Judgments

CA, CIVIL DIVISION

Case No: A3/2010/0010

Neutral Citation Number: [2010] EWCA Civ 849

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE ROYAL COURTS OF JUSTICE^

(MR JUSTICE TEARE)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Wednesday, 23rd June 2010

Before:

LORD JUSTICE LONGMORE

- -

Between:

ABLYAZOV

Appellant

- and -

JSC BTA BANK

Respondent

- -

(DAR Transcript of

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Official Shorthand Writers to the Court)

- -

Mr Duncan Matthews QC (instructed by Stephenson Harwood) appeared on behalf of the **Appellant**.

Mr Stephen Smith QC (instructed by Lovells LLP) appeared on behalf of the **Respondent**.

- -

Judgment

(As Approved by the Court)

Lord Justice Longmore:

1. I am afraid I am against you. It seems to me that this appeal in its present state unfortunately cannot be dealt with in a day. The first thing that is going to happen is there is going to be a substantial argument on whether new evidence should be submitted. Mr Smith has submitted that any such argument ought to fail and will fail, but the argument has to take place and that argument will have to be before the full court and that itself will take time.

2. Mr Smith submits that the question is a short point of principle, but the more the point of principle is urged the more the court will want to be sure that it has time to consider the point of principle with appropriate care and in appropriate detail. It does not seem to me that this case can go ahead on a one day estimate and I will therefore adjourn the case.

3. I was concerned in case there might be some prejudice to the respondent if I were to adjourn the case, but it does not seem to me there is any prejudice of any substance because the judge's order continues in the meantime until it is successfully appealed. Mr Smith says that everyone will be very busy next term dealing with the current state of this litigation in the Commercial Court. He puts forward the appalling prospect that there may be other appeals, not only from the judgment of Teare J which is currently awaited, argument having recently concluded, but of yet further appeals in relation to interlocutory applications in those actions. This court cannot be just available to the parties at any time they want for all the various appeals they might bring, and I think some degree of coordination really is required. This appeal should not be heard before Teare J gives his judgment in the current matters. I would then have some small confidence that extended further evidence will not be necessary because, to the extent that subsequent events need to be referred to, they will be referred to in his judgment.

4. But I do think that in the light of what is happening, this appeal would have to be listed for two days and will be listed as early as possible in the new term.

Order: Application granted

Practice – Order – Ex parte order – Claimant seeking order for appointment of receiver over first defendant's assets on basis that first defendant in breach of freezing order previously obtained against him – First defendant successfully obtaining ex parte order prohibiting disclosure of relevant documents, requiring that all relevant hearings be held in private, and prohibiting reporting of any matter withheld from public – Claimant seeking to set ex parte order aside – Whether order should be set aside – Contempt of Court Act 1981, s 71 – CPR 5.4C(4) – CPR 39.2(3)(g)

[2010] EWHC 545 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

10, 11, 17 MARCH 2010

17 MARCH 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 T Akkouh for the Claimant

A Trace QC and A Winter for the First Defendant

Lovells LLP; Stephenson Harwood

TEARE J:

[1] This is an application by the Claimant to set aside an order made by me *ex parte* (that is, without notice to the Claimant) on Monday 8 March 2010. The return date was Wednesday 10 March and in the event the

Claimant's application was heard on 10 and 11 March. The Claimant says that the order should be set aside because the First Defendant ought not to have proceeded *ex parte*, failed to disclose material matters and misrepresented others. The First Defendant does not accept that the order should be set aside for any of the reasons advanced on behalf of the Claimant.

THE EX PARTE ORDER

[2] The order sought and obtained *ex parte* was designed to ensure that the hearing of an application issued by the Claimant for a receiver to be appointed in respect of the First Defendant's assets be in private, that the public should not have access to the documents on the court file and that there be no publication of those documents or of the fact that there is an application for the appointment of a receiver.

[3] The order made *ex parte* provided as follows:

> "1. Until further order of the court:
>
> (1) no person may obtain a copy of any document disclosed by the parties or of any document before this court or on the court records (including, without limitation, application notices, draft orders, witness statements, exhibits, transcripts of evidence, skeleton arguments, orders and judgments) constituting, relating to or referring to the Respondent's application for the appointment of a receiver made by notice dated 19 February 2010 ('the Receivership Application'), without the consent of the First Defendant or, failing that, the leave of the court;
>
> (2) all hearings of or relating to the Receivership Application be heard in private pursuant to CPR r 39.2(3);
>
> (3) pursuant to section 11 of the Contempt of Court Act 1981 there be no reporting of any matter withheld from the public in these proceedings (which shall include, for the avoidance of doubt, the fact of the Receivership Application itself and any matter relating or referring to the Receivership Application) and in particular there be no reporting by the Respondent, publication by the Respondent, or dissemination of documentary or other materials by the Respondent of any matter relating or referring to the Receivership Application (including the fact of the Receivership Application)."

THE BACKGROUND TO THE EX PARTE ORDER

[4] The Claimant has obtained a Freezing Order against the First Defendant and others. On 12 November 2009 I ordered, after a contested hearing, that the Freezing Order be continued; see my judgment [2009] EWHC 2840 (Comm).

[5] At the same time I ordered that the information provided by the Defendants with regard to their assets be disclosed only to counsel and solicitors acting for the Claimant; see paras 66 and 67 of my judgment. An order to this effect had earlier been made by the Court of Appeal.

[6] Since then the Claimant has accepted that hearings in this matter must be in private so as to ensure that the restriction on disclosure is not breached.

[7] The Claimant claims that it has reason to believe that the First Defendant has dealt with one or more of his assets in breach of the Freezing Order and has therefore applied for an order that a receiver be appointed over the assets of the First Defendant. That application will, I am told, be strenuously opposed.

[8] The First Defendant has recently withdrawn his instructions from the counsel and solicitors who had been acting for him since the Freezing Order was first granted last year. He has instructed other counsel and solicitors. Indeed, he has instructed several counsel. Mr Duncan Matthews QC and junior counsel have been instructed to represent him in the action generally. Mr Anthony Trace QC and (different) junior counsel have been instructed to represent him in the receivership application. In another action brought against him by the Claimant ("the Chrysopa action") he has instructed Mr Vernon Flynn QC to represent him.

[9] On 1 March I gave certain directions with regard to the hearing of the receivership application, in particular that directions in that and other applications be heard together on 10 March. On that occasion the First Defendant was represented by Duncan Matthews QC. He said (in his skeleton argument) that publication of the mere making of the receivership application "could trigger a run on deposits at the First Defendant's banks which could cause those banks to collapse and/or cause runs on other regional banks". It was further said that the management of the First Defendant's banks might depart, that the First Defendant would be made vulnerable to defensive moves from partners in relation to jointly held assets and that there might be profound implications for the First Defendant's businesses by reason of banking terms and defined events of default. Finally, he said there was likely to be a serious effect on the financial markets in which the First Defendant operates. At the commencement of the hearing I asked whether the hearing should be in private. Mr Matthews and Mr Smith QC, who has acted for the Claimant throughout, agreed that it should be and I so ordered. No further orders designed to prevent publication of the receivership application were sought on that occasion.

THE EX PARTE APPLICATION

[10] On 8 March at 2.30pm Mr Trace applied *ex parte* for a number of orders designed, to use his phrase, to "close down" the receivership application, that is, to ensure that not only was it heard in private but also that the documents on the court file could not be seen by the public and that there be no publication of the application or of the documents generated by it.

[11] The application was supported by certain witness statements which I had read on previous applications in this matter and by two fresh witness statements. Of the latter two one was by Michael Fitzgerald, an expert witness, who has extensive experience in financial and capital markets in both developed and emerging countries (but no direct experience of financial markets and institutions in the countries of the former Soviet Union). He said that he understood that the First Defendant had "interests in a range of major banks and financial institutions in countries that constitute part of the former Soviet Union." He expressed the opinion that the receivership application "could not fail . . . to be seen in the markets as gravely negative information about the future position of the banks and financial institutions in question". He said that knowledge of that application could have a serious impact on "confidence in an emerging market bank". By way of example he referred to the bank BTA Moscow which he understood to be one of the institutions owned or partially owned by the First Defendant. He said that "the potential or actual appointment of a Receiver . . . would have a significant negative impact upon the depositor and borrower confidence in a bank of this type". This point was developed in several ways. He concluded that the:

> "potential appointment of a receiver would constitute a significant piece of negative information for a bank or financial institution in an emerging market . . . any consequent reduction in depositor or counterparty confidence could have very negative consequences both for the individual institution and/or the market as a whole."

[12] The second fresh witness statement was by David Cole, a solicitor acting on behalf of the First Defendant. He relied upon the witness statement of Mr Fitzgerald to support what he said was a real danger that if the receivership application were not kept confidential there could be "potentially very damaging consequences for the First Defendant". He further said that the application was made *ex parte*:

> "because there is a real risk that notice of the First Defendant's application would or might defeat the object of the application in that it may precipitate the Claimant taking steps, in advance of the hearing of the application, to disclose the fact of its having issued an application to appoint a receiver over the First Defendant's assets."

[13] At the *ex parte* hearing I was very sceptical of the suggestion that giving notice of the application to the Claimant might cause the Claimant to disclose to others the fact of the receivership application. The reason for my scepticism was that there was no evidence that the application had been publicised since the date of its issue on 19 February or that the Claimant had ever published anything from the previous hearings in private or from the information provided by the First Defendant under compulsion as to his assets. I expressed my scepticism to Mr Trace who said that the First Defendant's concern was that:

> "given the background in relation to this, if we intimate that what we actually wish to do is completely close down this hearing so that it is not only in private but something where nobody can actually put anything out, then given the allegations that are being made, and we say actually supported by the material we put before your Lordship, if we notify the other side they may well leak it in some way . . . ."

[14] A little later in the hearing I said I was "puzzled as to why you didn't, for example, say to Mr Smith or one his juniors or his solicitors, 'We are before the judge at 2.30. We give you notice. Please come along.'" Mr Trace said in response that that had been given very anxious consideration (which I do not doubt) but he repeated the First Defendant's concern that notice to the other side might defeat the object of the application.

[15] In my ruling I said that I was "not at all sure that it was an appropriate case for proceedings without notice" but I accepted that Mr Trace's argument was "just sufficient" to enable the application to be made *ex parte*. I was further satisfied that it was appropriate to make the order sought (with one minor alteration). I had had particular regard to the circumstance that I could see no legitimate prejudice to the Claimant if I made the order sought.

THE CLAIMANT'S CHALLENGE TO THE ORDER

[16] Mr Smith QC has submitted that there was no ground for proceeding *ex parte* and that the order should be set aside on that ground and on the grounds that there had been a serious lack of disclosure and misrepresentation. His "List of Criticisms" numbered 23. I will not deal with each one but only those which I regard as the most substantial.

[17] At the time that the *ex parte* hearing was taking place before me in Court 15 of the Royal Courts of Justice Mr Smith, together with his junior and instructing solicitors, were in Court 11 in the Royal Courts of Justice before David Steel J on an application in the Chrysopa proceedings in which the First Defendant was represented by Mr Flynn QC. Mr Smith said that this must have been known to those representing the First Defendant before me in Court 15. That was not denied. Mr Smith said that in those circumstances there was no reason why he could not have been told that there was an application before me in court 15 and that he was being given notice of that so that he could attend if he so wished. He told me that he could and would have attended because he had completed his submissions at 1pm. Mr Smith said that Mr Trace should have informed me that Mr Smith and his team were in another court.

[18] Mr Trace has submitted that this criticism is misconceived. He said that he had been prepared to give informal notice if I had required it. That is so. But I was not informed that MrSmith was just along the corridor in another court. If I had been informed of that I might very well have said that he should be informed that an application in these proceedings was being made so that either he or his junior might attend before me. I do not think that I would have thought that such notice would have entailed any risk to the First Defendant's interests. In circumstances where I had expressly said that I was puzzled as to why Mr Smith had not been informed that an application was being made before me I consider that the physical proximity of Mr Smith to court 15 where the *ex parte* application was being heard was a material matter to mention to me.

[19] Mr Smith criticised the account given by Mr Cole of Mr Smith's attitude to the hearing on 1 March being in private. Mr Cole, who did not attend the hearing on 1 March, said in his witness statement that on 1 March:

> "the Claimant did not make an application for the hearing to be in private at the outset and it was left to Counsel for the First Defendant to make that application. It was only just as the parties' representatives started going into the courtroom that it was mentioned to the reporter that the hearing would be in private."

[20] In fact what happened, as stated by Mr Hardman of the Claimant's solicitors, who was present on 1 March, was that before the beginning of the hearing Mr Smith QC noticed the presence of a reporter and explained that the hearing would be in private and suggested that she would not be allowed to remain. The reporter then withdrew. Mr Smith agreed with Mr Matthews that the hearing would be in private and explained that to the court staff and my clerk before I came into court.

[21] Mr Cole's account of the Claimant's, and, implicitly, Mr Smith's attitude to the hearing on 1 March being in private had no effect on me. I was aware that on 1 March Mr Smith had agreed to the hearing being in private and I had no doubt from my previous involvement in the case that Mr Smith had always accepted the need for the hearings to be in private and had done nothing to frustrate the court's orders in that regard. Nevertheless, Mr Cole's account was a material misrepresentation. It was designed to bolster the case that notice to the Claimant of the *ex parte* application might frustrate the object of the application. It was therefore incumbent upon Mr Cole to ensure that he gave an accurate and complete account of what had happened on 1 March. He did not do so.

[22] Mr Smith has also criticised the First Defendant for not drawing to my attention, in the context of Mr Fitzgerald's opinion, that the First Defendant's interest in the BTA Bank Moscow is not a matter of public record. Mr Smith referred me to a prospectus dated 18 December 2006 (which had been before me on earlier applications in this matter) which purported to list the beneficial owners of the shares in BTA Bank Moscow as at 30 June 2006. The First Defendant was not mentioned as a beneficial owner though it seems that he is in fact the beneficial owner of at least a substantial part of BTA Bank Moscow. It is apparent from the evidence in this matter generally that the First Defendant seeks to hold his assets through nominees. The suggested materiality of this matter is that in circumstances where the First Defendant's ownership or control of institutions such as BTA Bank Moscow is not a matter of public record it is not apparent how institutions such as BTA Bank Moscow will be affected by reports of the receivership application in relation to the First Defendant's assets.

[23] In response Mr Trace said that whatever may be a matter of public record the fact is that in Kazakhstan (and perhaps elsewhere) it is generally known that the First Defendant controls institutions such as BTA Bank Moscow so that there was no problem in assessing the weight to be given to Mr Fitzgerald's opinion. It was pointed out that in his Defence in this action the First Defendant has pleaded that he acquired a controlling interest in BTA Moscow in May 2008 and that this was known to the Claimant and the Kazakhstan Regulator; see paras 40 – 44. Since the hearing I have been provided with a Second Witness Statement of Alan Bercow which provides evidence of market awareness of the First Defendant controlling BTA Bank Moscow.

Nevertheless, the fact that the First Defendant's assets were generally held by nominees ought to have been expressly mentioned because it is a matter which affects the weight to be given to Mr Fitzgerald's opinion.

[24] Mr Trace also said that publication of the receivership application would also affect the ability of the First Defendant to do business in his own name. I accept that it would but this was not the threat which either Mr Fitzgerald or Mr Cole relied upon in support of the *ex parte* order.

[25] I accept that counsel and solicitors acting for the First Defendant carefully considered the propriety of applying *ex parte* and the matters which should be disclosed on such application. However, there was, in my judgment, a failure to disclose matters which were material to the application, namely, the presence of the Claimant's counsel and solicitors in the Royal Courts of Justice at the time the *ex parte* application was being made, Mr Smith's role in ensuring that the proceedings on 1 March were in private (and in particular in excluding the reporter from that hearing) and the circumstance that the First Defendant's ownership or control of the banks and institutions which it was said might be damaged by reporting of the receivership application was hidden from view by nominees. I consider that these failures were sufficiently serious to cause me to set aside the order made *ex parte*.

CONTINUATION OF THE ORDER

[26] However, there are particular circumstances affecting the present case which, notwithstanding my conclusion as to the seriousness of the First Defendant's failure to give full and frank disclosure of matters material to the application, justify the order being continued (albeit with certain amendments).

[27] First, there is, following the order of the Court of Appeal which I have maintained, an embargo on disclosure to the Claimant itself (as opposed to its counsel and solicitors) of the information given by the First Defendant under compulsion as to his assets. It is for that reason that Mr Smith has in the past agreed that hearings in this action have had to be in private. But that same reason provides a justification for making the orders sought by the First Defendant, albeit for a different reason from that relied upon by Mr Trace. It is no doubt in recognition of this that Mr Smith, on his application to set aside the order made *ex parte,* did not object to the order being continued so long as certain amendments were made to it to ensure, for example, that it did not impede the Claimants' ability to prepare for the hearing of the receivership application by discussing the same with prospective witnesses of fact or expert opinion.

[28] Secondly, although the First Defendant's interest in the BTA Bank Moscow and other institutions may not presently be a matter of public record (as opposed to market knowledge), the evidence which will be adduced on the receivership application is likely to reveal his interest. In those circumstances the feared damaging consequences, for example, to BTA Bank Moscow may come about, unless, in Mr Trace's words, the hearing is “closed down”. Such consequences are not inevitable because, as Mr Smith submitted, in circumstances where the nature of the serious allegations being made against the First Defendant are in the public domain, interested parties may be relieved rather than concerned that the First Defendant's assets, including BTA Bank Moscow, are in the hands of a professional receiver with a view to preserving them rather than in the hands of the First Defendant. However, the risk cannot be wholly discounted.

JURISDICTION TO MAKE THE ORDERS SOUGHT

[29] Since the orders which have been sought effectively prevent the public from having access to or knowledge of the receivership application it is necessary to set out the jurisdiction which the court is exercising. The source of that jurisdiction was not a matter of common ground between Mr Smith and Mr Trace. I will set out my conclusions without rehearsing the respective arguments of counsel.

[30] Any interference with the public nature of court proceedings is to be avoided unless it is necessary in the interests of the proper administration of justice; see *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966 at p 976H, [1998] 3 All ER 541, [1998] 3 WLR 925. Whether an interference with the public nature of court proceedings is necessary as an exception to the general rule of public hearings will depend upon an assessment of the particular circumstances of the case before the court.

[31] The CPR provides the court with particular powers which may be exercised in accordance with the above principle. Thus CPR 5.4C(4) provides that the court may, on the application of a party, order that a non-party may not obtain copies of a statement of case or make such other order as it thinks fit. Paragraph 1 of the *ex parte* order was made pursuant to this power. Similarly CPR 39.2(3)(g) provides that a hearing may be in private if the court considers that to be necessary in the interests of justice. Paragraph 2 of the *ex parte* order was made pursuant to that power.

[32] The parties before me were agreed that paras 1 and 2 of the *ex parte* order should be made, though, as I have indicated, for different reasons. I am mindful of the comment of Sir Christopher Staughton in *ex parte P*, The Times 31 March 1998 that "When both sides are agreed that information should be kept from the public that was when the court had to be most vigilant". However, having regard to the restriction upon disclosure of information to the Claimant which the Court of Appeal and I have already ordered and the risk to the institutions in which the First Defendant has an interest in the event that such interest becomes a matter of public record as a result of hearing the receivership application, I consider that the circumstances of the present case are such that those orders are necessary in the interests of the proper administration of justice. They will therefore be continued subject to the agreed amendment that para 1 should commence "No person other than the Bank and the solicitors and counsel for the Fifth, Sixth and Seventh Defendants may obtain . . . ."

[33] Section 11 of the Contempt of Court Act provides as follows:

> "In any case where a court (having power to do so) allows a name of other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

[34] It is this section which is the source of the court's power to make the third paragraph of the *ex parte* order. By making orders pursuant to the powers conferred by CPR 5.4C(4) and 39.2(3)(g) the court has allowed the receivership application (a shorthand phrase to encompass the fact of the application and the documents relating thereto) to be withheld from the public. The court therefore has power pursuant to s 11 to give directions prohibiting the publication of the receivership application (see *R v Arundel Justices ex parte Westminster Press Ltd* [1985] 2 All ER 390, 149 JP 299, [1985] 1 WLR 708 at p 710H-711C) so long as such directions are necessary for the purpose for which the receivership application has been withheld from the public. It seems to me that such a direction is necessary for that purpose because it will aid the very purpose underlying the making of paras 1 and 2 of the *ex parte* order. Unless such directions are given the publication of information relating to the hearing of the receivership application in private will not of itself be a contempt of court; see The Administration of Justice Act 1960 s 12(1)(e).

[35] In concluding that an appropriate direction should be given pursuant to s 11 of the Contempt of Court Act I have given consideration to two further matters. The first is that in circumstances where the proceedings are in private and where the information as to the First Defendant's assets cannot be disclosed by the Claimant's counsel and solicitors it may be said that an order pursuant to s 11 of the Contempt of Court Act is unnecessary, because no reporter is ever going to learn either of the receivership application of the information disclosed by the First Defendant as to his assets. However, mishaps are not unknown and in any event an order under s 11 is necessary if contempt proceedings are to be taken. The second matter is that between 19 February, when the receivership application was issued, and 8 March, when the *ex parte* order

was sought and obtained, the fact of the receivership application was disclosed to certain persons including KPMG and PwC, other consultants and the major shareholder in the Claimant. In those circumstances it may be said that it is now too late to make the order sought. However, I do not consider that it is. There is no evidence that the receivership application is in the public domain and therefore the order is necessary to ensure that it does not reach there.

[36] It is however necessary that the orders made by the court do not impede the legitimate interests of the Claimant. To that end Mr Smith submitted that there should be a proviso to the order as follows:

> "Provided always that the parties to the Receivership Application shall be entitled to show documentary or other materials and disclose the fact of the Receivership Application to:
>
> (i) (in the case of the Bank only) its creditors' steering committee and majority shareholder;
>
> (ii) any employee of a party or person who is instructed or engaged by a party (or who may be instructed or engaged by a party) in respect of the receivership Application;
>
> (iii) any potential witness in relation to the Receivership Application; or
>
> (iv) any third party who is reasonably thought to be considering acquiring assets owned directly or indirectly by the First Defendant."

[37] There is no dispute that proviso (ii) and (iii) are appropriate. They enable the parties to prepare for the receivership application. If the words "in breach of the Freezing Order" are added to proviso (iv) there is also no dispute as to that proviso. It will assist the Claimant to "police" the Freezing Order. There is a dispute as to proviso (i). There is no evidence that there is any requirement upon the Claimant to make any report or show any materials to the creditors' steering committee or the majority shareholder before 5 – 7 May, which is the date fixed for the hearing of the receivership application. In those circumstances the better course of action is, in my judgment, not to allow proviso (i) but to order that there be liberty to apply. Thus, if there is a necessity to make a further disclosure it can be the subject of evidence and any application by the Claimant can be considered in the light of that evidence.

[38] The parties agree that the reference to "the Receivership Application" in the first line of para 1(4) of Mr Smith's draft order should be replaced by "these proceedings".

CONCLUSION

[39] Although the First Defendant's failure to disclose material matters merits setting aside the order made *ex parte* I will continue it in the modified form suggested by the Claimant but amended as indicated in this judgment. I will ask the parties to prepare an agreed order.

Judgment accordingly.