

Judgments

CA, CIVIL DIVISION



Case No: A3/2014/2397

Neutral Citation Number: [2015] EWCA Civ 218

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM PORTSMOUTH COUNTY COURT

(HIS HONOUR JUDGE LEVY QC)

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 10 February 2015

Before

LORD JUSTICE KITCHIN

Between:

JSC BTA BANK

Applicant

- and -

ABLYAZOV & ORS

Respondents

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7404 1424

Official Shorthand Writers to the Court)

Mr Alexander Gunning QC (instructed by PCB Litigation) appeared on behalf of the Applicant

The **Respondents** were not present and were not represented.

Approved Judgment

Crown Copyright©LORD JUSTICE KITCHIN:

1. This is an application by the respondent, Mr Shegai, for permission to appeal against the judgment of Flaux J given on 27 June 2014 and his consequential order dated 7 July 2014. This order was made upon the application of the applicant, JSC BTA Bank, (“the Bank”) on the basis that Mr Shegai had failed fully and properly to comply with an unless order dated 10 June 2014 and that pursuant to paragraph 4 of that unless order, he therefore stood debarred from pursuing his application.
2. Permission to appeal was refused on the papers by Lewison LJ by order dated 26 September 2014. Mr Shegai has requested that decision be reconsidered at an oral hearing which has come on before me today. At this hearing, Mr Shegai has been represented by Mr Alexander Gunning QC.
3. The background relevant to this application may be summarised as follows. There are before the court long-running proceedings relating to frauds which have been committed against the Bank by its former chairman, Mr **Ablyazov**, and by his associate, Mr Zharimbetov. The present proceedings are proceedings within the main **Ablyazov** proceedings and concern a house at 9 Broad Walk in Winchmore Hill which is said to be worth in excess of £6 million, the registered owner of which is a BVI company called “Smaland” which is in turn owned by a company called “Welliton Solutions”. The issue to which they give rise is who is the true beneficial owner of 9 Broad Walk and Smaland. The Bank contends that it is Mr Zharimbetov but he, like Mr **Ablyazov**, has fled the jurisdiction and is in contempt of court in various respects. It is against that background that the Bank obtained freezing orders and receivership orders in respect of a number of properties with which these individuals are associated, including 9 Broad Walk.
4. Mr Shegai contends that he is the true beneficial owner of 9 Broad Walk and in these particular proceedings he sought a declaration to that effect. The proceedings were issued by application notice dated 26 April 2013 and were set down for trial to begin on 14 July 2014. On 7 November 2013, an order containing various directions was made by consent and it included an order that the Bank and Mr Shegai should give standard disclosure by 13 December 2013.
5. In his fifth witness statement dated 4 June 2014, Mr Shegai accepted in paragraph 7 that he was in breach of his obligation to give standard disclosure by the date specified in the order to which I have referred and apologised for his failure. That particular witness statement was made in the context of the application made by the Bank by application notice dated 1 May 2014 for an order that Mr Shegai be debarred from pursuing his application unless he gave that standard disclosure and, in particular, gave disclosure of particular categories of documents which the Bank believed to be of considerable importance. He went on to point out the particular difficulties which he was experiencing and said, at paragraph 12, that he had been doing his best to locate relevant documents and had, by way of example, made requests for documents from solicitors, registrars, consultants and bankers both directly and through his solicitors. However, he continued, he had found this to be a slow and time consuming process. He went on to say he had been distracted from the conduct of the proceedings by activities of the investigative authorities in Russia and Kazakhstan but undertook to use and commit the necessary time and resources to the case to enable him to meet future deadlines set by the court. In those circumstances he indicated that he would consent to an order in terms of at least paragraph 1 of the order sought by the Bank on the basis that the date for compliance was set for 10 July 2014. He said that he would try to complete the standard disclosure obligations before then if possible, but that because of the severe consequences of non-compliance, he would prefer to have a reasonable period in which to comply. He therefore sought the date for compliance of 10 July 2014.
6. Not surprisingly, neither the Bank nor the judge considered that acceptable, particularly since the date for the substantive hearing had been set for just a short time thereafter, the order for disclosure had been made as long ago as the 7 November 2013 and the Bank's application had been issued on 1 May 2014.

The Bank therefore pursued its application which came before Walker J on the papers and he made an order setting a very tight timescale and, by paragraph 2, requiring Mr Shegai by 4.00 pm on 13 June 2014 to:

“...conduct further searches, investigations, inquiries and requests to locate and give disclosure of documents in the following categories:

- (1) Documents from 1 January 2009 onwards within the following categories: (a) documents that show details of Mr Shegai's property portfolio; (b) documents that show details of Mr Shegai's tax affairs; (c) Mr Shegai's bank statements; and (d) the bank statements of any companies owned by Mr Shegai;
- (2) Documents held by Elias Christofi & Co Limited, Bluefin Nominees Limited and Blue Island Management Limited in relation to Smaland Property Holdings Limited;
- (3) The bank statements of Smaland Property Holdings Limited for its accounts held be LGT Bank (Suisse) SA;
- (4) The native electronic files containing the emails passing between Mr Shegai and Ms Inna Walker and passing between Mr Shegai and Mr Kravcenko that were first disclosed by Mr Shegai in the exhibit RS3;
- (5) The native electronic files containing the property brochures that were first disclosed by Mr Shegai in the exhibit RS4; and
- (6) The native electronic files containing records of Mr Shegai's Skype conversation history.”

7. The order then continued in these terms at paragraphs 3 and 4:

“3. Mr Shegai shall, by 4pm on 13 June 2014, file and serve on the Bank's solicitors a witness statement setting out the steps he has taken to provide the full and proper disclosure provided for by paragraphs 1 and 2 above.

“4. Unless Mr Shegai does fully and properly comply with paragraphs 1 to 3 above he shall be debarred from pursuing his application of 26 April 2013 in these proceedings and from defending the Bank's application of 6 June 2013 in these proceedings.”

8. As Flaux J explained, Mr Shegai purported to comply with the order and prepared and served for that purpose his sixth witness statement dated 13 June 2014. The judge summarised the contents of that witness statement insofar as it dealt with the paragraphs of the order to which I have referred. He began with paragraph 28 of the witness statement which reads:

“Pursuant to paragraph 2 of the order, I understand that I am obliged to conduct certain further searches, investigations, inquiries and requests to locate and give disclosure of documents in respect of those categories set out at sub-paragraphs 1 to 6. I shall deal with those categories in turn below.”

9. It is perfectly clear that the judge considered that Mr Shegai's explanation about the searches, investigations, inquiries and requests that he made for and his inability to produce documents relating to his property portfolio and tax affairs was, on the face of it, incredible. But he recognised that these were matters that could not be taken further on the application before him.

10. The position in relation to the bank statements and the documents held by Elias Christofi and the Bluefin companies was, however, a different matter. In that regard, Mr Shegai said at paragraphs 36 and 37 of his statement that he had already disclosed a number of bank statements from Smaland and Welliton as well as for his personal account at Norvik Bank and that he now disclosed a number of additional bank statements in respect of his personal accounts with Sberbank and Norvik Bank, and also bank statements of his company, Fovamento. He said that he had no other bank statements in his possession or control. But as the judge rightly recorded, he did not begin to say what searches, investigations, inquiries or requests he had made of his bankers or others about what bank statements existed. He did not identify what bank accounts he had or for what periods of time he had them. He did not say that he had done anything at all since the order of Walker J and, on the face of his witness statement, it was thoroughly clear to the judge that he had done nothing. In the judge's view this constituted a wilful failure to comply.

11. Turning to Christofi and the Bluefin companies, the judge observed that Mr Shegai had disclosed nothing earlier than a date in 2012 despite Christofi being a service provider with whom, if Mr Shegai was the beneficial owner of Smaland in 2009, one would have expected him to have communicated. As to this, he said at paragraph 39 of his witness statement:

"At my instruction, my solicitors wrote to Elias Christofi & Co Limited in October 2012 requesting copies of their files relating to Smaland and/or Welliton. Elias Christofi provided these to my solicitors by email in late November 2012. The majority of these documents have already been exhibited to my witness statements. I now disclose these documents in full...communications between myself and Elias Christofi and also be found within the experts' search results."

12. As for Bluefin he said this at paragraph 40:

"Again, at my instruction, my solicitors wrote to both Bluefin Nominees Limited and Blue Island Management Limited on 17 April 2014 requesting copies of their files relating to any work conducted in respect of the Property, Smaland and/or Welliton...neither of these entities have responded, and I do not have any other means of contacting them."

13. However, and as Flaux J went on to explain, this and a similar request in April 2014 were historical matters relating to a period of time when, on Mr Shegai's own admission, he had failed to comply with the order of Males J for general disclosure. Certainly, there was nothing by way of explanation from Mr Shegai about the steps he had taken by way of further searches, investigations, inquiries and requests in compliance with Walker J's unless order.

14. Mr Gunning now urges upon me that paragraph 2 of Walker J's order cannot have required Mr Shegai to repeat searches, investigations, inquiries and requests that he had already undertaken, particularly insofar as they had already yielded documents of which disclosure had been given, but was instead focussed on appropriate additional searches and can only have required further reasonable searches that might result in further disclosure. Turning to the two particular categories of documents upon which Flaux J focused, Mr Gunning submits that Mr Shegai confirmed in his fifth witness statement that he had made the usual inquiries of his bankers directly and through his solicitors and in his sixth witness statement explained what had been disclosed and what he was now disclosing. He submits that it has simply not been shown that Mr Shegai was in material breach of the order at all.

15. Despite the attractive way in which Mr Gunning has advanced these submissions, I am unable to accept that they have a real prospect of success on appeal. Paragraph 2 of the order is absolutely clear in its terms and required Mr Shegai to conduct further searches, investigations, inquiries and requests to locate and give disclosure of his bank statements and the bank statements of his companies as from 1 January 2009. In paragraph 12 of his fifth witness statement he simply said that he had made requests for documents of solicitors, registrars, consultants and bankers both directly and through his solicitors but that he had

found this to be a slow and time consuming process. They had yielded little. The whole purpose of Walker J's order was to require Mr Shegai to carry out further searches to find the relevant bank statements and then, pursuant to paragraph 3 of the order, to explain precisely what he had done. As his sixth witness statement makes clear, however, he did not do anything at all. Therefore, inevitably, he was also in default of paragraph 3 of Walker J's order. Further, it seems to me that this is something of which Mr Shegai was or ought to have been well aware because, as Flaux J related, Mr Shegai said at paragraph 28 of his sixth witness statement that he understood that he was obliged to carry out further searches, investigations, inquiries and make requests to locate and give disclosure of documents in respect of the categories set out at sub-paragraphs 1 to 6.

16. Turning to Christofi and the Bluefin Companies, the disclosure which had earlier been given was, as I have said, inadequate. Nevertheless, Mr Gunning submits that Mr Shegai did properly identify in paragraphs 38 to 40 his sixth witness statement the inquiries that had been undertaken and the documents which they yielded. He submits that if those searches were reasonable and appropriate, there was nothing more for Mr Shegai to do.

17. Once again, I disagree. There had been a failure to comply with the order for general disclosure and that had been accepted by Mr Shegai and, as I have said, he recognised that he was required to carry out further searches. But in this respect, just as in the case of the bank statements, he appears to have done nothing in compliance with Walker J's order. In my judgment, Flaux J and Lewison LJ were therefore right to conclude that Mr Shegai was in substantial breach of Walker J's order and, specifically, the terms of paragraphs 2 and 3 of that order.

18. Flaux J then considered whether he should grant relief from sanctions. He took the view in the light of the material before him that the degree of non-compliance was not trivial. To the contrary, it was a serious non-compliance and the consequence of that non-compliance was always perfectly clear to Mr Shegai from the terms of the order. He made no attempt to apply for an extension of time either to carry out the necessary searches or to make and serve an appropriate witness statement. Flaux J then asked himself whether, on the basis that the breach was not trivial, there was any good reason for that non-compliance and he answered that question in short terms; there was none.

19. Mr Gunning submits that the failures of Mr Shegai, such as they were, were not serious, particularly in the light of the efforts which he had made and the documents which he had produced as he explained in his sixth witness statement. He submits that in the light of the explanation given by Mr Shegai in that sixth witness statement, it cannot be said that any breach, if breach it was, was sufficiently serious to justify the sanction which the judge imposed.

20. I disagree. The documents were relevant to the central issue in the case, namely whether or not Mr Shegai's claim to have a beneficial ownership of 9 Broad Walk had merit. He had failed to meet the December 2013 disclosure deadline. He was well aware of the application made by the Bank on 1 May 2014. He knew that his disclosure was deficient and fully appreciated that he was required to conduct further investigations, searches and inquiries and to make appropriate requests to locate and give disclosure of documents within the categories the subject of the order. The substantive hearing was only a short time away. In my judgment, the judge placed appropriate weight on the short period of time for compliance and the difficulties that Mr Shegai faced and I have no doubt had well in mind the need for litigation to be conducted efficiently and at proportionate cost. At the end of the day, however, this disclosure was important going, as it did, to the central issue that the application raised. An Unless Order is of course a last resort but in this case it was justified and following Mr Shegai's further non-compliance, the judge was right to give effect to it. He has not erred in exercising his discretion in the way that he did. He has made no error of principle. He has not taken into account matters which were irrelevant; nor has he failed to take into account relevant matters. Despite Mr Gunning's able submissions, an appeal would not have a real prospect of success and accordingly this application must be dismissed. **Order:** Application dismissed