

Judgments

**EUROPEAN COURT OF JUSTICE**

Claim No: HC-2010-000020

2016 EWHC 2606 (CH)

**IN THE HIGH COURT OF JUSTICE**

**CHANCERY DIVISION**

Rolls Building,

110 Fetter Lane,

London EC4A 1NL

Monday, 15 August 2016

BEFORE:

**MR JUSTICE SNOWDEN**

BETWEEN:

**JSC BTA BANK**

Claimant

and

(1) **MUKHTAR ABLYAZOV**

(2) **SALIM SHALABAYEV**

Defendants

Caley Wright instructed by Hogan Lovells LLP appeared on behalf of the Claimant

The Defendants did not appear and were not represented

### **JUDGMENT**

(Approved)

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(Official Shorthand Writers to the Court)

MR JUSTICE SNOWDEN:

1. I have before me an application by JSC BTS Bank (“the Bank”) in proceedings against, amongst others, Mr Mukhtar **Ablyazov**. The background to these proceedings is relatively well known. The Bank is incorporated in Kazakhstan. Mr **Ablyazov** was its chairman for a number of years between 2005 and 2009, at which point he left Kazakhstan for London. Since 2009, the Bank has been engaged in proceedings against Mr **Ablyazov** and others in the Chancery Division and the Commercial Court, claiming that Mr **Ablyazov** systematically defrauded the Bank of very substantial sums of money.

2. In the course of those proceedings, in August 2009 the Bank obtained a freezing injunction against Mr **Ablyazov** in the Commercial Court. Subsequently, Mr **Ablyazov** was found to have been in contempt of court by failing to disclose his assets as required by the order, lying about his interests in certain assets, and dealing with assets in breach of the freezing injunction. He was sentenced to a period of imprisonment in his absence, having left the country for France.

3. In the course of the Chancery Division proceedings, an order was made by Mr Justice Henderson on 3 February 2011 for the search of a storage facility in Finchley, North London. On that application, as is conventional, the Bank gave an undertaking to the judge that it would not, without permission of the court, use any information or documents obtained as a result of the order, for the purpose of any civil or criminal proceedings, other than the claim that was being brought, or for the purposes of a receivership order that was made in those proceedings.

4. In execution of that search order, an iMac computer was seized, which has been later said to belong to a Mr Salim Shalabayev. On that computer were found a number of documents, three of which are relevant to this application. They are each in the form of a letter written by Mr **Ablyazov** to his sister, Ms Gaukhar Kussainova. In each of the letters, which are in English and drafted in very formal and legalistic language, Mr **Ablyazov** purports to make a substantial gift in cash to his sister.

5. In the proceedings in this country, the Bank obtained judgments against Mr **Ablyazov**, in excess of US \$4.6 billion dollars, which remain unsatisfied. The Bank is therefore now in the position, as a judgment creditor, of pursuing Mr **Ablyazov**'s assets in order to attempt to obtain satisfaction of these judgments. In pursuit of that aim, in June this year the Bank instituted proceedings in the circuit court at Fairfax County, Virginia, United States of America against Ms Kussainova, in which it seeks to recover substantial sums of about US \$4 million paid to her, on the grounds that they were the proceeds of Mr **Ablyazov**'s fraud perpetrated on the Bank.

6. On 27 July 2016, Ms Kussainova filed a demurer, seeking a dismissal of the Virginia proceedings, on the basis that they fall short of the evidential standard required for such a claim. Until now, the Bank has not sought to deploy the three letters to which I have referred in those US proceedings, but it now wishes to do so, in order to defeat the demurer filed by Ms Kussainova. For that reason, the Bank seeks to be released from the undertaking which it gave to Mr Justice Henderson in 2011, to which I have referred.

7. The court has a broad discretionary jurisdiction to release a party from an express undertaking of the type given in this case, if it is just to do so in the circumstances: see, amongst others, Dadourian Group International Inc. v Simms [2007] 1WLR 2967 and Dadourian Group International Inc. v Simms [2008] EWHC 186 (Ch). It seems to me that this is an appropriate case in which I should release the Bank from the undertakings which it gave for the purpose of deploying these documents in the proceedings in the United States. The purpose of the search order, when made, was to preserve documents which might be relevant to the Bank's claim against Mr **Ablyazov** and, if successful, in assisting the Bank either to recover its assets or otherwise obtaining satisfaction of the judgment in its favour. The Bank is now in the position of a judgment creditor of Mr **Ablyazov**, seeking such recovery, and it seems to me entirely just and convenient that it should be entitled to use the documents relating to him to pursue that end. It is also, in my judgment, appropriate in the interests of justice more generally that any decision taken in the proceedings in Virginia is taken on the basis that the fullest relevant evidence should be available to that court (subject, of course, to any decision that the Virginia court might make as to its admissibility or relevance).

8. Notice has been given of this application by the Bank to Mr **Ablyazov**, via an email address which had previously been used in proceedings. No response has been received from him. Notice has also been given to solicitors Withers LLP, who are instructed by Mr Salim Shalabayev, the owner of the computer on which the documents were found. They have responded in a letter of 12 August 2016, indicating that although they are instructed by Mr Shalabayev, they are not instructed to accept service of the application on his behalf. They have also indicated that the letters do not belong to him, and that Mr Shalabayev does not wish to be involved or a party to this application. It seems to me that, on the basis of that letter, it is unnecessary formally to join Mr Shalabayev as a party to these proceedings, or to give any other directions as to service of the application upon him as a condition of granting permission to the Bank to use the documents in the US proceedings.

9. The only other matter that is raised in the Withers LLP letter is that the documents may be said to be confidential as between Mr **Ablyazov** and his sister. It seems to me that that is unlikely. The documents, as I have indicated, are written in English and in a very formal and legalistic language. To my mind this indicates clearly that they were intended to be revealed and indeed shown to other parties and/or authorities.

10. Also, and in any event, I do not understand that confidentiality alone would be a ground upon which documents would be prevented from being disclosable or rendered incapable of use in other proceedings. And the circumstances in which they were obtained did not involve a breach of confidence: they were obtained through a legitimate search and seizure pursuant to an order of the English court.

11. I therefore propose to make the order giving the Bank permission to use the documents in a form which I have discussed with counsel, and of which he will produce an amended draft. That draft shall contain a paragraph releasing the Bank from any implied undertakings which it might be said to have given pursuant to the CPR. Although I think that this is probably unnecessary the paragraph can be included for the avoidance of doubt. As I have indicated, I have focussed on the express undertakings which the Bank has given, from which, for the reasons that I have given, I have decided that it should be released.