

Judgments

JCA BTA Bank v *Abyazov* and others

Practice – Pre-trial or post-judgment relief – Application for declaration – Claimant bank obtaining judgment against first defendant and seeking declaration that beneficial owner of second defendant company – Whether declaration to be granted

[2014] EWHC 455 (Comm), 2009 Folio 1099, (Transcript)

TEARE J

24, 27, 28 FEBRUARY 2014

28 FEBRUARY 2014

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

T Akkouch for the Claimant

The Defendants did not appear and were not represented

Hogan Lovells

TEARE J:

[1] This is an application by the Bank for a declaration that Mr **Ablyazov** is “the beneficial owner of the property known as Flat 79, Elizabeth Court, 1 Palgrave Gardens, London NW1 6EJ ('Elizabeth Court') and the entirety of the issued share capital in Rocklane Properties, a company incorporated in the British Virgin Islands.” The Bank wishes to enforce the judgments it has obtained against Mr **Ablyazov** (see *JSC BTA Bank v Ablyazov and others* [2013] EWHC 510 (Comm)) on those assets.

[2] Mr **Ablyazov** has not appeared on the hearing of this application. His solicitors, Addleshaw Goddard, were notified of this application on 4 February 2014 and of the hearing date. By letter dated 7 February 2014 Addleshaw Goddard said that their client was not the owner of 79 Elizabeth Court and therefore the recovery and sale of the property did not concern him. However, they said he had a full interest in the matter to the extent that the Bank sought costs against him. By letter dated 10 February 2014 the Bank said that it would not be seeking a costs order against Mr **Ablyazov**. In the result there was no appearance on behalf of Mr **Ablyazov** at the hearing although a representative of Addleshaw Goddard attended the hearing.

[3] Mr Terenov has also not appeared on the hearing of this application. He had caused Rocklane Properties to issue an application on 21 March 2013 seeking an order that the flat be removed from the Freezing Order, supported by evidence that he was the “ultimate beneficial owner” of the flat and that the shares in Rocklane Properties, the registered owner of the flat, were held on his behalf. But on 13 December 2013 he consented to an order staying his application, having sworn an affidavit in which he stated that “the truth is that I do not own and have never owned Elizabeth Court or Rocklane and the account I provided in support of the Release Application was untrue”.

[4] When seeking an order that Mr **Ablyazov** be committed to prison for contempt of court in late 2011 the Bank had submitted that Mr **Ablyazov** was the true beneficial owner of the shares in Rocklane Properties and was the UBO (“ultimate beneficial owner”) of the flat of which Rocklane Properties was the registered owner. This was denied by Mr **Ablyazov**. Mr **Ablyazov**'s case on the contempt application was supported by the evidence of the brothers Syrym and Salim Shalabayev. Syrym gave evidence (in paras 64 – 67 of his first affidavit dated 16 October 2011) that he had bought the shares in Rocklane Properties (and hence the flat) in 2003. He said that in October 2009 Salim was made the UBO (“ultimate beneficial owner”) of Rocklane Properties because he, Syrym, had decided to sell the flat to Salim. However, Salim did not go through with the purchase and so Syrym sold it another buyer in December 2009. Salim gave evidence (in para 28 of his Second Affirmation dated 24 November 2011) that in March 2010, after his brother had sold the flat, he, Salim, had agreed to rent the flat.

[5] The Bank failed to persuade the court to the necessary criminal standard of proof that Mr **Ablyazov** was the beneficial owner of the shares in Rocklane Properties and that he had lied on oath when saying that he was only the short-term tenant of the flat; see *JSC BTA Bank v Mukhtar Ablyazov* [2012] EWHC 237 (Comm) at paras 159 – 163. In my judgment on the contempt application I summarised my reasons for not being able to accept the Bank's case in these terms:

“159 The registered proprietor of the flat in Elizabeth Court is and has been Rocklane Properties Ltd, a company incorporated in the BVI. The flat was purchased in January 2002 for £650,000. Rocklane was one of the companies administered by Mr Udovenko and Syrym Shalabayev. It was one of the 102 companies mentioned in the email dated 9 October 2008 pursuant to which the UBO was changed from Mr Udovenko to Syrym Shalabayev. Thus before October 2008 the UBO was Mr Udovenko.

160 The case of the Bank is that the beneficial owner of the shares in Rocklane and hence of the flat in Elizabeth Court is and was Mr **Ablyazov**. Mr **Ablyazov**'s case is that the beneficial owner from 2003 until December 2009 was Syrym Shalabayev. It was said that Syrym Shalabayev sold it in late 2009.

161 The Bank's case is supported by the fact that at first the apparent UBO was Mr Udovenko and then, in October 2008, became Syrym Shalabayev when the UBO of (at least) some of Mr **Ablyazov**'s companies became Syrym Shalabayev. There was also evidence that on 15 October 2009 the UBO was again changed to Salim Shalabayev and on 3 March 2010 to Mr Ivan Terenov. These changes in the UBO, apparently from one trusted associate to another, are suggestive of there having been a single true beneficial owner. (There was no documentary evidence of an arm's length sale of the shares at any stage.) The Bank's case that that owner was Mr **Ablyazov** is supported by the fact that the occupants of the flat were variously the Shalabayev brothers and Mr Aizhulov which suggests that it was available for use by what Mr Smith called members of Mr **Ablyazov**'s entourage. Furthermore, a lease in favour of Mr **Ablyazov** was sent for execution on 11 November 2009 which was also when the sham lease on Carlton House was sent for execution. The Bank also pointed to oddities in the evidence called by Mr **Ablyazov**, namely, that Mr **Ablyazov** should take out a lease on a (relatively) small flat when he was about to take out a lease on Carlton House, that when Salim Shalabayev moved in after May 2009 he paid rent into the account of Bensbrough Trading, said to be owned by Salim Shalabayev and that, when in late 2009, the flat was (allegedly) sold by Syrym Shalabayev, Salim Shalabayev continued to pay rent to Bensbrough Trading. These oddities cast considerable doubt on the evidence adduced by Mr **Ablyazov**.

162 However, it is important to note that the Bank is not able to show that the funds used to purchase the flat came from other companies owned by Mr **Ablyazov** or that Syrym Shalabayev lacked the means to purchase the flat (his evidence as to his business career in Kazakhstan was not challenged save as to his evidence with regard to the uranium business). Thus the evidence with regard to Carlton House and Oaklands Park is materially different in these two respects. Also, although the lease on the flat was sent for execution in November 2009 there is evidence, unchallenged by the Bank, that a rental payment and a deposit were paid by Mr **Ablyazov** in April 2009, the start of the tenancy period, four months before the issue of WFO. For this reason the Bank had to say that Mr **Ablyazov**, who had taken advice from Clyde and Co with regard to freezing orders, was seeking to create the false impression that he had leased the property (though he must have overlooked the need for accompanying documentation and failed to take any steps at the same time to create an impression that he had leased Carlton House).

163 In these circumstances, I have considered whether the court can be sure on the evidence presently available that Mr **Ablyazov** was the owner of Rocklane and hence of the flat in Elizabeth Court. The evidence in favour of the Bank's case with regard to Elizabeth Court is materially weaker than with regard to Carlton House and Oaklands Park. Moreover, Mr **Ablyazov** can point to evidence that he was not the owner, namely, that he paid a deposit and rent long before the WFO was issued. In those circumstances, notwithstanding the matters which strongly support the Bank's case and the odd aspects of the evidence relied upon by Mr **Ablyazov**, I do not consider that the Bank's case is sufficiently cogent to expel all reasonable doubt that it is correct, though it may well be.

164 I therefore do not find this limb of the contempt charge to have been proved."

[6] In August 2013 the Receivers of Mr **Ablyazov**'s assets disclosed to the Bank documents which, the Bank submits, show that after Rocklane Properties had been added to the Receivership Order in January 2011 the brothers Syrym and Salim Shalabayev were involved in an attempt to show that Mr Terenov had become the owner of the shares in Rocklane Properties in March 2010, before Rocklane Properties had been added to the Receivership.

[7] Thus, on 8 and 9 February 2011 a corporate service provider, K Treppides & Co, emailed Salim and Syrym Shalabeyev seeking urgent advice in the light of questions asked by the Receivers. On 2 March 2011 Mr Terenov replied to K Treppides & Co thanking them for a letter informing him that “my company Rocklane” has some problems. He said he was in the process of instructing lawyers to object. On 3 March 2011 the corporate service provider replied saying “We will prepare the required documents in order for you to become the owner of the company. These documents will need to be signed by you and by the previous owner as well.”

[8] On 4 March 2011 the corporate service provider sent to Mr Terenov a “beneficial owner consent” to be signed by him and an “instrument of cancellation” to be signed by Salim Shalabayev.

[9] Mr Terenov signed a document in which he consented and agreed to become “a beneficial owner of 1000 shares” in Rocklane Properties. That document was dated 3 March 2010. He returned it to the corporate service provider under cover of an email dated 10 March 2011. It therefore appears to have been backdated in order to give the impression that sometime before Rocklane Properties had been added to the Receivership Order Mr Terenov had become the beneficial owner of the company. Similarly, Salim Shalabeyev signed an “Instrument of Cancellation”, also dated 3 March 2010, in which he stated that on that date he, being the beneficial owner of 1000 shares in Rocklane Properties, had agreed for them to be transferred to Mr Terenov. The nominee and trustee Androula Andreou signed a document dated 3 March 2010 stating that the shares were now held for Mr Terenov.

[10] Thus, instead of Syrym Shalabeyev selling the shares in Rocklane Properties in either December 2009 or March 2010 (as alleged at the committal hearing in November and December 2011), the apparent UBO was simply changed from Salim Shalabeyev to Mr Terenov in March 2011 in reaction to Rocklane Properties having been added to the Receivership in January 2011 and the change was backdated to March 2010. In my judgment, Syrym and Salim Shalabeyev, when giving evidence in the committal hearing as to Rocklane Properties and the flat, must have given evidence that they knew to be untrue.

[11] Indeed, Mr Terenov has now confirmed in his affidavit dated 18 November 2013 that in February 2011 he was contacted by someone known to him as “Vitaly” who told him that he, Mr Terenov, was to “become the owner of Rocklane and a flat in London” in return for being paid US\$1,000 per month. This explains his email to the corporate service provider dated 2 March 2011 (see above). He said he signed a share purchase agreement backdated to December 2009 and a declaration of trust backdated to March 2010.

[12] Mr Terenov said that in early 2013 he was told by Mr Tyshchenko (who in his affidavit dated 22 November 2013 has admitted to having dealings with Mr **Ablyazov**) that “we should issue the Release Application and get the flat out of the freezing order”. His evidence in support of that application was drafted by Vitaly, in so far as it related to the flat, and by Mrs Tyshchenko, in so far as it related to Mr **Ablyazov**. He accepts that the account he gave in support of the Release Application was untrue.

[13] It is in these circumstances that the Bank renews its case that Mr **Ablyazov** is and was at all material times the beneficial owner of the shares in Rocklane Properties and hence of the flat.

[14] At the outset of the Bank’s application for a declaration I raised the question whether the Bank, having tried and failed to obtain a ruling on the contempt application that Mr **Ablyazov** was the beneficial owner of the shares in Rocklane Properties, was now estopped *per rem judicatam* from raising the same issue a second time. Mr Akkouh, on behalf of the Bank, submitted that the Bank was not estopped, for two reasons. First, there was no inconsistency between the court’s decision on the contempt application and the decision which the Bank is now inviting the court to make on this application because the first decision was based upon the criminal standard of proof whereas the decision the Bank is now asking the court to make is based upon the civil standard of proof; see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p 542H-543C, [1981] 3 All ER 727, [1981] 3 WLR 906 per Lord Diplock. Second, issue estoppel (which is the

form of estoppel which could arguably be relied upon in this case by Mr **Ablyazov**) is subject to an exception of special circumstances, namely, where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, being material which could not by reasonable diligence have been adduced in those proceedings; see *Arnold v NatWest Bank* [1991] 2 AC 93 at p 109A-C, [1991] 3 All ER 41, [1991] 2 WLR 1177 per Lord Keith.

[15] It seems to me that the Bank is entitled to rely upon both arguments in this case. The standard of proof on the contempt application was the criminal standard of proof whereas the standard of proof on this application is the civil standard of proof. It follows that, strictly speaking, there is nothing inconsistent between, on the one hand, the court's decision on the contempt application that the Bank had not proved that Mr **Ablyazov** was the beneficial owner of the shares in Rocklane Properties and, on the other hand, the decision the court is invited to make on this application that Mr **Ablyazov** is the beneficial owner of those shares. Further, and in any event, in so far as the Bank now relies upon (i) evidence which has been disclosed to it by the Receivers and (ii) the affidavit which that evidence persuaded Mr Terenov to swear, it could not be said that such evidence could, with reasonable diligence, have been adduced by the Bank in the contempt proceedings. The Bank says that such evidence, in conjunction with the material relied upon at the committal hearing, shows that Mr **Ablyazov** is and was the beneficial owner of the shares in Rocklane Properties. If that is so, then it would be unjust to hold that the Bank was estopped from seeking to prove that that is so.

[16] In my judgment the Bank's case is now compelling. It is now plain that Mr Terenov was no more than a nominee for Mr **Ablyazov**, just as Mr Udovenko, Syrym Shalabayev and Salim Shalabayev had been before him. The suggestion that the shares in Rocklane Properties had been purchased by Syrym Shalabayev can now be seen to be untrue. Mr Terenov was placed in the position of being the apparent UBO of the shares in Rocklane Properties in March 2011 following the addition of the company to the Receivership. He was placed in that position, not because he had bought the shares in Rocklane Properties from Syrym Shalabayev, but because he had been paid for the use of his name and his signature on back-dated documents. It is plain from the documents disclosed by the Receivers that the brothers Shalabayev were instrumental in putting him in that position. They can only have done so because they were carrying out Mr **Ablyazov**'s wishes. This conclusion is confirmed by the third affidavit of Mr Tyshchenko dated 9 December 2013 in which he says at para 50 that "I am aware that **Ablyazov** beneficially owns a flat in London registered in Mr Terenov's name". It is true that there remains the evidence that Mr **Ablyazov** paid a deposit and rent on the flat before the Freezing Order was granted. But in the light of the evidence disclosed by the Receivers and of Mr Terenov's admissions that evidence is now insufficient to prevent the court from making the declaration that Mr **Ablyazov** is the beneficial owner of the shares in Rocklane Properties.

POSTSCRIPT

[17] After I had prepared this judgment in draft I came across the decision of the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160, [2013] 4 All ER 715 in which the law relating to *res judicata* was reviewed. The approach of the House of Lords in *Arnold v NatWest Bank* was followed, in particular, Lord Keith's statement that issue estoppel was not absolute; see the judgment of Lord Sumption at [2014] AC 160 at paras 20 – 26 with which the other members of the court agreed. Lord Neuberger added at para 62 that "in a case where the rule has been relied upon, I consider that it is helpful for a court which is inclined to accept the argument that it does not prevent a point being taken, to consider whether that outcome would work justice between the parties." As it happens I did consider the question of justice but in the light of Lord Neuberger's warning that "it is only too easy to fall back on it as excuse for an unprincipled departure from, or an unprincipled exception to, the rule" I shall articulate the reasons which caused me to consider that it would be just to permit the Bank to pursue on this application the factual allegation which it failed to establish at the committal hearing. The evidence given by the brothers Shalabayev at the committal hearing with regard to Rocklane Properties and the flat was untrue and must have been known by them to be untrue. That has been shown to be the case by evidence which could not with reasonable diligence have been put before the court at the committal hearing and which has only emerged since. It would be unjust to prevent the Bank from alleging and proving that Mr **Ablyazov** was the beneficial owner of the

shares in Rocklane Properties by reason of the Bank's failure to persuade the court of that fact at the committal hearing when untrue evidence had been adduced by Mr **Ablyazov** and when the evidence which proved the evidence was untrue was not available.

THE FORM OF THE DECLARATIONS

[18] There is no difficulty in the court declaring that Mr **Ablyazov** is “the beneficial owner the entirety of the issued share capital in Rocklane Properties, a company incorporated in the British Virgin Islands”. There is however a potential difficulty in the court declaring that Mr **Ablyazov** is “the beneficial owner of the property known as Flat 79, Elizabeth Court, 1 Palgrave Gardens, London NW1 6EJ.” The mere fact that Mr **Ablyazov** is the shareholder of Rocklane Properties does not mean that he is the beneficial owner of the real estate owned by Rocklane Properties; see *Jetvia SA v Bilta* [2013] EWCA Civ 968, [2014] 1 All ER 168, [2014] 1 Lloyd's Rep 113. Control of a company is not to be equated with beneficial ownership of its assets; see the judgment of Patten LJ at paras 23 – 25. In *Prest v Prest* [2013] UKSC 34, [2013] 2 AC 415 at para 52, [2013] 4 All ER 673 Lord Sumption said that “whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue”.

[19] Mr Akkouch submitted that it would not be the “correct analysis” to conclude that Rocklane Properties, rather than Mr **Ablyazov**, was the beneficial owner of the flat. He relied upon two matters. First, there is no evidence that Rocklane Properties had any independent business such that the purchase price of the flat must have been funded by Mr **Ablyazov** and accordingly there is nothing to rebut the presumption that the flat was acquired for Mr **Ablyazov** by Rocklane Properties. Second, the degree of control which Mr **Ablyazov** appears to have exercised over the flat (including allowing it to be used by his entourage and entering into a sham lease in respect of it to hide his ownership) is not consistent with Rocklane Properties being the beneficial owner of the flat.

[20] Mr **Ablyazov** can only be the beneficial owner of the flat if Rocklane Properties holds the flat on trust for Mr **Ablyazov**. It seemed to me that the reasons why the flat was said to be held on a trust by Rocklane Properties for Mr **Ablyazov** (when did that trust arise and how) required to be elaborated and so I asked Mr Akkouch to make some further submissions on the issue. Mr Akkouch informed me that the Bank, having reviewed the matter, considered that a declaration that Mr **Ablyazov** was the beneficial owner of the shares in Rocklane Properties was probably sufficient for its purposes and so did not now pursue the submission that Mr **Ablyazov** was also the beneficial owner of the flat. However, the Bank reserved its position to argue that he was the beneficial owner of the flat, in particular in the event that the Receivers encountered difficulty in being able to deal with it.

[21] Mr Akkouch will no doubt draw up a revised order to give effect to the court's decision in these altered circumstances.

Judgment accordingly.