Case No: 20091099

Neutral Citation Number: [2009] EWHC 2833 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 16 October 2009

BEFORE:

MR JUSTICE TEARE

- - - - - - - - - - - - - - -

BETWEEN:

JSC BTA BANK

Applicant/Claimant

- and -

MUKHTAR ABLYAZOV & ORS

Respondents/Defendants

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MR S SMITH QC & MR T AKKOUH (instructed by Lovells LLP) appeared on behalf of the Claimant

MR B DOCTOR QC & MR A TOLLEY (instructed by Clyde & Co LLP) appeared on behalf of the First to Third Defendants

Judgment

1. MR JUSTICE TEARE: This is an application by the claimants for an order that the first defendant attend for cross-examination upon his affidavits as to assets and as to his answers to what I call the Schedule C questions. There is, I think, little, if any, dispute between the parties as to the appropriate principles which govern the court's discretion in making such order.

2. In Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia & Ors [1996] EWCA Civ 759 Phillips LJ, as he then was, said:

> "In my judgment 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 or not alternative means of achieving the same end that are less burdensome. The Court has to weigh the various options in order to decide which best meet the dual requirements of justice and convenience."

3. I have also been referred to the decision in Den Norske Bank ASA v Antonatos [1998] EWCA Civ 649 in which Waller LJ said, having referred to the various authorities:

> "It is finally 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."

And reference is made to the decision of House of Spring Gardens Ltd v Waite [1991] 1 QB 241.

4. I have been referred to the two affidavits sworn by the first defendant pursuant to the order that he swear an affidavit setting out his assets and his answers to the Schedule C questions as part of the recent order. I have been taken through them by Mr Smith for the claimant and I have also been referred to the letters dated 2 October written by his instructing solicitors in which what are said to be deficiencies in those affidavits are referred to. Mr Doctor, on behalf of the first defendant, has not taken me to those alleged inadequacies in particular, though he has submitted in his skeleton argument at paragraph 10 that it is the defendant's case that he has complied with the order and that there is no requirement for him to take any further steps in this regard.

5. I have considered what has been submitted by Mr Smith and I accept his submissions that the affidavits which have been provided are inadequate. They do not serve to fit their purpose which is that they should enable the claimants to be able to police the operation of the freezing order. I also consider that it can fairly be said that the deficiencies are extraordinarily inadequate. I therefore consider that it is just, in principle, that there should be an order for cross-examination of the first defendant. The purpose of that cross-examination is, in circumstances where the affidavits he has provided do not enable the claimants to police the Mareva injunction, to provide an alternative means of providing the necessary information to the claimants with which they may police the injunction.

6. I have considered whether there are any appropriate alternatives to the making of such an order. No further affidavits have been suggested though a letter is promised from the first defendant's instructing solicitors dealing with the inadequacies referred to in the correspondence and that letter has been promised by close of play today. I do not consider the circumstance that that letter is expected later today a reason for regarding the order for cross-examination as being wrong in principle. It seems to me that if the letter is sufficiently detailed so that it resolves some or all of the inadequacies, that would go to shorten the cross-examination but, having regard to the passage of time which has elapsed since these orders were first made, it does seem to me appropriate that this court make an order for cross-examination.

7. Mr Smith for the claimants has requested that this court fix a date next week for the hearing, that is the week beginning 19 October. The defendant's defence is due on 20 October, as is the defendant's reply evidence regarding the defendant's application to set aside the freezing order which is due to be heard on return date which is fixed for 3 November for two or three days.

8. Mr Doctor, for the defendant, has submitted that if an order is to be made that it be on a date after the hearing of the return date for the freezing order. In practice that means one is looking at a date of about Monday, 9 November. The reasons he relies upon in support of that submission are, firstly, that although the time limited for providing the defence expires on 20 October, it is likely, he says, that more time will be needed and indeed a request for an extension of time until 27 October has been made. In those circumstances he submits that it would be inappropriate and unfair to the first defendant for the cross-examination to take place in the week of 19 October.

9. He also says that prior to the hearing of the return date the defendant's counsel will be preparing for the return date and they will also be needed at the hearing when the defendant is cross-examined and, accordingly, it would be inappropriate and unfair for the cross-examination hearing to take place before the return date.

10. It seems to me that it would be inappropriate and unfair to the claimants to delay the cross-examination until after the return date. The affidavits as to assets and as to the answers to the Schedule C questions were ordered by this court to be provided, I think, sometime in August. The court at that stage refused an application that the information should only be provided after the return date.

11. There was an appeal against that decision. The appeal was dismissed so that this court and the Court of Appeal made orders which envisaged that the information as to assets would be given and should be given before the return date. That information, because of the inadequacies to which Mr Smith has referred, has not been given. In principle, therefore, it is only fair to the claimants that the cross-examination, which is an alternative to the inadequate affidavits, should take place also before the return date.

12. So far as the difficulties that it is said face the first defendant with regard to the preparation of his defence, Mr Smith submits that that is in truth a red herring because the first defendant has known since the provision of the affidavits in support of the freezing order in August what was the case against him and it has since been pleaded. He suggests that in those circumstances it is unlikely that any real prejudice would be caused to the defendant in having to be cross-examined whilst the defence is still being

prepared. There is some force in that. On the other hand there is, in my judgment, also some force in Mr Doctor's point. The nature of the claim may well have been known about for some time but the reality is that it is likely that detailed contact between the instructing solicitors, client and Mr Doctor will continue to take place almost up until the last moment for service of the defence.

13. So far as the difficulties concerning counsel and the return date are concerned, it may well be that counsel are required, in justice to the defendant, to attend the hearing of the cross-examination but the first defendant has the assistance of a number of able counsel. Therefore, I do not see that there is much force in that point, though there is some. So the possible dates in reality for the cross-examination are either Thursday, 22 October, which I have been informed is available and is after 20 October, which is the date limited for filing the defence, or Monday, 26 October and Tuesday, 27 October. For the reasons I have given I do not consider it appropriate to look at a date after the return date.

14. Mr Smith has said that if the first defendant accepts that the claimants have a good arguable case there will be no objection to extra time for service of the defence. There has been no such concession but equally, as pointed out by Mr Doctor, it has so far not been contended that there is no good arguable case. In those circumstances and doing the best I can, it seems to me likely that the time for service of the defence will be extended by agreement at some point. That suggests to me that the date for the examination should not be 22 October because it may well be that the first defendant is still working on his defence at that time. The alternative seems to me to be Tuesday, 27 October. That will be the date on which Mr Doctor expects the defence to be provided.

15. It seems that before then there will be ample time for the first defendant to have given appropriate instructions to his legal team for the production of the defence so that if the court were to order the examination to take place on 27 October, it ought not to cause prejudice to the defendant such as to make it unjust to order the cross-examination on that day. For those reasons I will order the cross-examination on 27 October.

16. So far as costs are concerned, the need for this application has arisen out of the inadequate affidavits provided by the defendant pursuant to the orders of the court. For that reason it seems to me appropriate that the defendant should pay the costs of this application. Mr Smith asks for the costs to be on an indemnity basis on the grounds that this is a case which is out of the norm because of the serious inadequacies in the affidavit. He is right to say that it is out of the norm in that regard but I must also have regard to the fact that the defendant, when faced with this application, has to some extent responded constructively by agreeing that there should be cross-examination but stating that it should be after the return date. He has lost on that point but I do not consider it appropriate to order costs on an indemnity basis because although the matter has arisen out of the inadequate affidavits, he has responded to some extent constructively as I have indicated. Mr Smith will have costs on the standard basis.

17. The costs of the hearing of the cross-examination to be reserved to the hearing of the cross-examination.