

Judgments

QBD, COMMERCIAL COURT

Claim no 2009 Folio 1099

Neutral Citation Number: [2012] EWHC 648 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

COMMERCIAL COURT

Rolls Building

Fetter Lane

London EC4

8 March 2012

Before:

MR JUSTICE HAMBLEN

BETWEEN:

JSC BTA BANK

Claimant/Respondent

-v-

MUKHTAR **ABLYAZOV**

Defendant/Applicant

(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 Stephen Smith and Mr Tim Akkouch (instructed by Hogan Lovells) appeared on behalf of the Claimant.

Judgment

As Approved by the Court

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1. This is an application by the claimant to amend aspects of a Receiving Order obtained against the defendants in August 2010.

2. The application is made without notice and in private and is supported by the Receivers who have been represented at the hearing.

3. The background to the application is set out in a series of judgments which Mr. Justice Teare has given in these proceedings. The general background to the proceedings and to the Receivership Order is set out in his judgment of 16 July 2010 and in particular paragraphs 1 to 35, 126 to 147, and 161 to 170. The immediate background leading up to the present application is covered in his sentencing ruling of 16 February 2012 and his judgment of 29 February 2012.

4. In summary, the claimant bank has claims which I am informed total some \$4.5 billion against the defendants and in particular the first defendant Mr. **Ablyazov**. It is alleged that the claimant's assets were misappropriated when Mr. **Ablyazov** was chairman of the claimant bank. There are eight sets of proceedings in the Commercial Court and one in the Chancery Division.

5. Since August 2009, the claimant has done what it can to ensure that Mr. **Ablyazov**'s assets are preserved so that they will be able to meet any judgment subsequently obtained. The steps taken have included obtaining a worldwide freezing order against Mr. **Ablyazov** in August 2009, cross-examining Mr. **Ablyazov** as to his personal asset disclosure in late 2009, obtaining the Receivership Order in August 2010 and adding 636 undisclosed companies to the Receivership Order in January, April and May 2011.

6. In February 2012, the bank obtained an order committing Mr. **Ablyazov** to prison for a period of 22 months for three deliberate substantial contempts of court. The allegations found proved concerned the non-disclosure of assets in breach of the freezing order, the giving of false evidence on oath, and dealings with assets contrary to the terms of the freezing order. The recent events which have prompted the present application are essentially these.

7. Firstly, Mr. **Ablyazov** has, it would appear, gone into hiding. He did not, despite indications given otherwise to the Court, attend the handing down of the Court's judgment on the contempt application. He failed to attend the judgment and has since disappeared and has not informed his solicitors of his whereabouts.

8. Secondly, Mr. Batyrgareyev, who is Mr. **Ablyazov's** principal disclosed nominee, would appear to have taken a number of recent steps to procure formal corporate documentation relating to companies within Mr. **Ablyazov's** asset holding structures, seemingly for the purpose of dealing with such companies or their assets contrary to terms of the freezing and receivership orders. In particular, it has recently come to the claimant's attention that there has been an attempt to sell a valuable asset covered by the Receiving Order, namely Mr. **Ablyazov's** 10 per cent interest in a company called Novaya Tabachnaya Companiya in return for consideration of 77 million Euros.

9. There have been Cypriot proceedings brought by third parties in relation to this purported sale in which reference is made to a notice given from a company called Instem, of whom the director is said to be Mr. Batyrgareyev. That notice refers to a sale on 10 February of the shareholding and steps were taken in the Cypriot proceedings to seek to prevent that sale from being completed.

10. Thirdly, in his committal judgment Mr. Justice Teare found at paragraph 33 that Mr. Batyrgareyev had executed backdated novation agreements on Mr. **Ablyazov's** instructions for the purpose of dealing with frozen assets and frustrating the Receivership Order.

11. The application is supported by the 37th witness statement of Mr. Hardman and also by the Receivers' report dated 6 March 2012. The amendments which are sought to the Receivership Order and the justification for those amendments are explained in the Receivers' report, in Mr. Hardman's statement and the supporting skeleton argument the Claimant has provided for this hearing.

12. The Claimant seeks to vary the Receivership Order in the following respects:

"a. To appoint the Receivers as 'receivers and managers' over certain companies within Schedule 3 to the Receivership Order. Such an appointment will extinguish the powers vested in the current directors (Messrs Batyrgareyev and Kythreotis) to administer these companies and their assets.

"b. To amend paragraphs 12B and 12C of the Receivership Order so that the Receivers can use the powers granted under those paragraphs to obtain information about the assets which Mr. **Ablyazov** has disclosed.

"c. To list in Schedule 3 to the Receivership Order each company of which Mr. **Ablyazov** has admitted ownership, in order to make it clear that the Receivers' powers extend to the same.

"d. To amend paragraph 2 of Schedule 4 to the Receivership Order, to make it clear that the Receivers are only prevented by that paragraph from carrying on the business of certain CIS-based operating companies.

"e. To bring within the scope of the receivership the three UK properties which Mr. Justice Teare has found, to the criminal standard, belong to Mr. **Ablyazov**.

"f. To correct a small number of minor errors in Schedules 3A to 3C of the Receivership Order, and to add additional persons and entities to Schedule 5 to the Receivership Order."

13. The jurisdiction to make the orders sought derives from section 37(1) of the Senior Courts Act 1981, which provides that:

"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

14. The present application includes an application to appoint the Receivers as managers of various companies, and although section 37 does not make express reference to the appointment of a manager, it has long been recognised that the power to make such an appointment derives from section 37. Examples are the cases of *Hart v Emelkirk* [1983] 1 WLR 1289, and *Parker v Camden London Borough Council* [1986] 1 Ch 162.

15. The distinction between a receiver and a receiver and manager is explained in *Kerr & Hunter On Receivers and Administrators* as follows:

"Where a receiver is required for the purposes not only of receiving rents and profits, or of getting in outstanding property, but also of carrying on or superintending a trade, business or undertaking, he is called a manager, or more usually a receiver and manager."

16. The particular purpose for appointing the Receivers as managers in the present case would be to prevent Mr. Batyrgareyev from continuing to act as a director of companies caught by the Receivership Order, the need for which has been highlighted by the recent activities in relation to corporate documentation and in relation to the 10 per cent shareholding. As Lord Atkinson said in *Moss SS Co Ltd v Whinney* [1912] AC 254, 263:

"This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking a possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

17. Turning to the particular amendments which are sought to be made, the first is that the Receivers be appointed as managers of various companies identified in the draft order. The Receivers in their report state that they have concluded that were Mr. Batyrgareyev or another nominee, Mr. Kythreotis, to remain free to act as directors of any companies within the Receivership, then:

"Any Receivership assets held by or through any such companies will be vulnerable to dissipation or removal from the Receivership."

1. 18. In this regard reference is made to Mr. Justice Teare's judgment in relation to the backdated novation, the recent attempts made to obtain corporate documents and the recent purported sale of the 10 per cent shareholding.

19. The Receivers say that their appointment as managers would be the most simple, efficient and expeditious way of removing the powers of Mr. Batyrgareyev in particular over these companies. The need for such appointment is underscored by the recent findings made by Mr. Justice Teare and the fact that Mr. **Ablyazov** has gone into hiding.

20. It was an important part of the original Receivership Order that Mr. **Ablyazov** cooperate with the Receivers, and indeed paragraph 12 of the order contains a mandatory injunction obliging him to so cooperate.

He has now disappeared and not only is that cooperation therefore not going to be provided, but it also means that he is no longer, it would appear, subject to the jurisdiction and control of this court which was also an important part of the structure of the Receivership Order.

21. So, as Mr. Miles submits on behalf of the Receivers, the landscape has changed and there is a real need to extend the powers of the Receivers to make them managers in the way I have indicated.

22. The second amendments sought involve amendments to paragraphs 12B and C of the Receivership Order. These amendments would enable the Receivers to obtain information in relation to disclosed assets. The existing orders in relation to information have been of assistance, but it is now proposed by the Receivers, and supported by the claimant, that power be extended to what is described in the order as the "Disclosed assets", in order to make the Receivers' powers more efficacious. Again, that is particularly important in the light of the disappearance and therefore the non-availability of the cooperation of Mr. **Ablyazov**.

23. The third category of amendments concerns the Schedule 3 companies. Mr. **Ablyazov** almost invariably holds his companies through an extended corporate chain. The Receivership Order was intended to give control over these structures by appointing Receivers over Mr. **Ablyazov**'s properties generally by referring to his interest in the underlying disclosed asset as the subject matter of the Receivership.

24. There has been an ongoing dispute between the Receivers and Mr. **Ablyazov** as to whether this construction of the Receivership Order is correct. The claimant now applies for the names of all companies in which Mr. **Ablyazov** has a disclosed interest to be added to Schedule 3 of the Receivership Order. This is firstly in order to be able to procure information about all such companies from third parties and secondly to remove any doubt as to their appointment as Receivers and managers over such disclosed companies.

25. Given the difficulties which the Receivers have met in procuring information from third parties who were not explicitly named in the Receivership Order, and given the expectation that Mr. **Ablyazov** can no longer be expected to cooperate with the Receivers, the need for the amendments to the order is made out. This amendment would also involve changes to paragraph 2 of Schedule 4 of the Receivership Order so as to make it clear that the Receivers have power to carry on the business of the disclosed company but not of the local operating companies at the bottom of each corporate structure.

26. Next, the claimant seeks an amendment that the Receivership Order be extended to cover three UK properties which Mr. Justice Teare found, to the criminal standard, were owned by Mr. **Ablyazov**. These are identified in the original freezing order and they consist of a substantial property called Carlton House on Bishops Avenue in Hampstead, a substantial estate near Windsor called Oaklands Park, and also a flat in London called Alberts Court.

27. The registered proprietors are companies who are already caught by the Receivership Order, but the claimant and the Receivers have real concerns as to the maintenance of these valuable properties in the light of Mr. **Ablyazov**'s disappearance, and also evidence as to the lack of upkeep and lack of insurance covering these properties.

28. As far as Carlton House is concerned, it is unoccupied and it appears that there is no electronic security. It has had a garage broken into and there is real concern that the ground may be occupied by travellers or that the house could be broken into and vandalised.

29. In my judgment it clearly makes sense in the interests of preserving these assets that the Receivership Order be extended to cover them.

30. The other amendments sought are essentially minor amendments to names in the existing order, and to refer to additional corporate service providers or registered agents in the Schedules to the order.

31. Mr. Hardman in his statement at paragraphs 37 to 43 sets out various matters which might be raised in opposition to the order which is made. I am satisfied that none of them provide a reason why the order should not be made, but I would note in particular paragraph 37 in which he states as follows:

"The Bank anticipates that, as on the initial application for receivership, Mr. **Ablyazov** may argue that providing the receivers with these extra powers risks causing loss to his businesses. The Bank does not, however, consider that this is a point with any merit, mainly because the receivers are not seeking to become appointed as managers of any operating companies and are not seeking to run the businesses of any operating companies themselves. Rather, the receivers are simply seeking to be appointed as managers of the offshore holding companies to ensure that they are better able to prevent assets being dealt with in breach of the Freezing Order."

32. For the reasons which I have outlined, the reasons given by the Receivers in their report, and by Mr. Hardman in his witness statement, I am satisfied that the amendments sought for the Receivership Order should be made. In addition I am also satisfied that in line with earlier orders there should be provision that service of the order may be delayed until 22 March 2012 in order that the amended order can be recognised in other jurisdictions. In addition, again in line with earlier orders, it should be provided that no documentation relating to the application should be put on the court file until after service and in addition permission should be given to enforce the Receivership Order overseas. Again, this is similar to previous orders.

33. Finally, provision is also to be made for the purpose of ensuring that appropriately certified copies of the amended Receivership Order and certificates pursuant to judgment regulation are produced.

34. For all those reasons I grant the application with the amendments which have been discussed during the course of the hearing.

MR SMITH: My Lord, we're very much obliged. We will agree a revised form of the Order and attached Receivership Order with my learned friend and submit it to your Lordship for --

MR JUSTICE HAMBLÉN: Yes, if you would, thank you very much.

If you want a transcript of my ruling, can you just make sure the transcribers have the bundles and the documents which I have referred to.

MR SMITH: Yes, of course.

MR JUSTICE HAMBLÉN: All right, thank you very much.