Judgments

*JSC BTA Bank v Ablyazov and others

[2012] EWHC 1819 (Comm)

QBD, COMMERCIAL COURT

Mr Justice Christopher Clarke

4 July 2012

Practice – Pre-trial or post-judgment relief – Freezing order – Court making freezing order against first defendant, A, and others, during ongoing litigation – A being party to loan agreements, made by lending companies arguably controlled by A – Order compelling A to provide information as to spending and drawings made pursuant to agreements – Bank seeking declaration that A's rights under loans to be considered assets for purposes of order – Bank seeking dislosure of drawings made pursuant to agreements – Whether A dealing with assets within meaning of order.

Judgment

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

MR JUSTICE CHRISTOPHER CLARKE:

1. On 21 August 2009 Teare J granted a freezing order in favour of JSC BTA Bank ("the Bank") against Mr Mukhtar **Ablyazov** ("Mr **Ablyazov**") among others. It was continued on 12 November 2009 and subsequently amended and remains in force. I refer to it as "the freezing order".

2. The freezing order provided, so far as now material, as follows:

> *"4. Until judgment or further order… [Mr **Ablyazov**] must not, except with the prior written consent of the Applicant's solicitors –*
>
> *a. Remove from England & Wales any of [his] assets which are in England & Wales … up to the value of £ 451,132,000 ….*
>
> *b. In any way dispose of, deal with or diminish the value of any of [his] assets in England and Wales up to the value of …. £ 451,132,000 ….*
>
> *c. In any way dispose of, deal with or diminish the value of any of [his] assets outside England and Wales up to the value of …. £ 451,132,000 ….*

> *5. Paragraph 4 applies to all the Respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not [Mr **Ablyazov**] asserts a beneficial interest in them. For the purpose of this Order the Respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The Respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions.*
>
> *…*
>
> *EXCEPTIONS TO THIS ORDER*
>
> *9.*
>
> *a. Paragraph 4 of this Order does not prohibit [Mr **Ablyazov**] from spending up to £10,000 a week towards [his] individual ordinary living expenses … nor does it prohibit [Mr **Ablyazov**] from spending a reasonable amount on legal advice and representation. But before spending any money on legal advice and representation [Mr **Ablyazov**] must notify the Applicant's legal representatives in writing where the money to be spent is to be taken from.*
>
> *b. This Order does not prohibit [Mr **Ablyazov**] from dealing with or disposing of any of [his] assets in the ordinary and proper course of any business conducted by [him] personally."*

3. Mr **Ablyazov** is a party to four loan agreements ("the Loan Agreements") between Wintop Services Limited ("Wintop") and/or Fitcherly Holdings Limited ("Fitcherly") as Lenders. The amounts derived from these loans (£ 40 million in all) have been used to fund the enormous legal expenses of Mr **Ablyazov** and others and living expenses. The Bank contends that the Loan Agreements are shams. In my judgment of 26 October 2011 I said that there was good reason to suppose that these companies were ultimately owned by Mr **Ablyazov**.

4. If, however, the Loan Agreements are valid agreements, the Bank contends, and seeks a declaration, that Mr **Ablyazov**'s rights under them are assets of his for the purposes of the freezing order and that any drawings under the Loan Agreements could only lawfully be made pursuant to paragraph 9 of the freezing order, subject to any further order that the court might make. For the purposes of this judgment I assume, without deciding, that the Loan Agreements were not shams or made with companies ultimately owned by Mr **Ablyazov**.

5. The Bank also seeks disclosure of all drawings which have been made pursuant to the Loan Agreements in order to ascertain whether there are any assets which represent the traceable proceeds of such drawings or whether grounds exist to make applications against the recipients on the basis that they knowingly received property transferred contrary to the terms of the freezing order.

6. The point at issue was raised at the hearing of an application, issued by the Bank on 13 May 2011, for the disclosure of the ultimate beneficial owners ("UBOs") of Wintop, Fitcherly and a further funder, Green Life International SA ("Green Life"). Prior to the hearing of that application the UBOs of Wintop and Fitcherly became known by other means and the application proceeded in relation to Green Life only. I handed down judgment on that application on 26 October 2011. I declined to decide the point now in issue then since it had only been raised in the course of oral argument on the first day and it seemed to me that Mr **Ablyazov** was entitled to more time to consider it.

7. Pursuant to an order made by me on 9 February 2012 Mr **Ablyazov** filed his 16th witness statement for the purposes of this application. In that statement his address is given as "C/o Addleshaw Goddard".

8. In a judgment dated 16 February 2012 Teare J found Mr **Ablyazov** guilty of three deliberate and substantial contempts of court for which he was sentenced to 3 concurrent 22 month prison terms. He failed to attend Court on that date, although he had said that he would do so. He is in breach of an order made on 29 February that he should surrender himself to the UK authorities. His current whereabouts are unknown and it would appear that he has fled the country. In those circumstances his failure to state his address other than care of his solicitors has a heightened significance. Knowledge of his true address might enable the Tipstaff and those to whom the warrant is addressed to take steps to secure his apprehension.

9. The Bank does not suggest that Mr **Ablyazov** should not be heard because he is in contempt (whilst reserving its right to do so in respect of future applications). It takes this stance because it considers that the value of the declarations sought might be reduced if they are made without full argument. But the Bank invited me to disregard Mr **Ablyazov**'s 16th witness statement on the ground of non-compliance with the Practice Direction to CPR 32 which requires, at paragraph 18.1(2), that a witness statement should state the witness' *"place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer"*. The Court has a discretion pursuant to para 25.1 of the Practice Direction to refuse to admit a non-compliant witness statement.

10. I do not intend to take that course for a number of reasons. Mr **Ablyazov** is in contempt. But a contemnor is not to be precluded from defending himself in the action itself: *see Hadkinson v. Hadkinson* [1952] P 285, at 289-290, 296; and *Midland Bank v. Green (No.3)* [1979] Ch 496 at 506 per Oliver J. Nor is a fugitive from justice precluded from bringing and defending proceedings through our courts; or from giving evidence in relation to those claims: *Polanski v. Conde Nast Publications Ltd* [2005] 1 WLR 637 ("*Our law knows no principle of fugitive disentitlement*"); *JSC BTA Bank v. Solodchenko* [2011] EWHC 2163 (Ch) at [18]. The administration of justice will not be brought into disrepute if he is allowed to adduce evidence in this way. I can see no prejudice to the Bank in admitting his evidence. Lastly it seems to me illogical to admit argument in order that the judgment may not be regarded as wanting authority for the lack of it; but to exclude evidence when such exclusion might be said to have the same consequence.

The Loan Agreements

11. Mr **Ablyazov** entered into four loan agreements with Wintop and Fitcherly as follows:

a) Loan Agreement dated 1 September 2009 with Wintop;

b) Loan Agreement dated 1 April 2010 with Wintop;

c) Loan Agreement dated 17 August 2010 with Fitcherly; and

d) Loan Agreement dated 1 December 2010 with Fitcherly.

12. Each of the Loan Agreements provided for a £ 10 million facility available from the Lender to Mr **Ablyazov** for two years from the date of the Loan Agreement and contained the same highly favourable terms. Sums up to a maximum of £ 10 million per Loan Agreement were to be disbursed at the written request of Mr **Ablyazov** whether in one or several tranches (clause 1.2). Interest, at the rate of 5% per annum, was not to be payable until repayment of the principal sum (clause 1.3). The Lender was not entitled to demand repayment until four years after the commencement of the facility (clause 1.4). The agreement was expressed to create "*legal, valid and binding obligations of the Borrower*" (clause 1.8). No security was required to be given in support of the borrowings. The Agreements contained an English choice of law clause (clause 1.18).

13. They also contained a clause entitled "*Binding Effect for the Lender*" which stated that the agreement was "*enforceable against the Lender in accordance with its terms*" (clause 1.11). Clause 1.12 provided:

> *"Use of Proceeds. The proceeds of the Loan Facility shall be used at the Borrower's sole discretion. The Borrower may direct the Lender to transfer the proceeds of the Loan Facility to any third party."*

14. The Loan Agreements also included the following two terms:

> *"1.6 Cancelation of the Loan Facility. Notwithstanding section 1.1 hereof, any undrawn portion of the Loan Facility may be cancelled upon delivery to the Borrower of a written cancellation notice by the Lender.*
>
> *…*
>
> *1.16 Assignment. …The Borrower may not assign or transfer any of its rights under this Agreement without the prior written consent of the Lender."*

15. The argument for the Bank, which I consider in more detail below, is shortly stated. A right to borrow money from a lender under a loan facility is a chose in action. By directing the lender to pay money to a third party the borrower either disposes of or deals with that chose in action. He may be said to *dispose* of it in the sense that by directing payment to a third party he loses, *pro tanto,* the right to require payment of the same amount under the facility. At the very least he *deals* with it by exercising his right. Matters are put beyond doubt by the definition of assets for the purposes of the order as including "*any asset which [Mr **Ablyazov** has], directly or indirectly, power to dispose of, or deal with as if it were [his] own. The Respondent [is] to be regarded as having such power if a third party holds or controls the assets in accordance with [his] direct or indirect instructions."* When, or perhaps more accurately the moment before, the Lender complies with Mr **Ablyazov**'s instructions to pay his lawyers (or anyone else) it holds or controls assets in accordance with his instructions.

16. If it were otherwise an astute defendant could (i) borrow large sums (like the £ 40 million in the present case) from another person (but not grant security, which would be a disposition of or a dealing with his assets); (ii) reduce, thereby, his net asset position; and (iii) potentially reduce the amount available for the claimant by the full extent of the loan. The claimant might find that the lender had obtained judgment on what may have been a short term loan and execution for the amount lent before the claimant's claim was established. In this way he could in effect make payments otherwise than in the ordinary course of business out of his assets without being touched by the freezing order. All this could occur without any control by the claimant or the Court over the amount borrowed and the proportion of that spent on legal expenses, whether of the defendant or others, or on anything else.

17. Mr Duncan Matthews QC, for Mr **Ablyazov**, submitted that this scenario should be regarded as remote. Lending unsecured would be a big risk. The scheme would come unstuck if the Bank obtained an early judgment. If the monies borrowed were used to purchase assets they would be caught by the order. Lastly the lender might not be allowed by the court to enforce against the borrower/defendant's assets pending the determination of the claim. In any event the prospect of such a scenario should not influence the proper construction, in context, of what is meant by assets.

18. Whilst I see the force of these points I am not persuaded that the scenario is remote. Cases in which freezing orders are made often take a long time to come to trial. This case is an example. Even if the monies are used to purchase assets they may have been purchased by someone other than the defendant and in a foreign land. The lender would, prima facie, be entitled to execute any judgment for the debt, since execution would not involve a disposition of assets by the debtor. Even a voluntary payment may be no breach of an order if it is no more than a recognition of a creditor's rights of enforcement as where a defaulting mortgagor

surrenders property to a mortgagee: *SA Development Ltd v Fair Fashion Co v Wong Hang Bank Ltd* [1997] HKLRD 167.

19. The position is different if the lender is colluding with the debtor to frustrate the purpose of the order. Insofar as the Court has a discretion - if, for instance, its assistance is needed to secure enforcement e.g. if it is asked to make a third party debt order final – it may decline to do so or only do so on terms. Nevertheless, it may not be possible to prevent payment to the Lender unless it can be shown that there was some improper collusion, flouting of the freezing order, an abuse of the process of the court or actual or imminent insolvency of the debtor: see generally *Gee* on *Commercial Injunctions* paras 3-005-7 and 20-070-4; *The "Coral Rose"* [1991] 1 WLR 917. This might be difficult to establish, given that the lending per se would not be improper. The Court where judgment is sought may not be English.

The textbook answer

20. *Gee* contains the following passage at 19-022:

> "*A freezing order restrains the defendant from writing cheques addressed to his bank drawn on an account which is in credit, because in consequence one of his assets, the account in question, will be disposed of to the extent of the amount of the cheque. However, a freezing order does not prevent the defendant from incurring new liabilities, and accordingly the defendant is free to write cheques to be debited to an account in overdraft, or to use a credit card, thereby committing the credit card company to pay the supplier. The position will be different if the bank or credit card company has security over an asset belonging to the defendant; here the consequence of the transaction will be to increase the burden of the encumbrance on the asset in question, thereby diminishing its value to the defendant".*

The authorities

21. The authority cited for the second sentence is *Cantor Index Ltd v Lister* [2002] CP Rep 25, a decision of Neuberger J, as he then was, and *Deputy Commissioner of Taxation v Hickey* [1999] F.C.A. 259, a decision of the Federal Court of Australia. There is, in addition a further decision of Neuberger J in *Anglo Eastern Trust Ltd & Anor v Kermanshahchi* [2002] EWHC 1702. There is no decision at appellate level in England & Wales (or, so far as I am aware, any other part of the United Kingdom). Nor, so far as I am aware, has *Cantor* been referred to in any reported decision.

22. Mr Stephen Smith QC, for the Bank, submits that these authorities, which are not binding on me, are distinguishable (because the form of order has changed). It is also unclear whether in *Cantor Index* there was anything in the nature of a facility agreement as opposed to ad hoc borrowings. (There must have been some agreement in relation to the credit card but its terms were not considered). He does not, however, shrink from submitting that these cases were wrongly decided, a circumstance which may, he suggests, be attributable to the fact that the appropriate submissions were not made (as to which see paras 25 and 28 below).

23. In *Cantor Index* the freezing order prohibited the defendant from disposing of, or dealing with, or diminishing the value of any of his assets in England and Wales whether in his own name or not and whether solely or jointly owned up to the value of £ 200,000. The defendant had been meeting his living and other expenses using credit cards or by borrowing from his mother and his wife's bank account or from advances made by a company which he owned with his wife. One of the seven issues which fell to be decided was whether the defendant was entitled to use his credit card or other source of borrowing rather than spending his own money whilst the freezing order remained effective.

24. The argument for *Cantor Index* was that the effect of the spending in question was to create a debt in favour of a third party and thus reduce the defendant's overall net assets with the result that expenditure would be a breach of the freezing order. As to that Neuberger J said:

> *"I see the force of that submission as a matter of good sense and practicality. However I do not think that it is right, in light of the words of paragraphs 1(1) and 1(2) of the order. They provide that the defendant should not "dispose of, deal with or diminish the value of any of his assets". For a debtor to increase his indebtedness by borrowing from an existing creditor or even to create an indebtedness by borrowing from a new creditor, at least where the creditor is not secured on any of the debtor's assets, does not to my mind, as a matter of ordinary language, involve disposing of or dealing with or diminishing the value of any of the debtor's assets. I accept that it results in a diminution of the debtor's net asset position, but that is not what paragraphs 1(1) and 1(2) of the Freezing Order refer to.*
>
> *The argument the other way involves giving the language of those two paragraphs a less natural meaning, on the basis that this can be justified in light of commercial common sense. However, I do not think that is a course I can take in this case. First, the court should not easily be persuaded to construe a Freezing Order other than in its primary way if the consequence is to render its effect [more] invasive. A Freezing Order has grave consequences on a defendant's freedom of action and his ability to spend what is prima facie his own money, and if breached it involves a contempt. The court should therefore be slow to permit a looser construction rather than a narrower one, if the narrower one is the one the words more naturally bear"*
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> [Underlining in original. Bold added.]

25. Two features of the case are significant. First the order contained no definition of assets such as is contained in the order in the present case. Second, the argument addressed to the court was related to the defendants' overall net assets. No submission appears to have been made to the effect that there was a dealing with, or disposition of, a chose in action consisting of the right to borrow. In addition it is not clear from the report whether the money in question, described as "*advanced [to] the defendant*" ever came into his bank account or into his hands. If it did, there would have been a disposition of or dealing with it when he paid his living or legal expenses with it.

26. In *Anglo Eastern Trust Ltd & Anor v Kermanshahchi* the defendant had given an undertaking not to deal with or diminish the value of any of his assets up to the value of £ 1.3 million subject to certain exceptions. The claimant sought to strike out the defendant's defence on the footing that he had been in breach of that undertaking.

27. As to that Neuberger J said:

> *"What appears to have happened is that the costs of the defendant's legal advice and representation have been met by a company, which has paid the legal fees direct to the defendant's solicitors. That company, Alcole, is partly owned by one of the sons of the defendant. It appears also that this money is being paid over to the solicitors and is being treated as a loan between Alcole and the defendant.*
>
> *In those circumstances, it is said by the claimants that, because the defendant has not got assets worth more than £1.3 million, the undertaking is not being complied with because the expenditure is not a reasonable sum and/or because the defendant has not told the claimant's solicitors where the money comes from.*
>
> *I have some sympathy with that argument in principle, but as a matter of construction of the undertaking I do not think it will run. The reference to paying a reasonable*

sum on legal advice only applies if the expenditure concerned would otherwise be a breach of the freezing undertaking. If the legal expenses are being met by Alcole by way of direct payment to the solicitors, albeit that it is by way of a loan to the defendant, I do not think the payment of the money involves: "diminish[ing] the value of any of [the defendant's] assets". That is because, while the loan may involve diminishing the defendant's net asset value, there is no specific asset one can identify which is diminished in value. If the loan was secured on property then the value of the defendant's equity in the property would be diminished as the loan increased. That is not the position here.

Mr. Freedman advances two arguments to the contrary. The first is that one must read the words "diminish the value of any of his assets" in a commonsense commercial way so that, if the effect of an arrangement is, as in this case, to diminish the defendant's net asset value, that is good enough. Were this a commercial contract, given that such a construction may accord better with commercial commonsense than the narrower construction urged by the defendant, I might well have acceded to it. However, one is here concerned with an order which has a potentially draconian effect on the commercial and economic freedom of an individual against whom no substantive judgment has yet been granted. A freezing order, which has been referred to as a nuclear weapon, should in my view be construed strictly. Therefore, while I can see the force of his contention, I am of the view that the Mr. Freedman's first argument cannot prevail.

His second argument is that, although the legal fees were paid by Alcole directly to the solicitors, there was a notional moment, presumably while the money was being handed over, when it was the property of the defendant. I cannot accept that. It seems to me entirely artificial to treat money paid directly, albeit on A's behalf, by B to C, as being at any time the property of A. Until the money gets to C it is the property of B. The moment B pays it to C, it becomes the property of C. There is no need in such a case to invent a legal fiction, of a sort which is occasionally necessary in other circumstances, that at some notional point in time, the money is that of A. It is clear from cases such as Abbey National v. Cann in the House of Lords that a notional scintilla temporis is only to be invoked when absolutely necessary. I see no reason to invoke such a scintilla temporis or complication of the sort Mr. Freedman's argument involves in the present case. Therefore it seems to me that there is no breach of the undertaking in this case".

28. In that case, also, there was no extended definition of assets; nor was there, apparently, any argument to the effect that what the defendant had done was to dispose of or deal with an asset. What he was said to have done was to diminish its value. *Cantor Index* is not referred to in the judgment.

29. In *Deputy Commissioner of Taxation v Hickey* the Federal Court of Australia considered whether spending on a credit card in excess of the freezing order spending limits was a breach of an order not to deal with or dispose of any assets. The judge addressed the question whether or not the right to draw upon the credit account should be regarded as either property or an asset of either of the respondents. He said:

"For the purposes of these proceedings I do not think that the right (if indeed there was a right to draw upon the Visa Account) should be regarded as either property or an asset of either of the respondents …I assume that [the contract between the bank and the respondents] enabled the respondents to draw upon the account by using the Visa card up to a limit of $ 20,000 …It may well be that the respondents did not enjoy a legal right to draw, but only a privilege to draw funds, being a privilege which could be rescinded at any time at the bank's discretion. In the end I do not think that any such difference matters. In my view, when the respondents drew cash or paid expenses by debiting such amounts to the Visa Account they did not deal with or dispose of their assets or property within the meaning of the Mareva order. Throughout the relevant period that account was in debit. The Respondents simply caused pre-existing indebtedness to be increased."

The Bank's submissions in detail

30. The Bank submits that the right to draw down under the facility is a chose in action. When Mr **Ablyazov** directed the lender to pay monies and it did so he thereby disposed or dealt with the chose in action consisting of his right to demand such payment by converting it into an actual payment to a third party and a debt owed by Mr **Ablyazov** to the relevant Lender.

31. A chose in action amounts to an asset for the purposes of the freezing order. It could scarcely be otherwise since money in a bank account, the most common object of a freezing order, is, itself, a chose. Thus in *CBS United Kingdom Ltd. v. Lambert* [1983] Ch 37, Lawton LJ stated:

> *"The words 'dealing with' are wide enough to include disposing of, selling, pledging or charging; and there are no limitations put upon the word 'assets', from which it follows that this word includes chattels such as motor vehicles, jewellery, objets d'art and other valuables as well as choses in action."*

32. Mr **Ablyazov**'s rights against the Lenders were thus assets, even without an extended definition. The extended definition:

> "*For the purpose of this Order the Respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The Respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions"*

confirms that Mr **Ablyazov**'s use of borrowed monies was a breach. Under clause 1.12 he had the power to direct that the proceeds be dealt with "*as if they were his own*" and the Lender held the proceeds "*in accordance with his direct or indirect instructions*".

33. The freezing order under consideration in *Cantor* did not have the extended definition and Neuberger J's observations about the need to resolve any ambiguity in favour of the respondent must be considered in that context.

34. In *JSC BTA Bank v Solodchenko* [2011] 1 WLR 888 the Court considered the change which had been made between the form of order under consideration in *Cantor* and the form of order used in the *Admiralty and Commercial Court Guide*. The latter form includes the words "*and whether the respondent is interested in them legally, beneficially or otherwise*". I call these "the Commercial Court words". The form of order attached to the Practice Direction up to 2002 did not include the two sentences beginning "*For the purposes of this order…*" ("the extended definition") or the Commercial Court words. An order without those changes was held by the Court of Appeal not to cover assets in which the defendant had no beneficial interest: *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695 because such assets were not "*his assets*".

35. The Autumn 2002 edition of the White Book introduced the extended definition in order to catch assets which were in the beneficial ownership of the defendant or effectively under his control. A later version of the Commercial Court Guide introduced the Commercial Court words. In *Solodchenko* the Court held that the Commercial Court words *did* cover assets in which the defendant had no beneficial interest, e.g. assets of which he was a trustee or which he held as nominee.

36. Mr Smith submitted that, in the light of the extended definition and the Commercial Court words no defendant could be misled into thinking that he could deal with any valuable asset, including a right to borrow, with impunity.

37. The decision in *Hickey* that "*The Respondents simply caused pre-existing indebtedness to be increased"* does not, he submits, grapple with the means by which they did so, which was to deal with their rights of action under the agreement for the use of the credit card. The fact that the indebtedness increased shows that the right has been dealt with since the increase is the result of doing so.

The expert evidence

38. Both parties have filed expert evidence. The report of Luke Steadman, FCA for Mr **Ablyazov**, expresses the view, which I accept and which is not, as I understand it in dispute, that an undrawn credit facility is not an asset for the purposes of relevant accounting definitions.

39. The report of Mr William Kenyon of PricewaterhouseCoopers LLP, for the Bank is to the effect that the rights held by Mr **Ablyazov** under the Loan Agreements had real value *to Mr **Ablyazov***, albeit a value difficult to quantify and one not necessarily transferable to anyone else. To similar effect is the report of Mr Robin Bryant, a former banker.

40. I have found this evidence of only limited assistance. The fact that an asset is not an asset for accounting purposes does not necessarily mean that it cannot be an asset for the purposes of a freezing order, although it may be a pointer to that conclusion. There are assets, e.g. sums payable upon a contingency, which would not be treated as assets for accounting purposes but are assets none the less. Nor does the fact that the right to borrow is cancellable mean that it cannot be an asset within the meaning of the freezing order. Assets do not cease to be such because they are determinable on the occurrence of certain events: *Belmont Investment v BNY Corporate Trustee* [2012] 1 AER 505 at [89]. Conversely the fact that the right to borrow may be an asset with a value only to Mr **Ablyazov** (and not easily quantified even then) may support the submission that it is not the type of asset which the freezing order was intended to catch. Whether it is or not is a matter of construction of the order.

*Mr **Ablyazov**'s submissions*

41. Mr Matthews submitted that the new wording made no difference to the position as it was under *Cantor Index*. It was directed at a different situation, namely where the asset in question is held by a third party in circumstances where the respondent has the power to control the asset but may hold something short of a legal or beneficial title. It is aimed at clarifying what *type of interest* the respondent must have in the property rather than the *nature of the assets* in which an interest may be had for the purposes of the freezing order. Thus the decision in *BTA v Solodchenko* considered whether assets held by a trustee were caught by the words "*whether or not they are in their own name and whether they are solely or jointly owned and whether the respondent is interested in them legally, beneficially or otherwise*1*"* and decided that they were.

42. In the present case there is no question that Mr **Ablyazov**'s right to draw down under the Loan Agreements is his, and his alone. The relevant question is whether that right is an asset for the purpose of the freezing order. The new wording is irrelevant to that question.

43. The Bank's argument is based on the following syllogism. According to it (i) the right to draw down on a loan is a chose in action; (ii) all choses in action are assets; (iii) therefore the right to draw down on a loan must be an asset within the meaning of the freezing order. This syllogism, like so many of its kind, is invalid. The fact that the right to draw down is a chose, which is an asset, does not mean that it is an asset for the purposes of the freezing order.

44. If it were so there would be very odd consequences. There are many choses in action which people and businesses enjoy - such as contracts with service companies, key holders, staff, maintenance providers, burglar alarm providers, car clubs, etc. If the Bank is right the exercise or termination of any of those rights is caught by the freezing order as being a disposition of or dealing with a chose. Some choses in action are caught by a freezing order. Money in the bank is the obvious example. But the order does not extend to a chose consisting of a right to call for a loan creating an immediate correlative liability and thus, in effect, a right to incur a liability.

45. The assets which can be caught by a freezing order are limited to property which has value to third parties and against which a judgment creditor could enforce any judgment which he might later obtain. The purpose of such an order is to preserve the position so that assets against which enforcement might later take place are not removed from the asset pool. That this is so is apparent from what appears in the following paragraphs.

46. The following passages in *Gee* attest to the essential nature of "assets" for the purposes of the freezing order jurisdiction:

> a) §3.015: *"The purpose of the injunction is to preserve assets so that the claimant's claim can be satisfied. 'Assets' are property of a person or company which may be made liable for debts. It might therefore be thought that the order should be construed so as to cover anything against which a judgment could be enforced, or anything which might be taken and applied towards satisfying a judgment through bankruptcy or winding-up proceedings or otherwise…"*. The passage then goes on to confirm that, in any event, a respondent cannot be found in contempt if there is any ambiguity as to how the order is to be interpreted and therefore as to whether it has been broken;
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> b) §3.016: *"If the claimant cannot show a means of reaching the underlying property by execution or through insolvency proceedings or otherwise, then the Mareva order should not be allowed to prevent the transaction from proceeding. If, on the other hand, the claimant shows a means of reaching the underlying assets, then Mareva relief may be available*"; and
>
> c) §3.042: *"if the claimant would not be able to obtain execution on the relevant asset even if he obtains a judgment, then it would be wrong in principle to grant Mareva relief … in relation to that asset for the purpose of safeguarding the asset in anticipation of possible execution proceedings"*.

47. In *Camdex International v Bank of Zambia (No 2)* [1997] 1 WLR 632 it was accepted before the Court of Appeal that unissued Zambian bank notes ordered by the Bank of Zambia but not yet paid for would, if in the hands of the Bank, be "assets" within the meaning of the freezing order. However, the CA held that they should not be part of the "assets" frozen by the Mareva because they had no objective market value.

48. Sir Thomas Bingham MR (as he then was) said at 636H:

> *"It seems to me that in a situation such as this, it is important to go back to first principles. A Mareva order is granted to prevent the dissipation of assets by a prospective judgment debtor, or a judgment debtor, with the object or effect of denying a claimant or judgment creditor satisfaction of his claim or judgment debt. Here, it is plain that the defendant wants to transfer these bank notes to Zambia. In doing so it would not, as it seems to me, dissipate any asset available to satisfy the judgment debt because the asset has, in the open market, no value. It is not an asset of value to the plaintiff or other creditors of the defendant if it were put up on the market and sold."* (emphasis added in this and subsequent citations)

Aldous LJ said at 638C:

> *"The bank notes have at the moment no value and to remove them from the jurisdiction cannot amount to dissipation of assets. The view taken by the judge that they were assets was wrong. They only had a market value in Zambia"*

Phillips LJ (as he then was) said at 639D:

> *"A Mareva can properly be granted after judgment in circumstances, which must be rare, where this is necessary to prevent the removal or dissipation of an asset before the process of execution can realise the value of that asset for the benefit of the judgment creditor. That is not this case. The reality here is that the unissued bank notes, which are the subject matter of the application, are not assets which would be of any interest or benefit to a sheriff executing a writ of fi. fa.*
>
> *… In [the] circumstances, it seems to me, that the Mareva is being used in relation to these bank notes not for the purpose of preserving an asset that will be of value in the process of execution, but in an attempt to pressurize the defendant into discharging part of its liability under the judgment"*

49. These observations do not provide Mr Matthews with all the support he needs. The majority of the Court of Appeal did not (despite what was said by Aldous LJ) find that the bank notes were not assets covered by the order but that the order should be varied so as to exclude them from its operation. If they had not been assets no variation would have been needed. Sir Thomas Bingham recorded that the defendant "*accepts that these bank notes are bound by the Mareva or, in any event, will be the moment they become the property of the defendant*".

50. In *BTA v Solodchenko* [2011] 1 WLR 888 at [32] Patten LJ held *"the purpose of a freezing order is to prevent the dissipation by a defendant of assets which would otherwise be available to satisfy a judgment in favour of the claimant"* and at [49] Patten LJ described this as one of the *"established principles which underlie the grant of all freezing orders"*. Therefore, Mr Matthews submits, the "asset" itself must be available in enforcement proceedings.

51. In *Algosaibi v Saad Investments Company Limited* (CICA 1 of 2010 (Cayman Islands)), which was approved and adopted as containing an accurate statement of English law in *Linsen International v Humpuss Sea Transport Pte Ltd* [2011] 2 Lloyd's Rep. 663, Sir John Chadwick P held:

> *"It is necessary to keep in mind the basis upon which a court exercises the Mareva jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant"*: at [32];

52. Sir John Chadwick P held that one of the requirements for the grant of a Chabra-type order is that "*the court be satisfied that there is good reason to suppose either (i) that the [cause of action defendant] can be compelled (through some process of enforcement) to cause the assets held by the [non-cause of action de-*

fendant] to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the [non-cause of action defendant]". Flaux J approved and applied that principle in *Linsen*. See §§154 and 157. This passage of *Algosaibi* was also approved in *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm) at §58. The focus of all the judges is on whether or not enforcement procedures could later be used to gather in these particular assets. If not, they cannot be caught by the freezing order.

53. Mr Matthews derived from these cases two principles:

> i) the relevant property sought to be frozen must be of some value on the open market, quantifiable in monetary terms. If the property is, in reality, worthless or has some intangible and unquantifiable value, it cannot be available for enforcement and therefore cannot be the subject of a freezing order;
>
> ii) the relevant property must be amenable to the enforcement procedures of the court. If the property is of such a nature that it could never be enforced against, it cannot be frozen.

54. In the light of those principles the court was, he submitted, right in *Cantor, Anglo Eastern Trust* and *Hickey* to hold that a right to borrow cannot constitute an asset falling within the scope of the freezing order. Such a right has no objective value on the open market quantifiable in monetary terms.

55. There is (as I accept) no secondary market for rights to borrow under credit facilities - Steadman, para 17 - and it is difficult to see how any such market could work. An assignment of any such right (if possible) would still leave the obligation to repay with the original borrower. If the rights were to be transferred by novation it is difficult to see why a lender would consent to lending to a third party on the terms of the original lending facility. If the lender would not lend to the third party on the terms of the loan in the ordinary course it would not be likely to allow a sale of the undrawn facility to a third party. If the new party could obtain credit on the same terms it would have no need to purchase the facility from the original borrower.

56. Further Mr **Ablyazov**'s right to borrow has no monetary value which is quantifiable in monetary terms and which a creditor could realise. Mr Bryant, the Bank's banking expert, says in his evidence that he is *"not sure that the concept of a drawing right (whether exercised or not) as having value is a recognized one but only because in my experience the question has never been posed.*" This is a strong indication that such rights are impossible to value. Mr Kenyon suggests that the right is of value if the borrower draws down the money and deposits it in an account earning higher interest. But before drawdown there is no asset of any value. Alternatively he says that "*other favourable terms contained in the loan facility would also potentially create economic benefits for the debtor, albeit that these might be less easy to quantify meaningfully, or at all.*", which is tantamount to an admission that the right to borrow simply cannot be ascribed a monetary value. No expert confirms that any such right has any open market monetary value or proposes any method of valuation.

57. These propositions, it is submitted, hold good generally. Rights to borrow are not assets for the purposes of a freezing order. In ordinary parlance and understanding the type of asset whose disposal is restricted by a freezing order is an asset which can be seized by the clamant, if and when he becomes judgment creditor, and which can be sensibly treated as having some value to him. If so, the value can be taken into account for the purposes of determining whether there has been a breach of the monetary limits of the order or whether they are of a size which requires to be disclosed under any order for disclosure of assets above a certain value. A person made subject to a freezing order would not ordinarily expect that a right to borrow more, and, thus increase his indebtedness, was an asset that the order sought to restrain.

58. Mr **Ablyazov**'s rights under these Loan Agreements do not qualify. They (i) have no value quantifiable in monetary terms and (ii) would not be available to the Bank in any enforcement proceedings because neither the Bank nor any other third party would ever be able to get any of the loan monies.

59. As to (i) Mr **Ablyazov**'s rights are non-assignable without the lender's consent (clause 1.16). The loans were essentially personal loans made, according to Mr **Ablyazov**, by Mr Shalabayev and Mr Povny (the individuals behind the Lenders) because of a relationship of friendship and mutual trust for the purpose of funding legal and living expenses. In the case of Mr Povny he had the incentive of possible future business dealings with Mr **Ablyazov**. They were not entered into by the Lenders as an ordinary commercial transaction and the Lenders would have no interest in a third party taking up the loans. Mr **Ablyazov**'s right to borrow was, for all practical purposes unassignable. Therefore the rights cannot have any value. As Mr **Ablyazov** explained:

> *"there was never any question between myself and Mr Shalabayev nor Mr Povny that the loans would be assigned to a third party … I believe that had I requested either of Mr Shalabayev's or Mr Povny's consent to the assignment or transfer to a third party of any of my rights under any of the Agreements, neither Mr Shalabayev nor Mr Povny would have consented to such a request"*;
>
> and
>
> *"because of the nature of my relationship with both Mr Shalabayev and Mr Povny, the particular purpose for which the loans were made and each of their reasons for making the loans (which were very specific to me), I do not believe that either Mr Shalabayev or Mr Povny would have any interest whatsoever in lending the funds to a third party".*

60. In addition under clause 1.6 any undrawn portion of the facility could be withdrawn by the Lender at any time.

61. As to (ii) Mr **Ablyazov**'s practical inability to assign and the Lender's right of withdrawal effectively meant that the funds would never be available to meet the Bank's claims. The Lenders, who lent out of personal friendship and not as an ordinary commercial transaction, were never going to consent to an assignment of the right to drawdown to a third party nor forbear to withdraw the facility if there was any prospect of someone other than Mr **Ablyazov** getting the money. The idea that someone might seek to purchase the drawing rights is fanciful. Nor can a Receiver be appointed over an unassignable asset: *Kerr & Hunter on Receivers and Administrators* at §3-13; *Commercial Enforcement* §6.48.

62. The Bank submits that the question whether or not something is an asset does not depend on the ability of the claimant (or anyone else) to secure enforcement against it. The terms of the freezing order do not contain any such limitation and none should be implied, not least because of the difficulty of deciding whether an asset has that character and of determining who is to decide that question.

63. The Bank also submits that, even if the Loan Agreements are unassignable, Mr **Ablyazov**'s rights under them would vest in any trustee in bankruptcy. In *In re Landau* [1997] 3 AER 322 Ferris J held that a bankrupt's rights under a retirement annuity policy vested in the trustee in bankruptcy, even though they were non assignable in the terms of the policy. But that was, I note, essentially on the ground that vesting in the trustee was not to be equated with an assignment which the policy wording prohibited.

64. Mr Smith suggested that the idea that the Lender would not cancel the facility on Mr **Ablyazov**'s bankruptcy was not fanciful. It could, for instance, be the case that the person behind the Lender, if not Mr **Ablyazov** himself, was a business associate who might be anxious to increase Mr **Ablyazov**'s indebtedness in order to be able to execute later on some **Ablyazov** asset, such as a shareholding in a company in which

they each had an interest. In any event the court should not have to address itself to the question of enforceability, the answer to which was far from clear cut.

65. I regard this prospect as implausible. There is no evidence that the UBO of either Lender ever had this in mind and, if he did, the scheme would probably not work. Any post bankruptcy loan taken by the trustee would take precedence over prior creditors and could not be used to pay them off. For that reason the trustee would not be interested in taking it. Mr Smith observed that this analysis assumed that the loan was not paid off by the Lender obtaining execution against the shares. This in turn appears to contemplate a trustee who takes a further loan from the Lender on the footing that it will only be enforced against assets of Mr **Ablyazov** which the trustee is prepared to allow the Lender to seize and not to seek to realise.

66. As to the reliance placed on the new wording Mr Matthews submits that it takes the matter no further. It remains necessary to identify the *asset* of which Mr **Ablyazov** has a power of direction or control. There is none. There is, as Mr Smith accepts, no fund which Mr **Ablyazov** can order to be paid. Even if there was the Lender could withdraw it at any time. Mr **Ablyazov** can make a request to the Lenders under the Loan Agreements to disburse money, e.g., to solicitors, upon receipt of which the Lender will pay in accordance with the request. But the control of the monies actually paid remains with the Lender, which can decide on the source of payment, until the very moment when the money is in the payee's bank account. Mr **Ablyazov** has a right to have monies transferred from somewhere but no control, and no idea, as to where the monies will be paid from. They may not even come from the Lender since it may procure a third party to make the payment. It might even make payment in cash.

67. Mr Smith submits that once a drawdown notice has been given then Mr **Ablyazov** has a right of control over a particular amount of money which is sufficient to bring him within the wording of the freezing order.

Ambiguity

68. The order, Mr Matthews submits, is, at best in the Bank's favour, ambiguous. *Cantor Index* and *Anglo Eastern Trust* have stood unchallenged for over 10 years. They are referred to in the White Book in the following terms:

> i. "*A freezing order … restrains the respondent from dealing with his assets, but it does not prevent him from borrowing money, thereby increasing his overall indebtedness (Cantor Index Ltd v Lister, November 22, 2001, unrep. (Neuberger J.); Anglo Eastern Trust Ltd v Kermanshahchi [2002] EWHC 1702 (Ch); July 5, 2002, unrep. (Neuberger J.))*": para 15-55 (Volume 2, p 2968);
>
> ii. "*The example contains clauses stating that the terms in the order prohibiting the respondent from dealing etc. with their assets do not prohibit them from spending stipulated sums on living expenses or on legal advice and representation. It has been held that these clauses in combination do not prohibit the respondent from borrowing money to meet living and legal expenses, even though the result is that the amounts then spent on these matters exceed the sums stipulated (or, in relation to legal expenses, a reasonable amount) (Cantor Index Ltd v Lister, November 22, 2001, unrep. (Neuberger J.))*": para 25.1.25.6 (Volume 1, p 712).

69. In those circumstances the ambiguity should be resolved in Mr **Ablyazov**'s favour as *Cantor Index* and *Anglo Eastern Trust* show. At the very lowest there has been no contumacious breach. In those circumstances, given that the full amount has been drawn down under the Loan Agreements and legal expenses are being funded by a different lender – Green Life – on different terms no declaratory relief is appropriate.

70. Mr Smith submits that there is, in truth, no ambiguity. What has happened is that the wrong arguments have been submitted in earlier cases and the right ones not advanced.

Discussion

71. The question for decision (which I have not found without difficulty) is whether in exercising his rights under the Loan Agreements to have the Lenders pay monies to his solicitors (and others) Mr **Ablyazov** was disposing of or dealing with assets within the meaning of the freezing order. As the submissions that I have summarized show there is much to be said on both sides and the answer may depend on whether you look at the question from the viewpoint of a lawyer, an accountant or a businessman.

72. In my judgment the freezing order is to be construed in the way in which it ought reasonably to be understood by a businessman to whom it was addressed in the light of the purpose which it was designed to serve. That purpose was to prevent Mr **Ablyazov**, against whom the Bank might in the future secure a judgment, from disposing of his assets, otherwise than in the ordinary course of business, so as to frustrate any attempt by the Bank to secure payment of its judgment by whatever process of execution might be open to it.

73. In that context, as it seems to me, the assets to which the freezing order refers are assets which would or could be of some value to the Bank and against which the Bank would be capable of securing execution.

74. I recognise that the standard form of freezing order, which precludes a disposal of or dealing with assets, *prima facie* catches dispositions which do not amount to dissipation – as Robert Goff J recognised in *The Angel Bell* [1981] QB 65: hence the ordinary course of business exception – and that the terms of an order could relate to an asset which could not be seized in execution. That being so, it is possible that the standard form covers the exercise of a right to borrow even though that would not, of itself, amount to dissipation.

75. But the better view is that, in deciding the meaning of "*assets*", account must be taken of the purpose of freezing orders, which is as described in paragraph 72 rather than the prevention of any increase of indebtedness. In the light of that purpose, and looking at the question from the viewpoint of an addressee of the order, it does not seem to me that Mr **Ablyazov**'s right to borrow is, in this context, to be regarded as an asset, nor its exercise a disposal thereof or a dealing therewith. A man who, being entitled so to do, borrows more is not ordinarily to be described as disposing of or dealing with an asset as Neuberger J, in my respectful view rightly, decided.

76. Court orders and other legal documents do not always use ordinary language. There is good reason for this. It is often necessary to use specific legal terminology to describe particular legal concepts. Interpreting such terminology by reference to "ordinary language" may be entirely inappropriate and fail to give effect to what the court intended. It is not, therefore, possible to ignore the fact that choses in action are, in law, assets. That said, the freezing order does not use the words "*choses in action*" but the words "*assets"*, "*dispose of*" and "*deal with*". These are words of ordinary English, included in a court order which imposes severe restrictions on a person's freedom of action. In those circumstances it is legitimate to consider how the words would be understood by a businessman who was made subject to the restrictions of the order.

77. If I look at the question from a more legalistic viewpoint, there is no difficulty in regarding a right to borrow as a chose in action. But I do not regard it as clear that exercising a right to borrow money constitutes *disposing* of a chose, even though the exercise of the right means that, *pro tanto*, the right no longer exists. It may, perhaps, more readily be regarded as *dealing* with that chose. But, in context, both *disposing* and *dealing* suggest some form of transfer, or agreement to transfer – to be expected in an order which is designed to stop the movement of what might be taken in execution - as opposed to the exercise of a right to borrow i.e. to receive money in exchange for a debt.

78. Further, if the Bank's contentions be sound, the standard freezing order has some odd effects. Mr Smith accepted that, on the Bank's approach, every *termination* of a contract was, at least potentially, a breach of the order since it involved the disposal of a right (by bringing it to an end) even though the value of the right (e.g. a right to receive services for a price which reflected their true value) might be minimal. As I understood him, the same would apply to the *exercise* of a right under a contract such as a right to draw down, even though it did not involve a termination, because that exercise would, *pro tanto*, dispose of the right exercised.

79. In addition, if the Bank is right, there seem to me to be intractable questions of valuation e.g. as to the valuation of a right to borrow. I should not be understood as meaning that an asset is not an asset because it is difficult to value. But the fact that a particular construction would potentially involve a multiplicity of valuations of run of the mill and other contracts (which may be nigh on impossible to value) as well as preclude their termination, or the exercise of rights thereunder, is a reason for adopting a stricter construction.

80. These considerations illustrate to me the danger, and the error, of treating language designed to prevent the removal from a claimant's grasp of that which he might secure in execution of any judgment as applicable to every chose in action including the exercise of a right to incur a liability.

81. Lastly, I accept that, if there are two possible constructions, the court should, in a matter of this kind, which may well give rise to penal sanction (as in Mr **Ablyazov**'s case it already has), adopt the construction most favourable to the putative contemnor. If I had been satisfied that the construction adopted by Neuberger J was clearly wrong, I would not have forborne to give effect to the right construction because the wrong one had stood unchallenged for so long. But I am not so satisfied.

82. In the result I conclude that Mr **Ablyazov**'s rights under the Loan Agreements were not assets within the meaning of the freezing order; nor was his exercise of his rights a disposal of or dealing therewith. A right to borrow on the terms of the Loan Agreements is not the sort of asset which the freezing order contemplates. Mr **Ablyazov**'s rights under the Loan Agreements were of no value to the Bank. The loans, if not shams, were personal loans made by trusted friends or associates. They were incapable of assignment without the Lenders' consent and the rights to draw down could be withdrawn. There was no realistic prospect of the Bank securing the right to borrow on these terms by execution.

83. I do not regard the extended description or the Commercial Court words as altering the position. These provisions were drafted for a different purpose. There was, in my view, no asset of which Mr **Ablyazov** had legal or beneficial ownership or control of which he made a disposal or with which he dealt. Mr **Ablyazov** had a right to require the Lender to procure that third parties were paid (in a form which was to be agreed: clause 1.2). But he had no right of ownership or control in respect of any particular asset[s] nor any right to dispose of or deal with any asset as if it was his own. He exercised his right to borrow and, upon his so doing, the Lenders disposed of monies, which, until they reached the payees, the Lenders owned and controlled and alone had the power to deal with as their own. It was up to the Lenders to decide what monies to use for the payment and, until payment was made, they could change their mind. In consequence of the payment to the payees, Mr **Ablyazov** incurred an obligation to repay the Lender. As in *Anglo Eastern Trust* it is not necessary to treat the money paid by the Lenders as being at some notional *scintilla temporis* the property of Mr **Ablyazov** or as disposed of or dealt with as if it was his own or held or controlled in accordance with his instructions.

84. I have not forgotten that the effect of this interpretation is to allow someone in the position of Mr **Ablyazov** to effect a diminution of his assets outside the confines of the freezing order and may lead to the consequences to which I referred in para 16 above. Like Neuberger J I do not regard that as sufficient grounds for adopting a different construction of the order.

85. Accordingly I decline to make the declaration sought or to grant any consequential relief.

1 Cf. the wording in the present freezing order "*whether or not they are in their own name and whether they are solely or jointly owned and whether or not [Mr **Ablyazov**] asserts a beneficial interest in them.*"