



Stephen Smith QC

Call: 1983 Silk: 2000

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.

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Stephen has over 30 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.

Stephen was at the forefront of the development of the worldwide freezing order, having been junior counsel for the claimants in the groundbreaking case of *Derby v. Weldon*. Since then he has been involved in many leading freezing order cases both in England and abroad, including *FBME Ltd v. Hadkinson*, *JSC BTA Bank v. Solodchenko*, *JSC BTA Bank v. Ablyazov* and *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev*. Each of the mentioned cases went to one or more appellate courts: Stephen has appeared on appeals on more than 50 occasions, in England and several overseas jurisdictions (especially the Eastern Caribbean).

Many of Stephen's cases (including arbitrations) go to trial, or involve a trial, and require extensive cross examination. The JSC BTA Bank involved two heavy trials, the first, for the committal of Mukhtar Ablyazov, lasted some 3 weeks; the second, on the substantive merits of 3 sets of proceedings, lasted for 44 days and resulted in a judgment for in excess of US \$1.5bn. More recently, the trial of the allegations of contempt against Sergei Pugachev in the Mezhprom litigation resulted in sentences totalling 8 years and 11 months being imposed for 11 different contempts; the trial of the substantive claims (to bust the discretionary trusts) lasted almost 1 month.

The last 3 years have been a particularly busy period for Stephen (He was recorded by the lawyer magazine as the UK's "Most popular" (ie busy) barrister in 2018). They have yielded a large number of important reported cases, including:

- *JSC BTA Bank v. Ablyazov (No. 10)* [2015] 1 WLR 4754 (SC) (wide scope of the standard form freezing order)
- *Thevarajah v. Riordan* [2016] 1 WLR 76 (SC) (no second bite of the cherry of relief from sanction)
- *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2016] 1 WLR 160 (CA) (disclosure of the terms of, and assets contained within, a discretionary trust)
- *Thevarajah v. Riordan* [2015] CP Rep 19 (CA) (effect of debarral from defending)
- *Ardila Investments v ENRC* [2015] 2 BCLC 560 (Comm Ct) (disclosure of documents held by a subsidiary company)
- *JSC BTA Bank v. Ablyazov (No. 14)* [2016] 3 WLR 659 (Comm Ct); [2017] QB 853 (CA); [2018] 2 WLR 1125 (SC) (conspiracy to injure by the unlawful means of contempt)
- *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev (No.2)* [2016] 1 WLR 78 (Ch D) (indemnity costs of cross-examination)
- *Lemos v. Lemos* [2016] EWCA 1181 (CA) (claims of sham trusts and transfers to trustees in fraud of creditors)
- *Astor Resources v. Atalaya Mining* [2017] 1 Lloyd's Rep 476 (Comm Ct) (principle of futility, reasonable endeavours obligations)
- *JSC BTA Bank v. Ablyazov (No.15)* [2017] 1 WLR 603 EWCA 987 (CA) (abuse of process, privity and estoppel)
- *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch D) (protectors and sham trusts)
- *Khrapunov v. JSC BTA Bank* [2018] EWCA 819 (CA) (cross-examination by videolink disallowed)

Litigation & Arbitration

- Civil fraud and asset recovery
- Shareholder disputes
- Warranty claims
- Commercial litigation
- Joint venture disputes
- Interim remedies

1. The JSC BTA Bank litigation

There are over 70 reported decisions to date in this litigation, in most of which Stephen has appeared as lead advocate for the claimant bank. The following are the most significant decisions:

(1) BTA Bank v. Ablyazov (No.15) [2017] 1 WLR 603 EWCA 987

Abuse of process, privity and estoppel

(2) BTA Bank v. Ablyazov [2014] EWHC 2788

Bank entitled to production of documents created by or produced for solicitors as Defendant not entitled to claim litigation privilege.

(3) BTA Bank v. Ablyazov [2014] EWHC 2019

Respondent to Norwich Pharmacal proceedings obliged to pay Bank's costs as his evidence was evasive and dissembling.

(4) BTA Bank v. Lapointec & Limia [2014] EWCA 602

A claim by a third party that to be able to enjoy assets free from the Court's freezing and receivership orders had to go to trial.

(5) BTA Bank v. Ablyazov [2013] EWHC 691

Bank granted summary judgment for over US\$294m for fraudulent misappropriation of assets.

(6) BTA Bank v. Ablyazov [2014] 1 WLR 1414

Not all choses in action are caught by a freezing order. (The Supreme Court has granted permission to appeal).

(7) BTA Bank v. Usarel Investments [2014] 1 BCLC 407

The Court declined to extend the powers of a litigation receiver to enable him to pursue an appeal to the Court of Appeal for which the trial judge had granted permission to appeal.

(8) BTA Bank v. Salim Shalabayev [17.5.13]

It was an abuse of process for a non-party to seek to challenge a decision made in the proceedings after the non-party had given evidence and been disbelieved.

(9) BTA Bank v. Ablyazov [2013] EWHC 510

After a 44 day trial of 3 actions, the Bank was awarded damages in excess of US\$1.5bn, plus interest and indemnity costs, together with a port on the White Sea in Russia.

(10) BTA Bank v. Ablyazov (CA) [2013] 1 WLR 1854

A judge had not erred in refusing to recuse himself as the trial judge following his finding of contempt against a defendant, as there was no real possibility of bias and the right to make an application had been waived.

(11) BTA Bank v. Ablyazov (CA) [2013] 1 WLR 1331

There was jurisdiction to make an order that a defendant surrender himself to custody. The judge had been entitled to make orders debarring a defendant from defending the claims brought against him unless he surrendered himself and made proper disclosure of his assets.

(12) BTA Bank v. Usarel Investments [2012] I.L.Pr 53

The Court had jurisdiction to appoint a receiver of a company for the purposes of giving instructions in connection with the continuation of proceedings where the appointment of directors was in doubt.

(13) BTA Bank v. Ablyazov [2012] EWHC 2543

A defendant who had breached the terms of a freezing injunction by causing his companies to grant pledges to banks should use his best endeavours to intervene in any proceedings to enforce the pledges so as to inform the court of his breach.

(14) BTA Bank v. Ablyazov (CA) [2012] NJLR 757

The Court had jurisdiction to prevent a contemnor from pursuing an appeal against a committal order.

(15) BTA Bank v. Ablyazov (CA) [2012] 1 WLR 1988

The Bank was entitled to proceed against a defendant on a limited number of allegations of contempt, without having to abandon other allegations it had raised and notwithstanding a degree of overlap between the allegations and issues which would arise at the substantive trial.

(16) BTA Bank v. Kythreotis (CA) [2012] 1 WLR 350

Defendant sentenced to 21 months' imprisonment for failure to comply with the disclosure requirements of a freezing order (punitive part 9 months).

(17) BTA Bank v. Syrym Shalabayev [2011] EWHC 2908

Contemnor sentenced to two custodial sentences of 18 months and one of 6 months (to run concurrently) for breaches of the disclosure provisions of a freezing order.

(18) BTA Bank v. Solodchenko (CA) [2011] 1 WLR 888

A respondent to a freezing injunction in the Commercial Court form is not permitted to say that assets need not be disclosed because he holds them on trust for another.

(19) BTA Bank v. Ablyazov [2011] 2 All ER (Comm) 10

Application for a stay of proceedings struck out as allegations of political motivation were not justiciable.

(20) BTA Bank v. Ablyazov [2011] 1 WLR 2996

Even if proceedings were brought only partly for the purpose of making a recovery for the benefit of the Bank/its creditors (and partly for political purposes), they were not an abuse of process.

(21) BTA Bank v. Ablyazov (CA) [2011] Bus LR 119

An order appointing receivers of a defendant's assets was rightly made since there was a measurable risk that the defendant would deal with his assets in breach of a freezing order.

(22) BTA Bank v. Ablyazov [2010] All ER 2840

A standard form freezing order should be varied as there was real risk that the liberty to deal with overseas assets would be used to put assets beyond the claimant's reach.

(23) BTA Bank v. Ablyazov (CA) [2010] 1 WLR 976

Section 13 of the Fraud Act 2006 had removed the privilege against self-incrimination in respect of an offence under Section 328 of the Proceeds of Crime Act 2002.

(24) BTA Bank v. Ablyazov (CA) [2010] 1 All ER (Comm) 1029

It was appropriate for a defendant to give disclosure of his assets pursuant to a freezing injunction before his application to discharge the injunction could be heard.

2. Thevarajah v. Riordan [2014] 1 Costs LR 163

A party in default was not entitled to "another bite of the cherry" of relief from sanctions. Mitchell guidelines applied.

3. AK Investment CJSC v. Kyrgyz Mobil Tel Ltd (PC) [2012] 1 WLR

Where there was substantial evidence of specific irregularities, breaches of natural justice and irrational conclusions, the Court was entitled to find that there was a considerable risk of justice not being obtained in a foreign forum and refuse an application for a stay.

4. Cukurova Finance International v. Alfa Telecom Turkey Ltd (PC) [2009] 3 All ER 849

For the purposes of a right of appropriation of shares pursuant to the Financial Collateral Regulations 2003, it was not necessary for the chargee of the shares to obtain legal title to the shares for the appropriation to be effective.

5. Texan Management Ltd v. Pacific Electric Wire and Cable Co Ltd (PC) [2009] UKPC 46

The Court had jurisdiction to impose a case management stay of proceedings in the BVI, pending the determination of the proceedings in Hong Kong, even though the relief claimed in the BVI (the rectification of the share registers of BVI companies) was not available in Hong Kong.

6. Dian AO v Davis Frankel & Mead [2005] 1 All ER 1074

Court's approach to applications to search the Court record under CPR 5.4C.

7. The RBG Resources Plc litigation

There are a number of reported decisions in these proceedings in which Stephen acted as leading counsel for the provisional, then full, liquidators of RBG Resources, and then the trustee in bankruptcy of Viren Rastogi:

(1) Shierson v. Rastogi [2007] BPIR 891

The automatic discharge of a bankrupt was suspended where there remained substantial failures by the bankrupt to comply with his obligations to provide full details of his financial affairs.

(2) RBG Resources plc v. Rastogi [2005] 2 BCLC 592 A defendant who had adopted a totally unreasonable and unjustified stance in proceedings had his costs reduced by 40% on an application by liquidators to discontinue the proceedings against him.

(3) RBG Resources plc v. Rastogi [2004] EWHC 1089 Summary judgment entered against directors for US\$350m for dishonest breaches of fiduciary duty.

(4) RBG Resources plc v. Rastogi [2002] EWHC 2782

It was arguable that a senior employee was obliged to blow the whistle on suspected fraud of a director or manager by informing the auditors of the company or the authorities.

(5) Re RBG Resources plc (CA) [2003] 1 WLR 586

The Court was entitled to direct that directors of a company should be examined under s. 236 of the Insolvency Act 1986 by the liquidators of the company, even though the company (acting by its liquidators) had already commenced proceedings for fraud against those directors.

8. Fortis Fund Services Bahamas v. Seward & Kissel LLP (PC) [2007] UKPC 16

It was at least arguable that in providing advice to a manager in the Bahamas, lawyers intended the advice to be acted upon in the Bahamas and, if the advice was negligent, a tort had been committed in the Bahamas.

9. Shalson v. Russo [2005] Ch 281

The Court refused to consolidate sub-accounts in a Swiss bank so as to enable the claimant to overcome the rule that tracing was not permissible through accounts which were overdrawn.

10. Duggan v. Governor of Full Sutton Prison (CA) [2003] 2 All ER 678

Monies handed over to the Governor of a prison by a prisoner were not held by the Governor on trust for the prisoner and the Governor was under no duty to invest them in an interest-bearing account on the prisoner's behalf.

11. R (Feakins) v. Secretary of State (CA) [2004] 1 WLR 1761

An applicant for judicial review had standing to make the application even though he had indicated he would accept the decision under challenge if he was paid a sufficient sum of money.

12. R (Persey) v. Secretary of State [2003] QB 794

The Secretary of State's decision not to hold a public inquiry into the outbreak of foot and mouth disease was not irrational.

13. T. Choithram International v. Pagarani (PC) [2001] 1 WLR 1

A gift of shares to a trust was complete notwithstanding the absence of a formal transfer where the donor was also a trustee of the trust.

14. Trustor v. Smallbone [2001] 1 WLR 1177

It was appropriate to pierce the corporate veil and attribute the liability of a company to its sole shareholder where the company was a façade and used to conceal impropriety by the shareholder.

Other cases in which Stephen acted as a junior include:

Federal Bank of the Middle East v. Hadkinson (CA) [2001] 1 WLR 1695

Haji-Ioannou v. Frangos (CA) [1999] 2 Lloyd's Rep 337

Village Cay Marina v. Acland (PC)

Re BCCI (Morris v. Mahfouz) (CA) [1994] BCLC 450

The Derby v. Weldon litigation:

- (1) Derby v. Weldon (CA) [1990] Ch 48
- (2) Derby v. Weldon (Nos. 3 & 4) (CA) [1990] Ch 65
- (3) Derby v. Weldon (No. 5) (CA) [1989] 1 WLR 1244
- (4) Derby v. Weldon (No. 6) [1990] 1 WLR 1139
- (5) Derby v. Weldon (No. 7) (CA) [1990] 1 WLR 1156
- (6) Derby v. Weldon (No. 8) [1991] 1 WLR 73

Civil Fraud & Asset Recovery

Since 2009 Stephen has been the lead advocate in the complex fraud and asset recovery proceedings known as JSC BTA Bank v Ablyazov, in which over 70 significant judgments have been given so far in England (including 15 in the Court of Appeal). After a 40 day trial in 2013, judgment was entered for over US\$4.5bn in favour of Stephen's clients.

Latterly, Stephen has been heavily involved in the insolvency based litigation arising out of the collapse of the Russian Mezhprombank. That litigation has involved freezing and disclosure orders, including against the bank's former chairman Sergei Pugachev. The Court of Appeal's decision in February 2015 rejecting Pugachev's appeal against the scope and terms of the freezing order is an important further milestone in the development in the freezing order jurisdiction.

JSC Mezhdunarodniy Promyshlenni Bank and another v Pugachev [2015] WLR (D) 94 (Court of Appeal)

Acting for the liquidator of a Russian bank in claims of misappropriation of assets against the bank's former owner.

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Restructuring & Insolvency

Stephen is regularly instructed on complex, high-profile insolvency litigation.

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Re BCCI (Morris v. Mahfouz) (CA) [1994] BCLC 450

International & Offshore

Stephen has a successful offshore practice and has appeared in over 50 hearings at first instance, and more than twelve hearings at the Court of Appeal of the Eastern Caribbean, whilst also having appeared in the Privy Council on 10 occasions, on appeal from that court, or the courts of the Isle of Man, the BVI, and the Bahamas.

Stephen has also been called to the Bar of the Eastern Caribbean Supreme Court, the Bar of the Bahamas and of the Cayman Islands.

Stephen is also a licensed advocate in the Isle of Man, and has carried out advisory work pre-trial for cases in Bermuda and Hong Kong and the Channel Islands.

Significant offshore cases include:

Alhamrani v Alhamrani & Chemtrade Ltd v Fuchs Oil Middle East Ltd

The longest trial to date before the BVI Commercial Court since the advent of the commercial division of the BVI High Court. Stephen appeared at a hearing in Dominica before the Eastern Caribbean Court of Appeal, seeking leave to appeal to the Privy Council and a stay pending appeal.

Stephen Smith QC

VKontakte.com v Mail.ru

Shareholder dispute in relation to Russia's largest social network, involving unfair prejudice proceedings commenced in the BVI.

Cukurova Finance International v. Alfa Telecom Turkey Ltd (PC)

Stephen has been lead counsel for ATT in 6 out of the 9 Privy Council hearings, as well as multiple hearings in the Eastern Caribbean Court of Appeal and at first instance in the British Virgin Islands since 2007.

United Best Developments v Noble Field

Shareholder dispute in respect of a BVI company. The case settled before it was due to be heard in the Court of Appeal of the Eastern Caribbean.

AK Investment CJSC v. Kyrgyz Mobil Tel Ltd (PC) [2012] 1 WLR

Where there was substantial evidence of specific irregularities, breaches of natural justice and irrational conclusions, the Court was entitled to find that there was a considerable risk of justice not being obtained in a foreign forum and refuse an application for a stay.

Texan Management Ltd v. Pacific Electric Wire and Cable Co Ltd (PC) [2009] UKPC 46

The Court had jurisdiction to impose a case management stay of proceedings in the BVI, pending the determination of the proceedings in Hong Kong, even though the relief claimed in the BVI (the rectification of the share registers of BVI companies) was not available in Hong Kong.

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