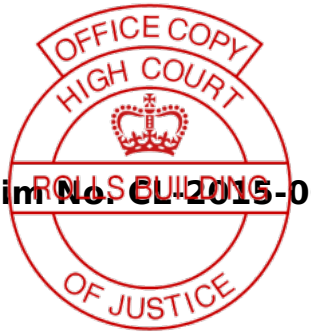

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
His Honour Judge Waksman QC sitting as a Judge of the High Court

Claim No. CL-2015-000549

B E T W E E N:

JSC BTA BANK

Claimant / Applicant

-and-

MUKHTAR ABLYAZOV

First Defendant

ILYAS KHRAPUNOV

Second Defendant / Respondent

Thursday, 21 June 2018

~~**Draft**~~ **Approved Judgment**

HHJ ~~UDGE~~ WAKSMAN QC:

1. Today, 21 June 2018, was the date set for the cross-examination of Mr Ilyas Khrapunov, the second defendant to these proceedings which were commenced against him ~~lodged~~ by the JSC BTA Bank (the "Bank") in 2015 ~~against him~~ along with ~~nd~~ the first defendant, Mr Ablyazov.

2. The underlying claim ~~h~~was ~~been~~ that Mr Khrapunov had conspired with Mr Ablyazov to break the terms of an original freezing order and a receivership order granted against Mr Ablyazov by effecting or assisting the removal or transfer of a number of funds so as to take those funds out of the reach of the freezing order against Mr Ablyazov and thus to assist him in evading and breaking clear court orders.

3. One particular claim concerns what is called the A ~~–~~and N Project Monies~~; , and~~ it is dealt with in the Amended Particulars of Claim at paragraphs 26(a) ~~through~~ to 26(f). The allegation is that back in 2011, Mr Khrapunov engaged a corporate services provider, Mr Aggarwal, to administer assets for Mr Ablyazov.

4. Mr Aggarwal was an English accountant, but well versed in making use of offshore companies and other entities by which the true ownership of particular assets could be concealed. Mr Aggarwal provided services to Mr Khrapunov, and Mr Khrapunov told Mr Aggarwal he was acting on behalf of a number of clients, but did not reveal the truth, which was that his true client was in fact Mr Ablyazov. In late 2011, some $56 million was paid to companies administered by Mr Aggarwal on the instructions of Mr Khrapunov~~; , and~~ then, between late December 2011

and October 2012, further sums totalling $439 million were paid to a different company, ~~one~~ incorporated in the Seychelles~~,~~ but also administered by Mr Aggarwal, for no or no sufficient consideration. The effect of all of that was that Mr Aggarwal, acting on the instructions of Mr Khrapunov, effected the transfer of all of those monies, which in fact were at all material times the assets of Mr Ablyazov. The allegation is that Mr Khrapunov knew perfectly well what he was doing which was to ~~and knew that what he was doing was~~ assist~~ing~~ Mr Ablyazov to evade the court orders to which I have referred.

5. Unsurprisingly, the losses claimed, inter alia, against Mr Khrapunov in this respect consist of the monies which had been illicitly transferred in this way on the footing that, if those monies had not been transferred, they would be now available for execution in respect of the several ~~and~~ very large judgments which have been awarded already against Mr Ablyazov. That is the underlying claim which is relevant for today's purposes.

6. A number of interim measures were granted by this court over a number of years against Mr Khrapunov in order to secure the claims against him. They included a worldwide freezing order made as long ago as July 2015, by Mr Justice Males. That order contained information requirements by which Mr Khrapunov was to provide not only details of his personal assets, but also details of his dealings with Mr Ablyazov's assets. Mr Khrapunov signally failed to deal with those

disclosure requirements.

7. Subsequently, he was ordered to attend for cross-examination, originally by Mr Justice Teare, in March 2016. He appealed that decision, inter alia, on the basis that, if he were to come to England to be cross-examined, he was likely to be the subject of an extradition request by the Governments of Kazakhstan and Ukraine, which would expose him to all sorts of serious risks.

8. The Court of Appeal dealt with that appeal on 27 March of this year. At paragraphs 18 and 19, the court held that, having regard to the previous history of non-disclosure by Mr Khrapunov and other matters, the Bank had a good arguable case that he had lied in the disclosure he had given, in the same way that it had a good arguable case that he had lied in the disclosure he gave in relation to non-personal assets. The application for permission to appeal against the order for cross-examination was refused in May 2016 by Lord Justice Moore-Bick and was certified as totally without merit. That was in respect of ~~against the~~ cross-examination ~~order~~ in principle.

9. There was a compelling case for the Bank to be able to cross-examine Mr Khrapunov.

10. What Mr Khrapunov then did was raise the question of extradition and the risk to him, before Mr Justice Phillips, as a reason why ~~and the learned judge rejected the application that~~ he should not come to England to be cross-examined, but, instead should be cross-examined ~~, as Mr Khrapunov proposed, it should take place~~ by video-

link from Switzerland. The learned judge rejected that application. He ~~at first instance~~ said that, on the basis that there was no extradition arrangement between the UK and Kazakhstan, and given the absence of any example of an ad hoc extradition arrangement, the risk of arrest with a view to extradition to Kazakhstan, if Mr Khrapunov came to England, was effectively non-existent, it was ~~and~~ certainly no greater than any continued risk to Mr Khrapunov in Switzerland, where he was then based, and there was no risk of extradition to Russia or Ukraine either.

11. The Court of Appeal ~~equally~~ was equally ~~not~~ unimpressed with the risk of extradition argument. If he was arrested here pursuant to a Red Notice, Ukraine, which was one of the other countries that he referred to, would be given an opportunity to put in evidence to say there was no impediment to extradition to Ukraine. Ukraine might be able to show it was now a safe place to which he could be extradited, but on the evidence, the Court of Appeal thought that possibility was speculative and the prospects of it being able to do so were low -- low but not completely unreal or fanciful. Then, as to the conditions under which he would be retained in the UK, the likelihood ~~i~~was that he would be granted conditional bail pending the decision on any extradition request, at most which would be six to nine months.

12. In dealing with the detriment that he would suffer if he came to the UK, the appellant said only that he found it distressing to be separated from his wife and children but it was

not suggested there was any serious difficulty of them coming to England to live with him while he was on bail, nor was it suggested there was any other significant detriment.

13. Then, drawing all of those threads together, and having given detailed consideration to the relevant law, and in particular the Polanski case, the Court of Appeal held:

"The order for cross-examination was granted in order to make the freezing order against him as effective as possible.... The administration of justice is liable to be brought into disrepute if the court is disabled from enforcing a freezing order in the most effective way. That would be the effect of granting a variation of the 23 March order proposed by [Mr Khrapunov], to substitute cross-examination in Switzerland for cross-examination in the High Court in London" (paragraph 91).

14. At paragraph 94, they said that they "consider that the Bank has made out a strong case that the appellant has been involved in assisting in a massive international fraud and is concealing evidence about relevant assets. The public interest in the court trying to give maximum practical effect to the freezing order … is strong". It may be, the court opined in paragraph 97, that Mr Khrapunov would refuse to come to the High Court for cross-examination anyway, but the court would be perceived as bowing to blackmail by him and would be liable to bring the administration of justice here into disrepute if it simply accepted the assertion he would not come, with, as they put it, "~~with~~

a shrug of the shoulders and a sigh". Therefore, as they state in paragraph 99, they dismissed the appeal and ordered that there should be cross-examination on a confidential timetable.

15. That date is today. As effectively threatened or promised by Mr Khrapunov, he has not attended. That is the background.

16. His non-attendance today is of particular relevance because of an unless order made by Mr Justice Males on 25 May 2018. That followed an application on the basis that there had been numerous defaults by Mr Khrapunov in relation to the payments of costs orders and also a failure to attend on an initial occasion for cross-examination. All I need do is read the body of the order. At paragraph 2, it says this:

> "Unless Mr Khrapunov fully and properly complies with each of the following orders by the following deadlines ..." – then they are set out – "... (i) those parts of his Amended Defence dated 31 October 2017 which address the Relevant Claims shall stand struck out and Mr Khrapunov shall be debarred from defending the proceedings insofar as they concern the Relevant Claims and (ii) the Bank shall be at liberty to enter judgment against Mr Khrapunov in relation to the Relevant Claims."

17. The particular matters which he now had to comply with were the payment of various costs orders and also having now to attend for cross-examination.

18. As is evidenced by his non-appearance today, which was the date set for cross-examination, as he well knew, there is a breach of

every part of the unless order, and the Bank has applied for there to be judgment in default. This occasion was used to deal with that application as well, and this was also identified to Mr Khrapunov.

19. On the face of the order and the non-compliance, the defence to the Relevant Claims (as defined in the unless order), which is that part that I recited, is struck out and the Bank is entitled to judgment in default.

20. Before dealing further with the nature of the particular order sought, I should recite that, yet again, Mr Khrapunov has said that he cannot, and will not, come into this jurisdiction for any purpose because of the risk of extradition. He said that both in respect of the video-link for his cross-examination, but also because he said that an hour would not be enough for this application for judgment in default. I do not know on what basis he says that, since it is an entirely simple application and, indeed, in other circumstances, it might have been dealt with by way of an administrative request.

21. But what effectively he does is to say again that there is a risk of extradition, this time adding that if that happened, he was then at risk of torture or even death. But, in essence, he is putting forward the same sort of reasons as he had put forward before Mr Justice Phillips and which were rejected by both him and the Court of Appeal.

22. It also is in keeping with the last time when he invoked such reasons, which was to deal with an application that he was going to make to the Commercial Court, which concerned his application to set

aside some parts of an order -- the order of Mr Justice Teare made back on 23 March 2016. All of this came before Mr Justice Popplewell on 18 May of this year but part of what Mr Khrapunov wanted then was to adjourn his own application, partly he said because he can't afford a lawyer and, secondly, again, because of the risk of extradition to the Ukraine and Kazakhstan.

23. I am not going to read the text of Mr Justice Popplewell's judgment. It is not necessary for me to do so, save that in paragraph 21 through to paragraph 27, the learned judge, in a comprehensive and careful fashion, explained why it was that the extradition arguments in particular had no merit whatsoever. I come to the same conclusion today.

24. Therefore, there is no reason why I should not deal with the application for default judgment today. The truth of the matter is that Mr Khrapunov has the means and the ability to come here, if he wished, to object to this judgment in default or indeed to put submissions in writing as to why it should not be made, since this is an interlocutory matter and where no oral evidence will be taken. But he has not done anything of that kind. There is, therefore, no obstacle at all to my making the judgment in default as requested by the claimant.

25. So far as the detail is concerned, the amount, as I have indicated, is the specific amount claimed by way of damages in the Amended Particulars of Claim. It constitutes a claim for a specific amount of money.

26. The only reason why this was not done by administrative request is because the unless order only operates in respect of part of the claim against Mr Khrapunov, and where, in those circumstances, a party seeks judgment in default of only part of a claim, it is obliged to make an application on notice, which is what has happened here.

27. The total principal sum claimed is $495.8 million. The Bank has discounted that to avoid any risk of double recovery, which concerns some New York proceedings, and the Bank has agreed to limit the sum claimed to US$424,110,000. The last transfer of the A and N Project Monies was 1 January 2014, and the Bank is content for interest to start then and not any earlier.

28. Although higher figures have been awarded, particularly by this court, including in related litigation concerning Mr Ablyazov, the Bank here seeks simply 4 per cent as a flat rate of interest for all of the relevant period. That seems to me to be eminently reasonable and appropriate.

29. Therefore, the interest claimed, at least to 5 July, would be a further US$76 million-odd. It seems to me that that needs to be adjusted so that the appropriate figure to today's date can be given as pre-judgment interest.

30. I agree with the suggestion in paragraph 19.6 of the Bank's skeleton argument that the rate for post-judgment interest should be less than the 8 per cent prescribed by the Judgments Act, which is really quite out of keeping today with

current levels of interest, and, therefore, I will substitute the rate of 5 per cent going forwards.

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