International fraud: English courts move with the times

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The trial of the first three claims in the long-running *JSC BTA Bank v Ablyazov* case has commenced in the High Court. This is, by any measure, a remarkable dispute, but there are also some interesting wider lessons that can be learned about how English courts are adapting to the increasing flood of international fraud litigation.

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On 7 November 2012, the trial of the first three claims in the long-running *JSC BTA Bank v Ablyazov* case commenced in the High Court. However, the principal defendant, Mukhtar Ablyazov, was not present and can take no active part in the proceedings: the former chairman and secret majority shareholder of BTA Bank is currently in hiding, having been sentenced to 22 months in prison for multiple contempts of court.

In a notable turn of events, on the day before trial commenced, the Court of Appeal upheld Mr Ablyazov's committal conviction, ordering that he be debarred from defending the proceedings as a result of his continuing failure to surrender himself to the authorities, and to give proper disclosure of his assets to the bank.

This is, by any measure, a remarkable dispute. Since the bank first obtained a freezing injunction in this jurisdiction against Mr Ablyazov in August 2009, the case has generated 49 reported decisions, including nine Court of Appeal judgments, in relation to a series of contested pre-judgment applications, appeals and cross-appeals.

But there are also some interesting wider lessons that can be learned from this dispute, particularly about how English courts are adapting to the increasing flood of international fraud litigation.

The facts

Mr Ablyazov is alleged to have been the mastermind behind misappropriations totalling over $10 billion during his tenure as the bank's chairman, principally through related party loans to companies in far-flung jurisdictions such as the British Virgin Islands.

In February 2009, with the bank in severe financial distress and about to receive significant state support, Mr Ablyazov fled from Kazakhstan to take up residence in London along with some of his closest associates. When the scale of the apparent fraud within the bank was uncovered, the bank took steps in this jurisdiction to recover the alleged misappropriations from Mr Ablyazov and his associates.

Adapting the freezer

What shines brightest from the BTA proceedings is the English court's willingness and ability to modify existing legal principles to keep pace with the developments of the modern age. A prime example of this is the manner in which the courts have recognised that worldwide freezing injunctions may need to be adapted to meet these developments.

First, the standard form Commercial Court worldwide freezing injunction order was varied in the BTA case so that the liberty to deal in assets located overseas was removed, on the basis that it was necessary to protect the bank's legitimate interests. This meant that Mr Ablyazov was only permitted to deal in his overseas assets if he first brought sufficient assets into this jurisdiction to meet the value of the bank's claims against him.

Secondly, in relation to the asset disclosure obligations that arise under freezing injunctions, the courts made clear that any assets held by a respondent on trust or as a nominee for another person would have to be disclosed to the claimant. For those familiar with the Russian litigation currently passing through the English courts, this latter development can be seen as an important means of identifying assets that oligarchs traditionally hold through intentionally opaque and complex off-shore structures.

A number of options

The BTA proceedings have also highlighted the unique range of tools that is available to litigators in this jurisdiction (even compared to those available in the US) during the pre-judgment phase of proceedings.

For example, the freezing injunction against Mr Ablyazov has been policed by the bank through a wide range of successively more powerful measures: first, the cross-examination of Mr Ablyazov on his initial asset disclosure; then, in July 2010, an order for the largest ever pre-judgment receivership over his worldwide assets; followed by the extension of the receivership to cover a further 600 undisclosed companies; and, ultimately, contempt of court proceedings against Mr Ablyazov for failing to disclose assets, lying under oath, and dealing in disclosed assets.

As a consequence, the message to respondents to a freezing injunction is clear: their asset disclosure must be full and proper from the outset and their compliance with the freezing injunction must be strict, or there may be very serious and wide-ranging consequences. This highlights the need for respondents to seek legal advice on their obligations from the very outset of proceedings.

In addition to the policing of the freezing injunction, the bank has deployed a number of other pre-judgment weapons available in this jurisdiction in order to obtain crucial information in the proceedings. In particular, the use of search orders and *Norwich Pharmacal* disclosure orders has proved instrumental in relation to the bank's contempt proceedings against Mr Ablyazov.

For example, based on information received from enquiry agents regarding the nocturnal movement of boxes by Mr Ablyazov's associates, the bank obtained a without notice search order against the licensee of a unit in a storage facility in north London. That led to the uncovering of a secret cache of hard copy and electronic documents, including incriminating documents which were later deployed against Mr Ablyazov in the committal proceedings.

Similar tactics overseas proved equally valuable: a further search order carried out in Cyprus against a company that was believed to be secretly administering Mr Ablyazov's undisclosed assets resulted in the discovery of a further treasure trove of documents that was due for imminent shredding and disposal.

Interestingly, the courts have also been willing to widen the scope of *Norwich Pharmacal* disclosure orders against third parties in response to the fact that international fraud can now take place at the click of a button. In January 2011, the bank uncovered evidence that Mr Ablyazov's associates may be secretly administering hundreds of undisclosed companies via a series of Yahoo! email addresses, and obtained orders requiring Yahoo! to disclose the contents of the relevant email accounts to the bank.

Consequences of contempt

All of this is not to say that the English courts are becoming overly pro-claimant in their approach to fraud claims and asset disclosure. One of the notable aspects of the BTA litigation has been the extent to which the courts have given Mr Ablyazov every possible opportunity to defend himself. So, despite being in hiding, Mr Ablyazov has been able to continue to instruct his solicitors from a secret location via undisclosed conference call and email accounts. And Mr Ablyazov's 11th-hour application for the trial judge to recuse himself on the basis of perceived, rather than actual, bias was afforded three days of judicial time in the High Court and the Court of Appeal (the judge's decision not to recuse himself was finally upheld by the Court of Appeal on 12 November 2012).

It is clear that there will be very serious consequences for individuals like Mr Ablyazov who flagrantly breach the court's orders. In giving its judgment on Mr Ablyazov's contempts of court, the Court of Appeal stated that "Mr Ablyazov has been unconscionable in his refusal to abide by the orders of the court…it is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr Ablyazov".

As a result of his actions, Mr Ablyazov finds himself debarred from defending the proceedings in this jurisdiction, leaving the bank free to obtain judgment against him and enforce against his assets on claims totalling more than $6 billion.

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