Judgments

QBD, COMMERCIAL COURT

Case No: 2009 F 1099, 2010 F 93, 362 and 706

Neutral Citation Number: [2011] EWHC 2500 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

The Strand

London

WC2A 2LL

Friday, 29 July 2011

Before:

MR JUSTICE TEARE

BETWEEN:

JSC BTA BANK

Claimant/Respondent

-v-

(1) **MUKHTAR ABLYAZOV**

& Others

Defendants/Applicants

(Transcript of WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400, Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

MR S SMITH QC and **MR T ANKOUH** (instructed by Hogan Lovells) appeared on behalf of the Claimant/Respondent

MR D MATTHEWS QC and MR T GRANT and MR E HO (instructed by Stephenson Harwood) appeared on behalf of the Defendants/Applicants

(Transcript of the Handed Down Judgment of

WordWave International Limited

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Official Shorthand Writers to the Court)

Judgment

As Approved by the Court

1. MR JUSTICE TEARE: This is the last day of term. If I don't give judgment on this application now there will be delay in my doing so. It seems to me the parties ought to know what the position is on this application and so I will give judgment now.

2. However, my reasons will naturally be rather more ragged than they would usually be.

3. The application is an application by Mr **Ablyazov** and Mr Solodchenko for an order that the claimant should provide security for the costs of Mr **Ablyazov** and Mr Solodchenko in defending five actions which have been brought against them and others by the BTA Bank. If such an order is made, the quantum of such security is either to be agreed or determined by the court at a further hearing.

4. There is no dispute as to the court's jurisdiction to grant security pursuant to CPR 13 (ii). That is on the basis that BTA Bank is resident out of the jurisdiction and not resident in a Brussels contracting state or a state bound by the Lugano Convention or a regulation state, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982.

5. The only question, therefore, is whether, pursuant to CPR 25.12, it is, having regard to all the circumstances of the case just to make the order sought.

6. The applicant's case is summarised at paragraph 23 of Mr Matthews's skeleton argument. He says there, as follows:

"Justice lies in granting security because:

"(1) there are real concerns as to the claimant's stability and creditworthiness and, therefore, its ability to meet any costs award;

(2) as is also agreed the applicants will have no way to enforce any costs award even assuming the claimant can meet it, if the claimant does not pay it voluntarily. Enforcement in Kazakhstan both in principle and in practical terms will be impossible;

(3) it is said this litigation is being fought by the claimant with striking aggression, which has and will significantly continue to increase the size of the costs incurred, justifying further the need for the claimant to have the comfort of security;

(4) as the claimant sought to make clear in the stay applications the applicants say the litigation is motivated in whole or in part by political and personal undercurrents, the ultimate end of which is the political destruction of Mr **Ablyazov**. This is not ordinary commercial litigation for the recovery of money. Accordingly, the applicants have real concerns that, if they are successful in this litigation, the claimant will take every possible step to avoid the enforcement of any costs award."

7. The first of those grounds, namely that there are real concerns as to the claimant's stability and creditworthiness and, therefore its ability to meet any costs award is disputed by the Bank. However, I accept that there are real concerns. It is for this purpose sufficient to note the credit ratings given by several agencies as to the claimant Bank. They are set out in Mr Bercow's 14th witness statement at paragraph 35 subparagraph 3.

8. Standard & Poor's rate the claimant as B minus which is described as:

"More vulnerable to adverse business financial and economic conditions but currently has the capacity to meet financial commitments."

9. The minus sign indicates that the claimant is toward the lower end of that bracket.

10. Fitch rate the claimant also as B minus, which is described as following:

"Highly speculative. B ratings indicate that material default risk is present but a limited margin of safety remains. Financial commitments are currently being met. However, capacity for continued payment is vulnerable to deterioration in the business and economic environment."

11. Moody's rate the claimant as B3. That is described as follows:

"Obligations rated B are considered speculative and are subject to high credit risk."

12. Moody's appends numerical modifiers 1, 2 and 3. Modifier 1 indicates the obligation ranks in the higher end of its generic category. Modifier 3, which has been used in relation to the Bank, indicates a ranking in the lower end of that rating category.

13. These ratings reflect, no doubt, the history of the Bank. The Bank has been reconstructed. Debts have been written off. A Kazakh sovereign wealth fund has given and is continuing to give necessary support to the Bank. As a result, as recently as June of this year, payments totalling $500 million were made to creditors. Those matters all show that the Bank's condition is improving substantially. Nevertheless, it seems to me, as the ratings indicate, professionals who assess such things are not convinced that the Bank is now on stable and sure foundations, although of course the foundations may in fact be stable and sure.

14. Mr Smith has suggested that the risk that the Bank may be unable to pay costs ordered against it is only a speculative risk and that there is not a material risk.

15. It is, of course, very difficult to judge such matters on an application of this nature using the inevitable broad brush which the court must when dealing with an application of this nature, but for the reasons I have summarised I consider that, although the risk of nonpayment of a costs order is very small, I do not consider that the risk can be entirely excluded.

16. It is not, it seems to me, a purely speculative risk. It is based on the grave situation which the Bank was undoubtedly in, in the past, albeit that it has taken considerable and substantial strides to recover from that position.

17. The second ground relied upon is that the applicants will have no way to enforce any costs award, if the claimant does not meet it voluntarily. That ground is established. There is no dispute about it. It is pointed out that the Bank has assets in either the United Kingdom or the European Union, against which enforcement of a costs order could take place, but they do appear to be liquid assets, as shown by the recent sale of one of them, some German bonds. I do not consider, therefore, that they show that the applicants will have no difficulty in forcing a costs award against assets within this jurisdiction.

18. The third matter relied upon is that the costs of fighting this litigation have been substantial and will continue to be substantial and to increase, because the litigation is being fought with striking aggression. No doubt, given the scale and complexity of this litigation the costs will, indeed, be great and the determination with which the claims are being fought necessarily obliges the defendants to incur very substantial costs.

19. The fourth ground is that the applicants say they have real concerns that, if they are successful in this litigation, the claimant will take every step possible to avoid the enforcement of any costs award. The Bank says, in response, that it is fanciful to suggest that it will not obey any costs order against it, in circumstances where it is litigating in these courts on such a huge scale.

20. Mr Matthews invites the court to consider what the attitude of the Bank and the Kazakh sovereign wealth fund will be if, as a result of the trial in November 2012, when three of these actions are to be fought, the Bank were to lose. He says, for the reasons stated in his skeleton argument, that there is a risk that the claimant will take every possible step to avoid enforcement of a costs award.

21. In support of Mr Smith's submission that this fear is fanciful, he points to, firstly, the fact that, if the claim against Mr **Ablyazov** fails, the Bank will nevertheless pursue the claims in debt against the companies involved in the actions. He also relies upon the obligation of the Bank to its creditors in the reconstruction agreements, to pursue recovery of sums due to it.

22. It seems to me that those matters relied upon by Mr Smith do make it most unlikely that the Bank would refuse to pay any costs order made against it because they would still be wishing to pursue remedies through the English court.

23. However, as I have said when dealing with Mr Matthews's first point, there is a risk, albeit a very small one, that even if the Bank wished to pay a costs order, it might not have the means with which to do so.

24. There are, therefore, it seems to me, real grounds for saying that it is just to order security for the defendants' costs. The Bank says that any such order is unnecessary because the applicants have what Mr Smith has called "de facto security". He further says that it would be unjust to make any such order in favour of Mr **Ablyazov** because Mr **Ablyazov** has not obeyed the disclosure order, in the freezing order made

against him, and has breached it in other ways and is facing a contempt hearing fixed for November of this year. He submits that no order should be made until the outcome of that hearing is known.

25. Dealing first with the suggestion of de facto security, this takes a number of forms. Firstly, reliance is placed on the sum of £57.5 million, which has been paid into court by the Bank, pursuant to orders of this court on the freezing order application, and of this court and the Court of Appeal on the receivership order application. That very large sum is to stand as fortification for the undertakings given by the Bank in order to obtain both the freezing order and the receivership order.

26. I do not consider it appropriate to water down that security by making it stand also as security for the applicants' costs, notwithstanding that the cataclysmic consequences feared by Mr **Ablyazov**, as a result of the receivership order, do not appear to have come about.

27. The second matter relied upon, as de facto security is that the Bank has costs orders in its favour already, which to date are said to exceed £4 million. However, the costs of defending the actions are likely to be much more than that and so the existence of these costs orders do not, it seems to me, negate the need for an order for security for costs.

28. The third form of de facto security relied upon is that the Bank is owed substantial sums, very, very substantial sums by companies owned and controlled by Mr **Ablyazov**. It is, therefore, said that he is able, through his control of those companies, to cause those companies to set off costs orders in his favour, against sums paid by the companies to the Bank in discharge of the companies' debts to the Bank.

29. This submission is based upon Mr **Ablyazov**'s evidence in this action in the context of the freezing orders and the receivership orders, in particular his third witness statement, sworn on 16 April 2010, and in particular the passages at pages 52 and 66. He said at paragraph 180 on page 52:

"I am a well known businessman in the CIS region and I am the ultimate indirect owner of companies that are involved in a wide ranging of Banking, financial investment, property investment development and other commercial activities. As I have explained above I currently hold assets in the mining, Banking commercial, real estate, shipping and tobacco sectors. In each case what I actually own, via the relevant nominee trusteeship structure, is shares in one or more holding companies, which own the trading company or companies that own the ultimate physical asset. For example, a piece of commercial real estate."

30. He says, at paragraphs 236 and following, that this manner in which substantial assets are held by him is standard practice for Kazakhstani individuals.

31. He then sets out the structure, which involves a company holding the asset, various holding companies above that initial company, and, at the top of the structure, is an individual who holds the shares in the company at the top of the structure, as nominee for Mr **Ablyazov**.

32. Mr Smith has identified a number of companies owned and controlled by Mr **Ablyazov** in that way, which owe money to the Bank. He has referred to a company called Paveletskaya, the details of that company are set out in Mr Smith's skeleton argument at paragraph 10(a). In essence Mr **Ablyazov** says that he owns 100 per cent of Paveletskaya and Mr Smith refers to evidence that Paveletskaya owes over US$170 million in principle and interest to the Bank. Other examples are given. The KPC loans, the relevant matters are set out in a note of 28 July by Mr Smith's junior counsel, Mr Ankouh, and other examples are referred to, concerning, for example, the Oceanarium and Business Centre, 1812 projects.

33. Mr Smith has instructions, if it is necessary, to give an undertaking on behalf of the Bank that, if and when Mr **Ablyazov** were to cause the companies to seek to set off against the sums they owe the Bank, costs orders in favour of Mr **Ablyazov**, the Bank would agree to him doing so. It does appear to me that an undertaking of that nature is necessary, in order to make the suggested de facto security work.

34. Mr Smith goes further and says that, if necessary, this court may lift the corporate veil, with regard to these various companies, for the reasons set out in Trustor AB v Smallbone & others [2001] Weekly Law Reports 1177, in particular, at paragraphs 14, 19 and 23.

35. It may be thought that it would be possible, having regard to these very large debts, which are owed by companies controlled by Mr **Ablyazov**, could be utilised in such a way as to provide security for Mr **Ablyazov**'s costs. However, it is to be noted, as Mr Matthews noted, that this argument was only developed in any detail in oral submissions.

36. Mr Matthews has challenged Mr Smith's submissions on the law, as to the circumstances in which it is appropriate to raise the corporate veil. He has also suggested that English law may not be the applicable law for determining this question. He suggests that there might very well be problems in giving effect to the arrangement contemplated by Mr Smith, with regard to the enforceability of the suggested undertaking.

37. It is very difficult for the court to form a view about such matters on this application, particularly in circumstances where the precise way in which the form of de facto security is put was only developed in oral submissions.

38. Mr Matthews has referred me to the decision of the Court of Appeal in a case called Ali Aoun v Hassan Bahri [2002] EWCA Civ 1390.

39. In the judgment of Lord Justice Tuckey the following is said at paragraphs 11 to 14:

"Traditionally, security was provided by payment into court or solicitors undertakings. Nowadays, bank guarantees are the norm, provided they are from first class banks. Other forms of security are not ruled out, but they must be copper bottomed in the sense that they can be enforced in a simple and straightforward way. Otherwise, the purpose of ordering security is defeated."

"Thus, in this case, as at an earlier stage, Mr Justice Moore-Bick rejected an offer by the appellant to provide security by the deposit of share certificates in other companies in which he had an interest and this court in AP (UK) v West Midlands Fire and Civil Defence Authority [2001] EWCA Civ 1917 rejected security in the form of a charge over property. The reason for this was put by Mr Justice Moore-Bick, in this case, when he said:

"The fact is that, if any of these shares have any realisable commercial value, it will be more appropriate for Mr Aoun to use them as counter security for a bank guarantee in favour of the defendants."

40. Passages in the judgment of Mr Justice Longmore in the AP UK case, are to the same effect. He expressed surprise that security was being offered in the form of a charge on real property, adding:

"For myself, I have never come across such a suggestion in a commercial or mercantile action. The reason for that must be that, in a normal case, if real property is sufficiently valuable to stand as security, there will be no difficulty in the claimant's procuring a bank guarantee for the purposes of security for costs by, if appropriate, granting a charge to the bank."

41. At paragraph 40, Lord Justice Tuckey said:

"In short, the matter is fraught with uncertainty and difficulty. Any attempt to execute such security would not be a simple and straightforward matter as the court intends when it makes such an order. The respondents were entitled to security which could be realised with relative ease."

42. In the light of the guidance given by the Court of Appeal in that case, it seems to me that it would b an unsafe and unsure exercise to seek to construct a form of security out of the debts owed by Mr **Ablyazov**'s companies to the Bank, his ownership and control of those companies and the undertaking offered to the court, the terms of which have not been put forward in any document. It would not appear to me that, although it might be possible to fashion some form of security, it might well be optimistic to suggest that enforcement of such security would be simple and straightforward and executed with relative ease.

43. The same goes for the charge over the debts which has been suggested by Mr Smith. There is a dispute as to Kazakh law as to whether such a charge would be effective. The expert instructed by Mr **Ablyazov** suggests that it would not. White & Case, who have been asked to give an opinion on this matter by the Bank suggest it would be enforceable. However, in the light of this guidance from the Court of Appeal it does not seem to me to be appropriate to go down the road of investigating whether such a charge would be effective as security.

44. The same, perhaps, goes for the further undertaking suggested by Mr Smith, that his clients would not sell any liquid assets which they currently hold in the United Kingdom and the European Union.

45. I, therefore, do not consider that this application should be refused on the grounds that there is what Mr Smith has said de facto security.

46. There remain some further arguments relied upon by Mr Smith. He submitted that the court should refuse to order security because the defendants are responsible for the Bank's financial condition. He said, initially at any rate, that this submission was based on the fraud which is alleged by his clients against Mr **Ablyazov** and the other defendants, but whether or not there was a fraud is, of course, in issue. The claimants do have a good arguable case. Nobody has suggested that the defendants do not have a good arguable defence.

47. In those circumstances, I do not consider it right to assume at this stage, before trial, that there was a fraud, in order to refuse the application for security.

48. An alternative way of putting this point was that Mr **Ablyazov** was responsible for the loans to his companies, the nonpayment of which has caused the Bank financial difficulty. It is said that Mr **Ablyazov** was at the helm and that all these problems took place on his watch and so he is responsible for them. But I am told by Mr Matthews that this, again, is in dispute. Mr **Ablyazov** says that he was removed from the helm by the authorities and that the reason that the debts have not been repaid is, in part, at any rate, because of the action of the authorities.

49. I therefore do not consider that I can fairly take into account the nature of the Bank's claims against the defendants at this stage, in order to refuse them security.

50. That brings me to the last matter relied upon by Mr Smith for refusing this order and that relates to the conduct of Mr **Ablyazov**.

51. Mr Smith says that Mr **Ablyazov** has disobeyed the disclosure obligations on him in the freezing order. Reference is made to my judgment on the receiving order application and also to the Court of Appeal's decision. They show that at an early stage in this litigation there was, indeed, a failure by Mr **Ablyazov** to comply with the disclosure obligations. It was those failures which led to the receivership order.

52. Secondly, it is said that Mr **Ablyazov** has admitted failing to mention the role of a gentleman, whom I will describe as Mr S, until his 13th witness statement. Mr Smith said that this manifests a lack of candour.

53. Thirdly, Mr Smith says that a sum of £50,000 of Mr **Ablyazov**'s assets was used to fund the legal fees of Chrysopa, another defendant, in breach of the freezing order.

54. Fourthly, it was said that, in accordance with the decision of the Court of Appeal, the freezing order was also breached, as a result of assets being dealt with by Mr **Ablyazov**, in breach of the freezing order.

55. Fifthly, it was said and reliance is placed on the report of the receivers, who have said in their reports that Mr **Ablyazov** has failed to cooperate with them.

56. So far as the third and fourth of those matters is concerned, that is the payment of £50,000 and the breach of the freezing order, as determined by the Court of Appeal, I do not consider that those matters would make it unjust to make the order for security for costs, if it would otherwise be just to make that order.

57. So far as the payment of £50,000 is concerned, that appears to have been caused by Mr **Ablyazov**'s solicitors, Stephenson Harwood, overlooking the fact that money advanced by a third party becomes an asset of Mr **Ablyazov**, whereas if the third party had paid the money directly to, in this case, Chrysopa, there would be no breach of the freezing order.

58. Of course, whether the third party was a true third party is a matter in dispute between the Bank and Mr **Ablyazov**, but for present purposes, it seems to me that this breach has come about, at least in part, by reason of an oversight by Stephenson Harwood and it would not be right to visit that on Mr **Ablyazov**, even though he may have been the person who gave instructions for £50,000 to be paid in respect of Chrysopa's legal fees. If that had been done directly by the third party there would, as I understand it, have been no breach of the order.

59. So far as the fourth matter is concerned, that is the breach of the freezing order in dealing with assets as found by the Court of Appeal. That breach may prove to be technical in nature. I take that adjective from Mr Smith's skeleton argument at paragraph 24, where, in referring to the Court of Appeal orders, he says:

> "The Court of Appeal also held that Mr **Ablyazov** had breached the freezing injunction by his sale of interests in Omsk Bank and BTA Kazan and the investment of the proceeds of sale in AMT Bank, albeit that the breach might, if Mr **Ablyazov**'s unsatisfactory evidence was correct, be technical in nature."

60. If there is a possibility that it may be held to be technical in nature, it doesn't seem to me to be a matter which would cause the court or which ought to cause the court to refuse to make an order for security for costs if it would otherwise do so.

61. So far as the fifth item is concerned, that of the criticisms made by the receivers, there is no doubt that the receivers have made criticisms of Mr **Ablyazov**, saying that he has refused to cooperate with them. The

receivers are officers of the court. They are experienced and there is no reason to doubt that they honestly hold the opinions they have expressed as to the conduct of Mr **Ablyazov**.

62. However, Mr Bercow tells me in his 14th witness statement, at paragraph 31, as follows:

"Mr **Ablyazov** strenuously denies that he has failed to cooperate with the receivers. He has, in the past, raised objections to the criticisms made of him in the receiver's reports. The receivers have not engaged with him on these issues. Mr **Ablyazov** has and continues to do his best to cooperate with the receivers in very difficult circumstances not of his own making.

"The receivers' key criticism of Mr **Ablyazov** is that he has been unwilling to instruct the companies, which are subject to the extended receivership order, to comply with the receivers. This criticism ignores the fact that Mr **Ablyazov**'s position is, that to the best of his knowledge and belief, he is not the owner of any of those companies, save for three companies which were worthless shells, so does not have the power to compel them to do anything.

"Notwithstanding the above, Mr **Ablyazov** asked the receivers in March 2011 to inform him what steps they wished for him to take with regard to contacting the companies which are subject to the extended receivership order, and has never received a response to this request from the receivers."

63. In these circumstances where the criticisms levelled by the receivers at Mr **Ablyazov** are denied, and Mr Matthews has told me that a very thick critique of the first set of criticisms has been provided by Mr **Ablyazov**, I do not consider that it would be appropriate for me to rely upon these criticisms in circumstances where the court cannot judge the extent to which they are valid when they have been denied by Mr **Ablyazov**.

64. That takes me to the first and second categories of disobedience relied upon, namely the disobedience of Mr **Ablyazov** to the disclosure obligations in the freezing order at an early stage in this action and to his admitted failure to mention the role of Mr S until very late in the day.

65. These are serious matters, particularly the failure of Mr **Ablyazov** to comply with his disclosure obligations. Their seriousness is reflected in the fact that they led to the making of the receivership order.

66. If it were otherwise just to make the order, I would not, however, consider it appropriate, on account of Mr **Ablyazov**'s disobedience in 2009, to refuse him an order for security for costs, notwithstanding that he has shown what Mr Smith described as a lack of candour, by failing to disclose the role of Mr S until very recently.

67. Mr **Ablyazov** said some time ago now, or perhaps it was his counsel said, that Mr **Ablyazov** had bared his soul with regard to his assets. The Bank says that he has done nothing of the sort and the Bank maintains that breaches of the freezing order have continued. As a result, they sought and obtained, I think, two extensions of the receivership order. I, in making those extensions, accepted that there was reason to believe that Mr **Ablyazov** owned more companies or assets than he had disclosed.

68. The Bank's case that the freezing order has continued to be breached has also led to the issue of a contempt application which is due to be heard in November of this year.

69. Mr Smith submits that, in those circumstances, it would not be appropriate for the court to make an order for security for costs until the contempt hearing has been determined. He submits that, if the con-

tempt is established, the court would need to consider whether it was just to make an order for security, in favour of someone who had deliberately and, over a long period of time, flouted orders of the court against it.

70. Mr Matthews has submitted that conduct of Mr **Ablyazov** in other parts of this action is not relevant when considering whether it is just to make an order for security for costs in his favour. But it seems to me that, in circumstances where, let it be assumed, a party has breached orders of the court, it must be right, in principle, for the court to consider whether it is just and appropriate to give that party the benefit of another order of this court.

71. The allegations of contempt made by the Bank refer, as I have said, to allegations that the freezing order has been breached over, in effect, the life of this action.

72. I consider that in those circumstances it would be not right in principle to order security before the contempt hearing is resolved and, for that reason, I do not propose to make an order that security be given for Mr **Ablyazov**'s costs.

73. Mr Solodchenko is in a different position. It is not said that he has disobeyed orders of the court. There is no contempt application against him. In those circumstances, it seems to me right, in principle, that he should have security for his costs.

74. I make that order as a matter of principle because the quantum is not yet either agreed or resolved.