21 October 2015

PRESS SUMMARY

JSC BTA Bank (Appellant) v Ablyazov (Respondent) [2015] UKSC 64
On appeal from [2013] EWCA Civ 928

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Kerr, Lord Clarke and Lord Hodge.

BACKGROUND TO THE APPEAL

The Appellant was one of Kazakhstan's four systemic banks. The Respondent, Mr Ablyazov, was its chairman and majority shareholder between 2005 and early 2009. In February, Mr Ablyazov fled to England following the Bank's nationalisation. The Bank claimed that he had presided over the misappropriation of US$10 billion of the Bank's monies for his own personal benefit, and commenced 11 sets of proceedings. It successfully obtained judgments against Mr Ablyazov in four cases, in an aggregate sum of $4.4 billion, and a Freezing Order on 12 November 2009.

Mr Ablyazov had entered into four Loan Agreements in 2009-2010. He exercised his right to draw down fully under those Agreements, and directed various payments for legal and corporate services and in relation to a property. The Bank applied for declarations that (on the assumption that the Loan Agreements were valid) Mr Ablyazov's rights to draw down under them were "assets" for the purposes of the Freezing Order and drawings under them could only be made pursuant to the exceptions at paragraph 9 of the Order. The first instance judge dismissed the application, and the Court of Appeal dismissed the Bank's appeal.

The issues before the Supreme Court were (1) whether Mr Ablyazov's right to draw down under the Loan Agreements is an "asset" within the meaning of the Freezing Order, (2) whether the exercise of that right by directing the lender to pay the sum to a third party constitutes "disposing of", "dealing with" or "diminishing the value" of the assets, and (3) whether the proceeds of the Loan Agreements were "assets" within the meaning of the extended definition in paragraph 5 of the Freezing Order, because the Respondent had the power "directly or indirectly to dispose of, or deal with [the proceeds] as if they were his own".

JUDGMENT

The Supreme Court unanimously allows the Bank's appeal on issue 3, on the basis that the proceeds of the Loan Agreements were "assets" within the meaning of the extended definition in paragraph 5 of the Freezing Order. Lord Clarke gives the judgment.

REASONS FOR THE JUDGMENT

The only real question is what the Freezing Order in fact made means [**16-17**]. The Court of Appeal was wrong to have regard to the flexibility principle, which has no role in the exercise of the construction of the Freezing Order as an order of the court. The correct approach to construction is restrictive, not expansive [**18-19**], and involves consideration of the particular context of the order, including the development of the relevant clauses in freezing injunctions [**21-26**].

Paragraph 5 of the Order in this case is very similar to paragraph 6 of the Order in *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436. Both differ from the pre-2002 form of Freezing Order, in that

they include an extended description of assets in the last two sentences and the words "whether the respondent is (or respondents are) interested in them legally, beneficially or otherwise" [**27**].

The courts have approached the language of the forms of Order cautiously, but the scope of Freezing Orders has been gradually extended. In *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695, the Court of Appeal recognised that it might in exceptional circumstances be possible to frame an Order so that it froze trust assets, and in *Solodchenko* the Court of Appeal concluded that this was the effect of the amendments to the first part of paragraph 6 of that Order. The standard form of wording does not prevent the Respondent from borrowing money and spending it [**28-30**]. In ordinary legal parlance, the choses in action representing the rights under the Loan Agreements would be regarded as assets [**31-33**].

Context is of particular importance. The Court of Appeal considered *Hadkinson* and *Solodchenko*, concluding that the enforcement principle is not absolute and that the right to draw down under the Loan Agreements undoubtedly belonged to the Respondent [**35**]. These are considerations arising from the wording added to the standard form of Freezing Order. So far as the standard form is concerned, the authorities do not support the proposition that the Respondent's right to draw down under the Loan Agreements is an "asset" within the meaning of Freezing Orders as originally drafted. It is inappropriate to reverse those decisions. The right is not an "asset" within the meaning of the Freezing Order and the Respondent did not dispose of, deal with or diminish the value of the "assets", if the Freezing Order is construed without reference to the extended definition in the second sentence of paragraph 5 [**38**]. The Bank's appeal on issues 1 and 2 is dismissed.

But the wording of the Order is different in the more recent forms, used in this case and in *Solodchenko*. The proceeds of the Loan Agreements are "assets" within the meaning of the extended definition in paragraph 5 of the Freezing Order in this case [**39**]. Mr Ablyazov's instruction to the lender to pay the lender's money to a third party was dealing with the lender's assets as if they were his own. It was wrong to dismiss the argument that the Respondent had a power to direct the lender what to do with the funds it was contractually obliged to make available to him. The Loan Agreements contain a binding legal obligation that the proceeds of the facility would be used at the Respondent's sole discretion, and a power to direct the lender to transfer the proceeds to any third party [**40-42**].

The extended definition is not primarily designed to catch assets which the defendant claimed he held on trust. That was the effect of the additional words at the beginning of the clause [**43-44**]. The last two sentences of paragraph 5 are designed to catch assets over which the Respondent has control, not assets which he owns legally or beneficially. The Respondent had the power to, and did, deal with the assets as if they were his own under clause 1.12 of each agreement [**45-50**]. The Bank's appeal on issue 3 is allowed.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html