



IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERICAL COURT
2015 EWHC 3871 (Comm)

2009 Folio No. 1099
2010 Folio No. 706
2011 Folio No. 79
CL 2015-000872

Rolls Building
Royal Courts of Justice
Friday, 18th December 2015

Before:

MR. JUSTICE POPPLEWELL

BETWEEN:

JSC BTA BANK

Claimant

- and -

MUKHTAR ABLYAZOV (and Others)

Defendants

- and -

MADIYAR ABLYAZOV

Applicant/Intervener

- and -

EFG PRIVATE BANK LIMITED

Third Party

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JUDGMENT

(As approved by the Judge)

APPEARANCES

MR. P. JONES QC and MR. C. WRIGHT (instructed by Hogan Lovells International LLP) appeared on behalf of the Claimant.

MR. P. KNOX QC and MR. J. SHEEHAN (instructed by Kingsley Napley LLP) appeared on behalf of the Intervener.

THE DEFENDANTS did not appear and were not represented.

MR. A. PELLING (instructed by Dechert LLP) appeared on behalf of the Third Party.

MR. JUSTICE POPPLEWELL:

- 1 This is an application by Madiyar Ablyazov, whom I shall call Madiyar to distinguish him from his father, Mukhtar Ablyazov, to whom I will refer as Mukhtar. Madiyar applies to be permitted to draw money for living expenses and legal expenses from an account held in his name at EFG Private Bank Limited (“EFG London”). The EFG London account holds about £1 million following a transfer into it of £1.1 million in February 2009 from an account in the joint names of Madiyar and Mukhtar at EFG in Geneva.
- 2 The Claimant (“The Bank”) claims that the funds are beneficially owned by Mukhtar, and were transferred at a time and in circumstances from which it is to be inferred that Mukhtar did not intend his 17 year old son to have ownership or control of the money. Madiyar, on the other hand, claims that the sum was a gift from his father to assist him in acquiring a Tier 1 Investor visa to establish a right to remain in the United Kingdom and, in the future, UK citizenship; and to support him in his studies and give him a financial start in life. Madiyar relies upon a written deed of gift dated 2 March 2009. The Bank contends that the document contains a forgery of Mukhtar’s signature.
- 3 The Bank claims in the alternative that if the transfer into the EFG London account was a gift, it was a transaction at an under-value to defraud creditors and should be set aside pursuant to s.42 of the Insolvency Act.
- 4 The rival claims give rise to triable issues, in respect of which I shall give directions leading to a two to three day hearing at some time in the course of next year. The question I now have to decide is whether Madiyar should be permitted to draw on the funds in the EFG London account for living expenses of the Swiss franc equivalent of about £10,000 per month, and for legal expenses in relation to these proceedings, which are currently estimated at about £300,000, pending determination of the rival claims.
- 5 The background is the lengthy and complex litigation by the Bank against Mukhtar and others, which I summarised in my judgment of 8th August 2014. The salient points for present purposes are that the Bank obtained judgment against Mukhtar for about \$4.6 billion, the great majority of which remains unsatisfied; on 6 August 2010, Teare J made a receivership order over Mukhtar’s disclosed assets, and that receivership order has subsequently been varied and expanded to cover a vast array of undisclosed assets, including those of a very large number of companies which were beneficially owned by Mukhtar through his usual *modus operandi* of using a nominee as the ultimate beneficial owner.

- 6 In these proceedings relating to the EFG account and the money within it, the Bank seeks as part of its claim, a receivership order over the funds if it succeeds in its contention that they remain beneficially owned by Mukhtar, by way of equitable execution of the judgments against him.
- 7 On behalf of Madiyar, Mr. Knox QC submits that the usual exceptions to a freezing order should apply so as to make allowance for normal living expenses and for legal expenses. He submits that Madiyar is only in the position of having to make an application because EFG London, having notice of the freezing orders made against Mukhtar, and of the Bank's claim to the contents of the account, have declined to allow Madiyar access to the funds for fear of breaching the freezing order; and that the position is therefore analogous to that in which the Bank would be seeking a freezing order directly against Madiyar in respect of the account.
- 8 He relied upon the statements of principle in *PCW (Underwriting Agencies) Limited v Dixon* [1983] 2 All ER 158 and *Anglo-Eastern Trust v Kermanshahchi* [2002] EWHC 2938 Ch, to the effect that in the normal case of a freezing order where assets are those of the defendant, he should not be compelled to reduce his standard of living, and should be permitted to spend what is his money for those reasonable living expenses, and in order to be able to defend himself by paying his reasonable legal costs. In *Anglo-Eastern Trust*, Neuberger J said at para.30:
- “It is clear that, save in exceptional circumstances, the defendant's right to use money which is prima facie his property, to pay his reasonable legal costs should prevail over a freezing order. In particular, the court must think long and hard before refusing an application to use English assets to fund English litigation.”
- 9 Mr. Knox also drew my attention to passages in that judgment of Neuberger J, which suggested that in cases of that nature the burden fell on the claimant to show on the balance of probabilities that there were other assets out of which the defendant could meet his normal living expenses or reasonable legal expenses.
- 10 On behalf of the Bank, Mr. Jones QC has submitted in his written skeleton that the position is more analogous to that in which a respondent to a freezing order seeks to be permitted to use funds in respect of which the applicant has a proprietary claim. The Bank does not in this case advance a case that it has a proprietary interest in the funds, although it does contend that they derived from the frauds practised on it by Mukhtar. The Bank accepts for present purposes that Mukhtar was the beneficial owner of the money in the EFG Geneva account when it was transferred to the EFG London account.

Nevertheless, it is submitted, if the Bank be proved right in its claim that Mukhtar retained and retains the beneficial interest in the money, it should be and will be available to the Bank in part-satisfaction of the Bank's judgment against Mukhtar. Therefore, it is submitted, to allow Madiyar to spend the money pending resolution of the issue would be to allow Madiyar to dissipate a fund to which the Bank is arguably now entitled by way of equitable execution of a judgment debt. The position, therefore, it is said, is analogous to that in which a claimant arguably has a proprietary interest in a fund which a defendant wishes to deplete pending the determination of the issue.

- 11 In my view, these submissions of Mr. Jones are well founded. The principles in such cases of a proprietary claim are well established. Where there are assets which may belong to the claimant, the court will not allow those funds to be used for living expenses or legal costs unless the defendant has shown by full and frank evidence that he does not have, or have access to, any other funds or assets which can be used for those purposes. If he does he must use such other funds or assets first. That is the threshold requirement which must be satisfied by a defendant in the case of a proprietary claim. If that threshold requirement is met, then the court has to carry out a balancing exercise. As Hoffmann LJ said in *Xylas v Khanna* (1992) WL 12678996 at p.6:

“In this case if the plaintiff establishes at the trial that the fund belonged to him and the defendant has been allowed to use it on legal expenses, the plaintiff will have suffered the injustice that the defendant has been allowed to spend his money. On the other hand, if the funds are not released and the plaintiff fails at the trial, or, worse still, if he would have failed if the defendant had been able to mount a proper defence, then the defendant will have suffered a grave injustice. The decision therefore requires ... a balancing of these risks of injustice to the parties.... The balancing exercise is very much a matter of discretion.”

- 12 Applying those principles, Mr. Jones first submitted in his skeleton argument that the Bank had a strong claim and that it was inherently unlikely that the transfer was a gift. As I have already indicated in the course of argument, I am unable to form a view on the merits of the rival claims, save to conclude that there is a triable issue on which each party has a real prospect of success. I therefore put the merits of the rival claims to one side.
- 13 In my view, Madiyar has not discharged the threshold burden of showing by full and frank evidence that he does not have access to other funds to meet his reasonable living expenses and legal expenses.

- 14 So far as his own assets are concerned, he has discharged that burden. He has disclosed bank accounts and details of his earnings, and I have no reason to doubt their completeness or their accuracy. They disclose that he has very little in his own name in the way of assets, and, so far as earnings are concerned, only the expectation of a salary in a start-up company in Geneva, which has hitherto produced only sporadic payment, and which in any event would not provide sums which would be anywhere near adequate for the relevant purposes.
- 15 So far as access to funds from others is concerned, however the position is different. He has not drawn on the funds in the EFG London account to support his living expenses since October 2011. During the period since then he was at university at Leeds until 2013. He then secured a paid internship and subsequently a job in London until September 2014, which in each case carried an income of the order of £20,000 per annum. He did not then commence work again until he moved to Switzerland in August or September of this year and took up the job with the start-up company, in respect of which he has only so far received by way of salary a total of CHF50,000, equivalent to about £33,000.
- 16 So far as legal expenses are concerned, he has paid £60,000 in respect of billed legal costs and on account of the anticipated costs of this hearing.
- 17 Although it is impossible to be precise about the amounts involved because Madiyar has given no details of them, it is to be inferred that the level of support he has required over the period from October 2011, together with the £60,000 of legal expenses he has paid, will have involved a level of provision by others in sums which are at least in the high tens of thousands of pounds, and may very well be considerably well in excess of £100,000.
- 18 Where has that money come from? In his first witness statement Madiyar says that since October 2011 his mother and his sister have provided for him. At para.41 he goes on to say - and this is in the witness statement made on 4 September of this year:

“In the past, as I have said, I have been helped by my family. However, I understand from them, so far as relevant, that they are not in a position to continue to assist me because they also have substantial legal fees to pay for in relation to their own cases around the world.”

- 19 Pausing there, that is an assertion not that they are unwilling to continue to support him, but that they are unable to do so because of their own asset position, by reference to substantial legal fees that they have to expend on cases around the world.

20 In his second witness statement made on 16th September, Madiyar says at para.7:

“Because I had not received a salary between August and November 2015, I have had to ask to borrow money from my mother to fund my living expenses and I also have fallen behind in some of my rent and utility payments.... I said in my first statement that my family could no longer lend me money. Although my mother is in a difficult financial position she has helped me on an occasional basis to pay some living expenses to make sure that I could pay for rent and food. However, my mother has told me that she is not able to help me pay legal expenses going forward because she has her own legal expenses to pay for and she does not work and has to support my younger siblings. She has helped me in the past and has paid approximately £36,300 for lawyers’ fees. Since making my first statement I have been able to borrow approximately £30,000 from my brother-in-law’s mother (who I refer to as my aunt or aunt-in-law) to pay towards my legal expenses so that I can make this application. I have not been used to seeking financial assistance from her, but she has been prepared to give me some help out of absolute necessity, but she will not fund future legal expenses. This means that unless I am able to access funds in the EFG London account I will not be able to pursue my application.”

21 In paras.16 and 17 he goes on to reiterate that although he has received support from his mother in the past, “she cannot do so any longer”.

22 On that state of the evidence it is clear that Madiyar has had very considerable financial assistance from various parts of his family in respect of living expenses and costs over a number of years and that they have continued until recently, but it is far from clear that such support cannot and will not continue. There is no evidence from the mother or the sister or what is referred to as the “aunt”, as to their position. There is no evidence of the nature, location or amount of assets available to them. This is important because what is said is that they are unable to support Madiyar, not that they are unwilling to support him. There is the bald assertion that his mother needs all her money for legal representation in relation to proceedings, later identified as “potential” proceedings, and to support other siblings, but there is no detail of the assets which she currently has available to meet those needs, or what those needs amount to in financial terms

23 In those circumstances, in my view, Madiyar has failed to discharge the threshold burden which lies upon him of demonstrating that it is likely that he cannot obtain access to funds outside the money in the EFG London account to

meet his reasonable living expenses and his legal expenses. Accordingly his application will be dismissed.
