Judgments

JSC BTA Bank v Ablyazov

Practice – Pre-trial or post-judgment relief – Receiver – Judgment entered against defendant – Receivers appointed in relation to defendant's properties – Claimant bank seeking to vary receivership order to permit receivers to sell properties – Whether variation appropriate in circumstances

[2013] EWHC 1361 (Comm), (Transcript)

QBD, COMMERCIAL COURT

HAMBLEN J

25 APRIL 2013

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T Akkouh for the Claimant

A De Mestre for the Receivers

Hogan Lovells International LLP; Freshfields Bruckhaus Deringer

HAMBLEN J:

[1] This is an application by the claimant bank to vary the receivership order made in relation to Mr Ablyazov's assets on 6 August 2010 so as to permit the receivers to sell three properties.

[2] Those three properties are: a mansion on the Bishop's Avenue in North London known as Carlton House; a 100-acre estate near Windsor known as Oaklands Park; and an apartment in St John's Wood known as Albert's Court.

[3] In summary, the bank says it is appropriate to make such an order because Teare Jhas found to the criminal standard that the properties belong to Mr **Ablyazov**. A judgment has now been entered against Mr **Ablyazov** in an amount exceeding US$3.6 billion. Mr **Ablyazov**'s application for permission to appeal to the Supreme Court has been dismissed. The receivers have been appointed in relation to the properties for a considerable time, have taken a number of steps in relation to them and are in the best position to organise their sale and, at least in relation to one of the properties, the bank is having to pay very substantial ongoing maintenance charges.

[4] I shall consider each of the properties to which I have referred in turn.

[5] First, Carlton House – this was purchased on 26 April 2006 for the sum of GBP15.5 million. The registered proprietor of Carlton House is Mount Properties. But it has been found to the criminal standard by Teare J that:

> "I am persuaded so that I am sure that the only reasonable inference to be drawn from the circumstantial evidence is that Mr **Ablyazov** was the beneficial owner of the shares in Mount Properties and hence the beneficial owner of Carlton House."

[6] It had been alleged by Mr **Ablyazov** that Carlton House in fact belonged to his brother-in-law, Syrym Shalabayev. This contention was rejected by the court and, in that regard, the judge's finding was upheld by the Court of Appeal – see in particular the judgment of Rix LJ at para 84.

[7] After the trial before Teare J had concluded but before judgment was handed down there was a further witness statement provided by Mr Shalabayev which suggested that an individual called Roland Koefer was claiming beneficial ownership of the shares in Mount Properties.

[8] Teare's J conclusion was "I do not consider the claim to be true that Roland Koefer may have purchased Carlton House from Syrym Shalabayev in November 2002."

[9] This finding was again upheld by the Court of Appeal. Rix LJ observed at para 97 as follows:

> "In the case of Carlton House and Oaklands Park, sumptuous homes which Mr **Ablyazov** and his family enjoyed, when they became the focus of attention in committal proceedings, the court was asked to believe that not Mr **Ablyazov**, but his brother-in-law, Syrym Shalabayev, was the owner by virtue of his success in the uranium business, a success not only entirely undocumented, but contradicted by documents and unmentioned by Mr **Ablyazov** when he was setting out his original account of Syrym's business career.
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> Moreover, when the point was made at trial that Syrym's alleged sales of these properties to third parties went unevidenced, despite the receivership orders against the companies concerned and notes placed on the Land Registry, mysterious buyers subsequently to trial belatedly emerged making themselves known not in England, but in Cyprus, but otherwise strangely quiescent as to the disaster by which their otherwise highly valuable properties have become embroiled in English proceedings."

[10] The evidence is that since that time no steps have been taken by Mr Koefer to seek resolution of the application made to the Cypriot court. The evidence is that the most recent valuation obtained by the receivers in relation to Carlton House is in the amount of GBP13.5 million to GBP15 million.

[11] Secondly, Oaklands Park – Oaklands Park's registered proprietor is Lafe Technologies Ltd, a company incorporated in the Seychelles. The shares in Lafe were purchased for £18.15 million. This was a property used by Mr **Ablyazov** and members of his family.

[12] The finding of Teare Jin the contempt hearing in relation to this property was "I am persuaded so that I am sure that Mr **Ablyazov** is the beneficial owner of the shares in Lafe and, hence, Oaklands Park. My reasons are essentially the same as found in my decision in relation to Carlton House."

[13] This is a property which the receivers have been unable to let and are having to pay out costs of approximately £24,000 per month to maintain. Again there was an application made in proceedings in Cyprus in relation to the shares in the only company, this time by a Mrs Beaud. The comments of Teare J and Rix LJ equally apply to her role and, again, she has taken no further steps to seek resolution of the application before the Cypriot court.

[14] The most recent valuation obtained in relation to Oaklands Park is in the amount of GBP20 million to GBP25 million.

[15] Thirdly, Albert's Court – this is a second-floor flat in the Palgrave Gardens Estate in St John's Wood. Its registered proprietor is Bensborough Trading Inc. It was purchased on 27 June 2008 for £965,000.

[16] Teare's J finding in relation to Albert's Court was "I am persuaded so that I am sure that the only reasonable inference to be drawn from the evidence is that Mr **Ablyazov** was the beneficial owner of Albert's Court."

[17] The bank seeks, as part of the variation of the receivership order, an order that the receivers take over as receivers and managers of Bensborough Trading in the same way as they have in relation to Mount Properties Ltd and Lafe Technology.

[18] I am persuaded that it is appropriate that the order be varied in that way.

[19] In relation to the variation seeking the inclusion of powers of sale, the bank submits that the court has jurisdiction to make an order in these terms.

[20] Reference is made firstly to s 37.1 of the Senior Courts Act 1981 and the court's general power in relation to the appointment of a receiver and to act according to what is just and convenient.

[21] Reference is also made to s 37.4 which confers a specific power on the court to appoint a receiver by way of equitable execution. In this connection, I have been referred to Kerr & Hunter on Receivers and Administrators at para 3-13 where reference is made to the power under s 37.4.

[22] It is also pointed out in relation to equitable principles governing the circumstances in which equitable execution may be available, that those principles do not apply in their full rigour where a judgment debtor is threatening or intending to deal with property in a manner which may amount to a fraudulent attempt to defeat the rights of creditors. In that connection, reference is made to the case of *Manchester and Liverpool*

District Banking Company v Parkinson (1888) 22 QBD 173, 58 LJQB 262, 37 WR 264, and *Goldschmidt v Oberrheinische Metalworker* [1906] 1 KB 373, 75 LJKB 300, 54 WR 255.

[23] Aside from s 37.1 and s 37.4, the bank further submits that the Chancery principles which restricted the exercise of the court's powers of equitable execution have developed and are no longer subject to restrictions suggested by some of the older case law. In this connection, I was referred to Gee on Commercial Injunctions, para 16.09 to 16.011.

[24] There, Gee explains as follows:

> "The effect of the emergence of the Mareva jurisdiction has been the recognition of a jurisdiction, available before and after judgment, to grant an injunction or appoint a receiver for the purpose of preserving assets of a defendant. The appointment of a receiver involves the court through its officer, the receiver, taking control of the relevant assets. It is only a short step post-judgment for the court to order the assets controlled by the receiver to be used to satisfy the judgment. A receiver appointed to preserve assets of the defendant pending judgment in the action may in due course become the means for satisfying the judgment. Similarly, post-judgment, if a receiver is appointed to preserve assets, then in principle the assets which he protects ought to be available to satisfy the judgment.
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> These considerations show that in deciding whether to appoint a receiver post-judgment the court should take into account whether, unless the appointment is made, the relevant assets are liable to be dissipated, and the limits of 'equitable execution' as operated by the former High Court of Chancery are no longer determinative. Instead the court should proceed in each case on the basis that section a seven confers on it a jurisdiction to make the appointment, but there remains a question of discretion, which will be exercised flexibly, taking into account all the circumstances of the case, including practical convenience, avoiding unnecessary delay, cost or expense, and considering whether the appointment is likely to provide the claimant with satisfaction of his judgment."

[25] The bank urges the court to follow that approach and submits that all those reasons apply here as to why the receivership order should be extended to cover a private sale.

[26] In support of a more flexible modern approach, I was referred to *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406, [1997] 3 All ER 523, [1998] 2 WLR 334; *Masri v Consolidated Contractors Int (UK) Ltd (Number 2)* [2008] EWCA Civ 303, [2009] QB 450, [2009] 2 WLR 621 and *TMSF v Merrill Lynch Bank and Trust Co Ltd* [2011] UKPC 17, [2011] 4 All ER 704, [2012] 1 WLR 1721.

[27] In this case the bank submits that the circumstances of the case, including practical convenience, avoiding delay, cost and expense and considering whether satisfaction for judgment may be achieved all point to varying the receivership order to include a power of sale.

[28] In particular, it is pointed out that the receivers are already in office; that the receivers already have a substantial knowledge of the properties; that they will be in a position to proceed more quickly in terms of marketing and sale than following through the formal procedures of a charging order; that the receivers are already receivers and managers of Mount Properties Ltd and of Lafe Technology Ltd and by the terms of the order I shall be making, Bensborough Trading Inc as well; and that the receivers will be able to use their powers to transfer and sell the properties without the bank needing to make Pt 8 claim seeking order for sale, without the need for the court to vest in the bank a legal term of 3,000 years in the properties to be sold and without the appointment of a representative of the bank or a bank solicitor as a person to sell the properties.

[29] It is pointed out that enabling the receivers to have the power of sale rather than going through the charging order procedure will in fact give the court greater control over the process because the receivers remain accountable to the court. It will also avoid any arguments about any dual role because if, for example pursuant to a charging order, the sale of the properties was entrusted to the receiver, there might be arguments as to the fact that in those circumstances the receiver would be acting on behalf of the bank. It would accordingly be more satisfactory for all matters of sale to be dealt with by the receiver in the context of the existing receivership order and their duties to the court.

[30] I accept the bank's submission, which is broadly supported by the receivers, that, for the reasons I have outlined and in light of the authorities to which I have referred, this is an appropriate case for the court to take the further step of enabling the receivership order to encompass the power of sale which is sought.

[31] The receivers have made it clear that no sale will be carried out until there is a final charging order. There is at present an interim order and a hearing that is due to take place in relation to making that order a final order in respect of all three properties. I consider that that should also be included in the draft order. I am satisfied that I have jurisdiction to make this order and in the exercise of my discretion it is an appropriate case, to make the order sought.

[32] I also accept the submission made by the bank and also receivers that it would be appropriate to make an order under CPR r 19.8A, which is a rule that gives a power to make judgments binding on non-parties, and I make the order in the draft terms which have been put before the court as amended orally during submissions.

[33] I should add that notice of this application has been given, not just to Mr **Ablyazov**, but to all other interested parties.

Judgment accordingly.