

Judgments

QBD, COMMERCIAL COURT

Neutral Citation Number: [2014] EWHC 793 (Comm)

No: 2009 Folio 1099

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

7 Rolls Building

Fetter Lane

London

EC4A 1NL

Wednesday, 26 February 2014

BEFORE:

MR JUSTICE TEARE

BETWEEN:

JSC BTA BANK

Claimants

- and -

MUKHTAR ABLYAZOV & ORS

Defendants

TIM AKKOUH (instructed by Hogan Lovells International LLP) appeared on behalf of the Claimants

JOHN MACHELL QC (instructed by Boodle Hatfield LLP) appeared on behalf of Sergey Tyshchenko

Approved Judgment

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(Official Shorthand Writers to the Court)

Wednesday, 26 February 2014

MR JUSTICE TEARE:

1. This is an application by Mr. Tyshchenko to adjourn two hearings, one is a further cross-examination of him which is scheduled to take place tomorrow, and the other is an application by the bank to add a company, Finansinvest, to the receivership order that is fixed to be heard on Friday of this week. I will deal first with the application to adjourn Friday's hearing.

2. This is based on two grounds. Firstly, it is said that Mr Tyshchenko and his instructing solicitors were not advised that Friday had been listed for the hearing of the Finansinvest application. The second reason is that very recently, further witness evidence has been provided by Hogan Lovells with regard to that application and Mr Tyshchenko wishes to have the opportunity to reply to it.

3. The position so far as the date of the hearing is concerned, is that it had been agreed between the parties that the hearing would take place on 28 February. That agreement was made shortly before an earlier hearing on or about 7 February. When the matter came before the court, it was not known whether the court was indeed able to hear the matter on 28 February, and so the order made by the court was to the effect that the hearing would take place on 28 February if possible, or so soon thereafter as is practicable.

4. Following that order, there was communication between the court and the clerks of counsel in which arrangements were under way to fix 28 February for hearing, but Mr Tyshchenko's counsel's clerk required a little time to take final instructions from the solicitors instructing counsel. It is unclear what happened thereafter. No documents have been provided to the court showing what happened. Hogan Lovells do not have any documents showing what happened. All that I have been told is that it is thought that the court fixed the date of the 28th with the clerks to the bank at Erskine Chambers over the telephone. It appears that no formal notice was given to Mr Tyshchenko's counsel or his instructing solicitors that the date had been fixed for 28 February.

5. However, it seems plain that all concerned must have been aware that there was, at the very least, a real likelihood that the matter would be fixed for 28 February and it is I consider of significance that there is no communication in evidence from Mr Tyshchenko's legal team after 11 February asking what had happened. It seems to me to be consistent with an understanding that it was likely that 28 February had been fixed. I am told by counsel for Mr Tyshchenko that he can in fact be available on Friday.

6. So I am not persuaded that that first ground is a ground of real significance.

7. The second ground relates to the further evidence provided by Hogan Lovells. The position is that Mr Tyshchenko had the opportunity to file evidence in answer to the bank's evidence by 4pm on 18 February. I am told that he elected to file no evidence in answer to the bank's case. There was, therefore, no cause for the bank to serve evidence in reply, because there was nothing to reply to. The fresh evidence appears in the main, perhaps not exclusively, to deal with recently discovered material which has caused the bank concern.

8. Mr Tyshchenko and his counsel are concerned and say that he would like the opportunity to give instructions on the matters. It seems to me of importance to note that the bank has made its application for Finansinvest to be added and provided evidence in support of that application. Mr Tyshchenko elected not to put in any evidence in reply. So the position seems to be that the bank is able to proceed with its application on Friday on the basis of the evidence upon which it originally relied. Mr Tyshchenko can have no complaint about that in circumstances where he elected to file no evidence in reply. That suggests that the hearing should go ahead on Friday.

9. So far as the new evidence is concerned, it may well be submitted that in circumstances where Mr Tyshchenko has had little, if any, opportunity to respond to the new material, that the court should give either no or very little weight to that evidence. But that seems to me to be a matter for the court hearing it. For those reasons, I refuse the application to adjourn Friday's hearing.

10. So far as the application to adjourn the hearing fixed for tomorrow for the further cross-examination of Mr Tyshchenko is concerned, the basis of the application is a little different. The court is aware, of course, of the tumultuous events in recent days in the Ukraine, in particular Kiev. Mr Tyshchenko is the chairman of the Supervisory Board of Fortuna Bank. He has approved a witness statement which has not yet been signed, but his counsel has undertaken that it will be signed by Mr Tyshchenko.

11. In that witness statement he says that Fortuna has deposits and net assets amounting to \$300 - \$400 million and his role as the Chairman of the Supervisory Board of Fortuna, is to ensure stability for Fortuna and protect Fortuna's clients from possible harm.

12. In the light of recent events, he says that his presence in Kiev is vital to the functioning of Fortuna. He has had to spend a lot of time meeting with the creditors and clients and he says he needs to meet with Fortuna's clients effectively daily. He says that he is the only person at Fortuna suitable to fulfil this function as the clients and creditors rely heavily on his constant involvement in Fortuna's business. He says that the political turmoil seems to be calming down and he hopes the situation within the banking industry will stabilise shortly. But at the moment, he says, the situation remains unstable and he says, "I cannot afford to spend a whole day away from Fortuna and its business." He says if matters proceed well in the Ukraine, he plans to travel to the UK on the 20th and make himself available to be cross-examined on any date after that.

13. That, in essence, is the reason for the application to adjourn tomorrow, though there is a further reason relied upon, namely that it is likely that the subject of the cross-examination would include the matters dealt with in Hogan Lovells' recent evidence and therefore, it is said, Mr Tyshchenko should have the opportunity to give proper instructions on those matters.

14. Against those considerations are the concern on the part of the bank to establish as soon as possible precisely what is happening with regard to Finansinvest and other companies. I have been referred to evidence which shows that apparently significant dealings in apparently substantial assets owned by companies with which Mr Tyshchenko is involved, have been taking place in recent weeks and months.

15. The court has to do its best to hold the balance between the parties' different interests. In doing so, it seems to me important to bear in mind that the bank does not allege any cause of action against Mr Tyshchenko. It has a Norwich Pharmacal order against him and he is therefore coming to the court as a third party involved in some way in Mr **Ablyazov**'s dealings, who may have relevant evidence to give to the court which would be of assistance to the bank.

16. The second matter to bear in mind is that he has already attended this court for cross-examination and has said he is willing to do so again in March. The third matter to bear in mind is that he has provided two affidavits to the court in response to the Norwich Pharmacal order.

17. I also have to bear in mind that, whilst the bank is obviously anxious to have answers to its questions, it is only speculation as to whether the bank would, in truth, be worse off having the answers to its questions in three weeks' time than it would having the answers to its questions, insofar as Mr Tyshchenko can give them, tomorrow.

18. Bearing those matters in mind, I have reached the conclusion that tomorrow's cross-examination ought to be adjourned. Mr Tyshchenko's personal position as Chairman of the bank in Kiev, which is in a state of political turmoil, cannot be ignored. I also take into account the absence of any evidence of real prejudice to the bank in having its answers to its questions in three weeks' time rather than tomorrow.

19. It seems to me that it is appropriate to adjourn tomorrow's hearing.