

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2011/030

BETWEEN:

**JEREMY OUTEN, JOHN MILSOM, AND DAVID STANDISH
(as Joint Receivers of Assets of Mukhtar Ablyazov)**

Appellants

and

MUKHTAR ABLYAZOV

Respondent

Before:

The Hon. Mde Janice M. Pereira

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances:

Mr. Robert Miles, QC, Mr. John Carrington with him, for the Receivers

Mrs. Tana'ania Small-Davis for Aleman, Cordero, Galindo & Lee Trust (BVI)

Ltd., an Interested Party

Mr. Andrew Willins for Totalserve Trust Company Ltd., an Interested Party

2011: November 9, 10.

Civil appeal - Commercial court - English Receivership Order - Allegation of misappropriation of bank's funds by Respondent, a former officer of the bank – Identification, location and preservation of assets – Recognition in the Virgin Islands of the English Receivership Order, in particular 12C which required inter alia parties served in the Territory and on the reasonable requests of the Receivers to disclose confidential information held by them in facilitating the identification and location of assets alleged to be held and concealed by the use of a network of corporate vehicles incorporated in the Territory of the Virgin Islands and elsewhere – Whether the learned judge erred in refusing to recognise paragraph 12C of the English Receivership Order – Whether the English Receivership Order should be recognised in its entirety

Held: setting aside the decision of the Commercial Court Judge made on 15th July 2011 refusing to recognise paragraph 12C of the English Receivership Order, and ordering that paragraph 12C of the said Order be recognised but only to the extent of paragraph 12C(a), and that both the Receivers and the Interested Parties file submissions on costs within 21 days, that:

1. The Court has a very broad power to recognise the appointment of and the

powers of a foreign receiver pursuant to the jurisdiction established by such cases as **Schemmer and Others v Property Resources Ltd. and Others** [1975] Ch. 273. Once the foreign Receivership Order is recognised, the court may then make such ancillary orders in relation to persons or assets within the jurisdiction in order to achieve the purposes of the Receivership, including orders requiring cooperation with the receiver by way of injunction, as it considers just or convenient, pursuant to the Schemmer jurisdiction and/or section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act ("the Supreme Court Act"). An order in the form of paragraph 12C is such an order. The learned judge found that there was no statutory or other legislative basis for the court's jurisdiction when there in fact was. As such, he erred in the exercise of his discretion.

Schemmer and Others v Property Resources Ltd. and Others [1975] Ch. 273 applied.

2. Where a foreign receiver has been recognised locally, the local court may make such orders in respect of persons or assets within its jurisdiction as are necessary to achieve the purpose of the receivership and in the interests of justice. It is right that the Receivers should be given the assistance of the Court in obtaining information which has been reasonably requested by them and is necessary for the performance of their function. If they ask unreasonable questions or make an unreasonable demand for documents of the citizen or resident, the court is available for the granting of relief. The court is the arbiter of disputes. If there should be a genuine dispute, that will be resolved by the court.
3. The Registered Agents of companies incorporated in the Territory of the Virgin Islands are likely and are required by law to have information in relation to those companies and their assets. The BVI companies within the Receivership are alleged to have been used by the respondent for the purpose of concealing ownership of assets. The Registered Agents of those companies are "mixed up" in a *Norwich Pharmacal* sense in such concealment, and accordingly it is just and convenient that they be required to provide such information and assistance to the Receivers as the Receivers may reasonably require for the purposes of the Receivership, particularly in circumstances where the Receivers are seeking to understand a complex network of companies established across a number of jurisdictions.
4. With regard to the learned judge's finding that to make the orders sought would deprive the recipients of the protections inherent in the *Norwich Pharmacal* procedure, even though this application is not made in a typical *Norwich Pharmacal* application, this does not deprive or limit the court in the exercise of its jurisdiction and powers given by section 24 of the Supreme Court Act. This section enables the Court to make such ancillary orders as may be necessary to give effect to an order made, such as a Receivership Order or an Injunction, as may appear to be just and convenient.
5. Paragraph 12C of the English Receivership Order required that the information sought must be required by the Receivers for the purpose of getting in the

assets and carrying out their functions in relation thereto. This amounts to a restriction on the type of information that the Receivers can require. The learned judge failed to properly consider the express requirement of reasonableness in paragraph 12C of the English Receivership Order. Furthermore, the Receivers are constrained by paragraph 27 of the English Receivership Order to use or disclose all information that has come into their possession for the purposes of the receivership. This amounts to a restriction on the use to which it can be put. The Court is accordingly satisfied that no real issue of confidentiality arises.

6. Paragraphs 12C(b) and (c) of the Receivership Order are not necessary and would be unduly onerous and over broad to require third parties such as Registered Agents in this jurisdiction who are not defendants to be required to attend on the Receivers and do all such things as the Receivers may require. The Court is satisfied however, that the Registered Agents may be in possession of information and documentation which may be of assistance to the Receivers in tracing the assets, which the Receivers are obliged to do.
7. On the question of costs incurred in complying with such requests, the Receivers have indicated their willingness to give an undertaking to meet the reasonable costs of third parties. The Court considers that this is appropriate. Accordingly, the order made by this Court shall become effective upon the Receivers filing with the Court an undertaking in writing signed by them to meet the costs reasonably incurred by any of the third parties in complying with any request for information or documents made by the Receivers pursuant to the Receivership Order.

ORAL JUDGMENT

- [1] This is the judgment of the court. This is an appeal by the Receivers of Mukhtar Ablyazov against a refusal of Bannister J. to recognise in its entirety a Receivership Order made by Teare J. in England in ongoing litigation between JSC BTA Bank ("the Bank") as claimants and Mr. Ablyazov as defendant, in which Mr. Ablyazov has been accused by the Bank of widespread misappropriation of the Bank's funds. The Receivers are officers of the English Courts. The sum claimed by the Bank is in excess of US\$1.8 billion. The Court in England was satisfied that Mr. Ablyazov had not been forthright with regard to the identification and location of all his assets, and that his assets were contained in a web of companies operating in various jurisdictions, some 700 of which have been identified and of which some 281 are located in the Territory of the Virgin Islands. There are alleged to be hundreds if not thousands of separate bank accounts held by those

companies. Money is being moved around this web of companies and bank accounts. In order to get a full picture of the two issues of assets and control, the Receivers needed to receive information from the Registered Agents of these companies as rapidly as possible.

[2] This led to a Receivership Order being made on 6th August 2010 in England. That Receivership Order was varied on 8th April 2011. On 15th April 2011 in the Territory, the learned trial judge made an order (on the Receivers' without notice application) recognising and giving effect to the English Receivership Order in this jurisdiction as it then stood at 8th April 2011. This order was continued following a return date on 6th May 2011.

[3] The English Receivership Order was twice further amended by Teare J. on the application of the Bank on 27th May 2011 and 9th June 2011. The order of 9th June 2011 amended the English Receivership Order by (amongst other things) the addition of a new paragraph 12C, requiring certain third parties served with the order (including certain registered agents within the BVI) to provide the Receivers with such information and documents, attend on the Receivers, and do such other things, as the Receivers reasonably require. Paragraph 12C read as follows:

“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 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.”

[4] The Receivers again applied for recognition of the English Receivership Order in its extended form, by a without notice application dated 15th June 2011. The application was initially heard by the learned trial judge on 17th June 2011. He was prepared at that hearing to recognise the extension of the Receivership by the order of 27th May 2011. However, he was not prepared at that hearing to

recognise the Order of 9th June 2011, in its entirety. He did not consider that he should recognise paragraph 12C unless some particular provision of the law of the Virgin Islands entitled him to do so, and he could find none. It is apparent from the transcript of the hearing that the learned trial judge was concerned that the order sought might be unconstitutional. The effect of it, he observed, would be that any person in the Virgin Islands to whom the Receivers decide to direct inquiries must give them any information, and give them any document, subject to a requirement for reasonableness. On 20th June 2011, after hearing submissions from at least three of the Interested Parties, the learned trial judge made an order recognising the English Receivership Order as amended on 9th June 2011, but subject to the proviso that paragraph 12C of the English Receivership Order was not enforceable in this jurisdiction without further Order of the Court.

[5] On 15th July 2011, the learned trial judge delivered a judgment in which he held that he would not recognise paragraph 12C of the English Receivership Order within the jurisdiction, nor would he order that those persons served within the jurisdiction with the Order of 20th June 2011, and the Receivers' letter dated 21st June 2011 be required to provide the information and documents, and give the confirmations, requested in such letter. He was satisfied that a freezing order ought to be made in respect of the assets of Mr. Ablyazov. He was further satisfied that to give effect to a freezing order it was necessary to appoint Receivers for the purpose of identifying and getting in his assets, and he recognised that, without acceptance of the disputed paragraph, the Receivers would not be able to carry out their duties properly.

[6] He found that Teare J's 9th June Order was too broad and overreaching. In paragraph 17 of his judgment, he held that the combined effect of paragraphs 12C and 20(2) was that any person who found himself within a country or State which recognises the Order and upon whom the Order was 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, and that there

is no limit to the number of times the Receivers may reasonably require the provision of information, attendance, or the performance of specified acts. There was no provision for the Receivers to meet the costs or reasonable expenses of persons thus reasonably required to comply. There were 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. He went on further to say in paragraph 18 of his judgment that the request and requirement envisaged by paragraph 12C would not be made in accordance with the provisions of any regime sanctioned within this jurisdiction by statute or subordinate legislation. He gave such examples as the **Financial Services Commission Act, 2001**¹ and the **Insolvency Act, 2003**.² He considered that this lack of a regime, coupled with the lack of safeguards, operated against the recognition of paragraph 12C.

- [7] Mrs. Small-Davis and Mr. Willins appeared respectively for Aleman and Totalserve, two Registered Agents in the Territory representing some 86 of the companies listed in the Schedule to the English Receivership Order. Their clients were only interested parties, two of the Registered Agents in the Virgin Islands from whom the Receivers had sought the information that the English Receivership Order authorised them to demand. The Receivers demanded to know, by their letter of 21st June 2011, among other things the “know your client” information. Who had been giving them instructions? Who was the “ultimate beneficial owner” of the company? What are its assets? Who was actually authorised to act for the company? Who was behind the person giving instructions? How did the whole picture fit together? At the same time, the Registered Agents owed a duty of confidentiality to their clients. From their point of view, they did not know of Mr. Ablyazov. He was said not to be their client of record. Any person seeking information from them would be turned away. Neither counsel had been instructed to object to the appeal, but to appear and to advise the court. They had reservations about the nature and effect of the full English Receivership Order. They expressed concerns, first about the width of the Order sought, and second about the lack of safeguards

¹ Act No. 12 of 2001, Laws of the Virgin Islands.

² Act No. 5 of 2003, Laws of the Virgin Islands.

for their clients built into the Order. The Registered Agents were concerned that the jurisdiction which the Court was being asked to invoke was obscure since they had not been able to find a single authority for a disclosure order within a receivership recognition suit.

- [8] The whole point of setting up a web of companies and bank accounts is to hide their beneficial ownership. Secrecy is at a premium in matters of this sort. Historical information in the hands of the Registered Agents concerning the companies would be essential to demonstrate the connections with persons and other entities connected with the alleged fraud. It seems clear that it is necessary for the proper performance of the Receivers' functions that the English Receivership Order be recognised as near as possible in its entirety. In order for the Receivers to effectively carry out their function of locating and preserving assets pending trial, they need full information relating to the BVI companies within the receivership, and their assets, particularly in the light of Mr. Ablyazov's failure to cooperate.
- [9] The Court has a very broad power to recognise the appointment of and the powers of a foreign receiver pursuant to the jurisdiction established by such cases as **Schemmer and Others v Property Resources Ltd. and Others**.³ This Court followed **Schemmer** in the case of **Millennium Financial Limited v Thomas McNamara and Another**⁴ in respect of a US Receiver in accepting that this Court has jurisdiction to recognise a foreign Receivership Order, although the Receivership Order was not recognised for reasons to do with the peculiar facts of that case. Once the foreign Receivership Order is recognised, the court may then make such ancillary orders in relation to persons or assets within the jurisdiction in order to achieve the purposes of the Receivership, including orders requiring cooperation with the receiver by way of injunction, as it considers just or convenient, pursuant to the **Schemmer** jurisdiction and/or section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**⁵ ("the Supreme Court Act"). An order within the form of paragraph 12C is

³ [1975] Ch. 273.

⁴ Saint Christopher and Nevis HCVAP 2008/012.

⁵ Formerly the "West Indies Associated States Supreme Court (Virgin Islands) Act", Cap. 80, Revised Laws of the Virgin Islands 1991.

such an order.

- [10] The learned judge held that to make the orders sought would deprive the recipients of the protections inherent in the *Norwich Pharmacal* procedure. He considered that any order in this matter should be made in the context of a *Norwich Pharmacal* application. However, even though this application is not made in a typical *Norwich Pharmacal* application, this does not deprive or limit the court in the exercise of its jurisdiction and powers given by section 24 of the Supreme Court Act. This section enables the Court to make such ancillary orders as may be necessary to give effect to an order made, such as a Receivership Order or an Injunction as may appear to be just and convenient.
- [11] The learned trial judge stated that there were no restrictions on the future use by the Receivers of any information acquired by them. However, paragraph 12C of the English Receivership Order required that the information sought must be required by the Receivers for the purpose of getting in the assets and carrying out their functions in relation thereto. This amounts to a restriction on the type of information that the Receivers can require. The Receivers are constrained by paragraph 27 of the English Receivership Order to use or disclose all information that has come into their possession for the purposes of the receivership. This amounts to a restriction on the use to which it can be put.
- [12] Where a foreign receiver has been recognised locally, the local court may make such orders in respect of persons or assets within its jurisdiction as are necessary to achieve the purpose of the receivership and in the interests of justice. It is right that the Receivers should be given the assistance of the Court in obtaining information which has been reasonably requested by them and is necessary for the performance of their function. If they ask unreasonable questions or make an unreasonable demand for documents of the citizen or resident, the court is available for the granting of relief. The court is the arbiter of disputes. If there should be a genuine dispute, that will be resolved by the court.
- [13] It is noteworthy that none of the companies mentioned in the Schedule to the

English Receivership Order has sought to challenge the Order, even though the relevant portion naming them has been served on them in the Territory of the Virgin Islands. Not one of them has applied to be taken out of the receivership. We understand that parts of the served Order have been redacted and that the Registered Agents have not been served with a clean copy of the entire Order, but that was in order to delete and keep confidential the names of other companies and Registered Agents affected by the Order. The Registered Agents would have had no difficulty reading the parts of the Order that related to them and the relevant companies that they represent.

[14] The Registered Agents of companies incorporated in the Territory of the Virgin Islands are likely and are required by law to have information in relation to those companies and their assets. The BVI companies within the Receivership are alleged to have been used by Mr. Ablyazov for the purpose of concealing ownership of assets. The Registered Agents of those companies are “mixed up” in a *Norwich Pharmacal* sense in such concealment, and accordingly it is just and convenient that they be required to provide such information and assistance to the Receivers as the Receivers may reasonably require for the purposes of the Receivership, particularly in circumstances where the Receivers are seeking to understand a complex network of companies established across a number of jurisdictions.

[15] As Lord Hoffmann explains in **Hadmor Productions Ltd. and Others v Hamilton and Another**,⁶ an appellate court is reluctant to set aside a judge’s exercise of his discretion unless it is satisfied that it was based upon a misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that had become available by the time of the appeal, or upon the grounds that there had been a change of circumstance after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interim injunctions may be sketchy,

⁶ [1983] 1 A.C. 191.

there may also be occasional cases where, even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion should be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

[16] We are of the view that in this case the learned trial judge erred in the exercise of his discretion. First, he found that there was no statutory or other legislative basis for the jurisdiction when there was. Second, he did not in our view have sufficient regard to the nature, purpose and effect of the English Receivership Order. The purpose of the Order was to assist the Receivers in obtaining information pursuant to their power given under paragraph 12B to request information from any third party within the jurisdiction from whom information might reasonably be required.

[17] We are satisfied that the learned trial judge failed to properly consider the express requirement of reasonableness in paragraph 12C of the English Receivership Order, and the further requirement that the information sought must be required by the Receivers for the purpose of getting in the assets and carrying out their functions in relation thereto.

[18] In our view, paragraphs 12C(b) and (c) are not necessary and would be unduly onerous and over broad to require third parties such as Registered Agents in this jurisdiction who are not defendants to be required to attend on the Receivers and do all such things as the Receivers may require. We are satisfied however that the Registered Agents may be in possession of information and documentation which may be of assistance to the Receivers in tracing the assets, which the Receivers are obliged to do.

[19] We are satisfied that no real issue of confidentiality arises. The Order itself is limited in its scope. The Receivers can only use the documents and information obtained in connection with the performance with their duties of

tracing, collecting and getting in the assets.

- [20] On the question of costs incurred in complying with such requests, the Receivers have indicated their willingness to give an undertaking to meet the reasonable costs of third parties. We consider that appropriate. Accordingly, the order we make shall become effective upon the Receivers filing with the Court an undertaking in writing signed by them to meet the costs reasonably incurred by any of the third parties in complying with any request for information or documents made by the Receivers pursuant to the Receivership Order.
- [21] With regard to the costs of these proceedings, both the Receivers and the Interested Parties shall file submissions on costs within 21 days. The Court will thereafter give a decision on the issue of costs.
- [22] We would set aside the decision of the Commercial Court Judge made on 15th July 2011 refusing to recognise paragraph 12C of the English Receivership Order and would order that paragraph 12C of the said Order be recognised but only to the extent of paragraph 12C(a).