Judgments

Milsom and others v Ablyazov

Self-incrimination – Privilege against self-incrimination – Receivers seeking order requiring defendant to provide responses to requests for information in course of proceedings against him by bank – Defendant claiming right against self-incrimination in respect to possible use of such information in ongoing committal proceedings against him – Whether right to self-incrimination applying to pre-existing documents – Whether compelling defendant to provide such information constituting violation of defendant's human rights – European Convention on Human Rights, art 6

[2011] EWHC 1846 (Ch), (Transcript)

CHANCERY DIVISION

ROTH J

27 MAY, 13 JUNE, 18 JULY 2011

18 JULY 2011

R Miles QC and A de Mestre for the Applicants

T Grant and A Winter for the Respondent

Freshfields Bruckhaus Deringer LLP; Stephenson Harwood

ROTH J:

[1] This is an application by the Receivers of the assets of Mr Mukhtar **Ablyazov** for an order that they be provided by him with responses to four requests for information which they have made in relation to assets within the Receivership. Mr **Ablyazov** did not object in principle to the provision to the Receivers of the requested information, subject only to questions of timing on which I have ruled and which decision does not

require further discussion in this judgment. Pursuant to that ruling, some of that information has now been provided and the balance is being provided, subject to conditions imposed to prevent the sharing or use of that information in communication with third parties pending an adjourned hearing and this further judgment. It is the question of the regime that should be imposed going forward as regards the use that may be made of this information that is the focus of the dispute between the parties.

BACKGROUND

[2] The Receivers were appointed by order of Teare J made on 6 August 2010 ("the Receivership Order") in an action brought by JSC BTA Bank ("the Bank") against Mr **Ablyazov**, which the judge described as "an extraordinary case". Details of the claim by the Bank and the defence of Mr **Ablyazov** can be found in the judgments of Teare J of 16 July 2010 and of the Court of Appeal of 19 October 2010 (dismissing Mr **Ablyazov**'s appeal against the Receivership Order). It is unnecessary to repeat those details in the present judgment and is sufficient to say that it is alleged that Mr **Ablyazov** was engaged in a massive fraud misappropriating funds to a total of some $4 billion from the Bank which is based in Kazakhstan and of which he was previously the chairman, whereas Mr **Ablyazov** contends that these are "trumped-up" allegations brought for political reasons because of his involvement in the opposition to the President of Kazakhstan. This is bitterly contested litigation, with very substantial resources deployed by both the Bank and Mr **Ablyazov** and no trust whatever between them.

[3] At the outset in the litigation commenced by the Bank, on 21 August 2009, Teare J made a world-wide freezing order against, among others, Mr **Ablyazov**; and a further world-wide freezing order was made on 12 November 2009 (together the "WFOs").

[4] The Receivership Order appointed three partners in KPMG LLP as the Receivers to receive the various assets specified in the order. Paragraph 12 of the order provides that Mr **Ablyazov** shall:

> "a. give to the Receivers such information and documentation relating to the Property and the Undisclosed and Further Undisclosed Assets and where the said Property or Undisclosed or Further Undisclosed Assets consist of shares in companies used by the First Defendant as a part of a structure through which to hold his interests in a business or asset, such information and documentation relating to all companies and their respective businesses and assets within that structure,
>
> b. attend on the Receivers at all such times, and
>
> c. do all such things (including, without limitation, use his best endeavours to procure his agents, nominees or attorneys to do all such things), as the Receivers may reasonably require for the purposes of getting in the Property and Undisclosed and Further Undisclosed Assets and carrying out their functions."

Paragraph 27 of the order provides:

> "The Receivers shall be permitted to use and/or disclose all information that has come, or will come, into their possession for the purposes of the receivership and no such use shall be restricted by or be a breach of paragraph 15 of the order of Teare J dated 12 November 2009 (as subsequently amended) and/or paragraph 5 of the order of Teare J dated 22 April 2010, save that such disclosure insofar as it relates to information provided by [Mr **Ablyazov**], if directed towards the [Bank] shall in the first instance be provided to the [Bank's] solicitors, Hogan Lovells International LLP, who shall continue to comply with paragraph 15 of the order of Teare J dated 12 November 2009 (as subsequently amended) absent further order."

The condition in para 15 of the WFO dated 12 November 2009 that is referred to provides that the Bank's solicitors shall not permit anyone else to have access to the information, and in particular will not disclose it to the Bank, without Mr **Ablyazov**'s consent.

[5] The Receivership order has been amended three times and I am told that it now covers about 700 companies. Many of those are incorporated in the British Virgin Islands, Cyprus, or the Seychelles. It is not in dispute that Mr **Ablyazov** holds his assets and interests through an extensive web of companies. As stated in the judgment of the Court of Appeal at para 6:

> "Mr A does not hold his assets in his own name. Rather, a nominee appears to hold shares in a holding company on his behalf and by that means controls the shareholdings in a chain of other companies at the bottom of which chain is an operating business. The use of a nominee and of companies registered in off-shore jurisdictions makes it difficult to trace his assets. He says that the elaborate scheme by which he owns his assets is necessary to protect him from unlawful depredations by the President of Kazakhstan."

[6] Under para 22 of the Receivership Order, the receivership application was transferred to the Chancery Division and it is as a result of that transfer that the present application has been heard before me.

[7] On 16 May 2011, the Bank instituted contempt proceedings against Mr **Ablyazov** alleging that he was in breach of the WFOs by failing to disclose assets, by giving false evidence under oath and by witness statements, and by dealing with assets. By its committal application, the Bank seeks to have Mr **Ablyazov** committed to prison for the statutory maximum period of two years. That is a very substantial, as well as obviously a very serious, application, supported by an affidavit running to 490 paragraphs. Following a directions hearing, by judgment given on 29 June 2011, Teare J held that the committal application should be limited to three allegations, one from each of the categories of contempt relied upon. He directed that the Bank must decide which of the several allegations in each category should be selected as the allegation to be proceeded with in that fashion. I have been informed that the Bank has duly made its selection.

[8] As stated earlier, Mr **Ablyazov** does not object to providing the requested information to the Receivers. However, he seeks the imposition of a restricted information regime in the light of the pending committal application. His particular concern, as set out in a witness statement by Mr Alan Bercow of his solicitors, is that his answers should not be passed to the Bank prior to the disposal of the committal application. More particularly, he requests that during the pendency of the committal application, the Receivers should be prevented from "disclosing to any third parties answers or documents provided by Mr **Ablyazov** to them" pursuant to his obligations under the Receivership Order "which touch on matters the subject of that committal application". The justification relied upon for that proposed restriction was the privilege against self-incrimination.

SELF-INCRIMINATION

[9] It is self-evident that the Receivers must use information and documents provided to them only for the purposes of the receivership. However, they say that it is necessary, particularly in a case as complex as the present, to make follow-up enquiries arising from that information. I was taken in the course of the hearing to some of the answers provided to the Receivers by Mr **Ablyazov** to illustrate the kind of questions that they would wish to pursue. I fully accept that they will very properly need to make such consequential enquiries, and indeed it was not disputed on behalf of Mr **Ablyazov** that it is appropriate for the Receivers to address questions to various third parties arising from the documents, for example to the Companies registries in certain overseas jurisdictions or persons identified by Mr **Ablyazov** as holding interests in some of the relevant companies. Moreover, the Receivers say that they will also wish to pursue enquiries with the solicitors

to the Bank since as a result of the steps taken in the litigation so far, those solicitors are the most accessible source of information regarding Mr **Ablyazov**'s assets.

[10] However, in the light of the pending contempt application, Mr **Ablyazov** contends that he is entitled to the protection afforded by the privilege against self-incrimination. It is not disputed that the subject of the enquiries that the Receivers wish to pursue concern areas that were included in the original contempt application. As a result of Teare J's recent ruling, it appears that the three selected allegations which the Bank will pursue do not overlap in the same way with the information requests made by the Receivers that are the subject of the present application. However, I understand that Teare J's ruling is likely to be the subject of an application for permission to appeal, and it cannot be said, at the present time, that the matter has been finally established in that regard. I shall therefore assume for the purpose of this judgment that there may still be an overlap between the scope of the Receivers' enquiries and the committal application although the degree of overlap is presently unclear. Moreover, although Teare J gave directions for a hearing of the committal application in November, that timetable may potentially be disturbed by an appeal.

[11] A contempt application constitutes quasi-criminal proceedings and art 6(2) of the ECHR is accordingly engaged. Mr **Ablyazov** also points to the domestic rules concerning committal proceedings, as summarised in *Arlidge, Eady & Smith on Contempt* (3rd edn, 2005) at para 15-35 (omitting footnotes):

> "A Respondent to a committal application is not a compellable witness although he is entitled to give evidence (including oral evidence) if he wishes to do so. Nonetheless, the court by virtue of its power to regulate its own procedure is entitled to require Respondents to swear affidavits or produce statements of witnesses as to facts upon which they may wish to rely, in advance of the hearing, so as to afford the Applicant an opportunity of preparing evidence in reply. It remains for the Applicant to prove the case beyond reasonable doubt, on the basis of the evidence filed in support. While he or she is able to supplement this by reliance upon admissions, under the ordinary rules of evidence, what may not be done is to make use of any evidence filed in advance by the Respondent until such time as the Respondent chooses to deploy it. So too, the fact that a Respondent may have been ordered to swear, file and serve affidavit evidence does not expose him to the risk of cross-examination upon that material until he chooses to place reliance upon it. It is provided in the current Practice Direction on committal inter alia that CPR 35.9, concerning the court's power to direct a party to provide information, shall not apply to committal applications."

[12] On that basis, it is argued that if the Receivers were able to furnish the Bank with information acquired under court order from Mr **Ablyazov**, the Bank could effectively obtain by the back door what it could not obtain directly by asking Mr **Ablyazov** while it is seeking to commit him for contempt. Thus the Bank would be in a position of being able to use answers given under compulsion in furtherance of its contempt application, something that it is well-established should not be permitted.

[13] In the interval between the original and adjourned hearings of this application, matters have moved forward. The Receivers have obtained confirmation from the Bank's solicitors that they will undertake that any information provided to the Receivers by Mr **Ablyazov** in response to the Receivers' requests that is disclosed (directly or indirectly) to the Bank or its legal advisers shall not be deployed as evidence in the committal proceedings without the Bank having obtained the permission of the court (subject to the qualification that this does not prevent it using the same information if derived from another source). The Receivers submit that this should be sufficient to address any legitimate concerns which Mr **Ablyazov** may have. However, Mr **Ablyazov** contends that this is not sufficient since his concern is not merely that the material may be deployed as evidence but also that it may be used strategically by the Bank or its solicitors as regards the way the contempt application is pursued. The example given in argument was that it could help the Bank to select which of the many allegations of contempt would be pursued, in the light of what were then Teare J's anticipated directions to narrow the scope of the contempt application. That possibility has been largely super-

seded since the Bank has now made its selection. However, in the light of a potential appeal, there remains the possibility that this might all be re-opened.

DISCUSSION

[14] I shall consider separately: (a) disclosure to third parties; (b) use of pre-existing documents; and (c) disclosure to the Bank or its solicitors. In my view, the considerations that apply to these categories are not the same

(a) Third Parties

[15] As I have observed, counsel for Mr **Ablyazov** very properly accepted that the Receivers will sensibly need to pursue follow-up enquiries with various third parties. It is of course theoretically possible that questions proposed by the Receivers to a third party will find their way back to the Bank but in most cases the chance of this seems to me remote. Furthermore, Mr **Ablyazov** has the protection of the undertaking being offered by the Bank and its solicitors. Although Mr **Ablyazov** strongly resisted the appointment of receivers, the decision that this exceptional step was appropriate on the highly unusual facts of the present case has been upheld by the Court of Appeal. Having been appointed, it is obviously essential that the Receivers should be able to carry out their task, which is not an easy one given the extraordinary complexity and scale of Mr **Ablyazov**'s interests. In the end, this category of use of the information by the Receivers was not resisted strongly on behalf of Mr **Ablyazov**. In the light of the Bank's undertaking, I stated at the conclusion of the hearing that it should be permitted. It should be noted that there is no question of the Receivers handing over to third parties Mr **Ablyazov**'s answers to the Receivers' enquiries, but simply of using those answers in framing and pursuing further investigations with third parties. The Receivers' investigations are of course not being made in the committal proceedings and I consider that it is unrealistic in all the circumstances to regard such enquiries addressed to third parties as infringing Mr **Ablyazov**'s privilege against self-incrimination.

(b) Pre-existing Documents

[16] By pre-existing documents I mean documents that have an existence independent of and prior to the requests addressed by the Receivers to Mr **Ablyazov**. In the course of the hearing, I invited counsel to address the court on the question of whether such documents are covered by the privilege at all, and subsequent to the hearing I received helpful written submissions on that question.

[17] In *Saunders v United Kingdom* (1996) 23 EHRR 313, [1998] 1 BCLC 362, [1997] BCC 872, the majority of the European Court of Human Rights ("ECtHR") stated:

> "68 The court recalls that, although not specifically mentioned in art 6 of the convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art 6 . . . . The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art 6(2) of the convention.
>
> 69 The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the convention and elsewhere, it does not extend to the use in criminal

> proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

[18] *Saunders* did not directly concern pre-existing documents, but this matter has been considered further in subsequent jurisprudence of the ECtHR. The distinction as regards pre-existing documents and other "independent" material was re-affirmed by the Grand Chamber in *Jalloh v Germany* (2006) 44 EHRR 667, [2007] Crim LR 717, 20 BHRC 575, a case which concerned the forcible administration of an emetic by the police to a Defendant to provoke the regurgitation of a bag which he had swallowed and which was found to contain cocaine. Holding that the use of this evidence at the Defendant's trial infringed the privilege against self-incrimination, the court distinguished *Saunders*, emphasising the degree of force that was used and that the treatment of the Defendant also infringed his art 3 rights of protection from inhuman or degrading treatment.

[19] Notwithstanding the emphasis in *Jalloh* on the means used to obtain the evidence, as opposed to the nature of the evidence itself, the approach to the question of pre-existing documents by the ECtHR in some of its decisions is not entirely easy to reconcile. However, there is now clear authority in England that the protection under art 6(2) does not extend to pre-existing documents. The Court of Appeal so held in *C plc v P* [2007] EWCA Civ 493, [2008] Ch 1, [2007] 3 All ER 1034. I note also that the European Court of Justice, applying art 6 ECHR, had similarly held that pre-existing documents are not covered by the privilege against self-incrimination: Case C301/04 P *Commission v STL Carbon* [2006] ECR I-5915, at paras 43-44, [2006] 5 CMLR 877, and see the Advocate General's Opinion at para 66. The same position applies as regards the privilege under English domestic law: *C plc v P* (Lawrence Collins LJ dissenting). Hence in the subsequent case of *R v S* [2008] EWCA Crim 2177, [2009] 1 All ER 716, [2009] 1 WLR 1489, in a judgment delivered by Sir Igor Judge P, the Court of Appeal stated, at para 18 "The principle that evidence existing independent of the will of the suspect does not normally engage the privilege against self-incrimination is clearly establish in domestic law."

[20] In the light of these authorities, and further having regard to the undertaking offered by the Bank to which I referred, I do not see any ground on which to impose a restriction on the Receivers' use of pre-existing documents obtained as part of Mr **Ablyazov**'s answers to their requests.

(c) The Bank

[21] Provision of information by the Receivers to the Bank's solicitors is subject under para 27 of the Receivership Order to the condition that such information is not to be disclosed to the Bank itself: see para 4 above. However, I accept the submission advanced on behalf of Mr **Ablyazov** that this in itself does not give him adequate protection as it is through its legal advisors that the Bank is conducting the committal proceedings.

[22] However, the further protection offered to Mr **Ablyazov** by the undertaking offered by both the Bank's solicitors and the Bank itself as set out in the exchange of correspondence between the Receivers' solicitors and the Bank's solicitors of 9 and 10 June 2011 is significant. In view of that undertaking, information that is derived solely from the Receivers cannot be deployed as evidence against Mr **Ablyazov** in the committal proceedings without the permission of the court having the conduct of those proceedings.

[23] The right to remain silent and the attendant protection against self-incrimination is not an absolute right: see the judgment of the ECtHR in *O'Halloran and Francis v United Kingdom* (2007) 46 EHRR 397, at para 53, [2007] Crim LR 897, 24 BHRC 380, where the Grand Chamber expressly rejected the argument that to apply any form of direct compulsion to require an accused person to make incriminatory statements

against his will of itself destroys the very essence of the right and thereby infringes art 6. As the court there noted after referring to *Jalloh*, at para 55, it is necessary to focus "on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put". Here, although a court order means that Mr **Ablyazov** is compelled to respond to the Receivers' enquiries, the compulsion flows from the very nature of a receivership regime being imposed whereby the Receivers have to take control of the numerous and wide-ranging assets specified in the Receivership Order. As regards safeguards, the undertaking to which I have referred provides a substantial degree of protection. The use to which the information is put is therefore in the first instance for the proper conduct of the Receivership. If it is to be used directly in the committal proceedings by way of evidence against Mr **Ablyazov**, further application to the court hearing the committal proceedings will have to be made. If such an application is made, the argument regarding self-incrimination can be directed in a more focused manner on the basis of the particular evidence at issue rather than, as here, on the basis of generality. As for Mr **Ablyazov**'s concern about strategic use of the information in framing the committal proceedings, it is not at all clear whether or to what extent any information would be of real assistance in that regard. The situation here is unusual in that Mr **Ablyazov** was already under an obligation to provide information regarding his assets to the Bank's solicitors under the first WFO. It is not, as I understand it, suggested that that obligation was suspended by reason of the committal application.

[24] The Receivers are officers of the court and they will bear in mind that they should use information provided to them by Mr **Ablyazov** in raising questions of the Bank only where necessary, particularly when the area of enquiry overlaps with the final form of the committal application. Even then, they should often be able to raise such enquiries without full disclosure of the information which they have received on the particular subject from Mr **Ablyazov**. In a judgment given on a previous application by the Receivers in this case on 11 April 2011, Briggs J included (at para 45) a direction:

> ". . . that wherever in future the Receivers propose to disclose originally private or confidential information of Mr **Ablyazov** obtained by them pursuant to the receivership order, they give specific consideration to the expediency for the purposes of the receivership of the disclosure of each part of it and to the question whether that expediency is a reasonable basis for overriding Mr **Ablyazov**'s original, but of course heavily qualified, rights of privacy and/or confidentiality."

That direction was given in the context of commercially confidential information disclosed in arbitration proceedings and which was therefore said to be protected by the confidentiality of the arbitration process. At that time, there was no committal application. Now, with the committal proceedings pending, it is all the more important that the Receivers give specific consideration to the expediency for the purpose of the receivership of any disclosure which they seek to make to the Bank's solicitors of information received from Mr **Ablyazov**. I therefore expand the scope of Briggs J's direction in that regard. But despite an untoward remark in the first witness statement of Mr Milsom suggesting that there is every reason why information should be provided to the Bank to be placed before the court in the committal proceedings, on which counsel now appearing for the Receivers very properly did not seek to rely, I consider that, following the argument in the application before me and the terms of this judgment, the Receivers should be relied upon to comply with this direction and act responsibly.

[25] Accordingly, subject only to this direction and in the light of the undertaking from the Bank and its solicitors, I shall not impose any restriction upon the Receivers as regards disclosure of the information provided by Mr **Ablyazov** in the course of inquiries they may make to the Bank's solicitors. In my judgment, such disclosure, in these circumstances, will not of itself violate Mr **Ablyazov**'s rights under art 6 and should be permitted.

Judgment accordingly.