Case No: 2010 Folio 93

Neutral Citation Number: [2012] EWHC 783 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane,
London EC4 1NL

Friday, 16 March 2012

BEFORE:

MR JUSTICE HAMBLEN

- - - - - -

BETWEEN:

JSC BTA BANK

Claimant/Applicant

- and -

(1) MUKHTAR ABLYAZOV
(2) ILDAR KHAZHAEV
(3) ANTON RYBALKIN
(4) CHRYSOPA HOLDING BV

Fourth Defendant/Respondent

(5) USAREL INVESTMENTS LIMITED
(6) LUX INVESTING LIMITED

Defendants

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MR T AKKOUH (Instructed by (Hogan Lovells) appeared on behalf of the Claimant.

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Approved Judgment

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Friday, 16 March 2012

J U D G M E N T

MR JUSTICE HAMBLEN:

1. This is an application by the claimant bank, JSC BTA Bank, for an order for interim payment against the fourth defendant, Chrysopa Holding BV, in the amount of US$65 million. The application is made on the basis that the court can be satisfied that Chrysopa has admitted liability to pay such a sum of money to the bank, pursuant to CPR 25.7(1)(a), and/or that, if the claim goes to trial, the bank will obtain judgment for a substantial amount of money against Chrysopa, pursuant to CPR 25.7(1)(c).

2. The bank's claim concerns a purported loan of US$120 million made by the bank to Chrysopa on 1 August 2008. The bank claims that the loan was, in reality, a contrivance by which the first defendant, Mr Ablyazov, the bank's then chairman and majority shareholder, with the assistance of the second to sixth defendants, unlawfully misappropriated monies from it. It seeks the invalidation of the loan and compensation from the defendants involved in the alleged misappropriation.

3. Chrysopa denies that the loan was an improper agreement and contended in its defence that it was a legitimate commercial transaction. Importantly for the purposes of this application, in that defence it admitted and averred that, in breach of the terms of the loan, it had failed to pay the bank interest. As of the date on which the application was issued, the bank claims that overdue interest amounted to US$78 million. The bank brings an alternative claim, in the event that its primary claim to compensation and invalidation fail, for the recovery of that interest.

4. Chrysopa has not been represented at the hearing today. By an order dated 5 October 2011 Field J declared that Chrysopa's solicitors had ceased to act for it. No further legal representatives have been appointed to act on Chrysopa's behalf.

5. On 30 November 2011 Eder J ordered that, unless Chrysopa gave standard disclosure and complied with the part 18 request made by the bank by 8 December 2011, its defence would be struck out and it would be debarred from defending these proceedings. Chrysopa failed to comply with any part of the order, and no response has been received from Chrysopa in relation to the present application.

6. The jurisdiction to order an interim payment is derived from CPR 25.7, which provides that the court may only make an order for an interim payment where (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant, or, under paragraph (c), it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money other than costs against the defendant from whom he is seeking an order for an interim payment, whether or not that defendant is the only defendant or one of a number of defendants to the claim. Once either of those provisions is engaged, the court has a discretion to order "an interim payment of a

reasonable proportion of the likely amount of the final judgment" – CPR 25.7(4).

7. I have been referred to two authorities in relation to the application of these principles: Schott Kem Limited v Bentley & Others [1991] 1 QB 61, and in particular pages 71D-74G; and HMRC v The GKN Group [2010] EWCA Civ 57. In the latter case, Aikens LJ said as follows at paragraphs 35-36:

> "The *burden* of proof is on the claimant. The *standard* of proof to which the court must be satisfied by the claimant in respect of the conditions set out in CPR Pt 25.7(1)(c) is that of the balance of probabilities….
>
> 36. That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the Interim Payment application under paragraph (c) has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?"

8. In relation to the position where alternative claims are made, the bank draws attention to what Neill LJ said in the Schott Kem case at page 72E(6):

> "Where a plaintiff makes alternative claims against a defendant, for example for rent with an alternative claim for mean profits, or for the price of goods with an alternative claim for damages, the court can order an interim payment without reaching a conclusion at that stage as to which of the alternative claims against the defendant will succeed at trial, provided that the plaintiff will recover a substantial sum under one head or the other – see the Shearson Lehman case [1987] 1 WLR 480."

9. In this case, the bank's claim is for misappropriation of the loan monies. It appears that the money was almost immediately transferred to the fifth defendant, Usarel Investments Limited, in which the first defendant, Mr Ablyazov, has acknowledged a substantial interest, and used to acquire a port on the White Sea, Vitino. Chrysopa contends that the transfer was made pursuant to a legitimate sub-loan agreement.

10. In support of its case that the loan was a contrivance used for the purpose of misappropriating funds, the bank relies, in particular, upon the following matters.

1. That no repayment of interest has ever been made pursuant to the loan.

2. That the bank has no record of any security ever being granted in support of the loan, contrary to the terms of the loan agreement.

3. That the terms of the loan were amended to disadvantage the bank after the loan had been drawn down.

4. That Chrysopa was ultimately owned and/or controlled by Mr Ablyazov, but that, in breach of the relevant disclosure obligations, such interests were never disclosed to the bank's board of directors.

5. That Chrysopa was at the material time a shell company having no substantial assets and carrying on no or no material business.

6. That no proper due diligence was conducted in relation to the loan, that such risks as were identified were not heeded, and that the loan was entered into at the height of the credit crunch when the bank was in a precarious financial position.

11. In the light of those factual matters, the bank makes three principal claims against Chrysopa. The first claim is that Chrysopa, to whom it is said Mr Ablyazov's intentions should be attributed, failed to act in good faith, reasonably and fairly, and/or acted in a manner directed at harming the bank. It is said that such actions were contrary to the relevant provisions of Kazakh law, as to which no admissions were made in Chrysopa's defence. Accordingly, it is alleged that Chrysopa is liable to pay compensation to the bank in the full loan amount of US$120 million plus interest. Secondly, the bank seeks the invalidation of the agreement as a consequence of the return from Chrysopa of all monies paid thereunder with their traceable proceeds. Thirdly, in the event that the loan is, contrary to the bank's primary case, in fact a bona fide commercial agreement, the bank claims repayment from Chrysopa of the interest as falling due under the loan agreement. As of the date on which the alternative claim was formulated, the amount of interest which had fallen due was US$51.12 million. Interest has subsequently been accruing at the rate of $60,000 per day, and the outstanding interest now stands in excess of US$78 million.

12. Chrysopa's case, as in its defence before it was struck out, was that the loan was not illegitimate. It contended that "The loan agreement was and remains a legally valid and enforceable contract. It is denied, as suggested by the bank, that the transaction was a sham or contrivance designed to misappropriate the loan monies from the bank". It also averred that Chrysopa was in breach of the agreement because it had failed to pay interest that was due. It is pleaded at paragraph 38:

> "Chrysopa admits that it is in default as to payment of interest due under the loan agreement as varied."

"No admissions are made as to the actual amount due." Then at paragraph 62(b):

"As admitted above, Chrysopa has breached the terms of the loan

agreement. In the premises, Chrysopa admits that sums are due and owing from it to the bank pursuant to the terms of the loan agreement."

13. Against that background, and applying the principles to which I have referred, the bank submits, first, that the application falls within the ambit of CPR 25.7(1)(a) by reason of Chrysopa having positively pleaded that it has failed to pay interest pursuant to the agreement, that being the interest being claimed by the bank in its alternative case against Chrysopa. I accept that submission. Secondly, it submits that the application also falls within the ambit of CPR 25.7(1)(c), in that the court can be satisfied, on the balance of probabilities and on the information put before it, that the bank will either succeed on its primary claims for compensation and invalidation of the agreement, or that it will succeed in its alternative claim against Chrysopa for interest which has fallen due under the loan.

14. As observed in the Schott Kem case, the court does not need to determine which of those claims would prevail, as long as it is satisfied that, whichever claim prevails, a substantial sum will be awarded to the claimant, and that it is therefore appropriate for an interim payment to be made. In the present case, I am satisfied that either the claimant's claim will succeed for the return of the loan sum in the full amount, or, if it is proven that the agreements are legitimate agreements, then it will succeed on its interest claim, as to which there is no issue as to the applicable rate and, therefore, to the sums being claimed. That the claimant will succeed on one or other of the claims is particularly clear in this case, where Chrysopa is no longer playing any part in the proceedings, and indeed has had its defence struck out.

15. In relation to discretionary matters, it is pointed out that this is not a case in which any irrevocable harm could be done to Chrysopa. It has never been suggested that Chrysopa has any operating business or employees. It is, the bank contends, a shell company. Its shares have been placed into the receivership order which has been made by this court of Mr Ablyazov's assets. No application has been made to the court to set the order aside, and the receivers, who have been given notice of the application, have not sought to intervene or raise any concerns as to the application.

16. In relation to the amount of any interim payment, the sum claimed is US$65 million. It is submitted that this represents a reasonable proportion of the sum which the bank will recover at trial. The bank's primary claims are for US$120 million plus interest, and its alternative interest claim is currently for a sum which exceeds US$78 million, which is increasing at the rate of $60,000 per day. The bank has deducted from the interim payment figure the sum of US$30 million to take account of the possibility that one of the amendments to the loan agreement may have had the effect of waiving interest for a 6 months grace period.

17. In addition, the bank says that it has done all it can to draw the application to the attention of Chrysopa. The bank's application was served by an email sent to Chrysopa's sole director, Mr Galim Nazarov, and it was sent to an email address which Eder J had in his earlier order determined was the appropriate one to be used. That email address remains a registered contract address at the Dutch

corporate registry. The email was sent on 27 February and is to be treated as having been received on 28 February, so that there has been the appropriate period of notice before the hearing of the application.

18. In all the circumstances, as outlined above, I am satisfied that this is an appropriate case for an interim payment to be made in the sum requested of US$65 million.

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