Judgments

JSC BTA Bank v Ablyazov

[2012] EWCA Civ 639

CA, CIVIL DIVISION

Lord Justice Moore-Bick

16 May 2012

Contempt of court – Committal – Appeal against committal – Claimant applying for conditions to be imposed upon contemnor's challenge against committal order – Contemnor arguing no justification for refusing to hear challenge – Whether conditions should be imposed on appeal against committal order.

Practice – Appeal – Appeal against committal order – Claimant applying for conditions to be imposed upon contemnor's challenge against committal order – Contemnor arguing no justification for refusing to hear challenge – Whether conditions should be imposed on appeal against committal order.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

LORD JUSTICE MOORE-BICK:

Background

1. This application represents the latest stage in the long-running battle between the claimant, JSC BTA Bank ("the Bank"), and its former chairman and part-owner, Mr. Mukhtar **Ablyazov**. The Bank alleges that Mr. **Ablyazov** has misappropriated very large sums of money from it using an extensive network of offshore companies. The total amount he is said to have stolen is put at about US$5 billion.

2. The proceedings began on 13th August 2009 when the Bank obtained a without notice worldwide freezing order against Mr. **Ablyazov** and a number of companies of which he is said to be the ultimate beneficial owner. The order was subsequently continued by Teare J. following a contested hearing and has since been extended and modified on a number of occasions. An order for the disclosure of his assets was made against Mr. **Ablyazov** in support of the freezing order and he was also ordered not to leave the jurisdiction until further order. Following what the court held was a failure to comply properly with the disclosure order, an order was made for the cross-examination of Mr. **Ablyazov**, which took place before Teare J. in October and November 2009. On 9th November 2010 receivers were appointed in respect of the assets of a number

of companies believed to be beneficially owned by Mr. **Ablyazov** because the court felt unable to trust him to comply with the terms of the freezing order.

3. In May 2011 the Bank applied to the court for an order that Mr. **Ablyazov** be committed to prison for contempt. It alleged that he had committed over thirty breaches of the court's orders or had otherwise acted in ways that amounted to contempt of court. In the interests of practical case management Teare J. ordered the Bank to select three allegations for trial, which he then proceeded to consider over a period of 13 days between 30th November and 21st December 2011. On 16th February 2012 Teare J. handed down a written judgment in which he held that Mr. **Ablyazov** was in contempt of court in a number of respects and ordered that he be committed to prison for a period of 22 months. He subsequently ordered Mr. **Ablyazov** to pay the Bank's costs and to make an interim payment in the sum of £750,000 in respect of them.

4. Mr. **Ablyazov** was not present in court when the judgment was handed down, despite having assured the judge that he would attend, and has since gone into hiding. His whereabouts are unknown, even, it appears, to his own solicitors, but there are strong grounds for believing that he has fled the jurisdiction and is living abroad. On 29th February 2012 pursuant to an application by the Bank the judge ordered Mr. **Ablyazov** to surrender himself to the Tipstaff by 4 pm on 9th March 2012 and by 4 pm on 14th March 2012 to serve on the Bank's solicitors an affidavit informing them of the location, nature and value of all his assets and any dealings with them since 27th August 2009. The judge also ordered that unless Mr. **Ablyazov** complied with those orders he should be debarred from defending a number of the actions brought against him by the Bank, that his defences should be struck out and that the Bank should be at liberty to enter judgment against him. However, the judge suspended the operation of that part of his order pending the outcome of any appeal by Mr. **Ablyazov** against the committal order. Mr. **Ablyazov** has since served a witness statement in response to the order, but has refused to make and file an affidavit because he is unwilling to disclose his whereabouts.

5. Just within time Mr. **Ablyazov** lodged an appeal against the order for his committal which is expected to be heard before the long vacation. On 13th March 2012 the Bank applied to the court for an order that unless within seven days Mr. **Ablyazov** complies with certain conditions his appeal be dismissed. The conditions which the Bank has asked the court to impose are

> (i) that Mr. **Ablyazov** surrender himself to custody;
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> (ii) that he make and file an affidavit providing full particulars of all dealings undertaken in connection with his assets since 1st January 2012;
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> (iii) that he satisfy the order for an interim payment in respect of the judgment for costs in favour of the Bank; and
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> (iv) that he provide security for the Bank's costs of the appeal in the sum of £200,000.

6. Mr. Stephen Smith Q.C. for the Bank submitted that over the course of the proceedings Mr. **Ablyazov** has repeatedly demonstrated a complete disregard for the authority of the court. He has complied with orders when it suited him, but has disregarded orders whenever he found it inconvenient to comply with them or thought that it was in his interests to ignore them. He is now seeking to challenge the committal order (and through it the orders made on 29th February 2012) on the basis that he will take the benefit of his appeal if the orders are set aside but will refuse to comply with them if they are upheld. That, he submitted, is not a position that Mr. **Ablyazov** should be allowed to adopt. If he wants to challenge the committal order, he should surrender himself to custody so that, if his appeal fails, he can be made to serve his sentence. For similar reasons Mr. **Ablyazov** should not be allowed to pursue an appeal unless he complies with the order that he make an affidavit giving disclosure, make a payment to the Bank on account of its costs and provide security for the costs of his appeal.

7. Mr. Charles Béar Q.C. for Mr. **Ablyazov** pointed out that a person committed to prison for contempt has an unfettered right to appeal against the committal order and submitted that, whatever restrictions have in general been placed on hearing those who are in contempt, the courts have always recognised that a contemnor is normally entitled to be heard in support of an appeal against the very order which he has been found to have disobeyed. It would be unprecedented, he submitted, for the court to impose on Mr. **Ablyazov** a requirement that he surrender to custody as a condition of being allowed to pursue his appeal against the committal order. As to the other conditions, he submitted that Mr. **Ablyazov** did not have the means to make a payment of £750,000 on account of the Bank's costs and that to require him to do so would stifle his appeal. He also submitted that to require Mr. **Ablyazov** to provide security for the Bank's costs of his appeal would be contrary to established practice and wrong.

Surrender to custody

8. Most of the argument was directed to the question whether Mr. **Ablyazov** should be required to surrender himself to custody as a condition of being allowed to pursue his appeal. The Bank's case is that he has demonstrated on more than one occasion that he is unwilling to accept the authority of the court and will not comply with its orders unless it suits him to do so. Mr. Smith pointed to the fact that he has consistently failed to provide the disclosure required by the freezing order, that he has failed to co-operate with the receivers, that he has expressly refused to make an affidavit verifying his disclosure, that there are good grounds for believing that he has left the jurisdiction in defiance of the order to remain here and good reasons for believing that he has continued to deal with his assets in breach of the freezing order. He submitted that it is an abuse of the process for Mr. **Ablyazov** to take advantage of the court's procedure for his own benefit while refusing to comply with its orders when the proceedings go against him. Moreover, he submitted that Mr. **Ablyazov**'s refusal to surrender to custody undermines the administration of justice and the Bank's right to a fair trial because the court's power to compel him to give the disclosure and assistance to the receivers necessary to enable the Bank's rights to be vindicated can be exercised effectively only if he is under its control.

9. Three lines of authority have a bearing on this limb of the Bank's application. The first concerns the court's discretion to refuse to hear a contemnor who has failed to purge his contempt. *Hadkinson v Hadkinson* [1952] P. 285 involved a dispute over the custody of a child following proceedings for divorce. The mother had been given custody of the child but had been ordered not to take him out of the jurisdiction without the court's consent. She subsequently remarried and took him to Australia where she was living with her new husband. The court ordered her to return the child to England and it was against that order that she sought to appeal. The father submitted that she should not be heard because she was in breach of the original order not to remove him from the jurisdiction. The court accepted that submission and declined to hear her. Romer L.J., with whom Somervell L.J. agreed, said (page 288):

> “It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. ...
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> Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.”

10. However, the rule was not regarded as absolute, as can be seen from the following passage, again from the judgment of Romer L.J., at page 289:

> “Is this case, then, an exception from the general rule which would debar the mother, as a person in contempt, from being heard by the courts whose order she has disobeyed? One of such

> exceptions is that a person can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the order upon which his alleged contempt is founded; neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt."

11. Denning L.J. preferred a different approach to the question. He said at page 298:

> "Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *re Clements v. Erlanger* (1877) 46 L.J. Ch. 375, 383: "I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction." Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

12. It is of note that all members of the court recognised that a contemnor is normally entitled to be heard in order to challenge the very order of which he is in breach.

13. The approach of Denning L.J. was subsequently approved by the House of Lords in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 A.C. 1, a case involving a journalist's refusal to identify his source in breach of an order to do so. After the defendant had been found guilty of contempt he appealed against the order for disclosure. The Court of Appeal refused to hear him in support of his appeal on the grounds that he was in wilful and contumacious contempt, but that decision was overruled by the House of Lords. Having referred to the judgment of Denning L.J. in *Hadkinson v Hadkinson*, Lord Bridge, with whom Lord Griffiths, Lord Oliver and Lord Lowry agreed, said at page 46G:

> "I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning L.J. better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions. But in practice in most cases the two different approaches are likely to lead to the same conclusion, as they did in *Hadkinson* itself and would have done in *The Messiniaki Tolmi* [1981] 2 Lloyd's Rep. 595.
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> Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal the court must, in my opinion, have a discretion to decline to entertain his appeal against the order. Thus, in the instant case, if Mr. Goodwin alone had been before the court and if the original order of Hoffmann J. had required no more than the deposit of Mr. Goodwin's notes with the court in a sealed envelope to be returned to him unopened in the case of a successful appeal, a refusal by the Court of Appeal to entertain any appeal against the order until it had been complied with could not, I think, have been faulted. This would have been, as was properly conceded by Mr. Robertson, an exercise of discretion fully in accordance with the principle as stated by Denning L.J. in the *Hadkinson* case. It would also, I

> think, have been justifiable in terms of the rules regulating the matter as formulated by Brandon L.J. in *The Messiniaki Tolmi* on the ground that to put one party in a position of having to resist an appeal against an order made in his favour with which the other party has in any event no intention of complying is an abuse of the process of the court."

14. Lord Oliver added the following comments at page 50D:

> "First, it is suggested that to decline to hear an appellant who is in contempt infringes the maxim "audi alteram partem" which lies at the root of every civilised system of law. A person whose very liberty is threatened by an order made against him ought, it is said, to have an absolute right to appeal against the very order that has put him in contempt. For my part, I think that this is too facile an analysis. The maxim "audi alteram partem" means not that a party has an absolute right in all circumstances to be heard in his own defence but that he must be given a proper opportunity to be heard. So long as that opportunity is given upon terms with which the proposing appellant can reasonably comply, there is not and there should not be any impediment in principle to the imposition by the court of proper conditions which require to be complied with before the appeal is heard. It is no denial of justice, for instance, to strike out the pleading of a litigant who contumaciously fails to comply with interlocutory orders, so that the action goes by [de]fault, or to impose a condition of bringing money into court as the price of giving leave to defend or even, in an appropriate case, of appealing. So I cannot, for my part, see why it should be considered a denial of justice to make it a condition of appealing that a litigant subject to an order should, before appealing, comply with the order to an extent which does not compromise his position in the event of his appeal succeeding. Whilst, therefore, there must clearly be a strong indication in favour of preserving a litigant's right to appeal, even though he may be in contempt of court, I am in entire agreement with my noble and learned friend Lord Bridge of Harwich in thinking that there must also be a discretion to refuse to hear the contemnor and in favouring the flexible approach suggested by the judgment of Denning L.J. in *Hadkinson v. Hadkinson* [1952] P. 285. One can, of course, envisage, as he did in that case, circumstances in which the court would be unlikely to exercise its discretion in favour of hearing a contemnor - he instanced the case of an abuse of the process or of disobedience to the order impeding the course of justice - but I would not be in favour of laying down any rules for the exercise of discretion, though it can do no harm to give examples which may serve as guidelines. For instance, where the appeal is grounded on an alleged lack of jurisdiction to make the order at all, it would seem, in general, right that the contemnor should be heard. At the other end of the scale, if the contempt consisted of a contumacious refusal to reveal the whereabouts of a ward of court, it would be likely to require a strong case before the court would consider entertaining a contemnor's appeal."

15. In *Arab Monetary Fund v Hashim* (unreported, 21st March 1997) the court had to consider whether to hear Dr. Hashim in support of his appeal against the judgment against him. Having referred to the speeches in *X Ltd v Morgan Grampian*, Lord Bingham C.J. (with whom Peter Gibson and Phillips L.JJ. agreed) said:

> "From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.
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> . . . I have, for my part, reached the clear conclusion that the court should decline to hear Dr. Hashim on his appeal. The judge found that he had broken a number of orders quite deliberately and knowingly. These were serious contempts, as evidenced by the penalty which the judge imposed. In the view of the judge these contempts constituted a "pattern of persistent disobedience". Most seriously, the contempts were designed to deny the AMF the lawful fruits

> of its judgment. The contempts are continuing to this day. There has been no attempt to purge, nor to obey the orders, nor to promise compliance. It is obvious that the AMF cannot track down its stolen assets until it knows where they are. Dr. Hashim's conduct is aimed at preventing the AMF doing that and he has so far been extremely successful. It would, in my judgment, be contrary to law, justice and common sense that a man who has shown himself willing wantonly to abuse the process of the court should be permitted to invoke that same process for his own ends. I would deny him that right and would accordingly strike out his appeal."

16. Finally, I was referred to the decision of this court in *Motorola Credit Corpn v Uzan (No. 2)* [2003] EWCA Civ 752, [2004] 1 W.L.R. 113, in which the court, having considered those authorities, expressed the view that it is necessary to satisfy considerations of fairness for the court to hear a person in contempt when the purpose of his application is to appeal against the order disobedience to which has put him in contempt. Potter L.J. giving the judgment of the court said:

> "50. Although more modern authority has made clear that the discretion of the court is free from the constraints of such a categorised approach, the proposition that the court will hear a person in contempt when the purpose of his application is to appeal against the order disobedience to which has put him in contempt, has the merit not only of good sense; it seems to us necessary to satisfy considerations of fairness. Whether or not a party is in contempt of court by refusing to obey an order irregularly made, or one consequent upon and/or ancillary to an order so made, the circumstances will be rare indeed where it can be right to shut him out from arguing an appeal or application to appeal against that order made in due time.
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> 51. In appealing the findings of contempt, and in applying for relief from the penalties imposed for such contempts (neither of which requires permission to appeal), the defendants cannot be prevented from putting forward all relevant circumstances, arguments and considerations which have governed or are relevant to their contempt. In this case, where the burden of the argument is that the orders in respect of which the defendants are in contempt were made consequent upon an earlier order irregularly made, it seems to us neither logical nor appropriate to shut out argument directed to reversal of the original order; . . ."

17. The second line of authority arises in a different field, but is nonetheless relevant to the issues that arise on the present application. It concerns the application of article 6 of the European Convention on Human Rights to the right of a convicted person who has failed to attend the hearing of his appeal to be heard by a lawyer in his absence. In *Poitrimol v France* (1994) 18 E.H.R.R. 130 the applicant was convicted in his absence of absconding with his children in breach of a custody order. Both the Cour d' Appel and the Cour de Cassation declined to hear the lawyer acting for him because the applicant had failed to respond to the summons for him to attend the hearing. The European Court of Human Rights held that the applicant's right under article 6(3)(c) to defend himself in person or by a lawyer had been infringed. The course taken by the courts was disproportionate in the circumstances because it deprived the applicant of his only chance of having arguments of law and fact presented at appellate level against the charge brought against him.

18. In *Lala v The Netherlands* (1994) 18 E.H.R.R. 586 the applicant was convicted of forgery. He appealed against his conviction but failed to appear at the hearing of the appeal because he would have been liable to arrest for failure to pay a fine imposed on an earlier occasion. The Court of Appeal refused to allow counsel to represent him and the appeal was dismissed. The European Court of Human Rights held that there had been an infringement of the applicant's rights under article 6 of the Convention. It said:

> "33. . . . as this Court pointed out in its *Poitrimol* judgment, in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial. As a general rule, this is equally true for an appeal by way of rehearing. However, it is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal, the more so if, as is the case under Netherlands law, no objection may be filed against a default judgment given on appeal.

> In the Court's view the latter interest prevails. Consequently, the fact that the defendant, in spite of having been properly summoned, does not appear, cannot - even in the absence of an excuse - justify depriving him of his right under Article 6 section 3 of the Convention to be defended by counsel."

19. *Poitrimol v France* was followed and applied in *Omar v France* (2000) 29 E.H.R.R. 210 where the court said:

> "34. . . . the right to a court, of which the right of access is one aspect, is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved."

20. In that case also the Cour de Cassation had refused to hear the applicants' lawyer because they had failed to attend the appeal. Had they done so, however, they were liable to be arrested following their conviction before the lower court of offences of laundering the proceeds of drug trafficking. In that regard the court observed:

> "40. The Court can only note that, where an appeal on points of law is declared inadmissible solely because, as in the present case, the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time limit for lodging an appeal has expired.
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> This impairs the very essence of the right of appeal, by imposing a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and exercise of the rights of the defence on the other."

21. In *Van Geyseghem v Belgium* (2001) 32 E.H.R.R. 24 the Brussels Court of Appeal refused to hear the applicant's lawyer in support of her appeal because she failed to attend the hearing. Again, the court held that there had been a breach of article 6. The court said:

> "34. . . . The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended."

22. Finally it is necessary to refer to the decision of the court in *Pietiläinen v Finland* (22nd September 2009), a case in which the applicant had been convicted of aggravated fraud. As in the other cases to which I have referred, he failed to attend the appeal in person and as a result the court dismissed his appeal. Drawing on its earlier decisions, the European Court of Human Rights held that there had been a breach of article 6. It said:

> "32. The right of everyone charged with a criminal offence to be defended effectively by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjus-

> tified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended (see *Van Geyseghem v. Belgium* [GC], no. 26103/95, §34, ECHR 1999-I.).
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> 33. Moreover, Court reiterates that the right to a fair trial, guaranteed under Article 6, §1 of the Convention, comprises *inter alia* the right of the parties to the proceedings to present the observations which they regard as pertinent to their case. As the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, §33, Series A no. 37), this right can be regarded as effective only if the applicant is in fact "heard", that is, his observations are properly examined by the courts. Article 6 §1 of the Convention places the courts, *inter alia*, under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision . . .
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> 34. The principles established in the above-mentioned cases apply to the present case. It was the Helsinki Appeal Court's duty to allow the applicant's counsel, who attended the hearing, to defend him, even in his absence. "

23. Although not directly concerned with the court's discretion to refuse to hear a person in contempt, this line of authority emphasises the importance attached to allowing a person on whom a criminal penalty has been imposed to address the court in support of his appeal against that penalty, particularly when his liberty is at stake.

24. The third line of authority is that represented by the decision in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, in which this court held that it was in the interests of justice to require the appellant to satisfy, or give security for, the judgment debt as a condition of proceeding with the appeal. Having considered the terms of CPR 52.9 Clarke L.J., with whom Wall J. agreed, said

> "41. We turn to the question whether there is a compelling reason for making the appellant either pay the judgment debt or secure it as a condition of permitting it to proceed with the appeal. We have reached the conclusion that the answer to that question is yes. In our judgment, the facts which combine to constitute a compelling reason are the following:
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> (1) The appellant is an entity against whom it will be difficult to exercise the normal mechanisms of enforcement. It is registered in the British Virgin Islands and has no assets in the United Kingdom. There is, accordingly, a very real risk that if the appeal fails, the respondents will be unable to recover the judgment debts and costs as ordered by Silber J. Given the attitude of the appellant to date, including that demonstrated on these applications, it is fanciful to think that the appellant will co-operate in the enforcement process.
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> (2) The appellant plainly either has the resources or has access to resources which enable it both to instruct solicitors and leading and junior counsel to prosecute its appeal and make an application to the court for a stay of execution and to provide a substantial sum by way of security for costs.
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> (3) There is no convincing evidence that the appellant does not either have the resources or have access to resources which would enable it to pay the judgment debt and costs as ordered. It has failed to do so. It is, accordingly, in breach of the orders made by Silber J. on 12 July 2001.
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> (4) The discovery which the appellant has provided of its financial affairs is inadequate and gives the court no confidence that it has been shown anything near the truth. Moreover, as stated earlier, it has produced evidence (when it wanted to) that it was a thriving and profitable

> institution. It has wealthy owners and there is no evidence that, if they were minded to do so, they could not pay the judgment debt including the outstanding orders for costs.
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> (5) For the reasons we have already given we are not persuaded that this appeal will be stifled if we make the order sought.
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> (6) In these circumstances, we find it unacceptable that absent any other orders of the court the appellant is intending to prosecute the appeal (and is willing to put up security for costs in order to do so) whilst at the same time continuing to disobey the orders of the court to pay the judgment debt and costs, as well as seeking to persuade us that it cannot do so.
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> 42. In our judgment these six factors add up to a compelling reason to make the orders sought by the respondents. We think there is a real risk that, unless the orders sought are made, the respondents, if the appeal is dismissed, will be deprived of the fruits of the judgment, and will only be able to recover whatever sum is secured by way of costs. In our judgment, on the facts of this case, it is not just to allow the appellant to proceed with an appeal which is designed not only to reverse the judge's decision that it is liable to the respondent but also to obtain judgment on its counterclaim for a very substantial amount, especially in circumstances in which it appears that it is willing and able to use resources from others, including perhaps its owners, while being unwilling to seek and obtain resources to discharge the judgment debt.
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> 43. Once it is concluded that there is a compelling reason to make the order sought, there can really be no doubt as to how the second question identified above, namely whether the court should exercise its discretion to make the order, should be answered. In short, it would be just, and in accordance with the overriding objective to make the order. We do not think that such a solution is in any way disproportionate. The appellant has been ordered to pay the judgment debt and costs after a trial, and should do so as a condition of the court giving it permission to challenge the order, provided only that it can raise the money. We see nothing unjust or inconsistent with the overriding objective in requiring such a company to obey the court's orders as a condition of being permitted to continue to prosecute its appeal. Thus we see nothing unjust in providing the trust which owns the appellant with a choice. If it is in the interests of the appellant for the appeal to continue, the trust must procure the payment of the current orders. If it does, the appeal will proceed. If it does not, the appeal will be struck out."

25. These principles were subsequently applied in *Taiga v Taiga* [2004] EWCA Civ 1399 and *Masri v Consolidated Contractors International (UK) Ltd* [2007] EWCA Civ 702. In the latter case the respondent submitted that to require him to pay the judgment debt as a condition of being allowed to proceed with his appeal would infringe his rights under article 6 of the Convention. Lloyd L.J. rejected that argument on the grounds that such an order represented in that case a proportionate response to the appellant's refusal to comply with the court's order and was in conformity with the decisions of the Strasbourg court in a series of cases.

26. Although in formal terms the issue before the court is not whether it should exercise its discretion to refuse to hear Mr. **Ablyazov**, the nature of the orders sought by the Bank makes it necessary to consider whether the dismissal of his appeal without any consideration of the merits would be an appropriate sanction if he failed to comply with them. For this reason the starting point for a consideration of the Bank's application is the first of those three lines of authority. This establishes that the question whether to decline to hear a contemnor, a course which will almost invariably lead to his appeal or application being dismissed, is to be determined by reference to how, in the circumstances of the individual case, the interests of justice will best be served. That is how the principle was formulated by Lord Bingham in *Arab Monetary Fund v Hashim*, reflecting the judgment of Denning L.J. in *Hadkinson v Hadkinson*. When deciding that question one factor the court must bear in mind is that, as Denning L.J. observed, it is a strong thing for a court to refuse to hear a party and is only to be justified by grave considerations of public policy. It is a step which a court will take only when the contempt itself impedes the course of justice. Moreover, the authorities show that particular care is to be taken before declining to hear a contemnor who is appealing against the very order of which he

is in breach and in my view the same degree of care is required where, as in this case, the contemnor is appealing against the judge's findings of fact which constituted a breach of the relevant order. Nonetheless, it is clear from the speech of Lord Bridge in *X Ltd v Morgan-Grampian* that the court may be justified in declining to hear a contemnor who not only wilfully refuses to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal.

27. Mr. Béar submitted that committal proceedings are to be treated as criminal proceedings for the purposes of article 6 of the Convention and that the decisions of the European Court of Human Rights which make up the second line of authority point strongly to the conclusion that a refusal to hear a contemnor who wishes to challenge the finding of contempt against him can never be justified. Mr. Smith sought to distinguish those decisions on the grounds that they are concerned with criminal rather than civil proceedings, but I do not think that they can be put to one side so easily. The decisions cited by Lloyd L.J. in *Masri v Consolidated Contractors* concerned ordinary civil proceedings and it is well established that in certain circumstances the court will be justified in imposing the sanction of striking out for failure to comply with its order. Proceedings for contempt are fundamentally different because they involve the risk of the sanction of imprisonment and are therefore to be regarded as criminal rather than civil in nature for the purposes of article 6: see *Newman v Modern Bookbinders Ltd* [2000] 1 W.L.R. 2559, *Mubarak v Mubarak* [2001] FLR 698 and *Daltel Europe Ltd v Makki* [2006] EWCA Civ 94, [2006] 1 W.L.R. 2704. There is no difference in principle or practice between an appeal against a conviction leading to a sentence of imprisonment and an appeal against a finding of contempt leading to an order of committal.

28. Mr. Smith submitted that the discretion to decline to hear a person in contempt has not been abrogated by the European Court of Human Rights and in that I think he is correct. However, it is, I think, reasonably clear that when deciding whether it is in the interests of justice not to hear a contemnor the court must take into account all the circumstances of the case. These will include the nature of the proceedings and the consequences for both parties of the decision one way or the other, but the importance of allowing a contemnor to contest the decision against him is a factor that has been emphasised in domestic case law. The Strasbourg cases certainly reflect the particular circumstances under consideration, but they emphasise in a more general way the importance of allowing a person convicted of an offence an opportunity to contest the decision against him and the need to ensure that any response to his failure to comply with the court's order is not disproportionate. The approaches are not in my view inconsistent and although the Strasbourg cases emphasise the importance of allowing the appellant to be heard, especially when his personal liberty is at stake, they do not differ significantly from the approach adopted in the more recent domestic cases. The importance that has been attached to allowing the appellant to address the court in support of his challenge to the order of committal is, to say the least, a powerful factor to be taken into consideration when deciding whether the interests of justice are better served by declining to hear him. The European cases to which I have referred were cited to the court in *Motorola v Uzan (No. 2)*, but the court did not find it necessary to consider them in detail. Although the language used by the Strasbourg court has become more definite over the course of time, the underlying principle of proportionality has not in my view been superseded. I do not accept, therefore, that any refusal to hear a contemnor would inevitably involve a breach of article 6, but I do accept that the circumstances in which such a course would be justified are likely to arise very rarely. The mere fact that the applicant is in contempt is not, in my view, sufficient justification.

29. One important factor to bear in mind in the present case is that there are two parties to the litigation and that in seeking to determine how the interests of justice will best be served it is important not to lose sight of the Bank's very real interest in obtaining information which will enable it to identify the ultimate destination of the funds to which it lays claim. That is unlikely to be achieved without the co-operation, however grudging, of Mr. **Ablyazov**. The committal order was intended in part to encourage him to give full and proper disclosure of his assets and to that extent the interests of justice would be better served by bringing him within the jurisdiction of the court. Moreover, there are certainly strong grounds for believing that Mr. **Ablyazov** is in wilful and contumacious default of other orders of the court, despite the explanation he has given in his most recent statement for his refusal to surrender to custody or to make an affidavit giving disclosure of his assets. Much of what he says appears at first sight to be exaggerated and implausible and it is striking that the fears for his personal safety on which he now relies so heavily were voiced only after judgment was given in the

committal proceedings. However, they cannot be entirely dismissed, as the judge himself has accepted. It can also be said that, as in the case of *Arab Monetary Fund v Hashim*, Mr. **Ablyazov** is doing his best to prevent the Bank from enjoying the fruits of any judgment it may in due course obtain against him and the other defendants and to that extent is abusing the process of the court. He has, for example, dealt with assets in breach of the freezing order and there is evidence to suggest that he is seeking to do so again. He has failed to co-operate with the receivers. There are very strong reasons for thinking that he has left the jurisdiction in breach of the court's order. All these factors point towards the conclusion that the court should make the order which the Bank seeks, even though a failure to comply would lead to the dismissal of Mr. **Ablyazov**'s appeal and in turn to the striking out of his defence to the substantive claim.

30. Looking at the matter in the round, the question then arises whether this is one of those cases in which it would be appropriate for the court, acting in the interests of justice, to make an order that will result in Mr. **Ablyazov**'s appeal being dismissed unless he has surrendered to custody. Three of the conditions which the Bank is asking the court to impose on Mr. **Ablyazov**'s right to proceed with his appeal reflect orders made following the findings of contempt against him. Those orders were made as a consequence of the finding of contempt and to that extent it can be said that he ought to be allowed to challenge them along with the finding itself, despite his refusal to comply with them in the meantime. Moreover, the decision in *Omar v France* suggests that to impose a condition that Mr. **Ablyazov** surrender to custody as the price of being allowed to pursue his appeal and the consequent infringement of his personal liberty would itself be a disproportionate response to his contempt. It is interesting to note that the Court of Appeal no longer declines to hear the appeal of a convicted person on the grounds that he has absconded: see *R v Charles (Jerome)* [2001] EWCA Crim 129, [2001] 2 Cr. App. R. 15.

31. In all the circumstances I have come to the conclusion that it would not be in the interests of justice to require Mr. **Ablyazov** to surrender himself to custody as a condition of proceeding with his appeal. However badly he may have behaved, Mr. **Ablyazov** is seeking to challenge an order which directly affects his personal liberty. As Potter L.J. observed in *Motorola v Uzan (No. 2)*, the circumstances will be rare indeed where it will be right to shut a contemnor out from arguing an appeal against an order of committal. I accept that full and proper disclosure of the location of the assets which the Bank is seeking to recover is necessary if there is to be a fair trial of the action, but I do not think that an order of the kind now being sought is the right way to protect the Bank's position. Mr. **Ablyazov** has not been committed simply for failing to give the disclosure required by the freezing order, but for specific acts and omissions amounting to contempts of court. If Mr. **Ablyazov** were to succeed in his attempt to have the committal order set aside, the requirement to surrender would disappear. Subjecting him to custody would not then be available as a way of compelling him to give the required disclosure. If his appeal fails, it may at that stage be appropriate to require him to surrender to custody as the price of being allowed to contest the claim, but that is for another day. I do not think that he should be required to surrender to custody as the price of being heard on this appeal.

The interim payment, security for costs and disclosure

32. Mr. **Ablyazov** has so far failed to satisfy the order that he make an interim payment of £750,000 to the Bank on account of its costs of the committal proceedings. The reason he has given is that he does not personally have the means to satisfy it, or indeed to finance his own legal costs, and that those who are providing the funds needed to pay his legal expenses are not willing to lend him the money to pay the Bank's costs.

33. The fact that Mr. **Ablyazov** is able to finance his defence to the Bank's claim is evidence that he does have access to substantial funds, at least for some purposes, and there is no reliable evidence (in contrast to his own assertion) to the contrary. Quite apart from that there remains the question whether he is to be believed when he says that funds are available only by way of loans from third parties who are not willing to finance his liability to the Bank. On a previous occasion Christopher Clarke J. found that there were strong grounds for believing that the two companies which had at that time been providing funds to Mr. **Ablyazov**, Wintop Services Ltd and Fitcherly Holdings Ltd, were in fact his creatures and that there was good reason to

believe that the company which is now said to be lending him funds to support the litigation, Green Life International S.A., is also owned or controlled by him.

34. Several of the factors which led the court in *Hammond Suddard v Agrichem* to require payment of the judgment debt as a condition of proceeding with the appeal are present in this case: difficulty in exercising the normal mechanisms of enforcement leading to a real risk that the Bank will be unable to recover its costs; access to funds sufficient to meet the considerable costs of instructing lawyers; a lack of convincing evidence that Mr. **Ablyazov** does not have access to resources that would enable him to make the interim payment; a lack of candour in giving disclosure of his financial affairs; and a lack of solid evidence that the order sought would stifle the appeal. On the other hand, in this appeal Mr. **Ablyazov** is not directly challenging the order that he pay the Bank's costs, or the order for an interim payment; he is appealing against the order for his committal. If he were simply appealing against the order for costs, there would be strong grounds for holding that he should not be permitted to pursue the appeal while he continued to disobey the order of the court and for concluding that there were compelling reasons for imposing the condition sought by the Bank.

35. Mr. Béar submitted that for the court to make an “unless” order would be contrary to the decision of the judge about how best to manage the proceedings, but I do not think that is correct. The judge was concerned to ensure that preparation for trial continued pending the determination of the present appeal, which, as he recognised, might result in a victory for Mr. **Ablyazov** and the consequent setting aside of his orders. In the absence of a stay any failure to comply with his orders would result in judgment being entered against Mr. **Ablyazov** and the proceedings being brought to a halt, subject only to a successful appeal. A failure to comply with an “unless” order made by this court, however, would lead to the dismissal of the appeal itself. However, it is precisely for this reason that it is necessary to consider whether the penalty for failure to comply with an order of that kind would represent a disproportionate response in this case.

36. The authorities to which I have referred in connection with the first limb of the Bank's application suggest that it would rarely be appropriate for the court to refuse to hear a person seeking to challenge an order for his committal, even though he remains in contempt. For similar reasons I think that it will rarely be appropriate to impose a condition of the kind sought by the Bank on the pursuit of such an appeal, since a failure to comply with it will lead to the dismissal of the appeal without the appellant's being heard. In that respect I can see no reason to differentiate between any of the conditions which the Bank is asking the court to impose. Support for that view can be found in the authorities relating to orders for security for costs. In *Hood Barrs v Heriot* [1896] 2 Q.B. 375 an order for attachment had been made against the appellant for breach of an injunction. The respondent applied for an order for security for the costs of her appeal on the grounds that the appellant had no property available for execution that was capable of satisfying an order for costs should the appeal fail. The court declined to make such an order. Lord Esher M.R. pointed out that the order of attachment affected the appellant's liberty and expressed the view that it would not ordinarily be appropriate to make an order for security for costs in those circumstances. Although he did not expressly state the reasons for that, I think it is reasonably clear that he considered that an appellant seeking to challenge an order for his attachment (nowadays for his committal) should have an unconditional right to pursue an appeal. The principle was followed and applied by Mance L.J. in *Gulf Azov Shipping Co. Ltd v Idisi* (19th December 2000, unreported), despite the fact that in his view the respondents had in other respects made out a very strong prima facie case for being granted security.

37. To order Mr. **Ablyazov** to make the interim payment would add nothing to the existing position without the addition of the sanction that his appeal be dismissed if he fails to comply, but if the sanction were to become effective it would deprive him of the opportunity to challenge the committal order altogether. The same may be said of the applications for security for costs and disclosure. In the light of the authorities I have come to the conclusion that it would not be right to impose on Mr. **Ablyazov** any of the conditions sought by the Bank because the consequence of any failure on his part to comply with them would be disproportionately severe.

38. For those reasons the applications will be dismissed.

Judgments

*JSC BTA Bank v Mukhtar Ablyazov and others JSC BTA Bank v Addleshaw Goddard LLP

[2012] EWHC 1252 (Comm)

QBD, COMMERCIAL COURT

Mr Justice Teare

15 May 2012

Practice – Pre-trial or post-judgment relief – Freezing order – Committal order – Disclosure – Power to make order requiring solicitors to disclose client's contact details – Client found to be in breach of asset disclosure order and in contempt of court – Party seeking disclosure from solicitors of client's conference call details and email details – Whether court having jurisdiction to order disclosure – Whether discretion should be exercised in favour of disclosure – Senior Courts Act 1981, s 37(1).

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 February 2012 the Court held that Mr. **Ablyazov**, the First Defendant, had acted in contempt of court; see [2012] EWHC 237 Comm. On the same day the First Defendant, who had failed to attend court despite having confirmed that he would attend court when judgment was given on the contempt application, was sentenced to 22 months imprisonment for his contempt. Also on the same day the Claimant, anxious to ensure that the Tipstaff be given as much information as possible as to where to find the First Defendant, applied to the court, *ex parte* on very short notice, for an order that Addleshaw Goddard LLP ("AG"), who acted for the First Defendant, provide to the Claimant and the Tipstaff all contact details which they had for the First Defendant. The Court acceded to that application and made the requested order, relying upon the authority of *JSC BTA Bank v Solodchenko* [2012] 1 AER 735. AG complied with that order.

2. Some days later, on 22 February 2012, AG informed Hogan Lovells LLP, the solicitors acting for the Claimant, that AG was in contact with the First Defendant on a daily basis by way of a conference call using

a dial in number provided to the First Defendant by AG (“the Conference Call Facility”). AG had also set up an email account which could be accessed by the First Defendant and to which AG sent documents for the First Defendant's consideration (“the Email Facility”). AG said: “This has been necessary so that we can take instructions and provide to our client, on a secure and privileged basis, the legal advice to which he is entitled.”

3. On 23 February 2012 the Claimant issued an application for an order that

> (i) [AG] shall as soon as reasonably practicable and in any event on [the day after the Order is granted] provide to the Claimant's solicitors and the Tipstaff orally and thereafter in writing all historic and current contact details (including, without limitation, postal and email addresses and all telephone numbers and Skype account details, the Contact Details) which they hold for the First Defendant and which were not notified to the Claimant and Tipstaff pursuant to the Order of Mr. Justice Teare dated 16 February 2012.
>
> (ii) [AG] shall, until further order of the Court, as soon as reasonably practicable and in any event within two hours of being made aware of the same, provide to the Claimant's solicitors all further Contact Details which they hold for the First Defendant which have not been notified to the Claimant and Tipstaff pursuant to the Order of Mr. Justice Teare dated 16 February 2012 or the order contained in paragraph (i) above.

4. On 29 February 2012 the court ordered the First Defendant to surrender to the Tipstaff. He has not done so.

5. In his Third Witness Statement dated 27 April 2012 Richard Leedham, a partner in AG, said that if the Court were to conclude that the Conference Call Facility or the Email Facility did constitute a contact detail which should be disclosed to the Claimant the First Defendant had stated that he would cease to use each facility for fear that the Claimant would use it to trace his whereabouts or listen to and monitor the confidential and privileged communications between the First Defendant and AG. The result of the order would therefore be that all communications between AG and the First Defendant would cease thereby prejudicing his fundamental right to obtain confidential and privileged legal advice.

6. The Claimant accepts that it wishes to obtain information regarding the Conference Call Facility and Email Facility so that it can seek to track down the First Defendant's location. The Claimant hopes, once it is provided with the relevant email address, to obtain a *Norwich Pharmacal* order against the email service provider which will require production of the internet protocol address being used by the First Defendant. That can be used to pinpoint the location of the First Defendant. A similar order against the provider of the Conference Call Facility might produce the telephone number used to dial into the facility and hence the location of the First Defendant. The Claimant then hopes to be able to obtain a court order in the place where the First Defendant is found which will bring about the First Defendant's return to this jurisdiction. His return is sought so that the coercive effect of the court's contempt order can be brought to bear on him. The Claimant is anxious that the First Defendant complies with the Freezing Order and Receivership Order which have been made against him in this action. The Claimant has no intention to listen to or monitor the communications between the First Defendant and AG.

7. Mr. Stephen Smith QC has submitted, on behalf of the Claimant, that the court has jurisdiction to make the order sought and that the court should make the order sought in the exercise of its discretion essentially for the reasons given by Henderson J. in *JSC BTA Bank v Solodchenko* [2012] 1 AER 735. Mr. Tim Dutton QC has submitted, on behalf of AG, that the court has no jurisdiction to make the order sought and that, if the court has such jurisdiction, the order ought not to be made. Mr. Dutton's submission depends, in essence, upon the fundamental or absolute nature of the right of any person, whether he is a contemnor or not, to confidential and privileged legal advice. In particular, if the effect of the order is to prevent the First Defendant from having access to such advice the court either has no jurisdiction to interfere with such access or, if it

has, its discretion should be exercised so as to ensure that such access is not interfered with. In response Mr. Smith says that if the First Defendant's access to advice is interfered with that will not be because of the order but because of the First Defendant's own decision to stop communicating with AG rather than run the risk of the Claimant knowing where he is and taking steps to ensure that he is brought back to this jurisdiction.

8. When I made the initial order for the disclosure of contact details on 16 February 2012 I followed the decision and reasoning of Henderson J. in *JSC BTA Bank v Solodchenko* [2012] 1 AER 735. However, that decision was made *ex parte* and without hearing any submissions on behalf of AG. I have now heard such submissions and must consider the matter afresh. Further, the facts before the court are different from those which were before the court on 16 February 2012. Today, there is evidence from AG that AG and the First Defendant have set up a Conference Call Facility and an Email Facility expressly for the purpose of giving and receiving confidential and privileged legal advice. The contact details associated with those facilities are now sought. There is no evidence that any such facilities existed on 16 February 2012, notwithstanding that AG disclosed a mobile telephone number and six email addresses on 17 February 2012.

Jurisdiction

9. In *JSC BTA Bank v Solodchenko* [2012] 1 AER 735 Henderson J. held at paragraphs 24-26 that the court has jurisdiction to make the order sought derived from section 37 of the Senior Courts Act 1981. That section provides that the court may grant an injunction where it is “just and convenient to do so”. Such jurisdiction comprehends power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the injunction is effective to achieve its purpose. In so holding Henderson J. followed the decision of the Court of Appeal in *AJ Bekhor v Bilton* [1981] QB 923 at p.940 per Ackner LJ and at p.949 per Griffiths LJ and in *Maclaine Watson v Department of Trade and Industry* [1989] Ch.286 at p303 per Kerr LJ. Henderson J. further held, at paragraph 37, that the court had jurisdiction to make the order pursuant to its jurisdiction to give directions to officers of the court. He said that the court should only do so in appropriate circumstances and so as to further the interests of justice.

10. Mr. Dutton submitted that properly analysed the decision in *AJ Bekhor v Bilton* established that the court only had jurisdiction to make an order ancillary to the making of an injunction where it was “necessary” to do so in order to make the injunction effective. He was correct to observe that the adjective necessary was used by Ackner and Griffiths LJJ. However, in *The President of the State of Equatorial Guinea v The Royal Bank of Scotland as Privy Council No 5 of 2005*, in a judgment delivered by Lord Bingham and Lord Hoffmann on 27 February 2006, it was said, in the context of the court's jurisdiction to grant *Norwich Pharmacal* relief, at paragraph 16:

> “Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance.”

11. In the light of that observation I am not persuaded that I should seek to draw a distinction between, on the one hand, an order being necessary to make an injunction effective and, on the other hand, it being just and convenient to make the order to ensure the effectiveness of the injunction. Henderson J. used the latter test. I consider that he was right to do so since that is the phrase used in section 37 of the Senior Courts Act 1981.

12. Mr. Dutton made a further, and formidable, submission. He said that whilst the court may have jurisdiction to make ancillary orders for the disclosure of information to ensure the effectiveness of an injunction the court does not have an unrestricted jurisdiction to make orders which may impinge upon the right to confidential and privileged legal advice. There were two strands to this submission.

i) The first derives from the right to confidential and privileged advice being absolute, by which is meant that it is subject to no exceptions and cannot be overridden by any other public interest; see *R v Derby Magistrates Court (ex parte B)* [1996] AC 487 at pp.506-9 per Lord Taylor and *Three Rivers (No.6)* [2005] 1 AC 610 at paragraph 25 per Lord Scott. The only "exception" (if that is the right word, which would appear doubtful) is that communications in the pursuit of crime or fraud are not protected by the right to confidential and privileged legal advice; see see *McE v Prison Service of Northern Island* [2009] 1 AC 908 at paragraph 11 per Lord Phillips. That exception is not relied upon on the instant application. Only Parliament may override the right and it has not done so; see *B v Auckland District Law Society* [2003] 2 AC 736 at paragraphs 46-56 per Lord Millett. Since the right is absolute the court cannot have jurisdiction to make any order which impinges on or interferes with the right. In the present case it is said that the contact details held by AG are protected by legal professional privilege and accordingly the court has no jurisdiction to make any order which requires such details to be disclosed.

ii) The second strand to the argument concentrates upon a person's right of access to a lawyer for confidential and privileged legal advice. That is "the necessary anterior right for without it the right to privileged advice is illusory". If the effect of the proposed order is to prevent the First Defendant having access to AG then the court can have no jurisdiction to make it because the order would destroy the First Defendant's right to legal advice.

13. There is logic in both parts of this argument. However, it is impossible to predict all the circumstances in which an order of the type sought in the present case may arise. For that reason it is, I think, permissible and preferable to hold that the court has jurisdiction to make an order of the type sought pursuant to section 37 of the SCA 1981 but that in deciding whether the order is "just and convenient" in any particular case, or whether the court should, in the exercise of its discretion, make the order sought the court must necessarily take into account both the absolute nature of the right to confidential and privileged legal advice and the prior right to have access to such advice. It may be that taking such matters into account will necessarily mean that the order sought will be refused where it requires disclosure of information protected by legal professional privilege or where its effect is to deny a person access to legal advice. But I do not consider that that renders the court's discretion illusory. Rather, it shows that the court must carefully consider all the circumstances of the case in order to decide whether the order is just and convenient and if so whether the order should be made.

14. I therefore respectfully agree with Henderson J. that the court has jurisdiction to make the order sought. That jurisdiction is to be found in section 37 of the SCA 1981. It is unnecessary to determine the scope of the court's jurisdiction to make the order sought pursuant to the court's power to give directions to solicitors as officers of the court since it has not been suggested that such power could be exercised where it was not appropriate to make the order pursuant to section 37 of the SCA 1981.

Just and convenient/discretion

15. The case for making the order sought is that the contact details held by AG, if disclosed by AG to the Claimant, will or may enable the Claimant (a) to identify where the First Defendant is, (b) to obtain an order from the local courts designed to bring the First Defendant back to this jurisdiction and (c) thereby enforce the orders previously made by the court, in particular, the surrender order, the committal order, the receivership order and the freezing order. By reason of being in hiding the First Defendant is no longer co-operating with the receivers. The Claimant also fears, on the basis of evidence put before the Court, that the First Defendant is dealing with his assets in breach of the freezing order. These are good reasons for making the order sought notwithstanding (a) that the First Defendant has denied that he is dealing with his assets in breach of the freezing order, (b) that he has given an explanation of the evidence relied upon by the Claimant to suggest that he is so dealing with his assets and (c) that it is uncertain whether the Claimant will be able to bring about the return of the First Defendant to this jurisdiction. Until the Claimant knows where the

First Defendant is it can hardly be expected to be able to adduce evidence of foreign law showing the procedures available to bring about the return of the First Defendant.

16. Mr. Dutton's response to that case echoes his arguments on jurisdiction. His first submission is that the lines of communication between the First Defendant and AG are used solely for the purpose of giving and receiving legal advice and cannot be disclosed because they are protected by legal professional privilege. Mr. Smith has submitted that the lines of communication are not privileged and therefore may be disclosed without breaching the First Defendant's right to confidential and privileged legal advice.

17. *Re Cathcart ex p Campbell* (1869-70) LR 5 Ch. App. 703 involved the examination of a witness under s.216 of the Bankruptcy Act 1861. The witness was a solicitor who was asked to disclose the location of the bankrupt's father, one of his clients. He refused to do so because the location of his client came into his knowledge in his professional capacity. This was held not to be sufficient to justify the witness' refusal to answer because the location of the client may simply have been a collateral fact and not in the nature of a privileged or confidential communication. However, James LJ said, at p.705:

> "If, indeed, the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said, "I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world", then the client's residence would have been a matter of professional confidence; but the mere statement by the solicitor, that he knows the residence only in consequence of his professional employment, is not sufficient."

18. That observation illustrates that whether or not information provided by a client to his solicitor is protected by legal professional privilege will depend upon the circumstances in which it is communicated by the client to his solicitor. James LJ was of the opinion that if the information was provided in confidence to the solicitor and not to the rest of the world then the information would be protected.

19. In *R v Manchester Crown Court ex p. Rogers* [1999] 1 WLR 832 a person had left the scene of a crime in a taxi and had been taken to a solicitor's office. The police sought production of documents from the solicitor which recorded the time of the applicant Rogers' arrival at the office in order to establish whether the applicant Rogers was or was not the person who had been taken by taxi to the solicitor's office.

20. Lord Bingham CJ said, at p.839 C-F:

> "It is in my judgment important to remind oneself of the well-established purpose of legal professional privilege, which is to enable a client to make full disclosure to his legal adviser for the purposes of seeking legal advice without apprehension that anything said by him in seeking advice or to him in giving it may thereafter be subject to disclosure against his will....In this case we must consider the function and nature of the documents with which we are concerned. The record of time on an attendance note, on a time sheet or fee record is not in my judgment in any sense a communication. It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or bank manager. A record of appointment made does involve a communication between the client and the solicitors' office but is not in my judgment, without more, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere, in my view ……. Production is sought of nothing relating to legal advice or the subject matter of legal advice. Any such reference in for example an attendance note can be covered up, blacked out or obliterated."

21. In *The Queen on the application of Miller Gardner Solicitors v Minshull Street Crown Court* [2002] EWHC 3077 Admin the police wished to establish the ownership of a motor car in the boot of which were found a

machine gun and sawn off shotgun. The police had evidence that the previous owner had rung a mobile phone number to arrange the sale of the car. Analysis of telephone records showed that the phone was registered to one ZH at an address which was the home address of NH and his brother AH. Someone using the telephone had telephoned Miller Gardner and the police sought permission to search the premises of the solicitors for material such as attendance notes which would have indicated which, if either, of the brothers had provided that mobile number as his contact number. Fulford J., with whom Rose LJ agreed, referred to *R v Manchester Crown Court ex parte Rogers* and quoted part of the passage from the judgment of Lord Bingham which I have quoted in this judgment. Fulford J said, at paragraphs 19 and 20:

> "19……As Lord Bingham stated during the course of his judgment, it is necessary to consider the function and nature of the documents. As a result although documents may be located at a solicitor's office, they do not attract legal professional privilege for that reason alone.
>
> 20. That decision provides strong support for the proposition that the provision of an individual's name, address and contact number cannot, without more, be regarded as being made in connection with legal advice. It records nothing which passes between the solicitor and client in relation to the obtaining of or giving of legal advice. Taking down the name and telephone number is a formality that occurs before the legal advice is sought or given. As my Lord observed during argument, providing these details does no more than create the channel through which advice may later flow: see in this regard the case of *Studdy v Sanders and others* [1823] 2 D and R 347."

22. Fulford J. concluded that neither the identity of the person contacting the solicitor nor the telephone number were information subject to legal professional privilege.

23. Mr. Smith relied upon both of these later decisions. However, I am not persuaded that they are analogous to the facts of the case before me.

24. The function and nature of the Conference Call Facility and of the Email Facility set up by AG is to enable the First Defendant to seek and receive legal advice. The number and address have been provided by AG to the First Defendant in confidence. In my judgment the connection between the telephone number and the email address and the seeking and receiving of legal advice in the present case is clear and manifest. By contrast the function and nature of the record of the applicant's time of arrival in *R v Manchester Crown Court ex p. Rogers* was to record his time of arrival. It was not to enable him to seek and receive legal advice though that probably was the purpose of his arrival at the solicitor's office. The time of his arrival was not information provided by the applicant to the solicitor in confidence.

25. In *The Queen on the application of Miller Gardner Solicitors v Minshull Street Crown Court* the name and telephone number of the caller were taken down as a formality "to create the channel through which advice may later flow." That might be thought to be helpful to Mr. Smith's argument but it is not apparent that the name and telephone number were provided to the solicitor in confidence in the same way as the telephone number and email address were provided by AG to the First Defendant in the present case.

26. The case of *Studdy v Sanders* [1832] 2 D and R 347 was referred to in *The Queen on the application of Miller Gardner Solicitors v Minshull Street Crown Court* but it also is not analogous to the present case. In that case the clerk of a solicitor was called to give oral evidence that the defendant had been the defendant in an earlier case. There was an objection that his knowledge came from a confidential communication by the defendant to the solicitor and so the clerk was not able to answer the question. This objection ultimately failed because the information in question was "easily cognizable to the witness and to many other persons without any confidence on the subject being reposed in him." By contrast the lines of communication set up by AG have been provided to the First Defendant in confidence.

27. In *The Law of Privilege* 2nd ed (ed. by B. Thanki QC) the following statement of principle is proffered at p.73, citing *Re Cathcart ex p Campbell*:

> "It is suggested that confidentiality is the touchstone and that privilege applies to facts known to a lawyer for the purposes of giving legal assistance or advice……"

28. That suggested statement of principle appears to me to be supported by the passage from the judgment of James LJ in *Re Cathcart ex p Campbell* which I have quoted. The importance of confidentiality is also illustrated by *Studdy v Sanders*. Further, the giving of information in confidence for the purposes of seeking and receiving legal advice appears to me to amount to the additional requirement said to be necessary by Lord Bingham in *R v Manchester Crown Court ex p. Rogers* before information may be regarded as privileged from disclosure ("a communication ...is not ....*without more* to be regarded as made in connection with legal advice")

29. I have therefore concluded that the telephone number and email address in the present case are protected from disclosure by legal professional privilege. That conclusion is supported by the observation of James LF in *Re Cathcart ex p Campbell* and is not inconsistent with the decision and reasoning in *R v Manchester Crown Court ex p. Rogers*. That conclusion is a powerful reason for further concluding that it is not just and convenient to make the order sought or, if it is, that the order sought should not be made in the exercise of the court's discretion.

30. If my conclusion is mistaken Mr. Dutton has his further argument. He submits that a necessary prior right to the right to seek and receive legal advice is the right of access to a solicitor. Mr. Dutton submits that the First Defendant will be deprived of that right if AG are ordered to disclose the lines of communication between the First Defendant and AG because he will be compelled to cease to use them. I agree that there must be such a prior right.

31. Mr. Smith has three responses to Mr. Dutton's submission:

> i) The First Defendant has shown a remarkable determination to defend the claims brought against him and he will find alternative methods of communicating with his solicitors.
>
> ii) The order sought will not deprive him of access to AG. Rather, it will be his own decision not to access AG rather than to surrender himself to the Tipstaff and comply with the court's orders or continue to use the established lines of communication.
>
> iii) The court should not be slow to make an order which increases the likelihood of the First Defendant coming out of hiding or returning to the jurisdiction.

32. I accept that the First Defendant has shown a remarkable determination to defend the claims brought against him. It is matched only by the Claimant's determination to pursue its claims against him. However, whilst it is possible to imagine other methods of communication perhaps involving third parties, paragraph 2 of the order sought by the Claimant will require any new contact details to be disclosed to the Claimant. It therefore seems to me that the submission made by Mr. Dutton must be dealt with now rather than avoiding it in the hope that the First Defendant will establish other lines of communication with AG.

33. I accept that if the court makes the order sought the First Defendant will be faced with a decision: whether to continue using the lines of communication established with AG and risk his location being detected by the Claimant or to cease to use those lines of communication and thereby deprive himself of access to legal advice. However, it seems to me unrealistic to say that if the First Defendant chose the latter course the court's order would not be and remain an effective cause of the First Defendant being deprived of access to AG. As Henderson J. said in *JSC BTA Bank v Solodchenko* [2012] 1 AER 735 at paragraph 19:

> "……I can think of few things more likely to inhibit the exercise by a client of his fundamental legal right to seek legal advice than an order requiring his solicitor to disclose to an adverse party contact details which were supplied to the solicitor in strict confidence and for the sole purpose of enabling the client to communicate with the solicitor."

34. I accept that the court should, in the language of Gross LJ, do and be seen to be doing all it can to ensure the efficacy of the court's orders (see *JSC BTA Bank v* ***Ablyazov*** [2012] 2 AER 575 at paragraph 48). I am mindful also of Henderson J.'s observation in *JSC BTA Bank v Solodchenko* (see [2012] 1 AER 735 at paragraph 39 that:

> "It is in the highest degree unsatisfactory that [Mr. Shalabayev] can still be at large, as a fugitive from justice, while he has solicitors on the record acting for him, and intervening in legal proceedings as and when it suits his purposes. Such a procedure is liable to bring the administration of justice into disrepute, and to give the impression that British justice is an a la carte menu from which he can order at choice without ever having to pay the bill."

35. Indeed, I followed that observation when making the *ex parte* order on 16 February 2012. Mr. Dutton criticised that observation. He said that Henderson J. failed to have in mind that having solicitors on the record for a contemnor is to be welcomed rather than criticised. In an arresting phrase Mr. Dutton said that the court must not use the fact of a relationship between the contemnor and his solicitor as a lever for bringing the contemnor to justice. I do not accept that Henderson J. was criticising Mr. Shalabayev for having solicitors on the record. Henderson J. had clearly in mind the very strong public interest in people having free and unfettered access to legal advice; see paragraphs 16-18 of his judgment. But he also had in mind that the sight of a contemnor intervening in proceedings as and when it suited him risked bringing the administration of justice into disrepute. I respectfully agree that there is such a risk.

36. The First Defendant is a contemnor who has gone into hiding in order to frustrate the court's orders. His is in an unattractive position and not deserving of sympathy. On the contrary if orders can be made which make it more likely that he will obey such orders ought to be made. But, as Mr. Dutton said, if ever anyone needed legal advice it is the First Defendant. He is currently exercising his right to appeal the court's decision to commit him for contempt. That appeal is due to be heard, I am told, in July of this year. He is also exercising his right to defend himself against the very substantial claims being brought against him by the Claimant, three of which are due to be tried in November of this year. His conduct is circumscribed by extensive freezing and receivership orders. As Henderson J. said in *JSC BTA Bank v Solodchenko* [2012] 1 AER 735 at paragraph 18 there is no such concept in this jurisdiction of an outlaw. A contemnor is as much entitled to the right of access to legal advice as a law abiding citizen. Ensuring that he has such right ought not to be regarded as bringing the administration of justice into disrepute.

37. Having taken into account all the matters urged upon me I am not persuaded that it would be just and convenient to make the order sought, or if it is, that the court should make the order sought in the exercise of its discretion. I do not consider it appropriate to make an order the foreseeable effect of which will be to deprive the First Defendant of his right of access to legal advice from AG when he has such need of it. When making the order in this case *ex parte* on 16 February 2012 I was not concerned with a case where lines of communication had been deliberately established by AG for the sole purpose of enabling the First Defendant to seek and receive legal advice. Henderson J. was, it seems, dealing with such a case (see paragraphs 12, 19 and 39 of his judgment) but there is at least one distinction between that case and the present. Mr. Shalabayev had not appealed against the committal order and whatever advice he had needed had been given; see paragraph 39.

38. By not acceding to the Claimant's application the court is foregoing an opportunity to make an order designed to make it more likely that the First Defendant will obey the court's orders. However, whilst there is a public interest in enforcing the court's orders there is also a public interest in ensuring that those who are

subject to the court's jurisdiction have access to legal advice. Although those two public interests exist, as Mr. Dutton suggested, in parallel there is, on the facts of the present case, a clear tension between them. I have to take both into account. I have done so and have concluded that, if a balance has to be struck, it lies in favour of ensuring that the First Defendant, notwithstanding that he has gone into hiding in order to frustrate the court's orders, should have access to AG for the purposes of seeking and receiving legal advice.

Conclusion

39. The Claimant's application must be dismissed. It is not just and convenient to make the order sought because the Conference Call Facility and Email Facility are protected by legal professional privilege. Further, it is not just and convenient to make the order sought because the foreseeable consequence of the order sought will be to deprive the First Defendant of his right of access to AG for the purposes of seeking and obtaining confidential and privileged legal advice.