Judgments

CA, CIVIL DIVISION

A3/2016/0269

Neutral Citation Number: [2016] EWCA Civ 547

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

(MR JUSTICE PHILLIPS)

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 23 March 2016

B e f o r e:

LORD JUSTICE LONGMORE

Between:

JSC BTA BANK

Respondent

v

ABLYAZOV

Applicant

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(Official Shorthand Writers to the Court)

Mr C Samek QC and Mr M Delehanty (instructed by Hughmans Solicitors) appeared on behalf of the **Applicant**

Mr S Smith QC and Mr T Akkouh (instructed by Hogan Lovells International LLP) appeared on behalf of the **Respondent**

J U D G M E N T

(As approved by the court)

1. LORD JUSTICE LONGMORE: This is an application for permission to appeal. It is of some urgency since it concerns a freezing order. Therefore, when the application came to me on the papers it seemed to me a sensible course to adjourn it into open court, which I have done. I have had the good fortune of an argument from Mr Samek for the Second Defendant, Mr Khrapunov.

2. Mr **Ablyazov**, as is well-known, was a chairman of the Claimant bank in this matter. He is the First Defendant. While chairman, he criminally misappropriated assets from the bank which now has an unsatisfied judgment against him for about $4.5 billion. He is, as I understand it, currently in prison in France awaiting the outcome of extradition proceedings.

3. The Second Defendant to these proceedings is Mr **Ablyazov**'s son-in-law, Mr Khrapunov, whom the bank alleges has not only conspired to injure the bank by unlawful means in assisting Mr **Ablyazov** in concealing both the assets which he stole and the assets bought with those assets, but has also assisted Mr **Ablyazov** in breaching the freezing and receivership orders made against Mr **Ablyazov**.

4. On 17 July last year Males J granted a worldwide freezing order against Mr Khrapunov which required him, firstly, to identify and inform the bank of his assets if they were worth more than £10,000; secondly, to say what his interests in those assets were; and thirdly, to identify the location of the assets which the bank was able to identify. That was never complied with.

5. On 6 November 2015 Popplewell J said that Mr Khrapunov must comply by 13 November and that the information provided was to be provided only to the bank's solicitors and counsel, a course suggested at that

stage by Mr Khrapunov himself. I will refer to that as the confidentiality regime. On 13 November, the day of compliance set by Popplewell J, Cooke J granted an extension to 23 November. On that date there was still no compliance, but Mr Khrapunov's solicitors purported to invoke the privilege against self incrimination as a reason for non-compliance.

6. On 24 November the bank applied for proper particulars of entitlement to that privilege to be given. On 30 November Mr Khrapunov filed an affidavit saying that he was subject to criminal investigations in Kazakhstan and Switzerland and civil proceedings in California and New York for a breach of fiduciary duty, conversion and fraud and also breach of the RICO statute.

7. On 1 December of last year Phillips J adjourned the hearing fixed for that day to deal with the bank's application of 24 November to allow argument that in the light of the confidentiality regime imposed by Popplewell J not only was the claim to invoke the privilege insufficient, but also that any risk of self incrimination that there might otherwise be was fanciful.

8. On 19 January Phillips J resumed the adjourned hearing. He was persuaded that it was not fanciful that disclosure would increase the risk of criminal charges largely because the bank had served a pleading in New York alleging a conspiracy to convert stolen funds into New York real estate and referring both to the existing criminal proceedings in Kazakhstan and the New York Investigation Department seeking assistance from Switzerland to prosecute Mr Khrapunov in Switzerland.

9. The judge did not explain how the order that Mr Khrapunov disclose his assets or the location would increase the current likelihood of criminal proceedings abroad, but as Mr Samek has submitted, that must have been the implication of the judge's conclusion. However, the judge also decided that restricting disclosure to solicitors and counsel ensured that any risk of or any increased risk of incrimination was not real but fanciful.

10. There had been evidence filed about the position in Switzerland and in the United States, that evidence not being challenged by the bank. It emerged from that evidence that in Switzerland the courts would only order disclosure of documents which were in Switzerland, not documents abroad. As the judge pointed out, there was no need for Mr Khrapunov to make the disclosure he was ordered to make in Switzerland.

11. As far as the United States was concerned, there was a risk, which the judge held to be theoretical, that Hogan Lovells, which practices in the United States under the name Hogan Lovells United States, could be brought before a grand jury and asked to disclose documents which they had. The judge said that it was fanciful that the United States' authority would even know that Hogan Lovells had any such documents, but in any event those documents would not be in Hogan Lovells United States' possession, but only in the possession of Hogan Lovells International, the bank's English solicitors.

12. So the argument would have to be that it might be alleged that Hogan Lovells United States were the agents in some way for Hogan Lovells International and that Hogan Lovells United States in their capacity as agents would be required to produce documents which they did not have which identified the assets. The judge regarded that whole proceeding as being fanciful.

13. He also said that to the extent that United States or Swiss or authorities sought assistance from the English court if they were minded to institute criminal proceedings as a result of investigations which they were making, the English court would have regard to the confidentiality regime imposed by Popplewell J.

14. The judge evaluated the risk that the confidentiality regime would not work. He decided that it would and that the risk of self incrimination was thus fanciful. That is an evaluative judgment on the part of Phillips J which this court would be bound to respect.

15. Mr Samek has sought permission to appeal on two broad grounds. He firstly says that the judge was just wrong to say that Hogan Lovells could not or might not be compelled to provide disclosure to the prosecution authorities in the United States and Switzerland and wrong to say that it was unlikely that those authorities would seek disclosure in the first place.

16. But as to such likelihood, there is certainly no sign of them doing so despite the longstanding proceedings there have been against Mr **Ablyazov**. It is true that Mr Khrapunov has only more recently come into focus as Mr **Ablyazov**'s son-in-law, but still there is no current criminal process in the United States or Switzerland. There is merely an investigation. As to compulsion to provide documents in the United States, the judge's conclusion seems to me not only to be one open to him on the facts but, in any event, plainly right.

17. It is said by Mr Samek that the finding that the authorities would not avail themselves of such rights as they might have was inconsistent with the judge's first finding that there was in fact a risk or an increased risk of self incrimination, but that seems to me to be quite wrong. There is no inconsistency between them at all.

18. The second main point which Mr Samek says would be appropriate for a decision by this court is that the judge's assessment of the reliability of the confidentiality regime is wrong. The confidentiality regime, submits Mr Samek, just cannot be relied on, especially if the Claimant's solicitors are coy (that is my word, not Mr Samek's) about the reasons why they want disclosure and coy about how the confidentiality regime could operate.

19. The fact is, however, that these orders are not uncommon in the Commercial Court or the Chancery Division. As Mr Samek points out, it is not just in the context even of self incrimination that such orders are made, but often if there are confidential matters which a defendant or indeed a claimant legitimately does not wish to have widely published or known.

20. There is no suggestion that these confidentiality orders have not worked in the past. It seems to be working in relation to Mr **Ablyazov** himself. That has already been subject of a Court of Appeal decision JSC BTA Bank v **Ablyazov** which is reported in [2010] 1 All ER (Comm) 1029. It is true that Sedley LJ in that case did point out that counsel and solicitors can find themselves in difficulties if they are unable to communicate things to their client. That is a potentially difficult feature.

21. It is that which Mr Samek says would justify an appeal because it would be appropriate, in his submission, for this court to say whether or not confidentiality is appropriate and if so, apparently to give guidance about how it is to be policed and so on. I have to say that does not seem to me to be an appropriate matter for this court to go into on the facts of this case.

22. As to the bank's solicitors' alleged coyness as to the reasons for their wish for disclosure, it seems to me to be obvious that the bank hopes to get a judgment in due course and wants to ensure as far as it can that there are assets available to satisfy that judgment. They do not seem to have been able to do that yet much in Mr **Ablyazov**'s case, but no doubt they hope they have better fortune if they do get a judgment in due course against Mr Khrapunov.

23. As to the suggestion of coyness about the how the club would operate, it does not seem to me that it is necessary for the bank's solicitors to go into detail about what the judge intended when he ordered the confidentiality regime. As I say, they are not uncommon orders. Everyone knows how they work. There is no evidence before the court of their not having worked.

24. Mr Samek says, and he is right about this, that if there were an appeal, this court would be in as good a position to make the relevant evaluation as the judge, but it seems to that only arises if there is some reason to suppose that the judge was wrong in the evaluation that he made. For my part, I see no such reason. It seems to me inappropriate, therefore, to grant permission to appeal in this matter.