

Judgments

JSC BTA Bank v *Ablyazov* and others

Practice – Order – Final order – Applicant bank applying for final charging order in respect of flat – Court in previous contempt proceedings finding respondent, MA, being owner of flat – Court rejecting evidence of witness SS that he was owner of flat – SS applying to oppose grant of final charging order – Whether abuse of process to permit SS to challenge findings made in contempt proceedings

[2013] EWHC 1835 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

17 MAY 2013

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S Smith QC, T Akkouch and E Gillett for the Applicant/Claimant

D Matthews QC and J Sheehan for Salim Shalabayev

G Hayman for Mukhtar *Ablyazov*

Hogan Lovells International LLP; Addleshaw Goddard LLP

TEARE J:

[1] The court has to decide whether to permit Mr Salim Shalabayev to be heard on the Bank's application for a final charging order in respect of a flat in Alberts court. The Bank says that Mr Shalabayev is in contempt of court and that the court ought not, in those circumstances, to hear him.

[2] The Bank accepts that the court's discretion has to be exercised by reference to the principles discussed by Moore-Bick LJ in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 639, [2012] NLJR 751. That was a case where there had been findings of contempt against Mr **Ablyazov** made as a result of an application by the Bank for an order that Mr **Ablyazov** be committed for contempt.

[3] It is apparent from the judgment of Moore-Bick LJ that the governing principle is set out by Lord Bingham in *Arab Monetary Fund v Hashim* where he said:

[4] "The test is whether in the circumstances of an individual case the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

[5] At para 28 Moore-Bick LJ said:

[6] "When deciding whether it is in the interests of justice not to hear a contemnor the court must take into account all the circumstances of the case. These will include the nature of the proceedings and the consequences for both parties of the decision one way or the other, but the importance of allowing a contemnor to contest the decision against him is a factor which has been emphasised in domestic case law. The Strasbourg cases certainly reflect the particular circumstances under consideration but they emphasise in a more general way the importance of allowing a person convicted of an offence an opportunity to contest the decision against him and the need to ensure that any response to his failure to comply with the court's order is not disproportionate."

[7] In the present case, there has not been an application to commit Mr Salim Shalabayev for contempt, so there are no findings of contempt made against him in contempt proceedings. However, Mr Smith on behalf of the bank says that it is clear that Mr Shalabayev has not complied with orders for disclosure, which were made against him in Norwich Pharmacal proceedings, and is also in breach of an order not to leave the jurisdiction and to deliver up his passports.

[8] As to the first of those matters, Mr Smith relies upon the fact that Cooke J, who heard Mr Salim Shalabayev being cross-examined as to the matters relevant to the Norwich Pharmacal Order, expressed the view that in his judgment there is no doubt there has not been full compliance with the order and that the true position, he said, is that the Appellant must now be in contempt of court. I am particularly exercised by the question whether it would be disproportionate to decide not to hear Mr Shalabayev in response to the charging order in circumstances where the property which is the subject of the charging order is not the subject of the orders for disclosure or the subject of the orders that he not leave the jurisdiction and deliver up his passports.

[9] Mr Matthews on behalf of Mr Shalabayev has said that a party in the position of his client is entitled to defend his property interests, even if he is in contempt, and he relies for that on art 1 of the first protocol to the European Convention on Human Rights. I am not sure that Mr Matthews is right in saying that a party is entitled to defend his property interests, even if he is in contempt, but I am not persuaded that it would be a proportionate exercise of the court's jurisdiction to debar Mr Salim Shalabayev from making submissions in circumstances where the property in question is not the subject of the orders in respect of which he is said to be in breach.

[10] For that reason I have decided that Mr Matthews can be heard on this application.

Judgment accordingly.