Representation of Standish, Milsom and Outen, Ablyazov

Jurisdiction:	Jersey
Judge:	The Bailiff:
Judgment Date:	23 December 2011
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Text

[2011] JRC 239A

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, Esq., Bailiff, **and** Jurats Tibbo **and** Crill.

In the Matter of the Representation of David Standish, John Milsom and Jeremy Outen, Receivers of the Assets of Mr Mukhtar Ablyazov

Advocate A. J. N. Dessain **for the Representors**.

Authorities

Schemmer -v- Property Resources Limited [1975] Ch 273.

Canadian Arab Financial Corporation -v- Player [1984] CILR 63.

Millennium Financial Limited -v- McNamara (15th March 2010).

Terry -v- Butterfield Bank (Guernsey) Limited (24th February 2006).

Dicey and Morris, Conflict of Laws, (14th Edition).

Contract — granting an order of recognition of the receivers and their powers in this jurisdiction and reasons thereof.

The Bailiff:

1 This is an application by the Representors ("the Receivers") for recognition of their appointment for the purposes of exercising their powers within the jurisdiction. They are not receivers in the more usual sense relating to insolvency or to the enforcement of security such as a debenture. They are persons appointed by the High Court in England to locate and preserve the assets of the defendant in proceedings in that jurisdiction pending trial. They are therefore officers of the English High Court; they do not act for the plaintiff in those proceedings.

2 This Court has not previously had to consider whether it has jurisdiction to recognise receivers of this nature and accordingly Advocate Dessain has addressed us on the law.

3 At the conclusion of the hearing, the Court granted an order recognising the authority of the receivers within the jurisdiction, but imposing certain limitations and restrictions on that authority as compared with the order originally sought by the Receivers. We now give the reasons for our decision.

The factual background

4 The plaintiff in the English proceedings is JSC BTA Bank ("the Bank") which is incorporated in Kazakhstan and is now apparently controlled by the State of Kazakhstan. Proceedings have been brought in the High Court against Mr Ablyazov and a number of other defendants. It is alleged that, whilst he was chairman of the Bank, Mr Ablyazovmisappropriated the Bank's funds. At the time of the making of the receivership order, the claim was in excess of US$1.8 billion but it was said that further claims were anticipated which would bring the total sum claimed to $4 billion. Mr Ablyazov denies the claims and states that they are an attempt by the President of Kazakhstan to take control of Mr Ablyazov's assets in support of a politically motivated claim because Mr Ablyazov is a leading figure in Kazakhstan's democratic opposition.

5 Since January 2009 Mr Ablyazov has resided in London. The proceedings were

commenced against him in August 2009 and a freezing order was issued against him. When he disclosed his assets pursuant to the freezing order they were said to be worth several billion dollars. He does not hold his assets in his own name. He uses a complex network of companies, trusts and nominees around the world because, he says, it is necessary to protect himself from unlawful depredations by the President of Kazakhstan.

6 On 6th August, 2010, having concluded that Mr Ablyazov had failed to make full disclosure pursuant to the freezing order, Teare J decided that the freezing order itself may not provide the Bank with adequate protection against the risk of dissipation of Mr Ablyazov's assets prior to trial and accordingly made an order appointing the Receivers in respect of certain assets of Mr Ablyazov.

7 The receivership order was extended on three further occasions. On 26th January, 2011, it was extended to cover 212 companies listed in the order (referred to as the “undisclosed assets”). In April 2011 it was extended to cover a further 389 companies (“the further undisclosed assets”) and finally on 27th May, 2011, it was extended to cover a further 35 companies (“the additional undisclosed assets”). In broad detail the assets now covered by the receivership order consist principally of the shares in and assets held by, for or on behalf of some 700 companies incorporated in a number of different jurisdictions.

8 One of the companies comprised in the additional undisclosed assets is a Jersey company called Eurasia Logistics Limited (“Eurasia”) which is administered in Jersey by Nautilus Trust Company Limited (“Nautilus”). Nautilus has made it clear that Eurasia will not disclose information without a local court order, although it has indicated through its advocates that, so far as it is concerned, Eurasia does not form part of the property of Mr Ablyazov.

9 So far, the Receivers have obtained recognition of the receivership order by the courts in Cyprus, the British Virgin Islands, the Seychelles, Luxembourg and Germany.

10 As mentioned earlier, it is important to emphasise that the Receivers, who are partners in the English firm of accountants KPMG, are officers of the High Court and have simply been appointed to recover and preserve the assets described in the receivership order. They are not there to take sides or make common cause with any of the parties. They are entirely neutral and are there simply to gather in and preserve the assets pending the outcome of the proceedings in the High Court. Receivers are appointed in circumstances where the High Court concludes that a freezing injunction alone will be insufficient to preserve assets pending the outcome of litigation.

11 The prayer of the Representation includes the following:-

> *“(3) Order that the appointment and powers of the Representors as Receivers pursuant to the Receivership Order be recognised by the Royal Court, and that the Representors be authorised and permitted to exercise their powers as*

Receivers pursuant to the Receivership Order within the Island of Jersey, including, without prejudice to the generality of the foregoing, that:-

(a) The Representors be authorised and permitted to take all such steps within the Island of Jersey as may seem expedient to recover and preserve the Property, the Undisclosed Assets, the Further Undisclosed Assets and the Additional Undisclosed Assets (within the meaning of those terms as defined in the Receivership Order) and to exercise the powers vested in each Receiver pursuant to the Receivership Order;

(b) The Representors be authorised and permitted also to identify and locate the Property, the Undisclosed Assets, the Further Undisclosed Assets and the Additional Undisclosed Assets (within the meaning of those terms as defined in the Receivership Order) within the Island of Jersey and to make enquiries and requests for information, documents and other materials, whether on paper, microfilm or tape or in any other form, whether electronically or otherwise, relating to the Property, the Undisclosed Assets, the Further Undisclosed Assets and the Additional Undisclosed Assets which may be in the possession or control in whatever capacity of any person within the Island of Jersey."

12 The receivership order itself contains detailed provisions which we do not think it necessary to describe. We would however refer to paragraph 12C of the receivership order:-

"12C Any person upon whom this Order is served within this jurisdiction or who falls within paragraph 20(2) (including without limitation those persons specified at Schedule 5) shall:-

(a) give to the Receivers such information and documentation relating to the Undisclosed, Further Undisclosed and Additional Undisclosed Assets,

(b) attend on the Receivers at all such times, and

(c) do all such things

as the Receivers may reasonably require for the purposes of getting in the Undisclosed, Further Undisclosed and Additional Undisclosed Assets and carrying out their functions in relation thereto."

The reference to paragraph 20(2) of the order is to persons in other jurisdictions where the order had been declared enforceable by a court of that jurisdiction.

The law

13 As mentioned earlier, it does not appear that this Court has previously had to consider whether it has jurisdiction to recognise the appointment of receivers appointed by a foreign

court. However, the issue has arisen in a number of other jurisdictions.

14 In *Schemmer -v- Property Resources Limited* [1975] Ch 273, Goulding J considered that the English Court had jurisdiction to recognise the title of a foreign receiver to assets located in England provided that there was a sufficient connection between the defendant and the jurisdiction in which the foreign receiver had been appointed to justify recognition of the foreign court's order. In that case, the court held that there was not a sufficient connection because the US court had purported to appoint a receiver over a Bahamian company which was not party to the US proceedings. It also declined to recognise the receivership on the ground that the proceedings, although technically civil, were concerned with the enforcement of a penal statute.

15 *Schemmer* was followed by the Court of Appeal of the Cayman Islands in *Canadian Arab Financial Corporation -v- Player* [1984] CILR 63 which held that the Grand Court of the Cayman Islands had an inherent power to recognise foreign-appointed receivers and managers over assets within the jurisdiction based on well-recognised conflict of laws principles. It adopted the same test as in *Schemmer* and made an order recognising a receiver appointed by the Supreme Court of Ontario in relation to a company incorporated in Ontario.

16 A similar approach, relying upon the inherent jurisdiction of the court, was applied by the Court of Appeal of St Christopher and Nevis in *Millennium Financial Limited -v- McNamara* (15th March 2010) and by the Royal Court of Guernsey in *Terry -v- Butterfield Bank (Guernsey) Limited* (24th February 2006), where receivers appointed by a court in Virginia, USA over a Bahamian company were recognised. Collas DB approved the following passage from Dicey and Morris, Conflict of Laws, (14th Edition) at para 30–127:-

> ***"Receiver appointed by court.*** The two clauses of Rule 167 relate to receivers appointed out of court. The circumstances in which the courts will recognise the powers of a receiver appointed by a foreign court are different. These circumstances seem to obtain where the foreign court had jurisdiction over the defendant whose property is made subject to the receivership. Such jurisdiction has been said to exist if there is a 'sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order.' When a sufficient connection will exist cannot be definitively stated. However, first, it seems that an appointment by a court in the country where the company is incorporated will be recognised. Secondly, it is also likely that the appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English Court would recognise the order of the foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by

> a court in a country where the central management and control of the company is exercised, particularly, perhaps, if there is no likelihood of intervention from the courts of its place of incorporation. Similarly, the relevant connection may be found to exist if the appointment is made by the court of the country where the company carries on business, particularly if that is the only country where business is carried on."

The Royal Court held that there was sufficient connection in that case on the ground that the central management and control of the Bahamian company had been exercised in the United States and that the appointment of the receivers would have been recognised in the Bahamas as the place of incorporation.

17 We see no reason for Jersey Law to take a different stance, so that such orders are not capable of recognition or enforcement. We conclude therefore that the Royal Court has an inherent jurisdiction to recognise the appointment of receivers appointed by a foreign court provided that there is a sufficient connection between the defendant whose assets have been made the subject of a receivership order and the jurisdiction in which the order has been made. In this case, Mr Ablyazov is resident in England and we hold that to be a sufficient connection for these purposes.

Application to the facts

18 We turn therefore to the question of whether the Court should, in the exercise of its discretion, recognise the receivership order.

19 In our judgment, it is appropriate to do so. The order was made following a five day inter partes hearing before Teare J. He was therefore in an excellent position to assess whether it was necessary to go beyond a freezing injunction and make a receivership order in order to ensure that the assets of the defendant would remain available to satisfy any eventual judgment in favour of the Bank. The Court has read his detailed judgment. It is in the interests of comity that we should make an order permitting the Receivers to exercise their jurisdiction in relation to those assets which are situated in Jersey.

20 Furthermore, it is significant that this is an international receivership involving some 700 companies in many different jurisdictions. There is clearly an interlocking network of companies and it is reasonable for the Receivers to seek recognition in a number of jurisdictions. As mentioned earlier, the receivership order has already been recognised in the BVI, Cyprus, the Seychelles, Luxembourg and Germany.

21 However, we do not think it right to make an order in exactly the terms asked for by the Receivers. First, like the Court of Appeal in the BVI, we do not think it necessary or proportionate to give the Receivers power to require any person in Jersey to attend upon the Receivers to provide information about the assets. That is a draconian power which

should only be exercised with the specific authority of this Court. Accordingly we order that sub-paragraphs (b) and (c) of paragraph 12(C) of the receivership order should not be recognised or enforceable in Jersey without further specific order.

22 Secondly, the orders originally requested did not make it clear that, if the Receivers requested information from a person in Jersey, that person would have the right to come to this Court in order to argue that it should not have to provide the information. As originally drafted, it appeared to be the case that any person refusing to comply with a request from the Receivers would be in contempt of court. Again, we did not consider that appropriate. Advocate Dessain argued that such a person could apply to the English Court but we do not find that constitutionally appropriate. It is for this Court to decide whether persons in Jersey holding confidential information should be forced to disclose that information or whether there are valid grounds for their not doing so. Accordingly we ordered that any person affected, which clearly includes any person to whom a request is directed, should have liberty to apply in respect of the exercise by the Receivers of their powers in Jersey.

23 Subject to those two provisos, the Court granted recognition of the receivership order and authorised the Receivers to exercise their powers within the jurisdiction.