Judgments

CA, CIVIL DIVISION

Neutral Citation Number: [2015] EWCA Civ 70

Case No: A2/2013/1529(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION, COMMERCIAL COURT

Mr Justice Teare

[2013] EWCH 1836 (Comm)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Tuesday 10th February 2015

Before :

LORD JUSTICE TOMLINSON
and

LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

JSC BTA Bank	**Claimant/ Respondent**
- and -	
(1) Mukhtar Kabulovich Ablyazov	**First Defendant**
(2) Salim Shalabayev	**Intervener/ Appellant**

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

James Sheehan (instructed by **Addleshaw Goddard LLP**) for the **Appellant**

Stephen Smith QC and **Emily Gillett** (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing date: 16 October 2014

Judgment

As Approved by the Court

Lord Justice Tomlinson : 1. In this judgment I shall refer to the Appellant/Intervener as Mr Shalabayev, to the Claimant/Respondent as "the Bank" and to the First Defendant as Mr **Ablyazov**. It is to be noted that the Appellant is Mr Salim Shalabayev as opposed to his brother Mr Syrym Shalabayev. It will be well-known to most who read beyond the first paragraph of this judgment that the two Messrs Shalabayev are the brothers-in-law of Mr **Ablyazov**, who has been found to have defrauded the Bank of massive sums. The two brothers-in-law are alleged to have been his associates and nominees both in that venture and in frustrating the attempts of the Bank to locate assets against which the Bank might enforce its judgment against Mr **Ablyazov**.

2. On 17 May 2013 Teare J made a final charging order in favour of the Bank over the interest of Mr **Ablyazov** in Apartment 17, Alberts Court, 2 Palgrave Gardens, London, NW1 6EL. I shall call this property "Alberts Court." It stands charged with payment of two judgments in favour of the Bank against Mr **Ablyazov** in the sum of £1.52 billion.

3. The previous day, 16 May 2013, Mr Shalabayev issued an Application Notice in the Commercial Court seeking an order that he be added as a party to the Bank's application for a final charging order over Alberts Court, and that the Bank's application should be adjourned pending trial of the issue who owned Alberts Court. The registered proprietor of Alberts Court has at all material times been Bensbourogh Trading Inc, a company incorporated in the British Virgin Islands. It is and always has been the contention of Mr Shalabayev that he, and not Mr **Ablyazov**, is the ultimate beneficial owner of the shares in Bensbourogh Trading Inc and hence the beneficial owner of the flat at Alberts Court.

4. However in earlier proceedings between the Bank and Mr **Ablyazov** pursuant to which the Bank sought to commit Mr **Ablyazov** for contempt of court, Teare J had, in a judgment dated 16 February 2012, [2012] EWHC 237 (Comm), determined on the criminal standard of proof that Mr **Ablyazov** is and has at all material times been the true beneficial owner of the shares in Bensbourogh Trading Inc and hence of the flat in Alberts Court. Mr Shalabayev was not a named party to those proceedings. He did however attend the hearing in order to give evidence on this issue on behalf of Mr **Ablyazov**. His evidence was disbelieved.

5. Mr **Ablyazov**'s appeal against his committal for contempt was dismissed. In relation to the ownership of Alberts Court Rix LJ observed:-

"89. As for Alberts Court: the points raised on behalf of Mr **Ablyazov** are a straightforward attempt to reargue the judge's assessment of the evidence of Salim and Syrym Shalabayev, witnesses who for the careful reasons given by the judge had no credibility with him. While the judge accepted that the case in respect of this

property was not as strong as in the case of Carlton House and Oaklands Park (I would comment, if only because the purchase prices were not as outstandingly large), the facts show that there was nothing to tie Salim Shalabayev with this property other than the say-so of the two brothers. However, he never lived there, although Mr **Ablyazov**'s driver and his wife had lived there. If, therefore, the property was not Salim's, it must have been Mr **Ablyazov**'s. Syrym, who had selected it, and negotiated for and paid for it, did not say that he bought it for himself."

6. By his Order of 17 May 2013 Teare J also dismissed Mr Shalabayev's application to be joined as a party to the Bank's application for the charging order. The judge determined that it would be an abuse of process to permit Mr Shalabayev to challenge the finding as to ownership of Alberts Court made in the contempt proceedings because that challenge amounted to a collateral attack which would bring the administration of justice into disrepute.

7. On 14 August 2013 I granted Mr Shalabayev permission to appeal to this court against the order made by Teare J on 17 May 2013. More particularly, I granted Mr Shalabayev permission to appeal against the judge's conclusion that to permit him to challenge the finding made in the contempt proceedings would amount to an abuse of process. I directed that Mr Shalabayev furnish security for the Bank's costs of the proposed appeal, which he has subsequently done.

8. It was drawn to my attention in connection with the application for permission to appeal that Mr Shalabayev was himself in undoubted contempt of court in two respects to which I shall return shortly. However an application for committal had been made only on 28 May 2013 and remained to be resolved. There were therefore no formal findings of contempt against Mr Shalabayev. With some misgivings, I left this out of account in my consideration of the question whether permission to appeal should be granted.

9. On 18 October 2013 Eder J determined in Mr Shalabayev's absence, he having chosen shortly before the hearing neither to attend in person nor to be represented, that he is guilty of contempt of court in respect of breaches of several orders of the court, breaches aggravated by lying to this court in 2012 about his then whereabouts. Eder J imposed three concurrent sentences of 22 months imprisonment. So far as is known Mr Shalabayev has not been within the jurisdiction since March 2012. He has withdrawn an appeal against his sentence and has not sought to challenge the findings of contempt. No attempt has been made to purge his contempt and there is no suggestion that he intends to do so.

10. By a Respondent's Notice issued on 8 January 2014 the Bank invited this court to exercise its discretion not to hear Mr Shalabayev's appeal against the order of Teare J dated 17 May 2013 on the basis that he is now a committed contemnor whose contempts are unpurged. A hearing for directions was listed. We heard the Bank's application on 16 October 2014. At the conclusion of the hearing we announced that we would not exercise our discretion to decline to hear Mr Shalabayev's appeal and that the Bank's application in that regard was accordingly dismissed. These are my reasons for having joined in that decision.

Mr Shalabayev's contempt

11. Mr Shalabayev is not party to any substantive proceedings brought by the Bank. The Bank has not asserted any cause of action against him. Apart from this dispute over the ownership of Alberts Court, Mr Shalabayev's main involvement as a party in this vast litigation was as a respondent to a *Norwich Pharmacal* application made against him by the Bank in December 2011. He was served with that application on 6 December 2011 whilst temporarily in London to give evidence on the Bank's committal application against Mr **Ablyazov**, as I described in paragraph 4 above. In fact, he was served at the conclusion of his evidence with a Disclosure Order made by Andrew Smith J.

12. The Disclosure Order related to Mr Shalabayev's role as nominal ultimate beneficial owner of two companies in the Seychelles, Millennium and Proteus, a role he performed at the request of Mr **Ablyazov**. Mr Shalabayev was sole signatory on accounts held by these companies at banks in Cyprus. As a result he was involved in two transfers of large amounts of money from Millennium to Proteus in early 2011. The effect of the second transfer, made in suspicious circumstances so far as concerns its timing, was to remove US$23 million from Millennium to Proteus and thus out of the scope of protection ordered by the court through freezing and receivership orders over Mr **Ablyazov**'s assets. It was that transfer which underlay the orders for disclosure made against Mr Shalabayev.

13. On 20 December 2011 Field J dismissed an application by Mr Shalabayev to discharge or set aside the Disclosure Order by reason of Mr Shalabayev's privilege against self-incrimination and/or material non-disclosures by the Bank in its application therefor. Field J remade the Disclosure Order and also imposed restrictions on the ability of Mr Shalabayev to leave the jurisdiction, requiring surrender of his passport to his solicitors and a prohibition on applying for any travel document until after he had complied with the Disclosure Order.

14. On 15 February 2012 Mr Shalabayev was cross examined before Cooke J as to his compliance with the Disclosure Order. On 16 February 2012 Cooke J delivered a judgment expressing the conclusion that Mr Shalabayev had not fully and properly complied with his Disclosure Order obligations under the 20 December 2011 order and he continued the travel restrictions pending proper compliance.

15. It seems that thereafter Mr Shalabayev left the jurisdiction in March 2012. At around the same time he applied for and obtained a new Kazakh passport which he failed to surrender to his solicitors. In October 2013 Eder J made the findings of contempt to which I have already referred.

16. It should be pointed out at the outset of the discussion that there is no direct connection between the findings of contempt against Mr Shalabayev and the issue of beneficial ownership of Alberts Court which arose in connection with the charging order proceedings. Mr Stephen Smith QC for the Bank suggests that there is nonetheless a real connection in that proper disclosure concerning the Millennium-Proteus transfer could have assisted in tracing misappropriated property which would have rendered it unnecessary to seek to enforce the Bank's judgments against other property such as Alberts Court. As to that, it is pointed out by Mr James Sheehan on behalf of Mr Shalabayev that the Bank has never yet asserted any more than that it “may well” have a proprietary claim to the misappropriated funds and has not yet established that, absent such a claim, the funds transferred belonged to Mr **Ablyazov** and were thus available for enforcement. It has also been said by the Bank that certain of the information sought from Mr Shalabayev has now been obtained from other sources. Less compelling is Mr Sheehan's point that there is no reason to think that breach of the travel and passport restrictions has in practice affected the prospect of the Bank obtaining information. The travel and passport restrictions were designed to enforce compliance with the disclosure obligation. However, Mr Sheehan's overall point that there is no very real connection between Mr Shalabayev's contempts and the subject matter of the charging order of proceedings is I think well-made. Still less is there any connection between Mr Shalabayev's contempts and the question whether his attempt to intervene in the charging order proceedings represents a collateral attack upon the earlier findings and is an abuse of process.

17. There is now a considerable body of authority dealing with the question how the court should approach the exercise of its discretion to refuse to hear a contemnor. Moore-Bick LJ summarised the proper approach in this very litigation in a similar application involving Mr **Ablyazov**- see his judgment [2012] EWCA Civ 639, delivered on 16 May 2012. At paragraph 26 he said this:-

“…The question whether to decline to hear a contemnor, a course which will almost invariably lead to his appeal or application being dismissed, is to be determined by reference to how, in the circumstances of the individual case, the interests of justice will best be served. That is how the principle was formulated by Lord

Bingham in *Arab Monetary Fund v Hashim*, reflecting the judgment of Denning L.J. in *Hadkinson v Hadkinson.* When deciding that question one factor the court must bear in mind is that, as Denning L.J. observed, it is a strong thing for a court to refuse to hear a party and is only to be justified by grave considerations of public policy. It is a step which a court will take only when the contempt itself impedes the course of justice."

At paragraph 28 he continued:-

"Mr Smith submitted that the discretion to decline to hear a person in contempt has not been abrogated by the European Court of Human Rights and in that I think he is correct. However, it is, I think, reasonably clear that 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 that 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. The approaches are not in my view inconsistent and although the Strasbourg cases emphasise the importance of allowing the appellant to be heard, especially when his personal liberty is at stake, they do not differ significantly from the approach adopted in the more recent domestic cases. The importance that has been attached to allowing the appellant to address the court in support of his challenge to the order of the committal is, to say the least, a powerful factor to be taken into consideration when deciding whether the interests of justice are better served by declining to hear him. The European cases to which I have referred were cited to the court in *Motorola v Uzan (No. 2)*, but the court did not find it necessary to consider them in detail. Although the language used by the Strasbourg court has become more definite over the course of time, the underlying principle of proportionality has not in my view been superseded. I do not accept, therefore, that any refusal to hear a contemnor would inevitably involve a breach of article 6, but I do accept that the circumstances in which such a course would be justified are likely to arise very rarely. The mere fact that the applicant is in contempt is not, in my view, sufficient justification."

18. The present is not of course a case in which Mr Shalabayev seeks to challenge the order of committal, and to that extent neither his liability for contempt nor his liberty is at stake. In one respect that makes the case for not hearing him the stronger, yet at the same time it also tells against declining to hear him because of the lack of nexus between the contempts and the issue on which Mr Shalabayev wishes to be at liberty to address the court.

19. The fons et origo of the discretion to refuse to hear a contemnor, at any rate in modern times, is the decision of the Court of Appeal in *Hadkinson v Hadkinson*, [1952] P 285. That was a case in which a wife, who had successfully petitioned for divorce, was given the custody of the only child of the marriage, a boy, until further order of the court, but was directed that he should not be removed out of the jurisdiction of the court without its sanction. Having remarried after the decree absolute she later caused the child to be removed to Australia, where she was living with her current husband. On a summons issued by the father of the child the judge ordered the mother to return the child within the jurisdiction not later than 31 August 1952. On an appeal by the mother against that order, counsel for the father took the preliminary objection that the appeal should not be heard because the mother had been at all times, and still was, in contempt. Denning LJ, after making the observations summarised by Moore-Bick LJ in the passage cited above, said, at page 298:-

"Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy

remains in Australia it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned we must decline to hear her appeal."

20. It is unnecessary on this application to debate the precise parameters of this principle, if indeed they admit of precision. It may be that it is not only where the contempt impedes the course of justice in the cause that the court will decline to hear a contemnor, but the lack of connection between the contempt and the subject matter of the application on which the contemnor wishes to be heard is plainly a powerful factor to be taken into account. Popplewell J in his judgment on yet another application in this litigation, [2013] EWHC 1979 (Comm) attempted to summarise the matter thus:-

"Ultimately, the question is whether, taking into account all the circumstances of the case, it is in the interests of justice not to hear the contemnor. Refusing to hear a contemnor is a step that the court will only take where the contempt itself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Justice Denning in *Hadkinson v Hadkinson* and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make: see page 298."

Mr Shalabayev's contempt has of course been serious, prolonged and deliberate. It is true that the court has few means at its disposal in order to bring pressure to bear upon him with a view to enforcing compliance with its orders. Nonetheless, whilst Mr Shalabayev's contempt has impeded the course of justice in ascertaining the truth concerning the Millennium-Proteus transfer, his continuing contempt is of little consequence to the just resolution of the question of beneficial ownership of Alberts Court, or the enforcement of the charging order if that is upheld.

21. Teare J was invited to decline to hear Mr Shalabayev's application to be joined as an intervener, albeit at a stage before Eder J had found the contempt proved. Teare J expressed himself as "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." He concluded "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."

22. For my part I am also concerned that Mr Shalabayev has had no proper opportunity to establish his claim to ownership of Alberts Court by being a party to any relevant judicial process. Being a witness in Mr **Ablyazov**'s committal proceedings did not entitle him to address the court upon the conclusion to be derived from the totality of the evidence. Whilst Teare J entertained Mr Shalabayev's application to intervene in the charging order proceedings, his ultimate decision was that Mr Shalabayev should not, for reasons unconnected with his contempt, be permitted to challenge the findings made in the earlier proceedings as to the beneficial ownership of Alberts Court. To decline to hear his appeal against that decision, in circumstances where Teare J had entertained but rejected his submissions, is in my view disproportionate and moreover introduces an unsatisfactory element of inconsistency. There has been no real change of circumstances since Teare J made his decision. Eder J's conclusions were inevitable, as Cooke J had already pointed out. To decline now to entertain an appeal from a decision to the making of which Teare J permitted Mr Shalabayev to contribute, in the sense of addressing argument on the merits, seems almost capricious. It would be disproportionate, because Mr Shalabayev has had no opportunity to establish his claim to Alberts Court, something he seeks to do not offensively but purely as a defensive response to the application of the Bank to charge it with the indebtedness of Mr **Ablyazov**. Where the only question at issue is whether he should be permitted that opportunity, and he wishes to challenge a decision at first instance rejecting his argument that he should, it does seem a disproportionate or at any rate an inappropriate consequence of his unrelated

contempt that he should be denied the right to challenge Teare J's conclusions. I do not say that because Teare J heard him, so should we. But it is my conclusion that Teare J having entertained his application, it would be a highly unsatisfactory outcome that we should decline to hear his appeal against its rejection. To my mind that would of itself be a conclusion which could bring the administration of justice into disrepute. And as will be apparent, Teare J was in my view quite right to entertain Mr Shalabayev's application. It will now be for this court to decide whether Teare J was right to conclude that it would be an abuse of process for the court to permit Mr Shalabayev to be joined as a party to the Bank's application for a final charging order with a view to challenging the findings in the earlier proceedings to which he had not been party.

23. The Bank sought permission to rely upon two new arguments in support of Teare J's decision. At the hearing below the Bank reserved the right to contend that Mr Shalabayev is bound by the findings made in the **Ablyazov** committal judgment because he was a privy of Mr **Ablyazov**. It now seeks permission to rely upon that argument. The second argument is that Mr Shalabayev is bound by the finding of Mr **Ablyazov**'s ultimate beneficial ownership of Alberts Court made in the **Ablyazov** committal proceedings because he is estopped by his own conduct in failing to take any steps prior to the handing down of the **Ablyazov** committal judgment to intervene to protect his own alleged property rights, by virtue of which he has knowingly acquiesced in or relied upon Mr **Ablyazov** alone defending the **Ablyazov** committal proceedings on the issue of the ultimate beneficial ownership of Alberts Court.

24. I would not permit the Bank to rely on the first of these arguments simply because it reserved the right so to do. In truth however the argument on abuse of process would be incomplete and possibly incoherent without an investigation of the extent to which there was an identity of interest between Mr **Ablyazov** and Mr Shalabayev. The second point is rather different, but there is no prejudice to Mr Shalabayev in allowing it to be taken provided he has the opportunity to deploy evidence in answer to it, if so advised. It is for these reasons that we both permitted the Bank to rely upon its two new grounds for upholding the judgment below, as set out in its Respondent's Notice, and permitted Mr Shalabayev to produce further evidence in relation to those grounds.

Lord Justice Christopher Clarke:

25. I agree.