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Supreme Court unpicks too strict a construction of freezing orders

by Graham Read QC and Rory Cochrane

On 21 October 2015, the Supreme Court delivered judgment in *JSC BTA Bank v Ablyazov* [2015] UKSC 64. This latest instalment in this long running litigation clarifies the meaning of the word “assets” as it is used in the standard Commercial Court freezing order set out in Appendix 5 of the Admiralty and Commercial Courts Guide.

In particular, Lord Clarke (with whom Lord Neuberger, Lord Mance, Lord Kerr and Lord Hodge agreed) clarified that although rights to draw down sums under loan agreements are not themselves “assets” of the respondent to a freezing order, any proceeds, once drawn down, are to be treated as “assets” of the respondent.

As documented in various court decisions, Mr Ablyazov was between 2005 and 2009 the chairman and majority shareholder of JSC BTA Bank (“the Bank”). When the Bank was nationalised in 2009, Mr Ablyazov fled to England alleging political persecution. The Bank has since pursued Mr Ablyazov, alleging that he presided over the misappropriation of over US\$10 billion of the Bank’s money. The Bank obtained judgments against Mr Ablyazov in the aggregate sum of over US\$4.4 billion. Prior to this however, and in order to prevent Mr Ablyazov from dissipating his assets, the Bank obtained a freezing injunction against Mr Ablyazov’s worldwide assets on 12 November 2009. The freezing injunction prevented Mr Ablyazov from, in effect, dealing with his “assets” other than for ordinary living expenses of up to £10,000 a week, or for the purpose of personal business, or for reasonable legal expenses.

The matter before the Supreme Court concerned Mr Ablyazov’s rights under four loan agreements entered into in 2010 (“the Loan Agreements”). Post the date of the freezing order, all the Loan Agreements had been fully drawn down and the proceeds transferred directly to third parties for various expenses that the Bank alleged did not fall within the permitted exceptions to the freezing order (i.e living, personal business, or reasonable legal expenses). Accordingly, if those payments had been made with monies directly controlled by Mr Ablyazov there would clearly have been a breach of the freezing order. The questions before the Supreme Court were (1) whether the rights to draw down under the Loan Agreements were “assets” within the meaning of the freezing order; (2) whether the exercise of those rights by directing the lender to pay the sums to third parties constituted “disposing of” or “dealing with” or “diminishing the value of” an “asset”; 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 on

the basis that Mr Ablyazov had the right to “directly or indirectly to dispose of, or deal with [the proceeds] as if they were his own”.

Decision

The Supreme Court considered the tension between various principles, including the “strict construction” principle (i.e. that, given the serious consequences flowing from a contravention of the order, it follows that “*orders of this kind are to be restrictively construed*”), which principle the Court considered to be crucial. The Court emphasised that, however much a Court might disapprove of the defendant’s conduct, “*the sole question is what the Freezing Order in facts means*”. The Supreme Court agreed with the Court of Appeal, and longstanding authority, that a right to drawn down loans were not “assets” in themselves within the meaning of the terms of the freezing orders. However, once the loan facilities were used, then the Supreme Court agreed with the Bank (and overturned the Court of Appeal) that the proceeds of the Loan Agreements were indeed “assets” under the terms of the order made. Lord Clarke stated that the point of the extended definition of “assets” in the freezing order is to catch rights which would not otherwise be caught, and, in particular, the “*respondents’ assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own*”. His Lordship stated at paragraph 48 that although Mr Ablyazov had not actually owned the relevant assets (as the drawn down funds had been transferred immediately to third parties) under the Loan Agreements he had power directly or indirectly to dispose of, or deal with them, as if they were his own.

The judgment clearly helps in determining the construction of the standard freezing order and is to be welcomed in reinforcing the width of standard worldwide freezing orders.

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