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Conspiring to breach the terms of a freezing order: what next for tortious conspiracy?

KEY POINTS

- Despite predictions to the contrary, and the attempts made by the House of Lords in 2007 and 2008 to narrow their scope, there has been a resurgence of interest in the economic torts, and in the conspiracy torts in particular.
- The Commercial Court has accepted it is arguable that breaching a freezing order in contempt of court constitutes unlawful means sufficient to justify imposing liability in the tort of conspiring to injure by unlawful means.
- Though this is understood to be the subject of an appeal, it is now recognised as arguable that a civil cause of action for damages can be relied upon against banks and other firms and finance professionals who may be said to have assisted in the breach of a freezing order.
- Regardless of the outcome, the recent evolution of the conspiracy torts has wider implications for the financial sector. Unresolved uncertainties as to the requisite quality of intention and degree of knowledge on the part of conspirators could see claims brought by broader classes of claimants, and against wider groups of co-conspirators.

By its judgment earlier this year in *JSC BTA Bank v Ablyazov and another* [2016] EWHC 230 (Comm), the Commercial Court has recognised that civil liability may arise for conspiring to breach the terms of a worldwide freezing order. If left undisturbed by the Court of Appeal, the decision will mark a further incremental step in the evolution of the tort of conspiracy.

Regardless of the outcome, there has been a resurgence of interest in conspiracy in its various forms. It is being pleaded in this jurisdiction and elsewhere in new ways to seek redress for claimants who have suffered loss by reason of the unlawful actions of others.

Recent decisions show that these torts remain plagued by uncertainties, but may pave the way for claims by broader classes of injured parties and against defendants in the financial sector who, for example, turn a blind eye to the unlawful activities of those with whom they engage in concerted action.

What are the implications for banks, other firms and professionals, and those affected by their activities?

INTRODUCTION

As recently as 2011, Lord Hoffmann predicted that the economic torts had in large part run their course; he thought conspiracy, in particular, to be an anomalous cause of action that was very unlikely to arise in practice.[1] Contrary to all such predictions, and to the attempts made by the House of Lords in 2007 and 2008 to limit their scope, the economic torts continue to thrive.

Indeed there has been a resurgence of interest in conspiracy in particular. Not only has the number of reported decisions increased in the last few years, both at first instance and on appeal, but practitioners and leading commentators alike observe that parties in this jurisdiction and elsewhere are pleading economic torts in new and creative ways.[2]

The tort of conspiracy in its various forms remains beset by uncertainties. These include what may or may not properly be regarded as conduct sufficient to justify imposing liability for conspiracy to injure by unlawful means, whether the position differs where harm is inflicted directly, or via an intermediary, and the necessary quality of intention and extent of knowledge required to establish liability on the part of alleged conspirators.

The decision of the Commercial Court earlier this year in *JSC BTA Bank v Ablyazov* [2016] EWHC 230 (Comm) extends what may be argued to be unlawful means for the purposes of the tort of conspiracy to injure by unlawful means. It has been accepted as arguable that a civil cause of action for damages lies against third parties who assist in breaching a freezing order.

Whether the decision will be left undisturbed by the Court of Appeal remains to be seen. But the proper parameters of these torts will remain unclear and the subject of litigation in financial disputes. These uncertainties have the capacity to give rise to claims against wider categories of defendants in the financial sector than may previously have been thought. Likewise, they may afford a remedy to wider classes of persons who have suffered loss.

This article examines some of the implications for banks, other firms and professionals in the financial sector and those caused loss by activities in which they may have participated.

CONSPIRACY TO INJURE BY UNLAWFUL MEANS

While liability in tort may be imposed for conspiracy to injure where the parties to the conspiracy act with malice, the tort of conspiracy to injure by unlawful means has been the particular focus of reported decisions in recent years.

In its classic formulation, liability arises where a claimant has suffered loss as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to

injure him by unlawful means, whether or not that is their predominant purpose.[3]

But what may constitute means for such purposes has long been unclear. Nearly a decade ago, in *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174, the House of Lords accepted on a detailed review of prior authority, that criminal conduct at common law or by statute used as a means of inflicting harm upon HMRC was sufficient to engage liability.

In doing so, their Lordships resolved a then long standing question as to whether conspiring in unlawful conduct, where directed at a claimant, is actionable whether or not that conduct would itself be actionable at the suit of the claimant. In contrast with the accepted position with regard to the related tort of unlawful interference, it was found that for the purposes of unlawful means conspiracy, the unlawful conduct need not itself be actionable. The tort is not a form of joint tortfeasance and is not therefore parasitic upon other civil wrongs.

The question of what further forms of conduct may suffice was left open, and has been explored incrementally. At the time the Law Lords variously considered imposition of liability to be justified by conduct that was "sufficiently reprehensible", was an offence that existed in order to protect the claimant who had been targeted, or where it was "highly blameworthy" or obviously unlawful to the man in the street.

In the absence of a clear dividing line, *Total Network* has, in the years since, been regarded as having the potential to convert a wide variety of conduct into the basis for a claim in tort. The courts have on occasion declined to do so. In *Digicel (St Lucia) Limited v Cable & Wireless* [2010] EWHC 774 (Ch), for example, it was accepted that non-actionable breaches of non-criminal statutes or regulations would not suffice for these purposes.

CONSPIRING TO BREACH A FREEZING ORDER IN CONTEMPT OF COURT

The decision of the Commercial Court in *JSC BTA Bank v Ablyazov and anor* [2016] EWHC 230 (Comm) earlier this year (Teare J, 11 February 2016) might be regarded as reflecting a wider view. The litigation pursued by a Kazakh bank against its former Chairman and majority shareholder, Mr Ablyazov, has now given rise to a plethora of authoritative decisions. The judgment of the Supreme Court last year ([2015] UKSC 64), for example, concerning the scope and interpretation of the freezing order granted in favour of the Bank in 2009, was the subject of detailed consideration in the December 2015 edition of this publication ((2015) 11 JIBFL 713).

Having successfully established that Mr Ablyazov breached the terms of the order,[4] the bank brought a further claim against Mr Ablyazov's son in law, Mr Ilyas Khrapunov, alleging he conspired in those breaches by forging documents and facilitating transactions involving Swiss, Belizean and Russian companies so as to put assets beyond the bank's reach.

It fell to the Commercial Court to determine, upon Mr Ablyazov's application to set aside the Claim Form and discharge a further freezing order, whether contempt of court could constitute unlawful means for the purposes of the tort.

As the court accepted, the law of contempt is concerned with maintaining and defending the authority of the court in the public interest and not with compensation of individuals. Thus the circumstances differ from those in *Total Network* insofar as it could be said that the law of contempt did not exist specifically for the protection of the claimant bank.

Distinguishing judgments in which it had been suggested otherwise, the court accepted that it did not have the power to order damages for contempt; but it did not agree that the absence of such a power amounted to a positive rule precluding the recovery of damages in this case. In pleading the tort, the Bank did not rely upon contempt alone and finding that such conduct would be sufficient to found a claim for tortious conspiracy would not subvert any positive rule.

The court found criminal contempt to be sufficient, and sufficiently reprehensible, to amount to unlawful means for the purposes of the tort. This the court saw as a principled incremental step justified by the reasoning in *Total Network*.

This represents a significant development. The House of Lords has previously been unwilling to impose liability upon third parties in negligence in respect of breaches of freezing orders. In *Customs and Excise v Barclays Bank Plc* [2007] 1 AC 181, for example, the House of Lords found that a bank, notified by a third party of a freezing order granted against one of its customers and affecting the account of that customer, did not owe a duty to the third party to take reasonable care to comply with its terms.

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That decision was distinguished by the Commercial Court in *Ablyazov* on the basis that liability for conspiracy to injure by unlawful means is imposed for intentional acts, and not for a failure to discharge a duty of care. It is, after all, a tort in which liability is imposed to compensate for harm intentionally inflicted by those who combine for that purpose.

It is understood that permission to appeal has been granted. If left undisturbed, the decision could significantly extend the law in respect of the liability of third parties for breaches of the terms of a freezing order. It also suggests that commission of criminal offences (provided sufficiently reprehensible), may be sufficient to found a claim in unlawful means conspiracy regardless of whom they are intended to protect.

This would have obvious implications for banks in this jurisdiction and elsewhere upon whom a worldwide freezing order is served, who may find they are exposed to a greater risk of claims for the recovery of damages where assets are dissipated.

Likewise, those representing respondents to a freezing order may wish to advise as to the implications of engaging in conduct in concert with others that may breach the terms of the order.

Arguably, the decision may also give rise to reluctance (without adequate assurances at least) on the part of those who may otherwise have entered into transactions with a respondent to a freezing order, notwithstanding the existence of a standard Commercial Court form ordinary business exemption. The cause of action is however to be welcomed in affording a remedy to the victims of fraud in circumstances where steps are taken to put assets beyond their reach.

KNOWLEDGE AND INTENTION TO CAUSE INJURY

But regardless of the final outcome, uncertainty as to the parameters of unlawful means conspiracy, unresolved in the years since *Total Network*, will persist. This will have wider implications for banks, other firms and professionals and those who are caused loss by the unlawful activities of others in the financial sector.

One unresolved issue relates to the quality of intention to cause injury required for the purposes of conspiracy to injure by unlawful means. In contrast to conspiracy to injure, causing harm need not be the conspirators' predominant intention where unlawful means are used, and in certain circumstances liability may be imposed where they act predominantly in their own interest.

Historically, the element of intention was only met where the act at the heart of the conspiracy was deliberate (see, for example, *Ware and De Freville v Motor Traders Association* [1921] 3 KB 40, at 56) and the combination needed to be aimed or directed at the claimant.

However, in *OBG Ltd v Allan* intention was, for the purposes of unlawful interference, found to be satisfied where a defendant seeks to advance his own interests by pursuing a course which he knows will necessarily injure the claimant ([2008] 1 AC 1, per Lord Nicholls at 57 and 58). According to Lord Nicholls' "explanatory gloss", in such circumstances the defendant's state of mind in going ahead regardless would satisfy the mental element of the tort.

Likewise, in *Total Network* the House of Lords accepted that liability for the tort of unlawful means conspiracy followed 'where the loss to the claimant was the obvious and inevitable … result' of the unlawful conduct conspired in.[5]

The limits of what might suffice have been the subject of scrutiny in recent years. Most recently, the Court of Appeal has taken what may be regarded as a narrow view in the context of claims in tort for the recovery of damages for loss said to be have been suffered by reason of infringements of EU and UK competition law brought alongside statutory so called "follow-on damages" claims.

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In *Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, the court did not accept it would be sufficient to show that defendant participants in a price fixing cartel, said to have conspired to cause injury by unlawful means, intended to make a profit at the expense of a class of persons to whom cartelised goods were sold. It was thought that gain and loss would not be "inseparably linked" in circumstances where purchasers may be able to pass on price increases.

This view was followed last year by the Court of Appeal in *British Airways Plc v Emerald Supplies Ltd and others* [2015] EWCA Civ 1024, which was not convinced that participants in an alleged air cargo services price fixing cartel intended to injure every purchaser of such services. An order striking out claims in the tort of unlawful means conspiracy was upheld, accordingly. It is understood that permission to appeal to the Supreme Court was refused in May 2016, but the Court of Appeal left the door open to the possibility that harm inflicted on a broader group may be actionable. It was observed that a defendant seeking to gain at the expense of an "identified and known class" of persons may satisfy the requirement for intent, even if some members of the class do not suffer loss.

Further questions arise as to the degree of knowledge required on the part of co-conspirator defendants who are said to have shared a common design, but performed different roles in a conspiracy. This may occur where, for example, services are provided by bankers and financial or other advisers that are alleged to have given effect to a wider conspiracy.

It is accepted that defendants need not have joined a conspiracy at the same time, and that concerted action must be taken by conspirators, who will not be fixed with liability merely for facilitating the conspiracy without sharing its common design.

But defendants may or may not be fully aware of the means used by others, and, in particular, whether the means to be used are unlawful. Circumstances depending, it may nevertheless be at least arguable that they are fixed with knowledge and intended to cause loss where they engaged in concerted action pursuant to a common design.

Historically, for the purposes of the tort of procuring breach, for example, it was considered that a defendant must know that his conduct was unlawful.[6] It has since been accepted for the purposes of conspiracy that while a defendant must know the relevant facts necessary to establish that the act was unlawful, he or she need not know the legal consequences.[7] But in the last few years, the Court of Appeal has commented *obiter* that it would be a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did.[8]

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At least two first instance decisions since have considered this issue. In *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* it was said that the answer lies in '... a painstaking analysis of the extent to which the particular defendant shared a common objective with the primary fraudster and the extent to which the achievement of that objective was to the particular defendant's knowledge to be achieved by unlawful means intended to injure the claimant'.[9]

It was further accepted that an absence of inquiry or blind-eye (so called "Nelsonian") knowledge may suffice, but only 'if the reason for not inquiring is that the defendant believed to be likely (rather than merely suspected) that which he did not want to know, and refrained from inquiry in order to avoid learning the unwelcome fact for certain'.[10]

In *Digicel v Cable & Wireless*, the question of which party bore the burden of proof on this matter was left open.[11] So whether honest belief is a defence, or the absence of it is a requirement of liability may be open to question.

WHAT ARE THE IMPLICATIONS?

Thus, the proper parameters of tortious conspiracy are evolving, and, by degrees, its contemporary function continues to be explored as cases are brought in more diverse fields against different categories of defendant.

The forms of conduct it is arguable are sufficient to justify liability for the tort of conspiring to injure by unlawful means for the time being include conspiring in breaches of a freezing order in contempt of court. But they have been left to incremental development on a case by case basis leaving practitioners to judge what may ultimately be regarded as sufficiently reprehensible.

Further, the limits the common law traditionally imposed upon the scope of the tort of conspiracy have become further blurred as its function in delimiting acceptable concerted conduct has been exposed to scrutiny. Two particular consequences are of likely importance to banks and other undertakings in the financial sector.

The first is that the class of injured parties who may properly be regarded as victims of an unlawful means conspiracy, where harm is not its predominant purpose but is the obvious and inevitable result, may depend upon whether they form part of a known and identifiable group.

This may be clearer in some markets more than others. Those to whom financial products have been sold, shareholders, trust beneficiaries, or creditors in an insolvency, for example, could all, circumstances depending, have a justifiable basis to allege that they were part of a known class, and have suffered loss as the obvious and inevitable result of unlawful conduct that defendants have conspired in to profit themselves.

The second consequence is increased likelihood, subject to the proper application of the elements of the tort, of claims against defendants who are said to have performed a more limited role (albeit beyond mere facilitation) as bit-part players in a wider conspiracy, particularly where it can be proven that they purposefully turned a blind eye to the unlawful nature of activities in which they participated pursuant to a common design.

The practical context in which this sits has a significant bearing. The fact sensitive nature of the issues in any given case, particularly where the degree of knowledge on the part of a defendant is in question, means that often claims are not inherently suitable for summary determination.

The professional standards applicable to those who draft statements of case rightly impose discipline in this regard. Members of the English Bar, for example, require not only clear instructions to plead fraud, but also reasonably credible material establishing an arguable case.[12] The courts have taken a particularly dim view of diffuse and inadequately pleaded allegations of conspiracy.[13]

But, quite rightly, claimants may be allowed a margin of appreciation in bringing tortious conspiracy claims in circumstances where, for example, relevant documents are not made available[14] and, likewise, the courts have been willing to infer the existence of a combination or understanding where doing so is appropriate.

For the time being, these considerations appear collectively to afford greater opportunity to claimants to recover losses they have suffered by reason of unlawful concerted action from defendants in the financial sector who can properly be said to have had a sufficient role. ■

1 *The Rise and Fall of the Economic Torts* (in *Torts in Commercial Law* (Sydney, 2011).
2 Hazel Carty, *The Modern Functions of the Economic Torts* (2015) CLJ 74(2) 261, at 264.
3 *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 1 All ER (Comm) 271, per Nourse LJ at 312).
4 [2013] 1 WLR 1331.
5 [2008] 1174, at 1284.
6 Court of Appeal in *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504, at 512–514).
7 *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393.
8 *Meretz Investments NV v ACP Ltd* [2008] Ch 244, at 289.
9 [2009] EWHC 1276 (Ch), at §[847].
10 [2009] EWHC 1276 (Ch), at §[838].
11 [2010] EWHC 774 (Ch), Annex §[119].
12 BSB Code of Conduct, r.C9.2(c).
13 *Tchenguiz v Grant Thornton* [2015] EWHC 405.
14 See, for example, *Jackson v Thompsons Solicitors* [2013] EWHC 2578.

Further Reading:

- Freezing orders: enforcement and ancillary disclosure principles undermined? [2015] 10 JIBFL 616.
- Developments in freezing foreign assets [2015] 2 JIBFL 111.
- LexisPSL: Dispute Resolution Practice note: Economic tort of conspiracy.