20 May 2014

International Fraud Litigation

# Recent Developments in the Law of Contempt


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## BTA Bank v Mr Ablyazov

- Trench warfare
- Billions involved
- Numerous parties
- Substantial court time
- Huge legal spend
- Appeals
- WFO and usual suspects obtained
- Exceptional orders
- Effective use of contempt proceedings

## Committals

- MKA (CA) [2013] 1 WLR 1331
  - 22 months
- Paul Kythreotis (CA) [2012] 1 WLR 350
  - 21 months
- Salim Shalabayev (Eder J) 18.10.13
  - 22 months
- Syrym Shalbayev (Briggs J) 27.6.11
  - 18 months
- Sergei Tyschenko 28.10.13
  - 2 weeks (suspended)

**The Bank used contempt in a variety of ways:**

1. to short cut the litigation, and debar
2. to mute challenges
3. to get disclosure

## Stepping stones to a committal

- Search Orders
- Norwich Pharmacal Orders
- Cross-examination

  – The test "is simply whether, in all the circumstances, it is both just and convenient to make the order. In applying this test, the court will have regard to the fact that it is a very considerable imposition to subject a defendant to cross-examination and consider carefully whether there are not alternative means of achieving the same end that are less burdensome." *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia & Ors* [1996] EWCA Civ 759 per Phillips LJ.

  – "It [is] important to recognise that it is only in exceptional circumstances that cross-examination would be ordered on an affidavit sworn pursuant to a Mareva order." *Den Norske Bank ASA v Antonatos* [1998] EWCA Civ 649 per Waller LJ.

# Ereshchenko

- JSC BTA Bank -v- Roman Vladimirovich Solodchenko and Others -v- Anatoly Ereshchenko, 5 April 2011, [2011] EWHC 843 (Ch)
  - Order for cross examination
- JSC BTA-v-(1) Solodchenko (2) Ereshchenko [2012] EWHC 550 (Ch)
  - Court should postpone the costs determination of the cross examination until after committal to avoid risk of prejudice
- JSC BTA-v-(1) Solodchenko (2) Ereshchenko [2012] EWHC 1891 (Ch);
  - Committal proceedings before Vos J
- JSC BTA Bank-v-Anatoly Ereshchenko [2013] EWCA Civ 1961
  - Appeal

# The Court of Appeal in Ereshchenko

Matters of common ground

a) Who makes the application?

b) Burden of proof

c) Standard of proof: beyond reasonable doubt

d) Standard of proof where an allegation rests on inference

# Paul Lowenstein QC

1. Appeals against refusals to commit are very rare
2. Appeals on issues of fact only in exceptional cases
3. Proportionality
4. Relationship between proving the case at committal and at trial

stewartslaw

## Subsequent application of the Ereshchenko Appeal

- *Dar Al Arkan Real Estate Development Company v Al-Sayed Bader Hashim Al-Refai* [2013] EWHC 4112 (Comm)
- *JSC Bank of Moscow v Kekhman* [2014] EWHC 183 (Comm)
- *Dar Al Arkan Real Estate Development Company v Al-Sayed Bader Hashim Al-Refai* [2014] EWHC 1055 (Comm)

- Matter left open by the Court of Appeal in Ereshchenko
- Procedural safeguards
- Hearsay evidence
- Authenticity challenge to documents

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# TRIAL BEFORE THE TRIAL

# ASPECTS OF THE USE OF

# COMMITTAL PROCEDURE

# IN COMMERCIAL FRAUD LITIGATION

**Outline for part of a seminar for**

**the CFLA**

**by**

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**THE COURT OF APPEAL IN ERESHCHENKO**

1 Two day hearing in June 2013. Judgment at [2013] EWCA Civ 829. Long judgment of Lloyd LJ dealing with the facts and principal issues of law. Further important judgment of Beatson LJ, with whom Elias LJ agreed.

2 Result: the Banks's appeal against the refusal of Vos J to commit Ereshchenko for contempt was dismissed and indemnity costs were awarded against the Bank.

3 The central allegation (judgment [41]):

3.1 Whether Mr Ereshchenko was telling the truth in what he said [in his evidence] in the respects charged as contempts; and

3.2 If not, whether he had, or did not have, an honest belief at the time that the relevant statement was true.

4 Points of note arising:

**(1) Matters of common ground**

*Who makes the application?*

5 Contempt proceedings may be brought either by a private litigant or by the Attorney General. In certain circumstances, private litigants require permission to proceed, see e.g. where the allegation is that the contemnor makes or causes to be made a false statement in the document verified by a statement of truth (see CPR Part 32.14(2)(b))

*Burden of proof*

6 The Applicant bears the burden of proof: **Gulf Azov Shipping Co v Idisi** [2001] EWCA Civ 21. See also **JSC BTA Bank v Ablyazov** [2012] EWHC 237 (Comm) per Teare J at [7]

7 The Respondent does not have to prove, or disprove, anything – see (e.g.) **JSC BTA Bank v Ablyazov** [2012] EWHC 237 (Comm) per Teare J at [9]:

> "…it is a corollary of the burden of proof being upon the Bank that if, after considering the evidence, I consider that [the Respondent's] case is or may be true then the Bank will have failed to establish the alleged contempt"

*Standard of proof: beyond reasonable doubt*

8 As noted above, the standard of proof for all forms of contempt is the criminal standard, i.e. proof beyond reasonable doubt. The court must therefore be "sure" that the Respondent is guilty separately in respect of each of the Allegations of Contempt against him:

8.1 see e.g. **JSC BTA Bank v Ablyazov** [2012] EWHC 237 (Comm) per Teare J at [7]; and

8.2 see also the paragraph 10 of the Practice Direction to CPR Part 81: "…*It should be noted that the standard of proof, having regard to the possibility that a person may be sent to prison, is that the allegation be proved beyond reasonable doubt*…"

9 The court must be very careful to assess the evidence in relation to each alleged contempt separately. This is particularly important where the alleged contemnor's state of mind is relevant: see e.g. judgment [46].

*The standard of proof where an allegation rests on inference*

10 The Court must take particular care with regard to proof when the principal allegations to be determined on the contempt application are based on secondary (inference) evidence. In short, the applicant can only succeed if the inference of dishonesty is the only possible inference that can reasonably be drawn: judgment [40], applying Teare J in **JSC BTA Bank v Ablyazov** [2012] EWHC 237 (Comm) at [8]:

> "the Bank's case…on the first of two allegations of contempt, depends upon inference from such circumstantial facts and matters as the Bank is able to prove. As in any criminal trial circumstantial evidence can be relied on to establish guilt. It is however important to examine the evidence with care to see whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Bank's case; see **Teper v R** [1952] AC 480 per Lord Norman. Further, I respectfully adopt the words of David Richards J. in **Daltel v Makki** [2005] EWHC 749 (Ch) at paragraph 30: "*In particular if, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with a finding of contempt, the claimants fail*." I accept the submission of Mr. Matthews QC, counsel for Mr. Ablyazov, that where a contempt application is brought on the basis of almost entirely secondary evidence the court should be particularly careful to ensure that any conclusion that a respondent is guilty is based upon cogent and reliable evidence from which a single inference of guilt, and only that inference, can be drawn…." (underlining added)

11 NB The relevant passage in **Teper** (p.489) reads as follows:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

**(2) Appeals against refusals to commit are very rare**

12 The CoA accepted Mr Ereshchenko's submission that whilst appeals against refusals to commit are legally possible, they are very rare (only 4 examples in the reports); tending only to arise in unusual cases: judgment at [38].

**(3) Appeals on issues of fact only in exceptional cases**

13 Appellant criticised committal trial judge for failing to find facts. CoA reiterated that it is only in the exceptional case (even where standard is only the civil standard) that the CoA will reverse a finding by a trial judge who has heard the witness. Even more so where, as here, the complaint was not that that the judge found facts with which the appellant disagreed, but that he refused to find facts that the appellant said should have been found: judgment at [39], [50]-[52].

14 Altogether inappropriate to ask the CoA to comb through documentary evidence, transcripts and detailed analysis of findings of fact by trial judge who has seen the relevant witness give oral evidence. Reminiscent of applications for permission by litigants in person.

*The test on fact challenges in inferential dishonesty cases*

15 This is the rule in an ordinary civil case. But:

15.1 the more inappropriate where appellant seeking to allege that the judge failed to find facts;

15.2 the more so where the finding in question concerns honesty;

15.3 yet more so where the criminal standard has to be applied.

16 Result is where challenge is to findings of fact in inferential dishonesty cases where the criminal standard applies, the correct test is perversity – finding must be based on an inference so compelling that no judge could fail to draw it: judgment [52].

**(4) Proportionality**

17 Proportionality is a relevant consideration in committal cases: judgment [60]. Assume, now, also costs proportionality

**(5) Relationship between proving the case at committal and at trial**

*General statement: Lloyd LJ* Judgment [61]-[63]

18 Legitimate for a committal judge to be concerned – where there is overlap – as to:

18.1 Possibility that findings on committal application might affect forensic position or findings of fact at trial;

18.2 Being asked to make findings on committal where there will likely be more disclosure available on same issues at trial.

*Specific discussion: Beatson LJ and Elias LJ*

19 Particular problems arise where committal applications are heard before the trial, where there is overlap between the issues arising at both.

20 Applicant and court should bear in mind – in cases of criminal contempt – that:

20.1 the allegation is of a public wrong and that its primary purpose should not be to vindicate a private right: judgment [71] citing **Malgar Ltd v RE Leach (Engineering) Ltd** [2001] FSR 393

20.2 satellite litigation should be avoided: judgment [72] citing **Daltel v Makki** [2005] EWHC 749

20.3 the documentary record may be incomplete on an early committal;

20.4 the applicant chooses which allegations to make and when to proceed.

21 The public interest in ensuring regard for the administration of justice and the obedience to orders lasted until the end of the committal application. Once Mr Ereshchenko had been acquitted, it was incumbent on the Bank to reassess whether it could still be said that its legitimate private aims mirrored the public interest or whether by then the primary purpose was to vindicate its private right – to pursue the appeal was ill-judged.

**SUBSEQUENT APPLICATION OF THE *ERESCHENKO* APPPEAL JUDGMENT**

22 The **Ereschenko** decision has been used to seek to postpone committal proceedings until after trial.

23 First, it was briefly mentioned on jurisdiction hearing in **Dar Al Arkan Real Estate Development Company v Al-Sayed Bader Hashim Al-Refai** [2013] EWHC 4112 (Comm) Andrew Smith J (citing Beatson LJ)

24 Then, it was the subject of detailed application to break application fixture in **JSC Bank of Moscow v Kekhman** [2014] EWHC 183 (Comm). Hamblen J:

24.1 Seeking to reconcile with the Ereshchenko appeal the judgment of **JSC BTA Bank v Ablyazov** [2011] EWCA Civ 1386 where Gross LJ recognised the dangers of overlap but held that the effect on timing would depend on the facts of each case

24.2 Holding that since **Ereschenko** did not disapprove **Ablyazov**, the correct approach would be for the court to proceed with caution if it is to hear the committal application before the trial.

25 Finally, at a hearing for the management of a committal application in **Dar Al Arkan Real Estate Development Company v Al-Sayed Bader Hashim Al-Refai** [2014] EWHC 1055 (Comm) Andrew Smith J

25.1 Timing issue arose again: this time in the context of an application to commit for civil contempt

25.2 The purpose of civil contempt for disobedience of orders said at [6][1] to be:

(a) To punish the contemnor

(b) To deter others

[1] By reference to **Lightfoot v Lightfoot** [1989] 1 FLR 414 and 416-417 per Lord Donaldson MR and **JSC BTA Bank v Solodchenko (No.2)** [2011] EWCA Civ 1241 per Jackson LJ at [45]

(c) To deter the contemnor from further disobedience

(d) (sometimes) to provide an incentive for late compliance

25.3 An important factor going to the question of the timing of the hearing of the committal application is if delay in hearing the committal application would significantly compromise the court's powers to punish the contempt: judgment at [10]

25.4 The decisive factor – by reference to Gross LJ in the **Ablyazov** case (above) was the importance of making effective the court's order: procedural fairness and just process requires the court to enforce its rules and orders – judgment at [18];

25.5 The respondent relied on the problem of overlap as discussed in the Ereshchenko case to say the contempt proceedings should be deferred until after trial.

25.6 Andrew Smith J cited Gross LJ in **Ablyazov** and Beatson and Elias LJJ in **Ereshchenko** dealt with before dealing with the application under 3 heads:

First: availability of evidence

25.7 Whilst there would be some overlap, Ereshchenko was distinguishable since, here, there was no strong relationship between timing and the evidence that would be available to the respondents

Second: very clear case

25.8 There was already strong evidence that this was a very clear case – so delay was less necessary

Third: civil (not criminal) contempt

25.9 The principles in Ereshchenko were said to apply to criminal contempt cases – wrong to translate them without modification to an application for civil contempt where the object was (at least in part) to compel the respondents to comply with their obligations

**ISSUE LEFT OPEN BY THE COURT OF APPEAL IN ERESHCHENKO**

*The extent of the second element of mens rea in cases of criminal contempt*

26 Mr Ereshchenko argued that for an allegation of criminal contempt of court to be made out, the Applicant as prosecutor must not only establish (1) that the alleged statement was false to the knowledge of the contemnor, but (2) it must also prove an intent on the part of the contemnor to impede or prejudice the administration of justice; a principle very recently reconfirmed in **OB v Director of the Serious Fraud Office** [2012] EWCA Crim 67 at [23] per Gross LJ citing the speech of Lord Oliver in **Attorney-General v Times Newspapers Ltd** [1992] 1 AC 191, at pp 217-218.

27 So, where an allegation of the giving of false evidence is made, putting the matter at its lowest, "*it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice*": **Malgar Ltd v RE Leach (Engineering) Ltd** [2001] FSR 393 per Sir Richard Scott V.-C. at 396.

28 Thus, it is for the Applicant to prove to the criminal standard the state of mind of the Respondent at each material time as regards:

28.1 first, his knowledge of the falsity of the relevant evidence; and

28.2 second, that in making each knowingly false evidential statement, his intention was to impede or prejudice the administration of justice.

29 Since the Bank failed on the first element, it was not necessary for the Court to discuss the second: judgment [66]. What follows is a summary of the argument that Mr Ereshchenko put before the court.

*What the Applicant must prove in order to show that the Respondent intended to impede or prejudice the administration of justice*

30 Two matters must be proved to establish this part of *mens rea* for non-publication criminal contempt: (1) that the act created a real risk or foreseeability of prejudice to the administration of justice; and (2) that the act was done with the specific intention so to interfere: **Attorney-General v Sport Newspapers Ltd** [1991] 1 WLR 1194 at 1200 per Bingham LJ[2] and Arlidge, Eady & Smith paragraph 11-31 to 11-34.

31 In the particular context of an allegation of giving false evidence, the subjective knowledge of the Respondent is crucial: "*it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice*": **Malgar Ltd v RE Leach Engineering (Ltd)** [2000] FSR 393 at 396 per Sir Richard Scott V-C (underlining added).

32 The Applicant in each case (by reference to the judgment of David Richards J in **Daltel** (above) at [81]) will inevitably say that the two aspects of the *mens rea* go hand-in-hand.

33 However, whilst the specific intention to impede or prejudice the due administration of justice can in an appropriate case be inferred from all the circumstances (see e.g. **OB v Director of the SFO** (above) at [23]), including the foreseeability of the consequences of the conduct, it is clear that such an inference of intent can only be drawn when "*the probability of the consequences taken to have been foreseen must be little short of overwhelming*" (per Bingham LJ in **A-G v Sport Newspapers** (above) at p.1208). This is a very high threshold for the Applicant to cross.

34 At the very least, given that there are two separate elements to the *mens rea,* the court must consider them separately.

[2] This case was to do with publication contempt, but the principles are of general application; see Attorney-General v Judd [1995] COD 15 at 16 and Arlidge, , Eady & Smith paragraph 11-33

**Procedural safeguards**

35 Domestic and European law each introduce a series of safeguards into the procedure for committal hearings, designed to safeguard the rights of the Respondent and to ensure a fair trial.

36 There are certain non-derogable procedural safeguards in contempt of court cases, breach of which the court will treat as fatal. This is because the court will always safeguard the rights of a respondent whose liberty is at stake.

37 A Respondent is well advised to record these safeguards in the skeleton opening (often not mentioned again) to ensure fair play.

*Governing Practice Direction*

38 The procedural rules governing committal applications are contained in the new CPR rules contained in Part 81.

*Application of the European Convention on Human Rights*

39 By paragraph 10 of the Practice Direction to Part 81 it is provided that: "*In all cases the* [European Convention on Human Rights] *rights of those involved should particularly be borne in mind.* "

40 The European Convention is engaged here by virtue of section 6 of the Human Rights Act 1998, which declares that it is unlawful for a court, as a public authority for the purposes of section 6(3) of the 1998 Act, to act in a way incompatible with the Respondent's rights enshrined in Article 6.

<u>Article 6 (1) – Fairness and the "Equality of Arms" principle</u>

41 The principal procedural safeguard in Article 6 is the right to a fair trial:

> "6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

42 The guarantee of a fair hearing under Article 6(1) is absolute: **Dyer v Watson** [2004] 1 AC 379 at [73], [123], [134]. A conviction obtained in breach of that right cannot stand: **R v Forbes** [2001] 1 AC 473 at [24].

43 The right to a fair hearing requires that a Respondent should have a reasonable opportunity of presenting his case to the court under conditions which do not place the party at a substantial disadvantage vis-à-vis his opponent.[3]

44 In criminal cases, the entitlement to a fair hearing extends both to the hearing on the merits and sentencing: **Phillips v the United Kingdom** (2001) BHRC 280 at [39].

Committal applications are 'criminal proceeding' for the purpose of Article 6

45 Whether a proceeding is "criminal" for the purpose of Article 6 depends not on a domestic characterisation of the proceeding but upon the autonomous meaning under the ECHR of the expression "criminal": Arlidge, Eady & Smith, paragraph 3-4 and authorities cited; Lester, Pannick & Herberg, Human Rights Law and Practice (3rd Ed., 2009), at [4.6.13], p.288.

46 It is clear from the European and English authorities that English contempt of court proceedings (even civil contempt) are criminal proceedings for the purpose of Article 6: **Kyprianou v. Cyprus** (2007) 44 EHRR 27 at p.584 [61]-[63]; **Daltel Europe Ltd v Makki** [2006] 1 WLR 2704 at [48] per Lloyd LJ; **Hammerton v Hammerton** [2007] 3 F.C.R. 107at [9] per Moses LJ and **Berry Trade Ltd v Moussavi** [2002] 1 WLR 1910 at [31] per Arden LJ.

47 In accordance with his Convention rights, a Respondent can expect a trial where:

47.1 he is given a fair chance to present his case, including through the use of an interpreter;

[3] Lester, Pannick & Herberg, Human Rights Law and Practice (3rd Ed., 2009), at [4.6.31] and authorities cited at fn 1.

47.2 he is not subjected to overbearing or oppressive procedures including being protected from cross-examination which is disproportionately long and where the court does not sit beyond standard hours during the course of his cross-examination;

47.3 the length of the trial itself is kept within proportionate and fair bounds;

47.4 the ambit of the trial is kept within appropriate and fair bounds by being confined to the grounds stated in the Committal Application and the Particulars of Contempt;

47.5 account is taken of the inequality between his financial standing and that of the Bank;

47.6 account is taken of the limited disclosure that the Bank has given (and of the fact that the Bank reveals facts and documents only when it suits its purpose to do so);

47.7 account is taken of the fact that he faces not only this extraordinarily heavy committal application but also is a defendant in the main proceedings; and

47.8 all procedural safeguards, such as those requiring the Bank to give proper notice of allegations, the case proceeding within the four corners of the Application Notice and the need for Mr Ereshchenko to have an opportunity (including a reasonable time) to respond to the Committal Application (and any amendments).

*Analogy with criminal procedure*

48 Civil contempt is not an English criminal offence: see ***Cobra Golf Ltd v. Rata*** [1998] Ch. 109. However, it is well-established that because of the penal sanctions that apply proceedings for civil contempt ought to follow closely the procedural rules which are applicable to criminal proceedings. In ***Jelson Estates v. Harvey*** [1983] 1

W.L.R. 1401, Cumming-Bruce L.J. accepted the proposition put forward by the Defendant (at 1408 C and G) that:

> "...proceedings for civil contempt are quasi-criminal in character, so that the principles that apply in entertaining and proceeding upon motions for a civil contempt ought to follow the analogy of criminal proceedings with some strictness."

**Hearsay evidence**

49 Hearsay evidence is, in principle, admissible in committal applications, always subject to the provisions of the Civil Evidence Act 1995 ("the 1995 Act") and Article 6 of the European Convention on Human Rights. Difficult questions can arise in relation to the admission and management of hearsay evidence on these applications.

**Authenticity challenge to documents**

50 There may be scope, as in the Ereshchenko application, for the Respondents to challenge the authenticity of such documents as are used against him where (1) the Applicant has obtained those documents e.g. on a search (and so has no knowledge of them itself) and (2) the search was against a 'tainted' source.

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Commercial


# Location, location, location

**Paul Lowenstein QC** & **Teniola Onabanjo**

detail why London has become a centre for international litigation

## IN BRIEF

- Highly developed dispute resolution sector.
- Unrivalled concentration & quality of commercial judiciary.
- A litigation system that evolves & works effectively.

Few will have missed the High Court battle between Boris Berezovsky and Roman Abramovich. JSC BTA Bank's many claims against Mukhtar Ablyazov and others in relation to an alleged fraud are also ongoing. These high profile cases involving foreign nationals highlight the increasing regularity with which international disputes are litigated in London. Presently, in the Commercial Court approximately 86% of cases involve at least one foreign party and in around 50% of cases all parties are from outside the UK. A glance at the Chancery cause list reveals a similar picture.

In some of these instances, the action will be brought in London because jurisdiction has been established, by agreement or under common law or European forum rules. However, a large number of litigants are choosing to resolve their disputes before the English courts in circumstances where the parties have little or no connection to England. What is driving them to do so?

### Legal expertise

The legal services sector in London has developed to meet the demands of the sophisticated markets and industries located there and, accordingly, international litigants find in London lawyers that are adept at dealing with disputes arising from a wide range of sectors, including banking and financial services, insurance and reinsurance, shipping, carriage of goods by sea, land and air, purchase and sale of commodities, fraud and the operation of markets and exchanges. This breadth of expertise is unrivalled in the global legal market. In addition, the legal services market in London is truly international, with London playing host to a large number of international law firms and with all top eight global law firms (by gross revenue in 2010–11) having a significant presence in London.

Litigation expertise aside, London also leads the field in arbitration, with more international and commercial arbitration taking place in London than in any other city in the world (*Unlocking Disputes*, published by TheCityUK in conjunction with the Law Society and the General Council of the Bar). London has embraced all forms of alternative dispute resolution, mediation in particular, and parties to a dispute may call on many senior practitioners and retired judges to facilitate the resolution of even the heaviest commercial disputes.

### The judiciary

London's judges are a key factor in the decision of foreign nationals to litigate there. London has the highest concentration of commercial judicial expertise anywhere in the world and its judges are skilled in dealing with complex issues of fact and law. Further, they are experienced in deciding cases in accordance with foreign law, with the result that parties may select England as a jurisdiction, while electing to have the dispute resolved in accordance with the law of a foreign state.

Critically, London's judges have a global reputation for impartiality and honesty. They are not influenced by the government of the day or by private interests. As Mr Justice Geoffrey Vos has said: "Our legal system is widely acknowledged to be long on integrity and short on corruption" (Counsel Magazine, February 2012). Judicial certainty is a factor underscored by international clients when they explain why they are happy to litigate in London.

### The litigation process

The very active case management on the part of the English courts also operates to draw foreign litigations to London. Parties to a dispute are attracted by the fact that the judiciary will ensure the timely and efficient progress of the case through a litigation process which, relative to many other jurisdictions, is

transparent and clearly structured. As Mr Justice Peter Smith remarked in a recent hearing: "As a centre of international litigation you have to ensure that the claimants can come to court and feel satisfied that their legitimate expectations are dealt with" (*JSC BTA Bank v (1) Solodchenko (17) Ereshchenko*, interim application, 15 March 2012). When interviewed, he elaborated that: "Judges in London have considerable experience in case managing international litigation quickly and efficiently. They are very used to giving claimants a fair crack of the whip while making sure that defendants are not overly pressed." Active judicial management of this balance, so as to ensure a fair trial, has become one of the London courts' unique selling points.

US litigants, in particular, are attracted to the London courts because they are at ease in a system which they regard as being similar to their own, but with few of the key perceived disadvantages. As John Leadley, a partner in the US-based international law firm, Baker & McKenzie, puts it: "US clients tend to feel at ease when litigating in England. They see many of the virtues of their own system, such as reasonably generous discovery rules, and fewer of the vices, such as jury trials. They also see the sense of the 'loser pays' costs rule in helping to deter spurious claims, although they can also be put off by it in marginal cases. Ultimately, it's a question of familiarity and cultural fit."

## Effective remedies

The flexibility of the common law, equity and the English procedural rules provide further reasons for choosing London as a forum. There is no sense in starting litigation if there is no prospect of an effective remedy at the end. The London courts have understood this and have been responsive to the evolving demands of international litigants in devising and refining rules and remedies accordingly. Recent examples include the strengthening of asset tracing rules in equity and the development of the Norwich Pharmacal regime, under which a third party to proceedings may be compelled to disclose documents or information where it is necessary in the interests of justice. London-based judges have also developed and refined a range of interim remedies, including freezing injunctions and search and disclosure orders, all designed to ensure the efficacy of the litigation. Changing times also require new working methods—so imaging orders to preserve digital evidence and e-disclosure are now commonplace.

## Resources

London's credentials as the world centre for international litigation has received a recent major boost by the addition of the Rolls Building to the legal infrastructure. This new high-tech court building on Fetter Lane in the heart of the legal district was formally opened by the Queen in December 2011. It houses the Chancery Division, the Commercial and Admiralty Courts and the Technology and Construction Court in a purpose built centre, with over 30 courtrooms and 55 conference rooms. There are three "super-courts", with the space and flexibility to meet the demands of multi-party litigation.

> **"London has the highest concentration of commercial judicial expertise anywhere in the world & its judges are skilled in dealing with complex issues of fact & law"**

London appeals very strongly to parties to international fraud litigation. According to Robert Hunter of Herbert Smith: "The courts of London are an excellent choice for litigants who want powerful procedures against parties who have committed fraud or put forward cases in bad faith." The availability of effective interim remedies and relatively predictable substantive law and procedural rules, coupled with a trial process which includes cross-examination to test an opponent's evidence, separates the English common law jurisdiction from many civil law systems and makes London a compelling choice for parties to a dispute involving allegations of fraud.

## The future

All of these factors combine to make London the natural forum of choice for international litigation. With the investment in infrastructure and the abundance of legal and judicial expertise, London should be set to retain its position as the leading centre for international litigation for many years to come. NLJ

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