BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 46 OF 2011

BETWEEN:

JEREMY OUTEN, JOHN MILSOM AND DAVID STANDISH
(AS JOINT RECEIVERS OF ASSETS OF MUKHTAR ABLYAZOV)

Applicants

and

MUKHTAR ABLYAZOV

Respondent

Appearances: Mr Robert Miles QC and Mr John Carrington for the Applicant Receivers
Mr Andrew Willins for Totalserve Trust Company and Ms Shirley Todman
Ms Tana'ania Small for Aleman, Cordero, Galindo & Lee Trust (BVI) Ltd and Trident Trust Company (BVI) Limited
Mr R Davis for Morgan & Morgan Trust Corporation Limited

JUDGMENT

[2011: 6, 15 July]

(BVI Court recognizing appointment of Receivers by High Court of Justice in England and Wales to receive all assets (as defined) disclosed by or believed to be beneficially owned by Mukhtar Ablyazov ('the assets') – term of English appointment that any person within any jurisdiction within which English order recognized and served with a copy of the English order provide the Receivers with such information and documents as the Receivers might reasonably require, attend on the Receivers at such times as they may reasonably require and do all such things as the Receivers may reasonably require, in each case for the purposes of getting in the assets ('the disclosure term') – Court refusing to make *ex parte* order including the disclosure term – Receivers applying *inter partes* for disclosure term to be included – whether disclosure term to be included in recognition order)

[1] **Bannister J [ag]:** On 6 August 2010, on an application made in the Commercial Court of the High Court of Justice of England and Wales, Mr Justice Teare appointed the present Applicants ('the

Receivers') as receivers of the assets of Mukhtar Ablyazov ('Mr Ablyazov'). The proceedings in which the application was made had been brought against Mr Ablyazov and others by JSC BTA Bank ('the Bank') for frauds alleged to have been carried out by Mr Ablyazov and associates of his before he was dismissed as a director of the Bank. The order appointed the Receivers to receive all the assets of Mr Ablyazov, whether disclosed by him or believed to belong to him, even though not disclosed. The Receivers are partners in the London office of KPMG LLP.

Subsequent developments

[2] By 8 April 2011 Mr Justice Teare's original order had been varied. One of the changes extended the classes of assets subject to the receivership to include 'Undisclosed Assets' and 'Further Undisclosed Assets' respectively. These latter categories were added to embrace assets not disclosed by Mr Ablyazov but which inquiries had revealed to be and which Mr Justice Teare accepted as assets which, at any rate arguably, belonged to Mr Ablyazov and ought, therefore, to be subject to the receivership. The Disclosed Assets consisted of various shares and whatever was standing to the credit of two named bank accounts. The Undisclosed Assets consisted entirely of shares in a long list of companies and in some of those companies' subsidiaries. The Further Undisclosed Assets comprised another list of shares. In addition to these assets, the Receivers were appointed to get in various sums of money paid out to various recipients by various named entities between 25 June and 24 October 2008 - or any property into which those payments could be traced. The only task of the Receivers, therefore, under the order as varied, was to get in and take possession of the money or any property representing the money, the shares and the sums of money (if any) in the two bank accounts.

[3] On an *ex parte* application made to this Court on 15 April 2011 I recognized the order of Mr Justice Teare as it stood on 8 April 2011. The Receivers were thus enabled within the Territory to carry out such of their functions and exercise such of their powers as were capable of being carried out or exercised here. There was an *inter partes* hearing on 6 May 2011, when I continued the order. On 27 May 2011 Mr Justice Teare varied his order again to include a schedule of Additional Undisclosed Assets, consisting of shares in a further list of companies. The shares listed in all four categories include the shares of companies incorporated in this jurisdiction.

[4] On 9 June 2011 Mr Justice Teare further varied his order. First, it was provided that the Undisclosed Assets included not only the shares previously listed, but also the assets of the underlying companies or of any subsidiaries of those companies, whether held in the relevant company's own name or by nominees. This variation applied also in the case of the underlying companies in the Further Undisclosed Asset and Additional Undisclosed Asset categories. Secondly, and importantly for present purposes, a new paragraph 12C was added in the following terms:

> '12C Any person upon whom this order is served within this jurisdiction within paragraph 20(2) (including without limitation those persons specified in 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.'

Paragraph 20(2) provided as follows:

> '(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court –
>
> (a) the First Defendant, or any nominee, trustee, agent or attorney appointed by him or holding assets (whether directly or indirectly) for him.
> (b) any person who –
>
> (i) is subject to the jurisdiction of this court;
> (ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
> (iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and

(c) any person, only to the extent that this order is declared enforceable by or is enforced by a court or is recognised in that country or state.'

Schedule 5 is a list of corporate service providers and associated law firms and of registered agents and liquidators. The list includes several Registered Agents practising in the Territory and providing administrative services to BVI registered companies covered by the amended order of Mr Justice Teare and one Liquidator, an employee of Totalserve Trust Company.

[5] On 17 June 2011 I was asked *ex parte* to recognize the order of Mr Justice Teare as varied by him on 9 June 2011 in the way I have described. While I was glad to recognize the 'embedded' order of 27 May 2011 and the variation extending the receivership to the assets of the companies whose shares are listed in the various schedules to Mr Justice Teare's order, I was not prepared at that hearing to recognize the order of 9 June 2011 in its entirety because I was not persuaded that it was appropriate for me to recognise and give effect within this jurisdiction to paragraph 12C. I therefore stood over the application for recognition of the 9 June 2011 order. The adjourned hearing took place on 20 June 2011, when I made an order recognizing the 9 June 2011 order with the exception of paragraph 12C.

[6] On 21 June 2011 the Receivers wrote to various Registered Agents in this jurisdiction. A copy of that letter is annexed at Appendix A to this judgment. The letter enclosed a redacted copy of Mr Justice Teare's order of 9 June 2011 and a copy of my order of 6 July 2011. It drew attention to paragraphs 12B, 12C and 20(2) of the order of Mr Justice Teare and to the fact that the recipient of the letter was one of the parties named in Schedule 5 to that order. Having noted that the order had been recognized by this Court, the letter very properly drew attention to the fact that paragraph 12C was not enforceable within this jurisdiction without further order of this Court. Curiously, the letter then went on to say that 'accordingly' the Receivers 'required' the recipient to provide them with information set out in the next section of the letter. There followed a long list of documents and information which the recipient was 'required' to provide. Summarising the most significant of the requirements, the recipient was to provide:

(1) copies of formal company documents, including share certificates, invoices raised in respect of the relevant company and Know Your Customer information with which the recipient had been provided;

(2) names and contact details of directors and shareholders, client of record and ultimate beneficial owner;

(3) a list of the company's assets, including details of bank accounts and current balances; and

(4) copies of all correspondence with the company, its agents, etc, and with any third parties respecting the company.

The letter went on to require confirmation from a director or other officer of the relevant company that the company would not issue any further shares or otherwise alter its capital structure, that it would not deal with any of its assets, and that it would not effect any alterations to its management structure without formal written instructions from the Receivers. The letter specified that the information/confirmation was to be provided by Thursday 30 June and warned that if the request was not fully complied with by that date, the Receivers reserved the right, as it was put, to seek orders from 'the appropriate Court to compel compliance by the recipient and by any associated parties.'

[7] Some recipients of this ambiguous communication disclosed some of the information required, although I have no evidence which Registered Agents did so or as to the extent in any given case of the information or documents disclosed.

[8] The matter came back *inter partes* on 6 July 2011, when the Receivers were represented by Mr Robert Miles QC, who appeared together with Mr John Carrington. Mr Ablyazov did not appear, but Ms Small appeared for Aleman, Cordero, Galindo & Lee Trust (BVI) Limited and Trident Trust Company (BVI) Limited and Mr Davis appeared for Morgan & Morgan Trust Corporation Limited. Mr Willins appeared for Totalserve Trust Company ('Totalserve') and for Ms Shirley Todman, an employee of Totalserve, who appears in the list of Liquidators in Schedule 5 to Mr Justice Teare's order of 9 June 2011. All these parties, who opposed the application, had been very properly notified of it by the Receivers.

The parties submissions

[9] Mr Miles QC submits that the function of the Receivers is to locate and preserve assets pending trial. He says that in order to be able to do that effectively, the Receivers need full information and documentation relating to the BVI companies and their assets, particularly in the light of Mr Ablyazov's failure to cooperate. No-one could quarrel with that submission. He refers to evidence, set out in the third affidavit of Mr Milsom, one of the Receivers, that certain Registered Agents have acted on instructions, received by the Registered Agent in question after it had been notified of the receivership order, to register transactions alleged to have occurred *before* the Agent was notified. Certain Registered Agents appear to have complied with such instructions. Mr Miles QC does not allege that in doing so any Registered Agent acted with knowledge of wrongdoing, but he relies on such transactions as supporting his contention that they have become mixed up in, even if they may not have been complicit in, attempts to thwart the processes set in place by Mr Justice Teare's orders and the recognition orders made by this Court.

[10] Mr Miles QC goes on to submit that where a foreign receiver has been recognized locally, the local Court may make such orders in respect of persons or assets within its jurisdiction as are necessary to achieve the purposes of the receivership. He relies upon the Cayman decision in **Kilderkin Investments v Player**[1] as an example. In that case the Cayman Islands Court of Appeal reversed a decision of the Chief Justice (reversing an earlier decision of his own) discharging an order recognizing in the Cayman Islands a receiver and manager of a Canadian Company appointed by by the Supreme Court of Ontario. The original recognition order contained a provision in the following terms:

> "'2. The Receiver is authorised and permitted to identify and locate all assets belonging legally or beneficially to Kilderkin within the jurisdiction of this court and to make inquiries and requests for information and documents, whether on paper, microfilm or tape or in any other form relating to any assets of Kilderkin which may be in the possession or control of any person, bank, or company within the jurisdiction of this court, notwithstanding the order of this court dated the 16th day of April, 1983.'"

[1] [1984-85] CILR 63

One of the grounds relied upon by the Chief Justice in reversing his earlier decision was that that power was unnecessary. It was in relation to that proposition that Carey JA said in the Court of Appeal:

> 'Plainly, all the assets of Kilderkin Investments would be at risk in the event that this action was successfully concluded in the plaintiffs' favour. Moreover, during the hearing of the present appeal, the appellants on behalf of Kilderkin filed an action against William Player to protect the assets and undertaking of Kilderkin. A responsible receiver and manager would enquire where his company's assets are so that they may be protected. It is difficult to conceive how the receiver and manager could properly function in accord with his prime duty, if he was quite unaware where the assets of the company were located. The claims against the company sought to trace funds which the plaintiffs were alleging were theirs, while the company would be asserting its own entitlement to those funds. Indeed, it is right to say that in locating funds of the company, the appellants were doing no more than was essential or prudent for the proper discharge of their duties. They would be acting consistently with their duties and in my view, need not have sought the order in terms of para. 2 of the application, which have earlier been set out. In these circumstances, I cannot regard the view of the learned Chief Justice that "[the Receiver's] preservation of the assets of Kilderkin in this jurisdiction in its capacity as receiver and manager of Kilderkin had no relevance to the suit (Cause 132) in this jurisdiction," as correct.'

[11] I am not sure that this passage helps Mr Miles QC. Although Carey JA was of the view that the insertion of paragraph 2 was unnecessary, it seems to me that it was probably put in in order to avoid any suggestion that the receiver and manager in that case might be thought to be acting in disregard of the territory's sovereignty by conducting official inquiries within the jurisdiction on behalf of a foreign court or, at any rate, that there might be some doubt upon the point which the inclusion of an express power would remove. Whether or not that is right, the power conferred by the order made in the **Kilderkin**[2] case was not coercive, so that the decision does not help in resolving the issues that arise in this application.

[12] Next, Mr Miles QC refers to the line of cases in which disclosure orders have been made as ancillary to, for example, freezing orders. He also relies upon cases in which injunctions have been granted against persons other than the actual defendant to the proceedings in which the injunction is granted, either on the grounds that the defendant's assets are being held by a

[2] (supra)

nominee against whom it is proper for an order to be made[3] or, on grounds analogous to the reasoning in **Norwich Pharmacal**[4], where some person other than the actual defendant has become mixed up in his affairs so that it is just to restrain that person in addition to the defendant[5]. Finally, he appeals to the **Norwich Pharmacal**[6] principle itself, as applied by the Court of Appeal in this jurisdiction to the position of registered agents in **JSC BTA Bank v Fidelity Corporate Services & ors**[7]. He submits that paragraph 12C is no more than a form of compendious **Norwich Pharmacal**[8] order entitling the Receivers to information from anyone within the Territory who may be considered to be in a position to provide it.

[13] I do not think that these cases help Mr Miles QC. They are concerned with the power of the Court itself, in proceedings brought for that or a connected purpose, to order disclosure against (a) parties to the proceedings or (b) third parties against whom, provided certain criteria are met, the court considers it just and convenient to make such an order. As for **Norwich Pharmacal**[9] itself, the exercise of the jurisdiction involves the statutory features of (a) service of process (b) upon a respondent who is thereby brought within the consideration of the Court and put in a position where he may, if so advised, challenge the application in advance of any order being made (c) by a person who is responsible for the costs of the respondent and who (d) will be bound by undertakings exacted by the Court as to the future dissemination of any information provided if an order is made. Simply making a blanket order that any person within the Territory upon whom the order has been served must comply with the requirements set out in the letter of 21 June 2011 would deprive the recipients of the protections inherent in the **Norwich Pharmacal**[10] procedure. If recognition of paragraph 12C is to be supported, some other justification than the principles upon which these authorities proceed needs to be found.

[14] Mr Miles QC goes on to submit that it appears that there are *or may be* assets within the jurisdiction (other than the shares in the BVI companies). This rather hesitant formulation is in itself

---

[3] **TSB Private Bank International SA v Chabra** [1992] 1 WLR 231
[4] [1974] 1 AC 133
[5] **Mercantile Group Europe AG v Aiyela** [1993] FSR 745 [1994] QB 366 (CA)
[6] (supra)
[7] HCVAP 2010/035 (21 February 2011)
[8] (supra)
[9] (supra)
[10] (supra)

surprising. Receivers are ordinarily appointed where there are known assets requiring to be protected. It is true that such assets may need to be specifically located, but without the known presence of such assets within the jurisdiction, it would be the practice, I think, of most courts, to decline to appoint a receiver on the grounds that to do so would be pointless. Mr Miles QC, however, does not regard this as important or as giving rise to a difficulty, because he says that it is not necessary for the Receivers to show that there are assets within the jurisdiction. That, of course, is strictly correct – it was for the Bank to show Mr Justice Teare that there were grounds for believing that there are assets of Mr Ablyazov (other than the shares) in the BVI. But Mr Miles QC goes on to say that it is the presence within the jurisdiction of persons with the control of assets or information relating to assets which is important. He says that the Receivers sought recognition here in order to better enable them to locate and preserve assets, which, he says, entails obtaining information from persons within the jurisdiction who have information in relation to those assets.

[15] What I get from this is that the receivership (at any rate so far as it is intended to be conducted in this jurisdiction) is seen as an investigation for worldwide purposes as much as (or more than) it is seen as a way of securing assets actually located within the BVI. That, I think, is at the root of the difficulty which arises in the present case. The recognition given down to 9 June 2011 to Mr Justice Teare's orders was to enable *assets* here to be got in and secured. The Receivers, on the other hand, clearly see paragraph 12C as enabling a form of non-statutory inquiry to be allowed to proceed in this jurisdiction in order, as far as I can see, to establish what assets Mr Ablyazov may have in other jurisdictions. I am going to have to decide whether it is right for me to lend the coercive authority of this Court to such a process.

[16] Mr Willins, for Totalserve, submitted that there would be a significant burden in supplying the information sought in the 21 June 2011 letter and objected that compliance might necessarily involve the provision of information about the affairs of persons other than Mr Ablyazov, where a duty of confidence could have arisen towards persons other than Mr Ablyazov and which might be broken in disclosing matters which also concerned Mr Ablyazov. He pointed out that no provision is made in the order for compensation to be provided by the Receivers against the costs of compliance or for legal expenses necessarily incurred in the course of compliance. He pointed to paragraph (v) of Schedule 2 to the order, which provides for *the Bank* to pay costs incurred 'as a

result of this order' and submitted that the Registered Agents should not have to rely upon payment by a party not present here and against whom paragraph (v) could presumably be enforced only by way of an application to the English Court. Ms Small and Mr Davis supported the submissions made by Mr Willins.

Decision

[17] The combined effect of paragraphs 12C and 20(2) of Mr Justice Teare's order of 9 June 2011 is that any person who finds himself within a country or state which recognizes the order and upon whom a copy of the order is served must, without limit of time and on pain of being proceeded against for contempt, give the Receivers any and all documents or information which they may reasonably require, attend on them at such times as they may reasonably require and do all such things as they may reasonably require. There is no limit on the number of times the Receivers may reasonably require the provision of information, attendance, or the performance of specified acts. There is no provision for the Receivers to meet the costs or reasonable expenses of persons thus required to comply. There are no restrictions upon the future use by the Receivers of any information acquired by them by this process or upon the persons to whom it may be disclosed.

[18] The requests and requirements envisaged by paragraph 12C will not be made in accordance with the provisions of any regime sanctioned within this jurisdiction by statute or subordinate legislation, such as Part IV of the Financial Services Commission Act, 2001, for example, which enables the Financial Services Commission to conduct inquires with the force of law behind them. Part IV, however, carefully defines the identities of the persons from whom information may be sought[11]. To take another example, section 282 of the Insolvency Act, 2003 ('IA 2003'), entitles a liquidator to demand information or require persons to attend for private examination, but in either case only persons within carefully defined categories are compellable.[12] The same point applies in respect of Court examinations under section 284 IA 2003. In all of these cases, because the applicable regime derives its authority from a statute defining the scope of the inquiry and identifying the persons who can be compelled to comply, the person from whom information is demanded is in a

[11] Financial Services Commission Act, 2001, sections 30, 32
[12] section 282(2)

position to challenge a request, either as being *ultra vires* or as oppressive. Under paragraph 12C the only challenges that could be made to a request by the Receivers would be that the person to whom it was made was not within the Territory, or that he had not been served with a copy of the order, or that it was unreasonable. This difference seems to me an important one, to be taken into account when deciding whether or not to recognize paragraph 12C.

[19] Although this jurisdiction is keenly aware of its responsibilities in the fight against commercial crime, those responsibilities have to be balanced against the need to ensure that persons within the Territory are not disturbed by foreign persons or bodies of persons unless such disturbance is authorised by the laws of the Territory. By way of illustration, while the Court has power under Part XIX of IA 2003 to grant orders in aid of certain foreign insolvency proceedings, such orders are subject to strict statutory restrictions. The Court cannot simply make whatever order it feels might suit the case. Thus, it cannot, on the application of a foreign representative, order a person to attend a Court examination under section 284 IA 2003 (although the Court may *authorize* a foreign representative to examine a person falling within section 282(2) privately, but with no obligation upon the person to be examined to attend).[13] It seems to me odd that the Court should grant to the Receivers, even though they are appointed by a friendly foreign court, more extensive investigative powers than it can grant to insolvency representatives from friendly relevant[14] foreign countries. So that is another factor which I think I must take into account in deciding whether to recognize paragraph 12C.

[20] I bear in mind the powerful obligations of comity owed by this Court to the Courts of the United Kingdom but I also have to keep in mind the need to ensure that the coercive powers of this Court are to be used within the Territory against residents of the Territory only when sanctioned by local legislation or Rules of Court, or in the exercise of the Court's powers pursuant to section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance, or in accordance with established judge made principle and precedent, such as the **Norwich Pharmacal**[15] jurisdiction.

---

[13] **Earp & anor v Agape Ventures Limited & ors** BVIHCV 2011/57 (26 May 2011)
[14] i.e. countries designated as such by the Financial Services Commission
[15] (supra)

[21] I have come to the conclusion that in the light of the considerations to which I have referred above I should not recognize paragraph 12C unless some particular provision of the law of the British Virgin Islands or some principle of law entitles me to do so. The combined researches of Mr Miles QC and of Mr Carrington have failed to identify any such provision or principle. It seems to me, therefore, that I should exercise my discretion against granting recognition to paragraph 12C.

[22] Mr Miles QC had a fall back position. He asked me to order that any person served with the order and a letter in the terms of the letter of 21 June 2011 be obliged to comply with its demands. I shall not do that because, although less drastic than purporting to establish the Receivers as a sort of private commission of inquiry backed by the Court's coercive powers, the proposal suffers, in my judgment, from the same inherent difficulties.

Conclusion

[23] For the foregoing reasons this application is dismissed. I am prepared, however, if invited to do so, to make an order in similar terms to those of paragraph 2 of the order made in **Kilderkin Investments v Player**[16].

Commercial Court Judge
15 July 2011

[16] (supra)