Judgments

JSC BTA Bank v Ablyazov and others

Practice – Pre-trial or Post-judgment relief – Receiver – Bank bringing claim against various defendants for fraud (claim) – Applicant shareholders or directors of fifth defendant company applying to court for permission to appoint receiver to defendant claim against fifth defendant – Applicants not being parties to claim – Whether court having jurisdiction to determine application – Whether application to be granted

[2012] EWHC 2698 (Comm), 2010 Folio 93, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

3, 8 OCTOBER 2012

8 OCTOBER 2012

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

S Smith QC and T Akkouh for the Claimant

C Kinsky QC and P Griffiths for the Applicants

Hogan Lovells International LLP; Edwin Coe LLP

TEARE J:

[1] The application now before the court was issued in what is known as *the Chrysopa action*, in which action the Claimant, BTA Bank, claims that US$120m. was advanced by the Bank to the Fourth Defendant, Chrysopa Holdings BV, pursuant to a sham transaction designed to disguise the transfer of the sum to entities owned or controlled by the First Defendant, Mr **Ablyazov**. The Bank claims that the Fifth Defendant, Usarel Investments Ltd, was mixed up in the alleged fraud. Damages and proprietary remedies are claimed against the Defendants, including Usarel.

[2] The application now before the court has been issued, not by one of the parties to *the Chrysopa action,* but by a number of entities who claim to have been or to be shareholders in Usarel and also by two entities who claim to be corporate directors of Usarel. The order sought is that the court appoint David Rubin of David Rubin & Partners LLP as receiver of Usarel for the purposes of defending the claim brought by the Bank against Usarel.

[3] The application was issued on 1 October 2012, just a month before the trial of the action is due to commence. The trial has been fixed for some time and is expected to last for some 12 – 14 weeks. It is unfortunate that the application has been issued so late in the day. Indeed, it was issued for hearing at the pre-trial review. It became apparent during the argument that the determination of the application involves issues concerning the Judgments Regulation. The Bank says that the court has no jurisdiction to determine the application but that if the court does have jurisdiction the court should not, in the exercise of its discretion, accede to it. In view of the proximity of the trial Usarel requires the application to be determined as soon as possible. This judgment has therefore been prepared in some haste and is in shorter form than I would prefer.

THE REASON FOR THE APPLICATION

[4] This is somewhat complex. Before *the Chrysopa action* was commenced the shares in Usarel were owned as to 100% by Lux Investing Ltd. The shares in Lux were owned as to 51% by Tedcom Finance Ltd and as to 49% by Vetabet Holdings Ltd. The shares in Tedcom were owned as to 75% by Direct Logistics Ltd, a company owned or controlled by Mr **Ablyazov**. The remaining 25% of the shares in Tedcom were owned by Med Consulting Ltd, a company owned or controlled by Ms Zhankulieva, an associate of Mr **Ablyazov**. The shares in Vetabet were owned or controlled by Mr Pukhlikov and Mr Sheklanov. Thus Lux and Usarel were the manifestation of a joint venture between Mr **Ablyazov**, on the one hand, and Mr Pukhlikov and Mr Sheklanov on the other hand.

[5] When *the Crysopa action* was commenced by the Bank against Mr **Ablyazov** and, amongst others, Usarel, Vetabet became concerned that Mr **Ablyazov**, who had control of Usarel and in whom Vetabet had lost trust, would not defend the claim brought by the Bank against Usarel in such a way as would protect the interests of Vetabet. Vetabet therefore sought to protect itself. It first sought to intervene in *the Chrysopa action* but that attempt failed. It also commenced arbitration proceedings in London pursuant to the Lux Shareholders Agreement and sought to bring proceedings against the Bank in London. Usarel is a company incorporated pursuant to the laws of Cyprus and proceedings were brought in Cyprus seeking the appointment of a receiver with powers, amongst others, to defend the claim brought by the Bank against Usarel.

[6] Ms Zhankulieva had also fallen out with Mr **Ablyazov** who, she claimed, had deceived her as to her interest in Usarel. She brought proceedings in Cyprus with a view to establishing what she said was her entitlement to a direct interest in Usarel, as opposed to an indirect interest through Tedcom and Lux. There was a default of appearance and/or defence and as a result the Cypriot court made orders in June 2011 to the effect that Direct Logistics Ltd (in effect Mr **Ablyazov**) was entitled to 38.25% of Usarel, that Med Consulting Ltd (in effect Ms Zhankulieva) was entitled to 12.75% of Usarel and that Vetabet (in effect Mr Pukhlikov and Mr Sheklanov) was entitled to 49% of Usarel. These shareholdings have now been registered in Cyprus.

[7] Vetabet and Med Consulting then allied themselves together so that, between them, they had majority control of Usarel. They (or Evoru Holdings and Dube Overseas who appear to have had Vetabet's and Med Consulting's shares transferred to them) appointed two corporate directors of Usarel, Polatia Holdings Ltd and Liberati Worldwide Inc (Before these appointments there had been no directors of Usarel because those who had been directors had resigned before the Cypriot court gave its judgment as to the shares in Usarel.) In these circumstances Vetabet felt confident that they would be able to defend the claim brought against Usarel (because Mr **Ablyazov** no longer had control of Usarel) and so they had no need to seek the appointment of a receiver by the Cypriot court to defend that claim. Vetabet's application for the appointment of a receiver was withdrawn in September 2011.

[8] However, Mr **Ablyazov** was unhappy with the Cypriot court judgment and has sought to challenge it in Cyprus. His challenge is ongoing. The Bank, suspecting that the loss of Lux's shares in Usarel was part and parcel of a plan to remove Mr **Ablyazov**'s assets from the Bank's grasp, has also commenced proceedings in Cyprus designed to overturn the Cypriot court judgment. It obtained injunctive relief but that was later set aside. The action, however, continues.

[9] Thus the position is that the Bank does not accept that the shareholdings in Usarel are as they have been declared to be by the Cypriot court or that the present corporate directors of Usarel have been validly appointed. Consistent with this view they have advised Edwin Coe, the solicitors acting for Usarel in these proceedings pursuant to instructions given by the corporate directors, that they may not have authority to act for Usarel. The spectre of an action for damages for breach of warranty of authority thus hangs over Edwin Coe.

[10] In these circumstances Mr Kinsky QC, counsel for the Applicants, has said in his Skeleton Argument that if the doubt as to the authority of Edwin Coe is not resolved the firm will have to come off the record and withdraw its instructions to counsel leaving Usarel without representation and the risk of substantial injustice. The purpose of the application now before the court is to resolve that doubt by appointing a receiver with power to instruct Edwin Coe to defend the claim brought against Usarel. Mr Kinsky submits that the court has power to do so pursuant to s 37 of the Senior Courts Act 1981 which provides that the court may appoint a receiver where it is just and convenient to do so.

[11] I was told that notice of this application was given not only to the bank but also to Addleshaw Goddard who act for Mr **Ablyazov** in *the Chrysopa action*. However, Mr **Ablyazov** has not been represented on this hearing.

THE BANK'S RESPONSE

[12] Mr Smith QC, counsel for the Bank, submits that the court has no jurisdiction to make the order sought by the Applicants. That is because, he says, art 22 of the Judgments Regulation confers exclusive jurisdiction with regard to this matter on the court of the state in which Usarel has its seat, that is, Cyprus. Thus, however desirable it may be in the interests of justice to make an order designed to ensure that Usarel is represented at the trial of the action brought against it, the court is powerless to assist.

[13] Article 22 provides, so far as material, as follows:

> “The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> . . .

> 2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or association of natural or legal persons, *or of the validity of the decisions of their organs*, the courts of the member State in which the company, legal person or association has its seat . . . .” (Emphasis added)

[14] Mr Smith submitted that the application before the court constitutes proceedings which have as their object the validity of the decisions to be taken by the receiver, an organ of Usarel, with regard to defending the claim brought by the Bank against Usarel. In support of this submission he relied upon *Speed Investments v Formula One Holdings (No 2)* [2004] EWCA Civ 1512, [2005] 1 BCLC 455, [2005] 1 WLR 1936 (though in *JP Morgan v Berliner Verkehrsbetriebe* [2010] EWCA Civ 390, [2012] QB 176, [2011] 1 All ER (Comm) 775 Aikens LJ had difficulty with the reasoning in *Speed Investments* and suggested that it be regarded as a decision on its rather special facts, see paras 56 – 58).

[15] If, contrary to his submission, the court does have jurisdiction to make the order sought Mr Smith said that it was not appropriate to make the order sought because Cyprus was the most appropriate court to make such an order, having regard to the fact that Usarel was incorporated in Cyprus, to the fact that there were related proceedings there in which the earlier order of the Cypriot court was being challenged and to the fact that Vetabet had sought the appointment there of a receiver but had withdrawn that application over a year ago. In support of that submission he relied upon *Dicey, Morris and Collins on the Conflict of Laws* 14th ed at para 30-024.

DISCUSSION: (1) JURISDICTION

[16] In view of the urgency with which this judgment is required I shall set out my views on this matter in short form.

[17] It is first necessary to note the context in which this matter has arisen. The Applicants are not seeking to sue anyone. Rather, they are making an application in an action in which the Bank is suing various parties. They are not seeking to establish jurisdiction over anyone. There is no dispute that in the action commenced by the Bank the court has jurisdiction over the various Defendants, including Usarel.

[18] In my judgment two matters flow from a consideration of this context. First, the rules on jurisdiction set out in the Judgments Regulation are not engaged by the application before the court. The Applicants are not seeking to sue the Bank; cf art 2.1 of the Regulation which is concerned with where persons must be “sued”. The rules on jurisdiction set out in the Judgments Regulation were engaged by *the Chrysopa action*, proceedings in which the Bank has sued several Defendants. But there is no dispute that this court has jurisdiction over the Defendants in *the Chrysopa action*. Second, the application before the court does not amount to “proceedings” within art 22.2. The relevant proceedings are those commenced by the Bank against the various Defendants, *the Chrysopa action*, and there is no dispute that this court has jurisdiction to hear and determine those proceedings.

[19] The application before the court is made in those proceedings. In those proceedings the court has power to appoint a receiver where it is just and convenient to do so pursuant to s 37 of the Senior Courts Act 1981. The Applicants ask the court to exercise that power. The application concerns the ability of one Defendant to the proceedings commenced by the Bank to be represented at trial. Although the application is made by persons who are not party to those proceedings it was not suggested that the Applicants had no *locus* or standing to make the application.

[20] I have therefore concluded that I am unable to accept the Bank's submission that the court has no jurisdiction to determine the application.

[21] The matter is comparable to the Bank's application made earlier in these proceedings for the appointment of a receiver, and later manager, of Mr **Ablyazov**'s assets for the purpose of making a freezing order more effective. It was not, so far as I am aware, suggested by anyone that art 22.2 prevented the court from having jurisdiction to appoint a receiver and manager of Mr **Ablyazov**'s assets on the grounds that the application to appoint a receiver and manager amounted to proceedings the object of which was the validity of prospective decisions to be taken by an organ of the foreign companies in question, namely, the receiver and manager. The reason why that was not suggested, as I understood Mr Smith to accept, was that the application to appoint a receiver and manager did not amount to "proceedings" within art 22.2 but was merely an application within the underlying proceedings in which the Bank claimed damages and other remedies against the Defendants for fraud. Those proceedings were not proceedings the object of which was the validity of decisions of organs of those companies. Essentially for the same reasons I do not consider that the application in this case amounts to "proceedings" within art 22.2.

DISCUSSION: (2) DISCRETION

[22] In principle, the requested appointment of a receiver is just and convenient because its purpose is to ensure that Usarel, a Defendant to a very large claim in fraud, is represented at trial by solicitors and counsel. It must be in the interests of justice that a Defendant to a such a claim be represented at trial.

[23] Mr Kinsky stressed that the court was not being asked to determine the issue which is currently before the Cypriot courts as to the identity of the shareholders in Usarel and, in consequence, as to whether the corporate directors of Usarel have been validly appointed. That is indeed the case. This court is not being asked to say that the corporate directors have been validly appointed with the consequence that Edwin Coe has authority to act in this action on behalf of Usarel. Rather, it is being asked to appoint a receiver so that if, as suggested by the Bank, the corporate directors have not been validly appointed and so Usarel has no directors, the receiver can confer authority on Edwin Coe to act in this action on behalf of the Bank. There is thus no risk of conflict between this court and any decision which the Cypriot court may make. If the Cypriot court confirms its earlier decision then Edwin Coe will all along have had authority to act on behalf of Usarel. (The court's order will have suspended the authority of the corporate directors to give instructions to Edwin Coe but that will not be inconsistent with the decision of the Cypriot court.) If the Cypriot court decides, pursuant to the arguments of Mr **Ablyazov** and the Bank (who, on this rare occasion, appear to be allies) that Lux remains the shareholder of Usarel, then the decision of this court to appoint a receiver for the purpose of instructing Edwin Coe will not be inconsistent with such determination because, if Lux remains the shareholder of Usarel so that the corporate directors were not validly appointed, Usarel had no directors. Thus the only effect of the appointment of a receiver will be that there will be no doubt that Edwin Coe have authority to act on behalf of Usarel. One of the purposes of the Judgments Convention is to minimise the risk of irreconcilable judgments in different states. There is no such risk in the present case.

[24] Mr Smith submitted that, notwithstanding the justice and convenience in ensuring that Usarel is represented at the trial, this court should not appoint a receiver because the appropriate court to make such an order is the Cypriot court. Usarel is incorporated in Cyprus and there are related proceedings on foot there. He pointed out that the court's order appointing receivers and managers of Mr **Ablyazov**'s assets recognized the importance of the courts of the place where the companies in question were incorporated by stating that the appointment would not become effective until this court's order had been recognized by the "local" court.

[25] I accept that the Applicants could have applied to the Cypriot court for the order they now seek and that this court would normally give considerable weight to the court of the country of incorporation as the appropriate forum where matters of the internal management of a foreign company are concerned. However, the receiver in the present case is being sought for a particular and very limited purpose, namely, to ensure that in proceedings commenced in England by the Bank against Usarel the latter is legally represented in such proceedings. The court is not seeking to resolve a dispute which undoubtedly exists as to the internal

management of Usarel. That dispute is before the Cypriot court where Usarel is incorporated. The court is merely wishing to ensure, in the interests of justice, that, however that internal dispute is resolved in Cyprus, Usarel is represented at the trial which is shortly to take place in this court. This is, it seems to me, a strong reason for concluding that it is appropriate that the English court make the order.

[26] Mr Smith said that there was a risk of prejudice to the Bank if the court made the order sought. First, he said that if the order were made and the Bank subsequently recovered judgment against Usarel, Mr **Ablyazov** or Direct Logistics might say that the judgment should be set aside because there were points which counsel, instructed by the receiver, did not take but which ought to have been taken. Second, Mr Smith said that when the Bank sought to "export" the judgment to, for example, Cyprus there might be difficulties in the way of enforcement if it were subsequently held that the court had no jurisdiction to appoint a receiver because then, technically, the judgment will have been made in default of defence which would make it difficult to enforce. I was not persuaded that there was a real risk of prejudice. As to the first suggestion I do not see why, if the court, having examined the evidence adduced at trial and considered the arguments of counsel, is persuaded that the Bank has a cause of action against Usarel and gives judgment accordingly, such judgment is liable to be set aside merely because certain points were not taken. Of course, any such judgment may be appealed but that is always the case. In any event, there are no obvious reasons why Edwin Coe and the counsel they intend to instruct will fail to take the points available to Usarel. As to the second suggestion, it seems to me that if there are difficulties in Cyprus in enforcing a judgment obtained in default of defence those difficulties will also have to be faced if the court does not appoint a receiver, because there will be no defence. In any event, one would expect that the prospects of enforcing the judgment in Cyprus would be the greater if the judgment has been obtained notwithstanding evidence adduced and submissions made by counsel on behalf of, or purportedly on behalf of, Usarel.

[27] Mr Smith also pointed out that this application has been made very late in the day when it could have been made a year ago in Cyprus. Instead it was abandoned a year ago in Cyprus. I was concerned by this and, as I indicated in the hearing, my provisional response to the application before having heard argument, was that, having regard to the fact that Usarel was incorporated in Cyprus, to the fact that related litigation is underway there and to the fact that a very similar application was made there but withdrawn, this court should not intervene. However, Mr Kinsky has explained why the application in Cyprus was withdrawn and for the reasons I have endeavoured to give I have concluded (contrary to my initial view) that it is appropriate that this court make an order for the purpose of ensuring that, if as suggested by the Bank, Usrael has no directors it can nevertheless be represented at the forthcoming trial in this court.

[28] There remains the question of delay. The application is made very late in the day. That delay has not been explained. It seems likely that Edwin Coe, having initially been confident that the corporate directors had been validly appointed (which was the reason why the application to appoint a receiver in Cyprus was abandoned), had second thoughts and recognised that there was a risk (as there always is in litigation) that the combined forces of the Bank and Mr **Ablyazov** might prevail before the Cypriot court, in which case Edwin Coe would be exposed to an action for damages for breach of warranty of authority. The lateness of the application is a matter to be taken into account but having done so I remain of the view that it is in the interests of justice that Usarel be represented at the forthcoming trial, notwithstanding that the application has been made very late. It was not suggested that the delay has prejudiced the Bank in any way.

[29] I have therefore concluded that the court should accede to the application.

THE FORM OF THE ORDER

[30] A number of points were taken with regard to the draft order. I shall attempt to deal with each of them.

[31] *The description of the receiver:* Mr Smith says that the receiver is not receiving anything and should therefore be described as a manager. Mr Kinsky refers to the use by the Supreme Court of Queensland (in

Swisstex Finance v Lamb 1988-1986 10 ACLR 135) to the description of receiver *ad litem* which, in English, may be described as Litigation Receiver. I would prefer that term. It sensibly describes the role and function.

[32] *Period of time for varying or setting aside:* I agree that this should be limited to 21 days. It is in the interests of justice that any challenge to this order be made sooner rather than later.

[33] *Undertakings*: The undertakings should be in respect of loss to Usarel or any other person. Whilst it is difficult to identify any loss which might be caused to Usarel or any third party by the making of the order, it is difficult to exclude the possibility of loss and, as Mr Smith observed there is no evidence of the financial standing of any of the Applicants. In those circumstances I consider that the undertakings should be fortified by the payment into court of £25,000 within seven days. In addition the bond of Mr David Rubin must be extended to cover the litigation receivership.

[34] *The powers of the Litigation Receiver:* They should be expressed as one principal power with several particulars as discussed during the hearing. I have considered Mr Smith's objections to ratification of previous instructions but to exclude this power would be inconsistent with the purpose of the appointment which is to put Edwin Coe's authority beyond doubt. I have also considered Mr Smith's objection to the power of borrowing money but I consider that the power should be included. To the extent that the Bank's proprietary claim succeeds in the action against Usarel it will take priority to any unsecured claim by someone who lends money to finance the defence. There should be inserted an express prohibition on the grant of security by Usarel. Mr Kinsky said that there was no suggestion security would be taken so this would put the matter beyond doubt.

[35] *Assistance from the Court:* There should be a provision that the court to which the Litigation Receiver may apply for directions should be the Chancery Division of the High Court. This replicates the provision which applies to the receivers appointed on the Bank's application. Mr Smith submitted that the Litigation Receiver should seek directions from the court in Cyprus but having regard to the limited purpose of the appointment, the conduct of a trial in this court, I was not persuaded that that was appropriate.

Judgment accordingly.