Judgments

JSC BTA Bank v Ablyazov and others

Practice – Pre-trial or post-judgment relief – Freezing order – Claimant bank situated in Kazakhstan bringing claims against defendants in respect of misappropriation of bank funds – Freezing order and disclosure of information granted in favour of bank – Information provided only to be shown to claimant's solicitors on basis of potentially placing third parties at risk of torture – Bank seeking to discharge restriction – Whether disclosure to bank giving rise to unacceptable risk to third parties in Kazakhstan

[2010] EWHC 90 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

22, 28 JANUARY 2010

28 JANUARY 2010

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.

S Smith QC and R S Levy for the Claimant

B Doctor QC and A Tolley for the First Defendant

Lovells LLP; Clyde & Co LLP

TEARE J:

[1] This is an application by the Claimant for an order that the First Defendant's affidavit and exhibit MKA 1 thereto and the information contained therein be released from the restrictions set out in sub-paragraphs 15(a) and (b)(i)-(iii) of the order made in this action on 12 November 2009. Those restrictions provided in essence that the information provided by the First Defendant pursuant to the Freezing Order in this action be provided only to the Claimant's solicitors and counsel and not to the Claimant.

[2] The nature of the Claimant's action against the Defendants, the reasons for the Freezing Order and the reason for the unusual restriction placed upon the information disclosed by the First Defendant appear from my judgment in this action dated 12 November 2009, [2009] EWHC 2840 (Comm).

[3] In his affidavit and exhibit MKA 1 thereto the First Defendant set out what he states has happened to the US$295m. which the Claimant alleges to be its money and which it alleges has been misappropriated by the First Defendant and others. It is a striking feature of his response that the First Defendant alleges that a substantial part of those funds has found its way back to the Claimant.

[4] The reason why the Claimant seeks an order that this information be released from the unusual restrictions placed upon it is said by Mr Hardman of Lovells, the solicitor acting for the Claimant, to be as follows:

> "Without such permission of the court, it is not possible for the Bank, or us, as its lawyers, to ascertain the accuracy of statements made by Mr **Ablyazov** in his Schedule C answers as to the movement of monies under the Compensation Agreements, much of which is said by Mr **Ablyazov** to have found its way back to the Bank.
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> . . .
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> The reason for the narrow permission sought by this Application is the need to ascertain the accuracy of Mr **Ablyazov**'s account as to the movement of the funds described in the Chart (being funds to which the Bank has a proprietary claim). This information is of crucial importance in enabling the Bank to trace the monies misappropriated from it."

[5] I am bound to say that this reason for the application seems to me to be obvious and cogent. It is a matter of obvious sense, expedience and justice that in circumstances where Mr **Ablyazov** has said that a great part of the sums allegedly misappropriated from the Claimant have been paid to it that the Claimant and its lawyers should be able to check whether that which Mr **Ablyazov** has said is true and then to decide what action should be taken if it is true or if it is not true. If it is true and the money has been paid to the Claimant as a deposit in the name of X the Claimant will obviously wish to consider what remedies are available to it to freeze that money in the hands of X. If it is true but the money has been paid by X in discharge of a liability of X to the Claimant the Claimant will obviously wish to consider what if any remedy he has against X. In either event a further application to this court would be necessary to permit the Claimant to make use of information obtained under compulsion. If Mr **Ablyazov**'s information is not true the Claimant will obviously wish to consider what if any action should be taken against him in this action.

[6] This application has been opposed. It has first been opposed on the grounds that if the information is released to the Claimant there is a risk that it will reach the prosecuting authorities in Kazakhstan and that persons in Kazakhstan linked with those companies through whose hands the money has passed may be subject to unlawful imprisonment and torture. I had to consider serious allegations of this nature in my earlier judgment; see paras 7 – 9, 31 – 38 and 66 – 67. It has also been opposed on the grounds that the application is misconceived and unnecessary.

[7] The First Defendant has sought to supplement Professor Bowring's evidence as to the lack of a rule of law in Kazakhstan with a further report from him. This has been exhibited to the Fourth Witness Statement of Dr Connerty, of Clyde and Co, the solicitor acting for the First Defendant. The Claimant strongly objected to this witness statement and in particular to the production of the further report because it was produced after the time limited by the rules for the service of such evidence as voluntarily extended by the Claimant. I had considerable sympathy for the Claimant's objection. The First Defendant appears to have ignored the rules and not even asked the Claimant, let alone the court, for an extension of time. The Claimant was not able to respond to it in the two days available before the hearing. Mr Doctor QC, on behalf of the First Defendant (and I think his instructing solicitor), apologised for this behaviour and, in view of the seriousness of the point at issue, requested that I admit the Fourth Witness Statement and the report. With extreme reluctance I have done so. I have done so, not because I consider that the First Defendant has a cogent claim on the court's indulgence, but because it is said that the liberty and safety of third parties in Kazakhstan might be at risk. For the same reason I have admitted Dr Connerty's Fifth Witness Statement.

[8] As I said in my previous judgment I am not able to make any findings as to the rule of law, or lack of it, in Kazakhstan. Professor Bowring's opinion is not accepted by the Claimant and there has been no trial of that dispute. On this application I have to do the best I can to balance what I have described as the obvious need of the Claimant and its lawyers to check the accuracy of the information provided by the First Defendant against the risk of improper and unjust action against third parties in Kazakhstan.

[9] In my earlier judgment I said:

> "In the light of the passage in Professor Bowring's report that information handed to the Bank 'would inevitably find their way into the hands of the authorities' it is not possible for me to regard the risk as fanciful notwithstanding the assurances given by Mr Varenko and Mr Dunayev."

[10] In his further report he has said this:

> "I am informed that Mr **Ablyazov** is concerned that persons in Kazakhstan who have had dealings with him or companies associated with him could be ill-treated if the authorities wanted information from them. I can confirm that in my opinion this is a real danger in Kazakhstan."

[11] Dr Connerty has said, on the basis of information from the Second and Third Defendants, that any offshore company with which the Claimant dealt would have a local representative or contact within Kazakhstan who dealt with the Claimant and whose name would be known to the Claimant and that, accordingly, if the names of the companies were provided to the Claimant, it would be simple matter for it to ascertain the names of the local representative. He then said:

> "If and when such names were obtained by the Kazakhstan prosecuting authorities, there is the obvious risk that the individuals in question will be subjected to interrogation, arrest and possibly imprisonment (or worse), in order to punish them for an actual or perceived association with Mr **Ablyazov**, and thereby also put pressure on Mr **Ablyazov** himself."

[12] Professor Bowring's opinion as to conditions in Kazakhstan was not challenged by any other expert on Kazakhstan either at the last hearing or at this hearing. I cannot therefore regard his opinions as fanciful. However, Mr Smith QC, on behalf of the Claimant, has brought to my attention two matters. The first is that of the many companies listed in the First Defendant's affidavit as companies to whom and by whom the funds in question were paid the First Defendant claimed an interest in only four of them. The Second is that the First Defendant, in his Defence to this action (served on 30 October 2009), has himself mentioned the

names of three of those companies in which he claims to be interested and which feature in his First Affidavit. Mr Smith has pointed out that the information in the Defence is not subject to the embargo in the Freezing Order and has therefore been seen by the Claimant. Notwithstanding that, there is no evidence that any harm has come to any individual in Kazakhstan associated with those companies.

[13] Dr Connerty has responded to this in his Fifth Witness Statement. He has said that it has come to his attention that a Mr Rizoyev, who is associated with Kinmate Trading Ltd, a company mentioned in the First Defendant's affidavit (but not one in which he claimed an interest), has been "targeted" by the Kazakhstan authorities. Criminal proceedings were brought against him in March 2009, he was extradited to Kazakhstan and he has given evidence to the Almaty Court on 25 December 2009 in a trial of other persons. Mr Rizoyev said he was the signatory for companies in the DCM group on the personal instructions of Mr **Ablyazov**, the First Defendant. Dr Connerty says:

> "It is clearly unsafe to proceed on the basis nothing untoward has happened or will happen to anyone associated with the companies mentioned in the Schedule C disclosure. Such adverse consequences have already befallen Mr Rizoyev and there may well be others of whom I am presently unaware who have already been subjected to such treatment."

[14] The press releases and decision exhibited to Dr Connerty's statement suggest that Mr Rizoyev was charged in March 2009 with an offence or offences which might be of a money laundering nature and has been extradited. He has given evidence at the trial of other persons charged with such offences. There is no evidence, as opposed to speculation, that he has been subjected to inappropriate, unjust or unlawful treatment. It seems to me that Dr Connerty's opinion or submission as to the risks of disclosing the matters in question to the Claimant lacks any firm evidential basis in the material which he has exhibited concerning Mr Rizoyev.

[15] Thus the position is that, notwithstanding the opinion of Professor Bowring, the Claimant has known of the names of three companies in which the First Defendant claims an interest since 30 October 2009 and yet there is no evidence before the court that any person in Kazakhstan who has had dealings with such companies or any local representative of those companies has been subject to inappropriate behaviour of the Kazakhstan authorities. Thus, albeit for a limited period, there is no evidence that the risk feared by Dr Connerty, Professor Bowring and the First Defendant has materialised. This is a matter which I must bear in mind and put in the balance.

[16] Before reaching a conclusion on this matter I must deal with Mr Doctor's further objections to the application. He submits that it is misconceived and unnecessary. The basis of this submission is the suggestion that all that is needed to check the accuracy of the information given by the First Defendant in his affidavit is that the Claimant's solicitors make use of the facility granted to them on 13 August 2009 to view the Claimant's automated banking system. This facility would enable the solicitors to discover whether the sums said to have been paid to the Bank on particular dates were in fact paid.

[17] However, this seems to me to be an unrealistically narrow view of the checks which the Claimant would wish to make. This application is made in the context of a claim that the First Defendant has misappropriated the Claimant's money. In that context it is to be expected that any check or enquiry as to the sums allegedly paid to the Claimant will include a check or enquiry as to the purpose of the payment; was it a deposit or was it a payment to the Claimant in discharge of an obligation owed to it? Upon the nature of the payment will depend the type of further action the Claimant might wish to take. This is to be expected where there is a proprietary claim.

[18] In response Mr Doctor submitted that the facility would also enable the purpose of the payment to be learnt and therefore the application was still unnecessary.

[19] The existence of the facility was mentioned by Dr Connerty in his Fifth Witness statement served on the eve of the hearing. He was informed of it by a “former employee” of the Claimant. It was not disclosed by the Claimant through Mr Hardman in his witness statement. It would appear that it should have been since it appears to be relevant to the Claimant's application. I nevertheless permitted Mr Smith to inform me what his instructions were as to this facility. I was told that it existed but that it did not give Lovells computer access to all transactions between the Claimant and third parties, in particular loan agreements and credit files. He accepted that the facility might enable requests to be made of the relevant departments for such documents but such requests would themselves disclose to the Claimant the information which the court's order required not to be disclosed to the Claimant. Further, a computer search for such documents might leave a trace which, arguably, might also be regarded as a breach of the order. The facility was therefore no answer to the application.

[20] It seems to me that it is highly likely that the sort of detailed enquiries which Lovells would wish to make about the payments (assuming that they were made as stated by the First Defendant) with a view to establishing the feasibility of remedies against third parties would at the very least risk disclosure to the Claimant of the information which the court order required not to be disclosed. For that reason the need for this application is probably not avoided by the existence of the facility.

[21] Mr Doctor submitted that the Claimant's application was too generalised and not sufficiently focussed in the manner contemplated by para 67 of my earlier judgment. I disagree. In addition to his affidavit the First Defendant disclosed further information when cross-examined as to his affidavit. This application is limited to the contents of the affidavit and exhibit, and in particular the monies said to have been paid to the Claimant. Whilst it would be possible to require the Claimant to make individual applications in respect of each payment as and when it has been confirmed to have been made this seems to me to me to be an unnecessary expense.

[22] I therefore do not consider that the application is either unnecessary or misconceived. The question which remains to be answered is whether to allow the application would give rise to an unacceptable risk to persons in Kazakhstan.

[23] The risk is said to be to persons who have had dealings with or who are representatives of companies mentioned in the affidavit which are associated with the First Defendant. However, the First Defendant disclaims any interest in all but four of the companies. That limits the risk although it is said that the Claimant will proceed on the basis that there is an interest and therefore those who have had dealings with or are representatives of any of the companies will be at risk. Nevertheless, the First Defendant's disclaimer of any interest in all but four of the companies must limit the reach of the suggested risk. In addition, three of those companies have already been disclosed to the Claimant by the First Defendant himself in his Defence and there is no evidence of any adverse consequences. Moreover, the fact that the First Defendant disclosed them himself without, so far as I am aware, any protest as to the risks he was thereby creating for those who have dealt with or are representatives of those companies in Kazakhstan does not suggest that he was concerned as to the consequences of such disclosure.

[24] There is a very strong case for disclosing the information in question to the Clamant; see *Mediterranea Raffineria Siciliana Petroli v Babanaft* (1 December 1978) per Templeman LJ. If the application is to be denied there has to be a cogent reason for not doing so. Having considered the evidence and the written and oral submissions I do not consider that the First Defendant has established that the risk of unjust and unlawful harm to third parties by the disclosure to the Claimant of the information in the First Defendant's affidavit and exhibit is such as would justify preventing that information being disclosed to the Claimant and thereby significantly impairing its ability to trace and preserve what it says is a substantial amount of its own money.

[25] For these reasons I have decided to accede to the application in the terms sought in the draft order.

[26] I have considered whether any limitations should be placed on the individuals within the Claimant to whom the information may be disclosed. However, I do not consider that that is necessary in circumstances where the risk of harm is not sufficient to prevent disclosure. For the same reason I do not consider it necessary to redact the names of the four companies in which the First Defendant claims an interest.

[27] Upon seeing this judgment in draft it was submitted on behalf of the First Defendant that the order made by the court should be limited to the details in the affidavit and exhibit of the payments made to the Claimant. I do not consider that this restriction is appropriate having regard to the nature of the Claimant's proprietary claim and the investigations which any person in the position of the Claimant would wish to make.

COSTS

[28] I have received written submissions on costs. The Claimant should have the costs of its application because it has obtained the order it sought. It has been submitted on behalf of the First Defendant that a deduction should be made in respect of such of the Claimant's as were incurred because of its failure to disclose the “facility”. There probably were some such costs. A deduction of 10% will be sufficient to cover them. It has been submitted that the costs of dealing with the late evidence adduced by the First Defendant should be on the indemnity basis to reflect the First Defendant's unreasonable conduct in serving it late without justification for doing so. I agree that that is appropriate, but restricted to the costs of dealing Dr Connerty's Fourth Affidavit.

[29] I will therefore make the order suggested in para 19 of the Claimant's submissions on costs save that (i) it should provide that the First Defendant shall pay 90% of the Claimant's costs and (ii) the indemnity basis should be restricted to dealing with Dr Connerty's Fourth Affidavit.

[30] I very much hope that the amount of the interim payment can be agreed.

Application allowed.