Neutral Citation Number: [2013] EWHC 2772 (Comm)

Claim No: NOT KNOWN

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Friday, 18 January 2013

BEFORE:

MR JUSTICE FLAUX

\- - - - - -

BETWEEN:

JSC BTA BANK

Claimant

- and -

ABLYAZOV & OTHERS

Defendant

\- - - - - -

MR PHILIP JONES QC appeared on behalf of the Claimant

MR GEORGE HAYMAN appeared on behalf of the Defendant

\- - - - -

Approved Judgment

Court Copyright ©

\- - - - - -

Digital Transcript of Wordwave International, a Merrill Corporation Company

165 Fleet Street, 8th Floor, London, EC4A 2DY

Tel No: 020 7421 4046 Fax No: 020 7422 6134

Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com

(Official Shorthand Writers to the Court)

Friday, 18 January 2013

J U D G M E N T

MR JUSTICE FLAUX:

1. This is the latest hearing in a long-running dispute between the claimant bank and its former chairman, Mr **Ablyazov**. It is not necessary to set out the nature of the claims or the Defence as those are usefully summarised in the judgments of Teare J in [2012] EWHC 237 Comm at paragraphs 3 and 4. The trial of this matter has now been proceeding before Teare J since some date in November of last year.

2. The present application follows on from similar applications made by the bank which were heard by Teare J in July 2012 and in relation to which he gave judgment in favour of the bank on 21 September 2012 (that is [2012] EWHC 2543 Comm), granting declarations as to Mr **Ablyazov**'s ownership of certain assets and his breach of both the freezing order made on 12 November 2009 and the receivership order, which although dated 6 August 2010 was the subject of a stay and took effect from either 9 or 10 November 2010. The court also made consequential orders that Mr **Ablyazov** should intervene in any enforcement proceedings in Russia in relation to those assets taken by the liquidator of AMT Bank, which was a subsidiary of the claimant bank which remained under Mr **Ablyazov**'s control even after the nationalisation of the claimant bank, and indeed remained under his control until the AMT Bank became the subject of liquidation proceedings in Russia.

3. By the present application the bank seeks similar orders in relation to the shares in OJSC Pabliskaya, held by Simple City Holdings Limited, a Cypriot company beneficially owned by Mr **Ablyazov**, which in turn was 99.9 per cent owned by a company called Invest Club Investments Limited in the British Virgin Islands. Ultimately all these companies are beneficially owned by Mr **Ablyazov** and clearly are assets of Mr **Ablyazov** caught by both the freezing order and the receivership order. The Pabliskaya shares are the subject of enforcement proceedings in Moscow by the Deposit Insurance Agency, which is the liquidator of the AMT Bank.

4. The basis for the enforcement proceedings is a pledge agreement whereby the shares were purportedly pledged to the AMT Bank as security for loans in relation to the Pabliskaya construction project in Moscow. That pledge agreement was purportedly dated 10 November 2010 and, although the claimants take issue as to whether it has in fact been backdated, on any view it was after the date of the receivership order.

5. It is appropriate at this stage of my judgment that I should deal with the point raised by Mr Hayman on behalf Mr **Ablyazov** in his oral submissions, although not foreshadowed in his skeleton argument, to the effect that any pledge of the shares in Simple City was not in fact in breach of the receivership order because the receivers were not appointed receivers of Simple City until much later on when there was a further amendment to the receivership order in fact dated 8 March 2012. For reasons which Mr Philip Jones QC on behalf of the bank pointed out in reply, that point is a bad point because what is clear is that the receivers were appointed over the disclosed assets of Mr **Ablyazov**, which included in the schedule to the receivership order his interest at Pabliskaya Square, Moscow, by reference to paragraph 338 of his third witness state-

ment, dated 16 April 2012, at which paragraph he set out the structure by which he owns that particular project, namely, that the property was owned by OAO Pabliskaya, a Russian company, which was in turn owned 100 per cent by Simplicity Holdings, which in turn was 99.9 per cent owned by Invest Club Investments Limited, a company incorporated in the British Virgin Islands.

6. In the schedule to the receivership order made with effect from 10 November 2010 the receivers were appointed specifically receivers of all the shares in Invest Club Investments Limited and it seems to me that by that means they were clearly appointed receivers over any of the assets of Invest Club Investments and in any event the intention clearly was that they would be appointed receivers over the first defendant's interest in Pabliskaya Square, however he held it. So in those circumstances what is quite clear is that any dealing with that asset, including seeking to deal with it by way of a pledge of the shares in Simple City, would be and was a breach of the receivership order. I should add for good measure that, irrespective of whether it was a breach of the receivership order, the entering into the pledge agreement was clearly a breach of the freezing order which had been made by Teare J in 2009.

7. What is said by Mr **Ablyazov** in his 22nd witness statement is that the pledge agreement was never in fact perfected because the AMT Bank had sufficient security in relation to the project elsewhere and therefore did not ultimately require to have a pledge over the shares. Accordingly he submits that the shares are unencumbered and he has produced what purports to be the entry from the relevant part of the register of shares, demonstrating that there was no pledge of those shares.

8. The claimant bank submit that that evidence is unsatisfactory and should be treated with the same healthy scepticism as the Commercial Court and the Court of Appeal have adopted to Mr **Ablyazov**'s evidence generally in this case. He is after all a serial contemnor who has been sentenced by Teare J to 22 months' imprisonment for contempt of court, a sentence which was upheld by the Court of Appeal, but he has fled the jurisdiction rather than surrender to the tipstaff. He has failed to give proper disclosure of assets, he has lied on oath in cross-examination and he has dealt with assets in breach of the orders of this court. It is not necessary for present purposes to do any more than to quote from the judgment of Sir Maurice Kay, Vice President of the Civil Division of the Court of Appeal, in his judgment following part of the judgment of the Court of Appeal dated 6 November 2012 dismissing Mr **Ablyazov**'s appeal against the order committing him to prison for contempt which Teare J had made. Sir Maurice Kay said this at paragraph 202 of the judgment:

"It is difficult to imagine a party to Commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr **Ablyazov**."

9. Mr Hayman on behalf of Mr **Ablyazov** puts forward the evidence of the share register and submits that there is no evidence that that was not genuine and that demonstrates that the pledge has not been registered and submits that it would be unfair to criticise Mr **Ablyazov** in relation to that evidence. There is, as I see it, some force in that point, but what matters for present purposes, as Mr Jones points out, is that the bank is not inviting this court to determine today whether or not the pledge agreement has been effected. What he seeks is a declaration that, if by making the pledge agreement, or any subsequent perfection of that agreement, any enforceable security was created over the Pabliskaya shares, that would have been a breach of both the freezing order and the receivership order. The fact of the matter is that, having considered the statement of claim and other pleadings in the Russian proceedings, it remains somewhat unclear upon what precise grounds the DIA is advancing its claim. But it seems to me tolerably clear that the DIA continues to advance a claim to enforce the pledge agreement irrespective of whether or not the pledge agreement has been registered in the share registry.

10. Mr Kulkov, who is the lawyer from Freshfields, who are the lawyers acting in Russia for the receivers, points out that it may be that the Russian court could order what would in effect be specific performance of the pledge agreement even if the pledge had not been registered on the share register. The reasons why it

is considered by the bank necessary to have the declaration and an order that Mr **Ablyazov** uses best endeavours to intervene in the enforcement proceedings in Russia to ensure that the Russian court is aware that, either by the pledge agreement or otherwise, enforceable security was created over the shares that was a breach of the freezing order and of the receivership order, can be summarised as follows. Firstly, the receivers, who are of course officers of this court, say in terms at paragraph 43(4) of their ninth report, dated 21 December 2012, as follows:

"Following consultation with the receivers, Hope and Lovells, lawyers for the bank, made an application to the English court on 17 December 2012 in relation to the Simple City proceedings [that is the present application]. In this application the bank is seeking *inter alia* a declaration that to the extent the share pledge was perfected, the grant of the pledge constituted a breach of the freezing order and, if perfected after 9 November 2010, was contrary to both the freezing order and the receivership order. If the English court is minded to make such a declaration the receivers consider that this would be of assistance in relation to the defence of the Simple City proceedings."

11. Second, Mr Kulkov in his witness statement dated 16 January 2013 provides a detailed explanation concerning the enforcement proceedings and makes the point that it does not appear to be part of the DIA's case in Moscow that the pledge has been perfected. They simply appear to be relying on the pledge agreement, and that is indeed what appears from the statement of claim. He makes the point, to which I have already alluded, that although the receivers' Defence states that the pledge had not been perfected, the DIA has not withdrawn its claim as a consequence and the Moscow court may well order the perfection of the pledge agreement. Obviously it would assist the receivers in resisting any such specific performance to be able to say to the Russian court that the English court had ordered that the pledge agreement and its enforcement would be a breach of both the freezing order and the receivership order.

12. Thirdly, the receivers are advancing a counterclaim in the enforcement proceedings seeking to invalidate the pledge agreement on the basis that it was entered into in breach of the receivership order. Whether or not there was a breach of the order is of course a matter of English law but the Russian court will need to determine that question and Mr Kulkov, it might be thought rather unsurprisingly, says this at paragraph 12 of his witness statement:

"In this regard I consider that the Moscow court will find a declaration sought by the bank in its application to the English court to be of potentially very significant assistance and persuasive value."

13. In his submissions to me Mr Hayman sought to contend that Mr Kulkov, as the lawyer for the receivers, was only concerned with demonstrating for the purposes of the Russian proceedings and for the purposes of the counterclaim that the receivership order had been breached. But it seems to me that that takes far too narrow a view both of Mr Kulkov's evidence and of what it is that the receivers are seeking to achieve in Russia. The fact of the matter is that the counterclaim that is made, which is a counterclaim which says in terms that the pledge agreement should be invalidated and therefore not capable of enforcement, is simply another way in which the receivers are seeking to contend before the Russian court that the DIA should not be entitled to enforce against the particular asset. As Mr Kulkov puts it at the end of his witness statement, in quite general terms, in paragraph 28:

"I consider that the relief sought in the bank's application, if granted, would be of significant assistance to the receivers in seeking to protect a receivership asset through their intervention in the Simple City proceedings. In particular it is my view that the Moscow court would find the declaration sought from the English court of very significant assistance."

14. Mr Kulkov then goes on in his witness statement to take issue with the various points made by Professor Maggs, the Russian law expert instructed by Mr **Ablyazov**, as to why, according to Professor Maggs, the Russian court would not recognise the receivership order or would not permit Mr **Ablyazov** to intervene

in the Russian proceedings. Mr Hayman sought to persuade me on this application that I should in effect decide that Professor Maggs was right and Mr Kulkov was wrong. It seems to me that it is simply not possible on an interlocutory basis to decide that. All I need say for present purposes is that it is at least arguable that Mr Kulkov is right and Professor Maggs is wrong and therefore it is at least arguable that the Russian court will recognise the receivership order, although the receivers have quite rightly expressed caution in that regard. Furthermore, what matters for present purposes is whether or not the order which is sought in terms of a declaration can be said to be entirely hypothetical or academic because it would never serve any useful purpose.

15. It seems to me that all that the claimant bank needs to demonstrate for present purposes is that it is at least arguable that the order which they seek from the court today by way of declaration is an order which may be of some useful purpose in Russia. It is striking in this regard that the similar order which was made by Teare J in his judgment in September was an order which was in fact in relation to enforcement proceedings which had not been commenced in relation to other assets but was simply an order which made the relevant declaration, which was for the purposes of assistance in relation to any enforcement proceedings which might be issued in the future. It seems to me that this present case is by far and away one where the claimants are in a stronger position than they were before Teare J.

16. In relation to the other part of the order which is sought, which is that Mr **Ablyazov** should use his best endeavours to intervene, Mr Hayman submits, relying again on the evidence of Professor Maggs, that Mr **Ablyazov** would not be entitled to intervene in the proceedings and relies upon Article 51 of the Russian Procedural Code. Mr Kulkov says in his evidence that Professor Maggs is wrong about that and Mr **Ablyazov** would be entitled to intervene and, although Mr Hayman sought to persuade me that I should prefer Professor Maggs, again it seems to me that is not an issue I either can or indeed need to determine for today's purposes. All that Mr **Ablyazov** is being asked to do is to use his best endeavours to intervene. If his intervention proves unsuccessful and he is sent away by the Russian court, he will at the very least have exercised his best endeavours and equally, if his intervention is permitted, then clearly it will have served a useful purpose.

17. It seems to me therefore that the order which is sought is one which it is appropriate to make, it is not simply hypothetical, it does serve a useful purpose and it seems to me it is an order which, in the exercise of the court's discretion and given the history of this case and the history of Mr **Ablyazov**'s defaults, is one in which the balance is very much in favour of the claimants. So for those reasons I propose to make the order sought.