

Judgments

No 2009 FOLIO 1099

Neutral Citation Number 2013 EWHC 1836 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Court No 8

The Rolls Building

100 Fetter Lane

London EC4

17 May 2013

Before:

MR JUSTICE TEARE

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BETWEEN:

JSC BTA BANK

Claimant/Applicant

-v-

MUKHTAR **ABLYAZOV** AND OTHERS

Defendants/Respondents

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MR S SMITH QC, MR T AKKOUH and MS E GILLETT (instructed by Hogan Lovells International LLP) appeared on behalf of the Claimant/Applicant.

MR D MATTHEWS QC and MR J SHEEHAN (instructed by Addleshaw Goddard) appeared on behalf of Salim Shalabayev.

MR G HAYMAN (instructed by Addleshaw Goddard) appeared on behalf of Mukhtar **Ablyazov**.

#### APPROVED RULING

**1. MR JUSTICE TEARE:** This is an application by the Bank for a final charging order in respect of a flat in Alberts Court in London. The Bank applies for a final charging order because in the contempt proceedings brought by the Bank against Mr **Ablyazov** it was determined that the flat in question was owned by Mr **Ablyazov** who is now a judgment debtor.

**2.** In the contempt proceedings Mr **Ablyazov** said that he was not the owner of the flat and that Mr Salim Shalabayev was. Mr Salim Shalabayev gave evidence that he was the owner but was not believed by the court. The court determined that Mr **Ablyazov** was the owner of the flat and Mr **Ablyazov** appealed against all the findings of contempt including that in relation to his ownership of Alberts Court and that appeal was dismissed.

3. In response to the application for a final charging order Mr Salim Shalabayev has through counsel and solicitors appeared to oppose the granting of a final charging order in respect of the flat in Alberts Court on the grounds that he, not Mr **Ablyazov**, is the beneficial owner of it.
4. His appearance to make that opposition has caused the bank, through Mr Smith, to submit that it would be an abuse of process to permit Mr Salim Shalabayev to challenge the finding made in the contempt proceedings because such attempt is a collateral attack on the findings made in the contempt proceedings.
5. Mr Salim Shalabayev was not a party to the contempt proceedings. Mr Smith has reserved the question whether or not he was a privy of Mr **Ablyazov** but today he relies upon the statement of principle by Sir Andrew Morritt as Vice Chancellor in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA civ 321 at paragraph 38 where after an extensive review of the authorities Sir Andrew Morritt set out the propositions established by those authorities.
6. Paragraph (d) of those propositions is as follows:
7. "If the parties to the latest civil proceedings were not parties to or privies of those who were parties to the earlier proceedings, then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if:
  8. "(i) it would be manifestly unfair to a party to the later proceedings that the same issue should be re-litigated; or
  9. "(2) to permit such litigation would bring the administration of justice into disrepute."
10. Mr Smith submits that to permit Mr Salim Shalabayev to mount a collateral attack on the finding in the contempt proceedings would bring the administration of justice into disrepute.
11. Mr Matthews, on behalf of Salim Shalabayev, submits that the principle there stated by Sir Andrew Morritt does not apply in the case of somebody, such as his client, Salim Shalabayev, who was only a witness in the previous proceedings.
12. Mr Matthews points out that in the cases to which Sir Andrew Morritt referred the person seeking in subsequent proceedings to challenge a finding made in an earlier set of proceedings had been a party to the earlier set of proceedings and that accordingly, the statement of principle by Sir Andrew Morritt, which I have quoted, should not be regarded as applying to the position of someone such as Salim Shalabayev who was not a party to the contempt proceedings but was a mere witness in them.
13. The statement of principle by Sir Andrew Morritt is certainly wide enough to encompass the present case where Mr Salim Shalabayev was not a party to the earlier proceedings but was only a witness.
14. It seems to me that in principle there is no reason why the doctrine of abuse of process based on a collateral attack should not be capable of extending to the position of a witness to the earlier proceedings who becomes a party to the later proceedings. Obviously his position is different from that of someone who was a party to the proceedings but that difference should be taken into account when deciding whether the collateral attack would bring the administration of justice into disrepute.

15. That the doctrine of collateral attack and abuse of process should not be limited in the way suggested by Mr Matthews is in my judgment supported by the dicta in *Conlon v Simms* [2008] 1 Weekly Law Reports 484 in two places.

16. Firstly, in paragraph 141 Lord Justice Jonathan Parker referred to what Lord Diplock had said in the *Hunter* case, namely that the circumstances in which abuse of process can arise are very varied, and secondly, in the judgment of Lord Justice Moore-Bick at paragraph 167 where he said:

17. "As Lord Justice Jonathan Parker has observed, abuse of process may take many forms and I therefore agree that it would be unwise to attempt to formulate any all-embracing principle by which to identify it."

18. Those passages in my judgment support the view to which I have come that the statement of principle by Sir Andrew Morritt should not be understood in the narrow and limiting way which was submitted by Mr Matthews. The question, therefore, is whether to permit Salim Shalabayev to challenge the finding in the contempt proceedings that the flat in Alberts Court was owned by Mr **Ablyazov** would bring the administration of justice into disrepute.

19. The issue in this application for a final charging order is whether the judgment debtor, Mr **Ablyazov**, is the owner of the flat. That was one of the issues determined by the court in the contempt proceedings. It is true that Mr Salim Shalabayev was not a party to those proceedings but he was a witness in those proceedings called by Mr **Ablyazov** to say that he, Mr Salim Shalabayev, was the owner of the flat in Alberts Court. So the issue which arises in this application for a final charging order is the very issue which was determined by the court in the contempt proceedings.

20. Mr Salim Shalabayev gave evidence on this very matter in the contempt proceedings and was disbelieved. The contempt proceedings were proceedings in which the allegations of the bank and the defence of Mr **Ablyazov** were considered by the parties and the court in considerable detail over many days and at considerable expense. It seems to me deeply improbable that there could be any further evidence relating to the ownership of the flat in Alberts Court which was not brought before the court in the previous proceedings.

21. Miss Naomi Simpson of Addleshaw Goddard, acting on behalf of Salim Shalabayev, has said in her first witness statement, dated 16 May 2013, at paragraph 21, that Addleshaw Goddard are in the process of obtaining full instructions from Mr Shalabayev as to the documentation he expects to be able to put into evidence at a full trial of this matter to prove his ownership of the property and that he has indicated:

22. "The following will be investigated with a view to such evidence being provided to the court."

23. A number of matters are then set out.

24. Mr Matthews emphasised the fourth of those, namely Mr Shalabayev's financial records in order to evidence to the court that the property was purchased with his own money.

25. That was a point made, as it happens, by Mr Matthews on behalf of Mr **Ablyazov** in the contempt proceedings. At paragraph 170 of my judgment I noted that it was said that Mr Salim Shalabayev had given evidence of his ability to purchase a property like 17 Alberts Court but for the reasons which I gave in that judgment I rejected Mr Salim Shalabayev's evidence as untrue.

26. A further point to bear in mind is that the judgment of the court on the contempt application was considered by the Court of Appeal. As I have said, all findings were challenged, including this finding concerning the flat in Alberts Court. The Court of Appeal, as can be seen from the judgment of Lord Justice Rix, considered the matter in considerable detail and rejected the appeal.

27. Those are all matters which seem to me to show that to permit Mr Salim Shalabayev to challenge the finding made in the contempt proceedings would bring the administration of justice into disrepute. Mr Matthews does not accept that and he submits that it could not sensibly be argued that it would bring the administration of justice into disrepute where Mr Shalabayev (1) was not a party to the committal application (2) had no opportunity to be heard on that application (3) had no control save to the limited extent of his own evidence over the evidence adduced in opposition to the claimant's allegations (4) was not legally represented on the committal application and (5) is not now seeking to initiate or prosecute litigation of his own but merely seeks to defend litigation by which the bank seeks to deprive him of that which he maintains is his property, and in that regard he relies upon observations in the Conlon case by the Court of Appeal to the effect that that matter, namely that a person is not seeking to initiate or prosecute litigation of his own is something which weighs against any finding of abuse.

28. I have carefully considered those matters and Mr Matthews' oral submissions to similar effect, but I do consider that this is as plain a case as there could possibly be of a collateral attack which would bring the administration of justice into disrepute. The ownership of this property was considered in considerable detail, both at first instance and on appeal.

29. Mr Salim Shalabayev gave evidence as to what he said was his ownership of the flat. He is, as I indicated in my judgment in the contempt matter at paragraph 18, someone who, along with his brother Syrym Shalabayev, assists or has assisted Mr **Ablyazov** in various ways, and bearing that in mind and all the factors to which I referred it seems to me that to permit Mr Salim Shalabayev to challenge the findings of fact that Mr **Ablyazov** is the owner would bring the administration of justice into disrepute, and so for that reason I accept Mr Smith's submission.

**30. MR MATTHEWS:** My Lord, I would ask for permission to appeal that decision. Your Lordship has gone further than any previous case and in particular, your Lordship adverts to subparagraph (d) in the Bairstow test. Subparagraph (c) was the issue estoppel case. And in our submission reading the two together at the very least has a real prospect of persuading the Court of Appeal that subparagraph (d) was not intended to be read as widely as your Lordship has.

31. Your Lordship has referred to the fact that this involves the same issue but that is not going to be an unusual feature. The point is that shouldn't be a sufficient factor.

32. Your Lordship has adverted to the fact that Mr Shalabayev gave evidence. That is always going to be the case of a witness. The point in our submission is that the position of a witness is fundamentally different and the question therefore is what is the significance of that and whether a person can be deprived of his property in circumstances where he has never been party to any litigation in which the issue of his entitlement to that property is in issue.

33. Finally, we would make the point that on Mr Salim Shalabayev's case this represents a substantial asset, a significant amount of the proceeds of business that he built up and is therefore a matter of fundamental importance to him as well.

34. In those circumstances we would invite your Lordship to give leave.

**35. MR JUSTICE TEARE:** Thank you, Mr Matthews. As you will appreciate, I considered this a clear case. For that reason I do not consider there is a real prospect of success and I refuse permission to appeal.