Judgments

*JSC BTA Bank v Ablyazov

[2011] EWHC 1522 (Comm)

QBD, COMMERCIAL COURT

Teare J

21 June 2011

Contempt of Court - Committal - Application - Several allegations of contempt made against defendant - Whether all allegations to be heard - Whether allegations needing to be fully set out - Whether allegations to be heard before main trial - Whether contempt hearing to be held in private.

Judgment

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE TEARE:

1. On 16 May 2011 the Claimant ("the Bank") issued an application seeking the committal of the Defendant ("Mr. **Ablyazov**") for contempt of court. This application was made in the context of the series of claims which the Bank has brought against Mr. **Ablyazov**.1 The application notice cited some 35 allegations of contempt.

2. Pursuant to a suggestion made by me on 24 May 2011 that the allegations would have to be limited in number for case management reasons the Bank has reduced the number of allegations of contempt which it requests to be heard, in the first instance, to 23.

3. On 10 June the Bank sought directions for the hearing of the contempt application. In particular, the Bank sought an order that the 23 allegations be heard in late September/early October 2011 over a period of 8 days. It was submitted on behalf of Mr. **Ablyazov** that the contempt allegations could not be heard until after the trial of the Drey, Chysopa and Granton actions which have been fixed for a long hearing commencing in November 2012 and the trials of the AAA Proceedings and the Paveletskaya Proceedings. Several points were made in support of this submission. They included: a contempt hearing would prevent Mr. **Ablyazov**

from being able to prepare for the trial of the action, the credibility of Mr. **Ablyazov** will be at issue on the contempt application and it is better that it be assessed at the trial of the actions, and the contempt application raises issues which will also arise in the trial of the actions which should be determined at trial and not on a contempt application.

4. Although I was only asked to give directions for the hearing of the contempt application the directions hearing lasted a whole day and counsel referred me to several authorities. A more formal judgment is therefore required than would be usual on a directions hearing but in view of the need to make my decisions known to the parties as soon as possible I shall express my views shortly. I have however endeavoured to consider all of the matters mentioned to me by counsel in their written and oral submissions

The number of allegations to be tried and when

5. Where allegations are made that a freezing order has been breached the claimant may bring a contempt application as a means of putting pressure on the defendant to comply with the freezing order; see *Dadourian Group International Inc. v Simms* [2007] 1 WLR 2967 paras.16-18 and 38. For that reason it will usually be appropriate to determine the contempt application promptly and before the trial of the underlying action, though the interests of fairness might sometimes require that it be determined after the trial; see para.25.

6. In the present case directions have been given for the trial of the Drey, Chrysopa and Granton actions to commence in November 2012. Those directions (set out in an order of some 8 pages) were given after a CMC lasting two days and involving several other parties not involved in the contempt application. It would be undesirable to disrupt those directions by ordering that a long contempt hearing involving many allegations should take place during the period when the parties should be preparing for the trial of the actions. Furthermore, although Mr. **Ablyazov** has, as has been demonstrated by the number of leading counsel instructed on his behalf, no shortage of funds he is a personal defendant who, I am told, speaks no or very little English. In order to take instructions from him documents must be translated into Russian and his instructions must be given through an interpreter. There are many matters arising from the several actions which have been commenced against him which require his attention and I am mindful that the burden of dealing with those many matters should not be such that he may not receive a fair trial either of the contempt application or of the actions themselves or both. It was for this reason that I suggested that the number of allegations of contempt should be limited.

7. At the hearing on 10 June I suggested that the contempt hearing should be restricted to 3 allegations; one of a failure to disclose, one of a failure to tell the truth on oath and one of a wrongful dealing with assets. In response the Bank suggested that, if the number of allegations should be further reduced from 23, the contempt hearing might be limited to 7 allegations.

8. If the purpose of bringing an application for contempt of a freezing order is to bring pressure on the defendant to comply with the freezing order it seems to me that that pressure will be brought by an application limited to 3 allegations as much as by one which extends to 7 or 23 allegations. The pressure is the threat of a prison sentence of up to two years. The Bank said that I must bear in mind that relief other than a committal for contempt is also sought and for that reason the number of allegations could not be cut down in the manner I suggested. However, if further injunctive relief is required to enforce the freezing order such relief can be sought by a further application pursuant to section 37 of the Senior Courts Act 1981. Such relief does not necessarily require a contempt application.

9. I therefore consider that on case management grounds the contempt application should be limited to 3 allegations, one from each of the several categories of contempt relied upon. It would not be appropriate for the court to decide which those should be. The Bank must decide. It must do so within 7 days.

10. If the contempt application is so limited I do not consider that it should unduly disrupt the preparations for the main trial or cause unfairness to Mr. **Ablyazov**. It is true that Mr. **Ablyazov**'s credibility will be in issue on the contempt application but that will often be the case where breaches of a freezing order are alleged. I do not consider that that matter requires that the hearing of a contempt application arising out of a freezing order be determined after the trial of the main action. It is also the case that the determination of the contempt application might involve determination of one or more issues in the trial of one or more of the actions. Whilst that can be a reason for delaying the hearing of the contempt application until after the trial of the actions it does not necessarily require such a direction; see and compare *Daltel Europe Limited and others v Makki and others* [2005] EWHC 749 (Ch) at paras. 3, 77-80 and 374 and *KJM Superbikes Ltd. v Hinton* [2009] 3 AER 76 at paras.18-19. In the present case, having regard to the limited number of contempt allegations to be heard and to the importance to the Bank of the efficacy of the freezing order, I consider that the potential overlap of issues between the contempt application and the trial does not require that the contempt hearing be determined after the trial of the main action.

Particulars of the allegations

11. Mr. **Ablyazov** said that the Bank's case should be clearly stated and particularised. That is of course correct. The Bank has stated its allegations in the contempt application and has set out its evidence in Mr. Hardman's affidavit ("Hardman 2"). Complaint has been made that, notwithstanding those steps, there is doubt as to the case to be met and as to the passages in Mr. Hardman's evidence on which reliance is placed. It seems to me that the allegation of failure to disclose an asset and of wrongful dealing with an asset should state not only the asset which has not been disclosed or in respect of which there has been a dealing but also the manner in which it is said that Mr. **Ablyazov** beneficially holds that asset. If that is done there ought to be no uncertainty as to the case which Mr. **Ablyazov** has to meet. The facts relied upon from which the Bank will invite the Court to infer (a) that Mr. **Ablyazov** beneficially holds that asset and (b) that he has failed to disclose it or dealt with it should be the subject of evidence. It seems to me that such evidence is already set out in Hardman 2. However, where reference is made to earlier statements by Mr. Hardman the particular paragraphs relied upon should be identified, either by reference to the appendix to Hardman 2 or in some other clear way. These steps should also be taken within 7 days.

Disclosure

12. There was debate as to what, if any, duty of disclosure the Bank had in the context of the contempt allegations. The Bank submitted that it had none (relying upon *Masri v Consolidated Contractors* [2010] EWHC 2640 (Comm) per David Steel J. at para. 27) but said that in any event it did not have any documents which damaged its case or assisted the case of Mr. **Ablyazov** (that the only assets he beneficially owns which are valued at more than £10,000 are those which he has already disclosed) beyond those which had been disclosed in Hardman 2 or in Mr. Hardman's earlier statements. It seems to me that if the Bank has a document which damages its case on the contempt allegations or assists Mr. **Ablyazov**'s case fairness requires that such document be disclosed. There would not be a fair trial if the Bank were able to make submissions that there has been a contempt for which he may be imprisoned without disclosing a document which damaged its case or assisted Mr. **Ablyazov**'s case. I do not think that anything said by David Steel J. in *Masri* invalidates that proposition. I will therefore order that the Bank's solicitor swears, within 7 days, an affidavit stating that it does not have any such document to disclose. Of course, if further searches reveal any such document it must be disclosed.

13. Mr. **Ablyazov** sought disclosure of all the documents obtained by the Bank in the categories listed in the 4th witness statement of Rosamund Prince at para. 29. I was not persuaded that such an order should be made. To the extent that such documents include documents which will fall to be disclosed in the main actions they no doubt will be disclosed. It was suggested, based upon Hogan Lovell's letter dated 25 May 2011, that Hogan Lovells were holding back documents relevant to the contempt application in order to catch Mr. **Ablyazov** out when he gave evidence in response to the contempt application. However, I was told by Mr. Smith that this was a misreading of Hogan Lovell's letter and that no such documents were being held back.

This is a further reason for requiring Hogan Lovells to confirm by affidavit that they do not hold any documents which damage the Bank's case or assist Mr. **Ablyazov**'s case on the contempt allegations.

Villiers v Villiers [1994] 1 WLR 493

14. The Bank wishes to reserve for future determination those allegations of contempt which are not heard before trial. Mr. **Ablyazov** says that this would not be a proper approach, would conflict with the observations of Sir Thomas Bingham MR and Hoffmann LJ in *Villiers v Villiers* at pp.499-500 and would be an abuse of process.

15. Contempt of court on a large scale has been alleged by the Bank. However, the maximum sentence is two years. It seems to me that if the Bank proves a contempt in the three categories alleged it will, arguably, have proved a serious contempt. In those circumstances it is likely that nothing of substance would be achieved by reserving for future determination those allegations of contempt which have been made but are not included within the 3 to be heard before the trial of the actions.

16. The Bank says that no final decision should yet be made concerning those additional allegations of contempt since Mr. **Ablyazov**'s evidential response to the 3 allegations to be heard is not yet known. In this regard reliance was placed upon the observation of Pill LJ in *Phillips v Symes (No.3)* [2005] 1 WLR 2986 at para. 54 that there could arise circumstances in which it may be appropriate to leave over consideration of alleged attempts.

17. It seems to me that it would be inappropriate now to declare that any future attempt by the Bank to bring further allegations of contempt for a hearing would be an abuse of process. Whether that would be an abuse would depend upon the circumstances then prevailing and I cannot know what they will be. However, the right of Mr. **Ablyazov** to seek to strike out any such further allegations on the grounds of *Villiers v Villiers* is preserved.

Other orders sought

18. Mr. Matthews said that he would wish to consider the orders sought in paragraphs 3-8 of the draft order at tab 3 of the bundle once he knew which allegations are being pursued. If the Bank has identified the 3 allegations on which it relies before I formally hand down this judgment I would hope that such matters could be finalised then.

19. Mr. Matthews has requested that the contempt hearing take place in private. However, such hearings should normally take place in public; see para.9 of PD RSC 52. I consider that to the extent that the 3 allegations require mention to be made of “restricted information” such information should be anonymised in the same way as was done with one or more of my earlier judgments in this matter. The hearing should take place in public. That is the appropriate course where a contempt is alleged which may lead to the contemnor being imprisoned.

20. I will ask the parties to prepare a draft order.

1 For a brief description of the principal claims see my judgment at 2010 EWHC 1779 (Comm) paras.2-4.