the conspiracy in a way which does not reflect the reality of the complaint made by the Bank (which is to allege liability flowing from the making of the original agreement), nor its totality (since, as explained above, liability of each of Mr Khrapunov and Mr Ablyazov for actions pursuant to the conspiracy may not depend at all on the giving of further instructions by Mr Ablyazov to Mr Khrapunov). Moreover, the judge's analysis undermines the objectives of the Convention highlighted above, since if the Bank wishes to rely on Article 5(3) it would have to sue Mr Khrapunov in different jurisdictions, depending on the dates when further instructions were given by Mr Ablyazov, but in relation to the same original conspiracy agreement, thereby incurring increased costs, the risk of increased delay and giving rise to the risk of irreconcilable judgments being reached in different jurisdictions. In my view, these matters point strongly in favour of the correctness of the Bank's submission on its appeal.

Conclusion

88. For the reasons given above, (1) I would dismiss Mr Khrapunov's appeal on the question whether the Bank has established that it has a good arguable cause of action against him for the tort of conspiracy to injure by unlawful means; (2) I would dismiss the Bank's appeal based on Article 6 of the Convention; (3) I would dismiss the Bank's appeal in respect of limb (a) of Article 5(3) (place where the damage occurred); however, (4) I would allow the Bank's appeal in respect of limb (b) of Article 5(3) (place of the event giving rise to the damage).

Lord Justice Beatson:

89. I agree.

Lady Justice Gloster DBE:

90. I also agree.