

Re-examining cross-examination in light of new evidence (Khrapunov v JSC BTA Bank)

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Dispute Resolution analysis: This article concerns the latest reported judgment arising out of the long-running dispute between the Kazakh bank, JSC BTA Bank, and its former manager, Mukhtar Ablyazov. The Court of Appeal considered the impact of new evidence on a failed application by Mr Ablyazaov's son-in-law, Mr Khrapunov. Mr Khrapunov had applied for the adjournment of his cross-examination in relation to a worldwide freezing order, alternatively for it to take place in Switzerland by video-link. However, his application at first instance had been rejected. Fresh evidence emerged concerning the prospect of Mr Khrapunov's extradition from England if he attended the cross-examination, so the matter came before the Court of Appeal. Having granted permission to appeal in a rolled-up hearing, the Court of Appeal determined that the appeal should constitute a review (as opposed to a re-hearing) of the original decision and that the original decision should not be varied as a result of the new evidence. Written by Jon Felce, partner at PCB Litigation LLP.

Khrapunov v JSC BTA Bank [\[2018\] EWCA Civ 819](#)

What are the practical implications of this judgment?

The case demonstrates the strong desire of the English courts to give practical effect to worldwide freezing orders, one of its two 'nuclear' weapons (alongside search orders). The ability to cross-examine respondents where required is a significant part of that process, and the court emphasised the paramount importance of that taking place in person. Respondents will need to have a very good reason for not attending court for cross-examination.

The case also reinforces that the timely conduct of proceedings is imperative. Unless any delay is justified and reasonable, the English courts do not look favourably upon a failure to adhere to procedural or court-ordered timetables. The primary reason Mr Khrapunov's original application (and thus the attempt to vary the order) failed was because of his delay in issuing the application in the first place.

A further practical implication concerns the circumstances in which a decision can be revisited if fresh evidence comes to light. It is not unusual for new information or documentation to emerge after a hearing. However, unless there has been any duplicitous conduct involved (such as a failure to comply with the obligation of full and frank disclosure upon an ex parte hearing), the central question is whether that new evidence would have materially impacted upon the original decision rather than whether it should have been available to the original court in the first place.

What was the background?

The case forms part of the long-running dispute between JSC BTA Bank and its former manager Mukhtar Ablyazov concerning substantial sums claimed to have been stolen by Mr Ablyazov and then hidden with the help of his associates.

In late 2015, Mr Ablyazov's son-in-law, Mr Khrapunov, was made the subject of a worldwide freezing order. The order included various asset disclosure requirements and, following Mr Khrapunov's alleged non-disclosure in response, the bank obtained an order for his cross-examination. Six days before the scheduled cross-examination, Mr Khrapunov applied to adjourn the hearing, alternatively to give evidence by video-link from Switzerland (where he lived). He expressed concern that, if he attended the cross-examination in London, he would be arrested and/or extradited to Kazakhstan, Russia or Ukraine to face criminal proceedings there.

The application was refused. In particular:

- it had been issued at the last possible minute (being the last day on which three clear days' notice could be given before the cross-examination hearing)
- the risk of being extradited to Kazakhstan was non-existent
- there was no evidence of criminal proceedings in Russia or the Ukraine, and
- there were concerns about the relative effectiveness of any cross-examination in Switzerland given the apparent impact of Swiss law on the process

It subsequently transpired that, unbeknownst to the bank's London litigation team at the time of the hearing, there were criminal proceedings afoot in Ukraine, leading to Mr Khrapunov being placed on Interpol's 'wanted' list.

Consequently, Mr Khrapunov appealed against the judge's decisions, contending that the original decision should be quashed and/or that he be cross-examined in Switzerland.

What did the court decide?

The Court of Appeal considered that there had been no procedural or other irregularity of sufficient seriousness to justify a re-hearing rather than a review of the original decision, and nor did fairness require the same. The original hearing had been on notice and no duty of full and frank disclosure arose. The failure to inform the court about the Ukrainian criminal proceedings had been inadvertent and not deliberate. Further, the judge's (discretionary) case management decision was primarily based upon Mr Khrapunov's delay in issuing the application. As such, the new evidence would probably not have had an important influence on the result of the hearing.

The Court of Appeal then turned to whether the original decision should be varied as a result of the new evidence. While that would ordinarily be determined initially by the court at first instance, the parties had agreed that the Court of Appeal could decide the same (given that it had all the powers of the lower court, and having heard full argument on the point, it could resolve the issue expeditiously and without further cost).

Having conducted a balancing exercise between (i) the prejudice to the bank of cross-examining Mr Khrapunov in Switzerland, and (ii) the risks facing Mr Khrapunov if he came to London, the court refused to vary the original order, finding it unlikely that Mr Khrapunov would be extradited and therefore the prospect of his extradition was outweighed by the practical issues concerning cross-examination. Nevertheless, to minimise the risk to Mr Khrapunov, a confidentiality club was established in relation to the conduct of the cross-examination hearing.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Sales and Newey LJ
- Date of judgment: 24 April 2018

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