

# Damages for breach of a freezing order: a damp squib?

Stephen Smith QC

# Memory Lane

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- A freezing order is “one of the law’s two ‘nuclear weapons’” (Bank Mellat v. Nikpour [1985] FSR 87)
- Said at a time when the only recognised freezing order was a “domestic” freezing order

# The Golden Age

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- Derby & Co Ltd v. Weldon (No. 1) [1990] Ch 48
- Babanaft International Co SA v. Bassatne [1990] Ch 13
- Haiti v. Duvalier (No. 2) [1990] 1 QB 202
- Derby & Co Ltd v. Weldon (Nos. 3 & 4) [1990] Ch 65

# Johnny Foreigner

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- Per Nicholls LJ in Babanaft:
- “It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extra-territorial jurisdiction.”

# Standard Form Order frontispiece

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- “If you [Respondent] disobey this order you may be held to be in contempt of Court and may be imprisoned, fined or have your assets seized.”
- “Any other person who knows of this order and does anything which helps or permits the Respondent to breach the terms of this order may also be held to be in contempt of Court and may be imprisoned, fined or have their assets seized.”

# Standard Form Order paragraph 19

- (1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this Court.
- (2) the terms of this order will affect the following persons in a country or state outside the jurisdiction of this Court –
  - (a) the Respondent or its officers or its, her or his agent appointed by power of attorney

# Standard Form Order paragraph 19 (con'd)

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- (b) any person who –
  - (i) is subject to the jurisdiction of this Court;
  - (ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and
  - (iii) is able to prevent acts or missions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and

# Standard Form Order paragraph 19 (con'd)

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- (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state.”

# Standard Form Order paragraph 20

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- “Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with –
- (1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the respondent
- (2) any orders of the Courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant’s solicitors”

# Khrapunov - facts

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- Ablyazov's assets were administered by "trusties" on his behalf
- Including members of his family: Ilyas Khrapunov is his son-in-law
- The Claimant had good evidence to show that Khrapunov had been involved in the movement of Ablyazov assets worth over US\$500m after the WFO was granted against Ablyazov in 2009
- As Ablyazov's son-in-law, Khrapunov would have known about the WFO

# Khrapunov issues for the Supreme Court

- (1) Does a claim for conspiracy to breach a WFO sound in damages?
- (2) If the conspiracy was hatched in England but the co-conspirator was domiciled in Switzerland and all the acts pursuant to the conspiracy took place abroad, does the English Court have jurisdiction?

## Supreme Court answer (1) (JSC BTA Bank v Ablyazov (No. 14) [2018] 2 WLR 1125)

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- Yes: the unlawful means for the purposes of the tort of conspiracy to injure by unlawful means are not required to be separately actionable
- A breach of an Order of the Court is only marginally less heinous than a crime (it may even be a crime) and is more reprehensible than a breach of contract
- And anyway, a breach of a court order may be civilly actionable

# Supreme Court answers (2)

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- As Ablyazov (France) and Khrapunov (Switzerland) were domiciled in other Convention territories when the proceedings commenced (in 2014), they could only be sued in England if an exception applied
- The relevant exception for Khrapunov was article 5(3) of the Lugano Convention, viz. the Court “where the harmful event occurred” would have jurisdiction
- That meant either the place where the damage occurred (in this case, various different countries abroad); or the place where the event giving rise to the damage occurred
- Since the place giving rise to the damage was where the conspiracy was hatched (England), the English Court had jurisdiction

# What about the Babanaft proviso?

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- How can it be unlawful – a tort - for a third party overseas to assist in the disposal of assets when the order restraining the disposal says that foreign third parties can ignore it?
- SC Judgment para. 23: “At first sight, there is more to be said for the argument that a right of action for conspiring to breach a freezing order injunction would expose foreigners to liability notwithstanding the standard proviso in such orders that their terms “do not affect or concern anyone outside the jurisdiction of this court”. But the proviso is irrelevant to the position of a party in contempt, such as Mr Ablyazov, who is by definition subject to the jurisdiction of the court.”

# How useful is the Khrapunov extension?

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- Potentially very significant
- Especially if the foreign third party has assets in the UK (unlikely) or in a Convention territory (more likely) or in a state where enforcement of an English judgment is relatively easy (eg BVI, Cayman, Switzerland) (not unlikely)
- The fear of judgment in England for the loss of all assets dissipated is likely to be much greater than the fear of proceedings for contempt (since a EAW will not be available)

# Jurisdiction difficulties

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- But note that establishing jurisdiction in England – or even that England is the governing law of the wrongdoing – may not be easy if none of the defendants was within (or domiciled within) the jurisdiction when the conspiracy was hatched
- The CA rejected the argument that the Bank suffered damage in England irrespective of the location/domicile of the conspirators, because the value of its English freezing order and judgments was undermined
- And the SC refused permission to appeal on this point

# Damages for conspiracy or for contempt

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- Cause of action in conspiracy now established
- Cause of action for damages for contempt is not
- Judge and CA not attracted to the idea
- But gained more traction in SC, see para. 22
- Point not argued in HL in *Customs and Excise Comrs v. Barclays Bank plc* [2007] 1 AC 181
- Per SC: “We do not think that the last word has necessarily been said on this subject in this court.”

# Scenario postulated in argument in SC

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- Suppose a Swiss domiciled CSP agrees to meet a WFO defendant in London, to discuss future movements of assets
- When he lands in London the CSP is served with a Norwich Pharmacal Order to disclose all past dealings with the defendant's assets, at which point he learns of the WFO
- He complies with the disclosure order, and then immediately returns to Switzerland; on arrival he transfers the \$500m he is holding for the defendant to an account in Latvia which he knows is operated by a third party for the defendant (after deducting \$50m for his troubles); he tells the defendant what he has done and says he wants nothing more to do with him or his assets; the \$450m is never recovered
- The CSP may not be committed for contempt, but why should he not be liable for the loss he has caused, even though there was no conspiracy?

# Stephen Smith QC

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Stephen Smith is renowned for his work in civil fraud litigation (typically claims for breach of fiduciary duty, deceit and misrepresentation), especially in connection with freezing injunctions, asset tracing, disclosure orders, jurisdictional and forum disputes, sham trusts and committals to prison for contempt of court. He also has vast experience in insolvency cases and general commercial litigation. He is a part time judge of the Chancery Division of the High Court.

Stephen has over 35 years' experience as a barrister in England, for more than half of which he has been a QC. He has also been called to the Bar (or licensed to practise as an advocate) in the British Virgin Islands, the Commonwealth of the Bahamas, the Isle of Man and the Cayman Islands, and he has frequently advised in respect of cases proceeding in other jurisdictions (such as Bermuda, Hong Kong and the Channel Islands). He has appeared in the Supreme Court and Privy Council on more than 15 occasions.

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