Judgments

JSC BTA Bank v Ablyazov and others

Practice – Pre-trial or post-judgment relief – Receivership order – Freezing order – Application to amend receivership order and freezing order – Whether application to be granted

[2013] EWHC 1869 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

FIELD J

8 MAY, 2 JULY 2013

2 JULY 2013

M Swainston QC and S Ford for the Applicants

S Smith QC and T Akkouh for the Claimant

McGuireWoods London LLP; Hogan Lovells International LLP

FIELD J:

[1] This is an application to amend: (i) a Receivership Order made by Teare J on 6 August 2010 (as amended) ("the Receivership Order"); (ii) a Freezing Order made by Teare J on 23 November 2012 ("the Freezing Order"); and (iii) any other relevant orders made in the underlying proceedings whose potential effect is to prevent Dregon Land Ltd ("Dregon Land") from dealing with its interest in a large storage facility ("the Domodedovo Logistics Park") near Domodedovo Airport in Moscow.

[2] The Receivership Order was granted in respect of defined categories of assets, specified sums of money and numerous identified companies on the basis that the foregoing were beneficially owned and/or under the control of the First Defendant ("Mr **Ablyazov**"). The Receivership and Freezing Orders were made in the context of multiple sets of proceedings in which the Claimant ("the Bank") alleges that Mr **Ablyazov** has misappropriated assets worth hundreds of millions of dollars while he was the Bank's majority shareholder and Chairman.

[3] Since being found to be in contempt for breaching freezing and disclosure orders, Mr **Ablyazov** has been on the run outside the jurisdiction. In three of the sets of proceedings brought against him the Bank has now obtained judgement for approximately US$3.7 billion. It is not disputed that at one time Mr **Ablyazov** had a significant interest in the Domodedovo Logistics Park through his beneficial ownership of shares in Dregon Land.

[4] The Applicants have put before the court copies of a number of agreements that on their face relate to:

> (i) an Original Facility Agreement dated 19 September 2007 as amended on 28 December 2007 ("the OFA");
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> (ii) a pledge of the shares in Dregon Land to Eurohypo Aktiengesellschaft (Now known as Hypothekenbank Frankfurt AG) ("Eurohypo") in 2007 ("the Dregon Land Pledge");
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> (iii) a debenture dated 27 September 2007 ("the Debenture");
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> (iv) an assignment in late 2010 of Eurohypo's interests under the OFA to Chisholma Holdings Ltd ("Chisholma"), a company owned by Mr Sait Salam Gutseriev, a prominent Russian property magnate ("the OFA interests assignment");
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> (v) the enforcement in March 2011 of the Dregon Land Pledge by Chisholma; and
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> (vi) the sale by Chisholma of the shares in Dregon Land to two other companies wholly owned by Mr Sait Salam Gutseriev ("Mr Gutseriev"), Lapointec Ventures Ltd ("Lapointec") and Limia Holdings Ltd ("Limia").

[5] Under the OFA, Eurohypo as Lender agreed to make available a US$746,980,000 facility to Bondiza Consulting Ltd ("Bondiza") as Borrower for the development of the North Domodedovo Logistics Park. This was followed by a Deed of Accession and Deed of Amendment and Restatement of the OFA dated 31 July 2009. Dregon Land is listed in Pt I of Sch 1 as Facility Guarantor and as an Obligor and Group Member.

[6] The other named parties to the OFA (as amended and restated) are, inter alios:

> (a) CJSC "Joint Venture 'Eurasia M4" ("Eurasia M4");
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> (b) Flairis Technology Ltd ("Flairis") – also a Facility Guarantor, Obligor and Group Member;
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> (c) Eurasia Logistics Ltd, ("Eurasia Logistics"), Flairis's parent company – also an Obligor and Group Member and the then holder of 51% of the shares in Dregon Land; and
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> (d) Seretta Assets Ltd ("Serretta"), a New Obligor and at this time the holder of 49% of the shares in Dregon Land.

[7] The Dregon Land Share Pledge is dated 4 October 2007 and provides for the pledging to Eurohypo by Eurasia Logistics and Seretta of their shares in Dregon Land as continuing security for Bondiza's obligations

under the OFA. It is not disputed that under the pledge Eurasia Logistics and Seretta executed blank instruments of transfer of all the shares in Dregon Land ("the Instruments of Transfer").

[8] Clause 5.01 of the Dregon Land Share Pledge provides that the pledge would become immediately enforceable upon and at any time after the occurrence of a Material Event of Default. Clause 5.02(iii) provides that after the security has become enforceable, the Pledgee may complete and put into effect the Instruments of Transfer.

[9] Seretta thereafter transferred its shares in Dregonland to Seaworld Processing Ltd ("Seaworld") and by a further agreement dated 20 November 2009 Seaworld was substituted as Pledgor under the Dregon Land Share Pledge (the "Substitution Agreement"). The Substitution Agreement also included an Instrument of Transfer.

[10] The Debenture was executed by, inter alios, Flairis as Chargor and Eurohypo as Lender (the "Debenture"). Clause 3.1(a) and Sch 2 to the Debenture provides for the assignment by Flairis to Eurohypo by way of security of 11 Loan Agreements dating between 29 September 2006 and 21 June 2007 between Flairis as Lender and Eurasia M4 as Borrower. It seems that these intra-group loans totalling US$207,095,000 were the means by which sums drawn down under the OFA were loaned by Flairis to Eurasia M4.

[11] Clause 8.1 of the Debenture provides that any time after the occurrence of an Event of Default the security created by the Debenture shall become immediately enforceable and the Lender may, inter alia, enforce all or any part of that security and take possession of and hold or dispose of all or any part of the Charged Assets (as defined in Cl 1.1).

[12] There seems to be little doubt but that by the end of December 2010, Bondiza was in default under the OFA for (inter alia) non-payment of sums due totalling US$15,115,109.80 and in the summer of 2010, with a view to assigning its interest in the OFA and the security it held in relation thereto ("the OFA interests"), Eurohypo: (i) engaged PriceWaterhouseCoopers and Jones Lang Lasalle to value the Domodedovo Logistics Park and Clifford Chance to act as its legal advisers; and (ii) presented the opportunity to purchase the OFA interests to private investors in Moscow including B&N Bank which is owned by a nephew of Mr Gutseriev.

[13] The OFA interests assignment and an amendment and restatement agreement dated 13 December 2010 provide for the assignment by Eurohypo of the Eurohypo OFA interests to Chisholma, a Cyprus special purpose vehicle. At the date of the execution of these documents US$325,100,000 was outstanding under the OFA.

[14] The stated consideration for the acquisition of the OFA interests was US$35,246,308.69 by way of initial consideration and US$308,600,000 by way of deferred consideration. It does not appear to be disputed that the initial consideration was paid on the due date, 22 March 2011.

[15] A Refinancing Facility Agreement made between Tercialia Enterprises Ltd ("Tercialia") as borrower and Eurohypo as lender, provides for Eurohypo to advance US$308,600,000 to enable Tercialia to provide Chisholma with the means of paying the deferred consideration. The deferred consideration was stated to be payable on the earlier of the drawdown date of the Refinancing Facility and six months after the effective date of the OFA interests assignment. There is evidence that Chisholma's obligation to pay the deferred consideration was secured by security granted over certain assets owned by Mr Gutseriev's group of companies, a bank guarantee from B&N Bank and a personal guarantee from Mr Gutseriev.

[16] On 30 March 2011, the Dregon Land Pledge was enforced by Chisholma which on 26 April 2011 sold 99% of the shares in Dregon Land to Lapointec and the remaining 1% to Limia Holdings Ltd ("Limia") for Eur1.00 based, it is said, on a valuation of Dregon Land's net assets by Jones Lang LaSalle. Also on 30

March 2011, Chisholma enforced the Debenture by appointing receivers over Flairis who assigned the intercompany loans to Tercialia which undertook to pay Chisholma by way of deferred consideration an amount equal to the total amount outstanding under the intercompany loans, being US$343,846,308.69.

[17] On behalf of the Applicants, Mr Swainston QC submits that it is manifest that, pursuant to the OFA interests assignment, the subsequent enforcement of the Dregon Land Pledge and the sale of the Dregon Shares to Lapointec and Limia, Mr **Ablyazov**'s interest in Dregon Land passed to Lapointec and Limia which are companies in which he (Mr **Ablyazov**) has no interest. Those agreements, submits Mr Swainston, were bona fide, arms length transactions made for good consideration, with the result that the Bank has lost any entitlement it may have once had to include the shares in Dregon Land in the protective orders obtained from the court.

[18] In the alternative, Mr Swainston submits that matters have moved on since the original freezing order was made against Mr **Ablyazov** on the basis that Mr **Ablyazov** had full title to the shares in Dregon Land. At the very least, Lapointec and Limia had shown that, by reason of the OFA interests assignment and the enforcement of the Dregon Land Pledge, they had legal title to the Dregon Shares and if the Bank were going to seek to reverse these transactions or establish a collusive breach of the court's order, it should accept that the Receivership and Freezing Orders no longer applied to the Dregon Land shares and bring a free-standing claim which would require it to establish that the court had the necessary jurisdiction to determine the claim. In the alternative, if the Bank were to have the benefit of a continuation of the Receivership and Freezing Orders over the Dregon Land shares, it should be obliged to show that there was jurisdiction for the making of a *Chabra (TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231) order against the Applicants, which there was not since now that judgement had been entered against Mr **Ablyazov** it could not be shown that the Applicants were necessary and proper parties to the determination of an issue between the Bank and Mr **Ablyazov** (cf *Linsen International Ltd and others v Humpuss Sea Transport Pte Ltd and others* [2011] EWHC 2339 (Comm), [2012] 1 BCLC 651, [2012] Bus LR 1649).

[19] Mr Smith QC for the Bank resists the making of any order within the instant application that would remove the Dregon Land shares from the Receivership Order or the Freezing Order. Instead, Mr Smith submits there should be a trial of the issue as to whether Lapointec and Limia acquired an enforceable interest in the shares in Dregon Land and the court should make the necessary pre-trial directions. It is the Bank's case that either the enforcement of the Dregon Land Share Pledge was wholly fictitious in that Mr **Ablyazov** was always intended to be, and did remain, the true beneficial owner of Dregon Land (in whole or in part); or, if it was intended that Mr Gutseriev should acquire all or part of Dregon Land, the purported enforcement of the Dregon Land Pledge was collusive, being designed to dress up a sale by Mr **Ablyazov** of Dregon Land as something that would not constitute a blatant breach of the freezing order made against him, in which case the enforcement of the Dregon Land Pledge would be a breach of the freezing order then in place to which Mr Gutseriev was a collusive party.

[20] In support of the Bank's case, Mr Smith QC relied on the findings made in the contempt proceedings against Mr **Ablyazov** on three specimen charges that Mr **Ablyazov** had: (i) failed to make disclosure of his interest in a BVI company, Bubris Investments Ltd; (ii) lied on oath as to his ownership of three properties in England; and (iii) been guilty of grave breaches of the freezing order by dealing with assets in the form of repayment of loans with a face value of over US$80 million.

[21] Mr Smith also submitted that, given that the Domodedovo Logistics Park was Mr **Ablyazov**'s principal undisclosed asset – it had been conservatively valued at between US$360 and US$390 million by Eurohypo in mid 2010 – and given Mr **Ablyazov**'s well-demonstrated determination to hang on to his assets in the face of the freezing orders made against him, it was inconceivable that he would have taken a business decision to allow enforcement of the Dregon Land Pledge to take place when what was owed was US$337 million and he had access to many millions of dollars that he was hiding from the court which he could have used to discharge this indebtedness.

[22] Mr Smith also relied on the finding by Teare J in proceedings subsequent to the contempt proceedings that Mr **Ablyazov** had not, as claimed by Mr **Ablyazov**, given away his interest in the "Eurasia Logistics project" in July 2009 to two members of its management, Mr Trofimov and Mr Volkov, to satisfy an unparticularised debt owed to them. The Eurasia Logistics project was the name given to Mr **Ablyazov**'s project for the development, through a network of companies, of five logistics centres, including Logopark Pyshma in the Eastern Urals and Logopark Kolpino in Russia's Sverdlovsky District, as well as the Domodedovo Logistics Park. In these subsequent proceedings Teare J acceded to the Bank's application for a declaration that Mr **Ablyazov** remained the owner of Logopark Pyshma and Logopark, see [2012] EWHC 2543 (Comm). Mr Smith also pointed to evidence that two individuals, Mr Shalabayev (Mr **Ablyazov**'s brother-in-law) and Mr Udovenko, both of whom had been used by Mr **Ablyazov** as nominees, were behind actions taken in the affairs of Bondiza, Flairis, Dregon Land and Eurasia M4 in the period 7 October 2009 to December 2010. (See para 49 of the Bank's Skeleton Argument.)

[23] At the forefront of Mr Smith's submissions was his reliance on evidence obtained from Inquiry Agents instructed by the Bank to conduct surveillance of Mr **Ablyazov** and his key known associates. This evidence is related in paras 123 to 129 of the 58th witness statement of Mr Christopher Hardman, a partner in the Bank's solicitors, Hogan Lovells International LLP. On 7 October 2009, Mr Udovenko took a taxi to 64-65 Vincent Square, London, which are offices associated with Mr Gutseriev's brother, Mikhail Gutseriev and his companies, Samfar Property Ventures (UK) Ltd ("Samfar") and Treadstone Partners Ltd ("Treadstone"). Mr **Ablyazov** also visited 64-65 Vincent Square. His first visit was on 7 September 2010 where he remained for 4½ hours. The following day, Heads of Terms were entered into between Mr Gutseriev and Eurohypo in which it was stated, inter alia, that a US$313.5 million finance facility would be provided by Eurohypo for the purpose of "refinancing the purchase of shares and corporate purposes". Mr **Ablyazov** visited these offices again on 27 September 2010 for approximately one hour 20 minutes. On 30 September 2010 there was the first default of payment of interest under the OFA and on 10 November 2010 the OFA interests assignment was executed in favour of Chisholma.

[24] Mr **Ablyazov** next visited 64-65 Vincent Square on 23 February 2011 where he stayed for 2½ hours. In late March 2011, the Dregon Share Pledge was enforced. Mr **Ablyazov** went again to 64-65 Vincent Square on 13 April 2011 for one hour 15 minutes. On 26 April 2011 Chisholma entered into the sale and purchase agreement under which it sold its shares in Dregon Land for Eur1.00. On 3 June 2011, Mr **Ablyazov** attended at Vincent Square yet again, this time for a long meeting lasting until approximately 9.30pm.

[25] On 14 June 2011 Mr **Ablyazov** was observed meeting several individuals seen previously at Vincent Square and was observed the following day travelling to Vincent Square. His last observed visit to this address was on 29 September 2011 when he stayed for approximately one hour.

[26] Mr Smith also argued that the way in which the Dregon Share Pledge was enforced was irregular, which he says makes Mr **Ablyazov**'s failure to take any steps to seek to prevent execution against the Domodedovo Logistics Park, or to seek a proper, transparent sale of his interest in the Domodedovo Logistics Park post-execution (given the substantial equity contained therein), especially remarkable. In support of his irregularity contention, Mr Smith relied on:

> (i) the fact that the Pledgee's entitlement under the pledge was subject to "not unreasonably discounting the value of the interests of the Pledgors";
>
> (ii) paragraph 17.1.1 of the OFA interests assignment, which provides: "If the Assignee undertakes or is involved in any Enforcement Action, it shall do so diligently and with due care and so as to obtain fair market value for any asset subject to any Underlying Security as a result of such Enforcement Action;"
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> (iii) paragraph 17.2 of the OFA interests assignment, which provides:

> "The Assignee shall, at its own cost, obtain an independent valuation of any asset subject to any Underlying Security before undertaking any Enforcement Action in relation to any such asset. Any such valuation shall be carried out on a market value basis without any special assumptions . . . . Such valuation shall be prepared by any of . . . PricewaterhouseCoopers, Jones Lang LaSalle . . .;"

(iv) the assertion that the Dregon Land Shares were not sold at the best price reasonably obtainable – Eur1 does not represent the equity in the Domodedovo Logistics Park even on the basis of the Jones Lang Lasalle report – and were sold to related parties.

[27] Responding to the Bank's case, Mr Swainston relied on a reply witness statement of Mr Walter H White Jr, a partner in the Applicants' solicitors, McGuire Woods London, LLP. In this witness statement, Mr White states, inter alia, that as a result of the OFA interests assignment, Chisholma "incurred liabilities of around $388,710,714.35" which exceeded the value put on the Domodedovo Logistics Park by Jones Lang Lasalle and was towards the upper range of the PriceWaterhouseCoopers' valuation. Mr White also states that Chisholma's liabilities were greater than the amount demanded as part of the enforcement of the Dregon Land Pledge.

[28] Mr White further contends that there is nothing in those paragraphs of Mr Hardman's 58th Witness Statement where he relates the evidence provided by the Bank's Inquiry Agents that undermines a previous statement made by McGuire Woods London that their instructions are that there were no meetings between Mr **Ablyazov** and Mr Gutseriev in relation "to the asset at issue in this Application".

[29] Mr White also says that he has been told by a Mr Kalyuzhny, a legal adviser to the extended Gutseriev family who has had discussions with Mr Hardman about the documents relied on in this application ("the transactions"), that:

(i) the business interests of Mr Sait Salam Gutseriev and Mr Mikhail Gutseriev are distinct;

(ii) Mr Kalyuzhny only had one meeting where he actually sat down with Mr **Ablyazov** and this took place in or around January 2010 when he was representing solely Mr Mikhail Gutseriev who was present, and there was no discussion of the transactions;

(iii) Mr Kalyuzhny has not discussed the transactions with Mr **Ablyazov** at any time; nor has he discussed them with any representatives of Mr **Ablyazov**;

(iv) any other discussions Mr Kalyuzhny has had with Mr **Ablyazov** were unrelated to the transactions;

(v) Mr Sait Salam Gutseriev has never met Mr **Ablyazov**;

(vi) Mr Kalyuzhny has never spoken with Mr **Ablyazov** on behalf of Mr Sait Salam Gutseriev or any of the Applicants; and

(vii) there were/are no agreements or arrangements in place between Mr Sait Salam Gutseriev and Mr **Ablyazov** with regard to the transactions or the underlying assets.

[30] In reply to the jurisdiction arguments raised by Mr Swainston, Mr Smith submitted that since the Receiving and Freezing Orders and their predecessors had been properly made when granted and the Applicants were before the court there was no question of the Bank having to show that the court had territorial jurisdiction to determine the issue whether the transactions relied on by the Applicants should be reversed or involved a collusive breach of the court's orders. Instead, the question was simply whether it was just and

appropriate to order that there be a trial of that issue. In the alternative, if it is a requirement to establish a jurisdictional gateway for service of an application notice on the Applicants as *Chabra* Defendants, the gateway in question is para 3.1 (3) of CPR PD6B, see *C Inc plc v L* [2001] CLC 1,054. There were several sets of proceedings that continued against Mr **Ablyazov** in which judgement had not yet been obtained and even in those actions where judgement had been entered against Mr **Ablyazov**, there was an issue between the Bank and Mr **Ablyazov** as to whether the Receivership and Freezing Orders ought to be continued in respect of the Dregon Land shares on the basis of Mr **Ablyazov**'s beneficial ownership therein, as to which the Applicants were necessary and proper parties.

[31] I agree with Mr Smith's first submission on jurisdiction. The Receivership and the Freezing orders and their predecessors having been properly made when they were granted – at which time the Dregon Land shares were beneficially owned by Mr **Ablyazov** – and the Applicants having brought their application before the court, the only question is whether it is just and appropriate to order that there be a determination of the issue of where lies the beneficial ownership of the Dregon Land shares.

[32] Is it just and appropriate to make such an order? In my opinion it is since I find that the Bank has established on the evidence a good arguable case for challenging the Applicants' contention that Lapointec and Limia are the beneficial owners of the Dregon Land shares and are otherwise entitled as against the Bank to exercise full rights of ownership in respect of those shares.

[33] In case I am wrong to conclude that the only question is whether it is just and appropriate to order the determination of the issue of who has beneficial ownership of the Dregon Land shares, I go on to consider whether the Bank can show that there is jurisdiction for the making of a *Chabra* order against the Applicants. As to this, I accept Mr Smith's alternative submission based on *C Inc plc v L* that the court has jurisdiction to make a *Chabra* order against the Applicants under para 3.1(3) of CPR PD6B. In my judgement, the Bank's claim that the Dregon Land shares belong beneficially to Mr **Ablyazov** and not Lapointec and Limia is a classic *Chabra* claim and there is an issue between the Bank and Mr **Ablyazov** (who was served within the jurisdiction) as to whether he retains beneficial ownership of the Dregon Land shares which it is reasonable for the court to try and the Applicants in my view are necessary and proper parties to that claim.

[34] I am accordingly of the view that it is just and appropriate that there be a trial of the competing claims made by the Bank and the Applicants as to where lies the beneficial ownership of the Dregon Land Shares and that, if it be necessary for the Bank to establish it, the court has territorial jurisdiction over the Applicants in respect of such a trial.

[35] Thus, for the reasons I have given, I dismiss the Applicants' application to have the Receivership and Freezing Orders amended so as not to apply to the Dregon Land shares and I order instead that there be a trial of the competing claims made by the Bank and the Applicants as to where lies the beneficial ownership of the Dregon Land Shares.

[36] I shall hear further submissions from both sides as to what pre-trial directions the court ought to make.

Application dismissed.