Judgments

QUEEN'S BENCH DIVISION

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2010] EWHC 2219 (QB) 2010 Folio 706

Royal Courts of Justice

Tuesday, 24th August 2010

Before:

MR. JUSTICE CHRISTOPHER CLARKE

B E T W E E N :

JSC BTA BANK Claimant

- and -

MUKHTAR. **ABLYAZOV** & Ors. Defendants

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Mr. Phillip Marshall Qc And Mr. C. Jones (Instructed By Hogan Lovells International Llp) Appeared On Behalf Of The Claimant.

Mr. Simon Colton (Instructed By I-Law) Appeared On Behalf Of The Respondents, Other Than The 6th Respondents.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE CHRISTOPHER CLARKE:

1. This is an adjourned application for an "unless" order debarring the respondents from defending and entitling the claimant, JSC BTA Bank ("the Bank"), to enter judgment unless certain information and documents are provided. The Bank is one of the largest in Kazakhstan. It was effectively nationalized on 2nd February 2009 in the wake of the worldwide financial crisis. Until that date the first defendant, Mr. **Ablyazov**, was the beneficial owner of the majority of the Bank's shares and Chairman of its Board. The second defendant, Mr. Zharimbetov, was a close associate of the first defendant and first Chairman of the management board. Both of them have now fled to this country. Various criminal prosecutions are pending against them and others in Kazakhstan. Several sets of civil proceedings are pending against them and those who are said to be their associates in this court.

2. The current proceedings concern what is said to be a scheme of misappropriation by which over a billion United States dollars was extracted from the Bank in late 2008. The scheme was effected through, so the Bank says, the use of the first to fourth respondents to this application who supposedly borrowed from the Bank, and the fifth to ninth respondents, who were the direct recipients of the Bank's advances - the monies being transferred to them at a bank in Latvia pursuant to letters of credit opened by the Bank on be-

half of the borrowers in their favour on the basis that they were intermediaries for the purported supply of oil machinery and equipment.

3. The Bank's case is that the whole scheme was a sham carried out by and for the benefit of the first defendant, who used the second defendant as his assistant, and the respondent companies as his vehicles. A summary of the Bank's case is set out at para.20 of the Bank's skeleton argument and in the points of claim, to which I refer but which it is unnecessary to recount.

4. No defence has yet been filed. The first defendant claims that the loans were made to financial entities of substance, and that he had no connection with either the borrowers or the intermediaries. In the present proceedings the Bank makes proprietary claims in respect of the sums advanced and claims for compensation against the first and second defendants (the Bank's officers) for breach of duty, and for compensation against the borrowers and intermediaries for participation in that breach.

5. On 9th June this year Mr Gavin Kealey QC, sitting in this court as a Deputy Judge, made "without notice" freezing orders against the respondents. He held that the Bank had established at least a good arguable case of fraud against the respondents and that there was a real risk of dissipation. As to the latter he said this:

"3. I am also satisfied on the basis of the material that I have read that there are assets outside this jurisdiction and, insofar as the potential sixth respondent is concerned (which is an English company called Loginex Projects LLP), inside this jurisdiction, that are subject to a real risk of dissipation or secretion such as to render any judgment rendered against the Respondents nugatory unless the freezing order applied for by the applicant is granted. I am influenced in coming to that conclusion perhaps most cogently by the fact that it is clear to me that the claimant has, as I have already indicated, a good arguable case at the least that the respondents participated in a scheme which was an overarching scheme designed to extract from the claimant very substantial sums of money in circumstances which, if true, were fraudulent and arranged so as to prevent the claimant from recovering any of those sums.

4. The approach that I adopt is not dissimilar to that of Teare J at paras.11 to 12 of his judgment dated 12th November 2009 in another action by the claimant against, among others, I think, the proposed first and second defendants. The risk of dissipation or secretion is fortified, to my mind, by the almost complete lack of transparency in relation to the respondents, their assets, their dealings, their owner, their controllers, and their accounts, if any. There is always the possibility that the monies have long gone and therefore the respondents have no assets on which any freezing order can bite, but that does not deter me from making an order in this case: while that possibility exists since the sums have been paid out to so-called intermediaries; since there is no sign of any of the equipment or material for which those sums were advanced; since there is no indication that any of the respondents or the other proposed defendants are on notice of this application. Therefore there is an appreciable and real possibility, to my mind, that the sums in question are still under the control of, even if nominal, the respondents."

6. His order included disclosure provisions. Those are set out in paras.9 to 10 of his order and are to the following effect. Each respondent was required, within five working days of service and to the best of his ability after making reasonable enquiries, (1) to inform the Bank's solicitors in writing of all their assets worldwide exceeding £10,000 in value, giving their value, location and all details regarding them; (2) to provide answers in writing to specific questions set out in a schedule (Schedule D) which were directed among other things to obtaining disclosure of what had become of the $1,031,263,000 paid out by the Bank; and (3) to supply copies of all documents in their control which evidenced the above matters. The information thus provided in writing was then to be set out in an affidavit to be served within seven days after service of the freezing order.

7. At the same time the Bank was given permission to serve those respondents who were located outside the jurisdiction on the basis that there was a serious issue to be tried as against them and they were necessary and proper parties to the proceedings against the first and second defendants, against whom there was a real issue to be tried and who were domiciled here. The Deputy Judge regarded this country as the place which was clearly the most suitable for the hearing of all claims in the interests of all the parties and in the interests of justice.

8. In accordance with the permission granted by the Deputy Judge all the foreign based respondents have been duly served at their registered offices - in the British Virgin Islands in the case of the first, fourth, seventh and ninth respondents; and in the Seychelles in the case of the second, third and fifth respondents. The sixth respondent has been served in England and Wales since that is where it is registered. Disclosure in accordance with the order was due by 1st July. The affidavit was due by 5th July.

9. An ancillary freezing order containing substantially identical disclosure provisions was granted without notice on 11th June against the first, fourth, seventh and ninth respondents in the Court of the British Virgin Islands. This was continued following an *inter partes* hearing on 5th July on which date an order was made for the BVI respondents to provide the disclosure previously ordered forthwith. They have not done so. On 2nd July the freezing order was continued *inter partes* by Burton J. Only the fourth and seventh respondents were represented at that hearing. No extension of time was sought for compliance with the disclosure orders. The learned judge drew attention to the need for urgent compliance with the disclosure order. No application was then made for the order to be discharged or varied or for the time to be extended.

10. On 14th July I-Law (on behalf of the fourth and seventh respondents) asked Hogan Lovells (the solicitors for the Bank) for an extension of time of four weeks. On 15th and 22nd July acknowledgements of service were filed on behalf of the Seychelles and the BVI respondents. These indicated an intention to challenge the jurisdiction. The sixth respondent has not filed an acknowledgement of service and has not been represented before me.

11. On 21st July Hogan Lovells pointed out that the statement of an intention to challenge the jurisdiction did not mean that those affected were no longer bound by the freezing order and asked for a proposal for compliance with it. On 2nd August Hogan Lovells indicated that the Bank was about to issue the present application which was then issued on 4th August. On 3rd August I-Law said that they would, on behalf of their clients, be issuing an application to challenge the jurisdiction by 12th August.

12. On 9th August I-Law sent a letter on behalf of the first four respondents purporting to provide the information ordered to be disclosed. None of the other respondents provided any information at all either then or since. The Bank regarded the information provided by the first four respondents as seriously deficient. On 10th August Hogan Lovells wrote to I-Law pointing out what they said were the deficiencies.

13. On 12th August the respondents, other than the sixth respondent, issued their application to challenge the jurisdiction and to have the freezing order set aside upon the footing that England is not the convenient forum but Kazakhstan is. The application to set aside the freezing order is consequent upon the jurisdictional challenge.

14. On 13th August the present application came on before Blair J. He adjourned the application until last Friday with a direction that the respondents were to serve any further evidence, including their response to the deficiencies alleged in Hogan Lovells' letter of 10th August, by Wednesday 18th August. In effect he gave a final opportunity of compliance. No further evidence has been received. On 18th August, however, I-Law sent a fax providing further information on behalf of the first to fourth respondents which the Bank contends provides, in reality, almost no further information. They also indicated that the represented defendants intended to provide an affidavit complying with the requirements of para.9(1)(a) of the freezing order

and para.9(1)(c) insofar as it relates to 9(1)(a) by 3rd September. On 19th August Hogan Lovells responded saying that the information contained in I-Law's letter was inadequate.

15. This application raises the question as to whether the court can and should make an order debarring a defendant from defending and giving the claimant liberty to enter or apply for judgment when there is an extant application to set aside the permission given for service out and to discharge the freezing order.

16. Mr Philip Marshall QC, for the Bank, submits that such "unless" order should be made. In support of that he draws attention to the fact that the courts have stressed the importance of compliance with the disclosure provisions of worldwide freezing orders on numerous occasions. In *CIBC Mellon Trust Co. Ltd. v Stolzenberg* [2003] EWHC 13 Ch. Etherton J. (as he then was) emphasized how essential such orders are in combating fraud. He said, at para.103:

"Freezing orders are critical weapons in the court's armoury against fraud, securing the preservation of assets which might otherwise be wrongly dissipated pending judgment and in appropriate cases the preservation of evidence, including documentation, and the provision of information to trace the proceeds of fraud."

17. Both he and the Court of Appeal in the same case cited the judgment of the Court of Appeal in *R C Residuals Ltd. V Linton Fuel Oils* [2002] 1 W.L.R. 2782 in which Sir Swinton Thomas said:

"This court cannot stress too strongly the importance of strict compliance with court orders, particularly unless orders. If relief is granted lightly an entirely wrong message goes out to litigants and their advisers. Further, as Brooke LJ pointed out in the course of argument, judges of first instance are entitled to complain if, having made orders envisaged by the rules and which they are encouraged to make by this court, this court then lightly sets them aside."

A reference to these observations was also made by Waller L.J. in *Tan Insurance Services v Covey* [2009] EWA Civ 19, para.72.

18. In *Derby & Co. Ltd. v Weldon (Nos.3 and 4*) [1990] Ch. 65, the court made, on appeal, a Mareva order against a Panamanian corporation on the footing that in the event of disobedience there was sufficient sanction in that the court could bar the defendant from defending. It was not concerned to enquire whether or not the order was enforceable in Panama. There is therefore no bar to the making of the order sought arising from any potential problem about enforcement of the freezing order in the British Virgin Isles or the Seychelles.

19. These cases did not, however, address the question as to whether an "unless" order should be made during the pendency of a challenge to the jurisdiction. In *Grupo Torras v Sheikh Fahad & Ors*. C.A. 60 of February 2004, Steyn L.J. said:

"The central question is whether a commercial judge was right in refusing to discharge a disclosure order annexed to a worldwide Mareva injunction pending a decision on the challenge to the jurisdiction of the English court. Whilst this question is not a jurisdictional one, it does raise an issue of legal principle as to the nature of a judge's discretion to make a disclosure order in such circumstances."

20. The relevant facts for present purposes were these. On 24th November Mance J. started to hear Sheikh Fahad's challenge to the jurisdiction. Two days later Saville J. granted a worldwide Mareva injunction against Sheikh Fahad. It contained an order directing Sheikh Fahad to disclose his assets worldwide within 21 days. It further contained an order directing him to state what had become of specified sums totalling US$ 22.5 million as well as a further sum of US$ 7.5 million. On 3rd December Cresswell J. granted

Grupo Torras leave to commence proceedings against Chemical Bank in New York. Grupo Torras immediately started those proceedings. On 17th December the order made by Saville J. on 26th November as subsequently amended was served on Sheikh Fahad. On 21st December Sheikh Fahad issued a summons to set aside the disclosure part of the order of Saville J. and the leave granted by Cresswell J. to bring proceedings against Chemical Bank. On the same day Grupo Torras issued a summons seeking leave to bring proceedings against Sheikh Fahad in Singapore, Switzerland and the Bahamas. These two summonses came before Waller J. for hearing on 12th and 13th January 1994. The proceedings to challenge the jurisdiction of the English courts occupied the time of the commercial court from 24th November to 14th December and from 17th January until 10th February. Mr. Justice Mance reserved judgment, and that judgment had not been delivered at the date of the hearing before Waller J or the Court of Appeal. On 11th January, after a hearing lasting a day and a half Waller J. refused to discharge the disclosure order and ordered Sheikh Fahad to serve an affirmation in accordance with Saville J's disclosure order.

21. The argument for Sheikh Fahad was put in this way:

"Turning now to the merits of the decision of Waller J. the parties are agreed that he had to exercise a discretion in deciding whether to direct a disclosure order before resolution of the jurisdictional issues. The nature of that discretion is a disputed matter to which I will in due course turn. ... Mr. Andrew Smith Q.C. who appeared for Sheikh Fahad, submits that Waller J. misdirected himself in two respects. First he submits that the judge misdirected himself as to the nature of his discretion. He says in fact that the discretion is a narrow one. He put it this way:

"Where the court, as in this case, can see that there is or is likely to be a serious challenge to his jurisdiction it should, in normal circumstances, refuse any sort of relief which cannot be undone if the court has no jurisdiction. It should only grant such relief if there are exceptional circumstances justifying it. "

"He says the basic error made by Waller J. was to require disclosure in the absence of such circumstances. I am not sure what the phrase 'exceptional circumstances' in this submission means. After all it is already the law that a worldwide Mareva to which a disclosure order is ancillary should only really be made, and only if, there are exceptional circumstances. Presumably the submission means that something more is required to obtain a disclosure order if there is a challenge to jurisdiction."

22. Lord Justice Steyn went on to say:

"The consequences of accepting Mr Smith's submission must be considered. If the discretion to make a disclosure order is as narrow as Mr. Smith says, the worldwide Mareva injunction will be a relatively toothless procedure in the fight against rampant transnational fraud. In many such cases despite a cogent case of fraud the connections of transactions with different countries will enable a defendant to raise jurisdictional challenges which may take months to resolve in the first instance, many months to determine in the Court of Appeal and even longer to decide in the House of Lords - and there may be a reference to the European Court. During such lengthy delay it would be impossible to 'police' the Mareva injunction and that is the purpose of the disclosure order. The importance of this policy factor is underlined by a consideration of the link between a worldwide Mareva injunction and a mandatory disclosure order. It is undoubtedly right that as a matter of legal principle a disclosure order is ancillary to the worldwide Mareva order. That is so whether the reason for the disclosure order is required as adjectival on the court's statutory power under s.37(3) of the Supreme Court Act 1981 to issue a Mareva injunction, or as falling within the court's inherent jurisdiction. Mr. Veeder submits that the discretion to order disclosure arises both from the statute and from the inherent jurisdiction of the court. I agree."

23. Then a little later he said this:

"But ultimately one has to return to legal principle. For my part I would accept Mr. Veeder's submission that since an interlocutory injunction may be granted on assumptions of fact and law, it follows that an interlocutory injunction may be granted on an assumption that there is jurisdiction. That is so in respect of the inherent jurisdiction to grant a disclosure order. Similarly, it is said, on the basis that the disclosure order is adjectival on the statutory power contained in s.37(3) of the Supreme Court Act 1981 to make a worldwide Mareva injunction. The statute contains no hint of the legal principle advanced on behalf of Sheikh Fahad. Despite Mr. Smith's attractive and careful arguments, I consider that the power to order a disclosure order is not limited in the way he submits. Where rarely and in exceptional cases a worldwide Mareva is granted, a disclosure order will usually follow. On the other hand I would emphasize that a disclosure should only be made for the purpose for which the power exists, namely to 'police' the Mareva injunction. But when one bears in mind the exceptional nature of the remedy of a worldwide Mareva injunction I do not find it at all surprising that Waller J. said that such disclosure orders are commonly annexed to worldwide Mareva injunctions. In my view the judge did not misdirect himself in respect of the nature of his discretion."

Nourse L.J. agreed with those reasons.

24. The court thus refused to set aside the order of Waller J. In doing so it recognised that Sheikh Fahad might suffer some prejudice if it were to turn out that he won the jurisdictional battle as, in the event, he did not. Steyn L.J. said:

"Undoubtedly if the plaintiffs ultimately lose the jurisdictional battle there is some prejudice to Sheikh Fahad in that it will then not be possible to undo the invasion of his privacy. Whilst this prejudice is real it is of a lesser order than the prejudice that Grupo Torras may suffer if it is unable to police the Mareva injunction for some time. The confidential file contains cogent testimony to Sheikh Fahad's capacity to move assets from jurisdiction to jurisdiction using a myriad of accounts. He is undoubtedly an international financial operator. If Sheikh Fahad is indeed a sophisticated fraudster, as Grupo Torras' points of claim and evidence prima facie show, any delay in enforcing the disclosure order will give Sheikh Fahad ample opportunity to protect himself against a possible judgment in a claim for US $450 million by moving his assets to financial safe havens. The balance tilts decisively in favour of disclosure now."

25. In the same vein in *Motorola Credit Corporation v Uzan & Ors* [2002] 2 All E.R. (Comm) 945 Steele J. made a worldwide freezing order in aid of proceedings against a defendant in the United States. The order required the provision of information about assets. The defendants applied to have the freezing order discharged and sought a suspension or stay of the requirement to provide information pending the hearing. The learned judge refused. His decision was upheld by the Court of Appeal. *Grupo Torras* was cited. As the headnote records:

"A disclosure order was a very important part of the jurisdiction to make worldwide freezing orders as was clear from the authorities. In the instant case although it might appear at first sight as though the court was dealing with an application for a stay for a very short period of time, the application for discharge of the worldwide freezing order might well be appealed to the Court of Appeal and even to the House of Lords. The reality was that if the disclosure order were to be suspended it would remain suspended for a very great period of time. Although a disclosure order was an invasion of the defendants' privacy, a freezing order could not in all circumstances be effected without such an order. While the defendants might have an arguable case for discharging the worldwide freezing order, the claimants had a strong case on fraud and dissipation of assets. Furthermore if the defendants had wished to be free of the worldwide freezing order, they could have arranged to provide security but they have not done so. Accordingly the appeal would be dismissed."

26. Similarly in *JSC BTA Bank v **Ablyazov*** [2009] EWCA Civ 1125 the Court of Appeal, in one of the proceedings related to these proceedings, dismissed an appeal against an order requiring a provision of information about assets pending a challenge to the freezing injunction.

27. Mr. Marshall submits that whether an "unless" order is made is a matter of discretion and that the size of the fraud, the strength of the case, the existence of proprietary claims which may be rendered nugatory without prompt disclosure, the substantial period of disclosure that has already passed and the woeful attempt, as he put it, at compliance all support the grant of such an order. In *Motorola Credit* Waller L.J. observed that a freezing order in normal circumstances cannot be effective without disclosure. The only order he submits that stands any realistic prospect of securing disclosure is the order which he seeks.

28. For the represented respondents Mr. Simon Colton submits that no "unless" order should be made. He referred me to *Raja v Van Hoogstraten* [2004] EWCA Civ 968 where the Court of Appeal considered an appeal against an order that a party be debarred from defending a claim by virtue of a failure to comply with the disclosure obligations in a freezing order. The Court of Appeal held that the order should not have been made. The first ground upon which it did so was because it was unclear what Mr. Van Hoogstraten was required to do in order to comply with the order. The second reason was expressed thus by Chadwick L.J. at paras. 112-113:

"112 The second reason is that, even if it were clear what Mr van Hoogstraten had to do in order to comply with the disclosure obligations, striking out his defence and counterclaim was not an appropriate response to his failure to make adequate disclosure. It must be kept in mind that the disclosure which Mr van Hoogstraten was required to make was not disclosure in the action; in the sense that it was necessary in order that there be a fair trial of the issues in the action. It was disclosure in aid of a freezing order made in anticipation of the claimant's success in the action. In that context the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Ltd* (The Times, March 5 1988), cited and applied in this Court in *Arrow Nominees Inc and another v Blackledge and others* ... and by Sir Andrew Morritt, Vice-Chancellor, in *Douglas v Hello! Ltd (No 3*) ... are directly in point. Mr Justice Millett said this:

'I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render further conduct of the proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.'

113. There was, in the present case no risk that the failure to make disclosure in aid of the freezing order would put in jeopardy the fairness of a trial of the issues in the action. The most that could be said was that failure to make disclosure in aid of the freezing order might lead to a position where the claimant's success in the action would be rendered nugatory by the dissipation of assets which ought to have remained available to meet any judgment which he obtained. In that sense it might, perhaps, be said that inability adequately to police the freezing order 'would render further conduct of the proceedings unsatisfactory'. But that, of course, is founded on the premise that the freezing order, made without notice to Mr van Hoogstraten and on which he had never been heard, was to stand. And, by refusing to hear and determine the application to set that order aside, the judge could not safely proceed on that basis."

29. A few weeks earlier a different panel of the Court of Appeal had handed down the decision in *Stolzenberg v CIBC Mellon Trust Co. Ltd.* [2004[EWCA Civ 827. The court referred to *Arrow Nominees v Blackledge* [2000] EWCA 200 and cited in particular the judgment of Chadwick L.J. therein which includes the following passage:

"I adopt as a general principle the observations of Millett J. in *Logicrose Limited v Southend United Football Club Ltd*, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court and that accordingly a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured by, for example, the late production of a document which has been withheld. But where the litigant's conduct puts the fairness of the trial in jeopardy, where it is such that

any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold, bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason as it seems to me is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice."

30. From these two cases Mr Colton extracts the proposition, which he submits is binding on me, that unless the breach of the order would put at risk a fair trial of the issues in the action or render further conduct of the proceedings unsatisfactory, no order such as the one sought should be made. The expression "*further conduct of the proceedings*" is not entirely clear. If it refers to the trial of the substantive issues in the action, it adds nothing to the first part of the proposition. If it extends further, as Chadwick L.J. thought that in a sense it might, it would not avail an applicant in the position of the Bank in the present case if the last two sentences of para.113 of the judgment of Chadwick L.J. In *Raja* represent a universal rule precluding the making of any "unless" order in a

case such as this where a challenge to the order remains unresolved.

31. I cannot accept that they do. Firstly, neither *Logicrose* nor *Arrow Nominees* was concerned with disclosure in order to police a freezing order. Secondly, in an earlier part of his judgment Chadwick L.J. referred both to *Grupo Torras* and *Motorola* and to the fact that the latter case had recognised "*the need to strike a balance between the prejudice to the defendant if he is required to disclose assets which it is later held he should not have been required to disclose and the prejudice to the claimant if the defendant is not required to disclose assets which it is later held he should have been required to disclose*." He then added that *Motorola* was not authority for the proposition that a defendant will always be refused a stay of the obligation to make disclosure pending the final determination of the application to set aside the freezing order.

32. Chadwick L.J's observation that the judge could not safely proceed in *Raja* on the basis that the freezing order would stand has to be looked at in the light of Steyn L.J's acceptance in *Grupo Torras* that a disclosure order in support of a freezing order can be made upon an assumption that there is jurisdiction. Further, as Pill L.J, who was party to the decision in *Raja*, observed in *Marcan Shipping v Kent* [2007] 1 W.L.R 1864, 1880, "*Raja had several very unusual features which caused the court in effect of its own motion to order that the sanction of dismissal should not apply*."

33. Lastly, if Mr. Colton be right, fraudsters will flourish, since a challenge by the jurisdiction will automatically preclude the court from enforcing, by any realistic sanction, a disclosure order. Mr. Colton accepts that a disclosure order can be made and continue in force notwithstanding a jurisdictional challenge, and he says it may be the subject of a contempt motion but not an "unless" order. A contempt motion particularly against a foreign corporation is likely to be of little value and certainly of little timely value.

34. The decision in *Raja* was considered by the Court of Appeal in *Marcan* where the judge had made an order that unless the claimant gave disclosure of specified documents and provided security for the defendants' costs by a specified date, the action would be dismissed. The order was not complied with and the defendants applied for judgment, which was given. The appeal was dismissed. Counsel for the appellant submitted as follows:

"Since the purpose of disclosure is simply to ensure a fair trial, the court's attitude to a failure to comply with an order for disclosure should differ from that which it might adopt to other failures to comply with procedural directions, and should only strike out the claim if there is a real risk that the failure to give disclosure will prevent there being a fair trial."

35. In support of that, counsel cited *Logicrose*, *Arrow Nominees* and *Raja*. Reference was made to Millett J's dictum in *Logicrose*. Lord Justice Moore-Bick said in his judgment that the submission that Millett J's statement of principle had been adopted and approved in *Arrow Nominees* put the matter too high. Of Chadwick L.J's judgment in the latter case, he observed.

"He also held that the court is entitled to strike out proceedings where a litigant's conduct placed the fairness of the trial in jeopardy or amounts to such an abuse of the process as to render further proceedings unsatisfactory. He also recognized that the court is entitled to take account of the wider interests of justice as reflected in the overriding objective, although he adopted as a general principle the observations of Millett J. in *Logicrose v Southend United Football Club Ltd*. [1998] 1 WLR 1256. Therefore, his observations, with which both Roche L.J and Ward L.J agreed, reflect a more robust approach to litigants whose conduct is liable to subvert the overall fairness of the proceedings. Moreover Ward L.J. was at pains to emphasise that the principles embodied in the CPR may justify a more robust approach to litigants whose conduct is liable to have that effect."

36. Lord Justice Moore-Bick also said this:

"26. Mr. Henderson placed a good deal of reliance on these authorities but I do not think they support his case. *Logicrose Limited v Southend United Football Club Ltd*. was not concerned with the consequences of failing to comply with a conditional order. It was concerned with an application to dismiss the action for failure to comply with the rules relating to discovery - an application that today would be made under CPR r.3.4(2)(c). On an application of that kind the court will inevitably have to consider the circumstances in which the default occurred and its consequences both for the future of the proceedings and more generally. In the event the judge dismissed the application because he was not satisfied that there had been a deliberate attempt to suppress the document in question, but it is fair to say that he would have dismissed it in any event once the document had been produced because he considered there could still be a fair trial. It is unnecessary for present purposes to consider whether the factors that are decisive in influencing the judge in that case would necessarily carry the same weight today in the light of the court's duty to further the overriding objective and the range of matters to which it must have regard for that purpose. The observations of Chadwick and Ward LL.J. in *Arrow Nominees v Blackledge* [2002] BCLC, 167 suggest they might not. It is clear, however, that the court was not concerned with a situation of the kind that arises in the present case.

27. The same may be said of the decision in *Arrow Nominees Inc. v Blackledge*. In that case no question arose of a failure to comply with a conditional order. The court was concerned only with an application to strike out the petition as constituting an abuse of process. The case did therefore raise issues of a broadly similar nature to those considered in *Logicrose*, but it did not fall for consideration of the consequences of a failure to comply with the conditional order. Only in *Raja* had there been a failure to comply with an order of that kind but in that case it did not form the primary ground of the application to strike out the defence and counterclaim, and the court did not deal with the issue in those terms. Accordingly none of these authorities is directly in point in the present case. It is interesting to note, however, that, as Pill L.J. explains, the claimant in *Raja v Van Hoogstraten* did submit that because of the nature of the order the sanction for which it provided should be given effect and that the court rejected that argument without expressly dealing with it, in effect granting relief of its own initiative."

37. Mr. Colton points out that in cases such as these there are two distinct questions: (i) Should an "unless" order be made; and (ii) if that order is not complied with should there be any relief from sanction - and that different considerations, including the incidence of the burden of proof or persuasion apply to the two cases. *Markcan* was a case dealing with relief from sanction. Nevertheless the decision is, in my judgment, informative as to the proper ambit of the three decisions upon which Mr Colton relies.

38. In my judgment if the court makes an order for disclosure for information or documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at

liberty to enter judgment. Were it otherwise, in many cases the order would be without effect. The making of such an order is of course a discretionary exercise. It is necessary in a case such as this, where there is a challenge to the jurisdiction and to the making of a freezing order, carefully to consider whether or not it is right to require the immediate production of information given the prospect that the court may later hold that jurisdiction should not have been exercised or that the freezing order should not have been made. It is plain from *Grupo Torras* that it is open to the court to make an order for the production of information even during the pendency of a challenge to the jurisdiction. If that be so it must, as it seems to me, follow that it is open to the court to impose a sanction for non-compliance as a means of securing compliance. The Court of Appeal in *Grupo Torras* cannot have contemplated that although an order for disclosure could be made during the currency of the challenged jurisdiction, it could not be enforced or could only be enforced by a sanction which did not involve entitling the claimants to enter judgment. There are many cases in which it is only an "unless" order that will ensure compliance. Thus in *Mellon Trust* the Court of Appeal (at paras.49 and 177) agreed with the trial judge that on the facts he had no realistic alternative to making an "unless" order in the face of the persistent defiance of two of the defendants in relation to the disclosure of their assets. In the case of one of the defendants, Chacrona, the order was made during the pendency of its application to challenge jurisdiction: see paras 3(19) and (22).

39. Mr Colton submits that the present application is novel because it seeks to obtain judgment (or a debarring which has the same effect) before the jurisdiction challenge is determined or the application to set aside the freezing order is heard. This seems to me something of a mischaracterisation. The application seeks, essentially, compliance with the court's order for which the "unless" provision is intended as a sanction. The court expects its orders to be obeyed by those who are subject to them. The relevant prejudice to be considered is, therefore, that which would accrue to the respondents if the order sought was complied with and it subsequently turns out that the court has no jurisdiction or that the freezing order should not have been made. In that event the respondent will have suffered the invasion of their privacy constituted by the provision of information which they were not compellable to provide. In any event, the making of an order such as that sought is not entirely novel: see *Mellon Trust*.

40. Mr. Colton further submits that before a jurisdiction challenge is heard or the application to discharge the freezing order is determined, the court is not in a position to determine whether breach of the freezing order would have such an impact on the proceedings as to render their future conduct unsatisfactory so as to justify the debarring of the respondents. Reliance is again placed on the words of Chadwick L.J. in *Raja*. Nor, it is said, is the court in a position to determine the merits so as to decide whether it is appropriate that an "unless" order should be made.

41. As to that I do not accept that the question is solely whether non-compliance will render further conduct of the proceedings unsatisfactory. As *Arrow Nominees* and *Markham Shipping* indicate, the court is entitled to take into account the effect of making, or not making, the order sought on the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective.

42. As to those considerations the object of the present case is to compensate the bank for the huge sums allegedly purloined from it by what is said to be a dishonest scheme by securing a judgment against the wrong-doers which can effectively be enforced so as to make a real recovery. In deciding what order to make the court, as I have said, must necessarily take into account on the one hand that absent an "unless" order the Bank may effectively be prevented from any recovery, or restricted in the recovery that it might otherwise make. If the jurisdictional challenge fails that may work very unfairly to the Bank and produce a result which is most unjust in that in the period leading up to a failed jurisdictional challenge assets may have been put out of reach, or further out of reach. On the other hand, it must take account of the fact that if the court has no jurisdiction and the order is complied with, it would have compelled the defendants to produce information as to what has happened to the monies which would otherwise remain private. Further, although the court cannot determine the merits finally even on an interlocutory basis it can reach a view as to whether or not the material put before it merits the order sought.

43. Mr. Colton further observed that under para.9(1)(b) of Mr. Kealey's order the respondents are required to answer various questions in a schedule under the heading "*Information as to the identity of further wrong-doers*", which is a form of *Norwich Pharmacal* relief. The use of the *Norwich Pharmacal* jurisdiction is, he submits, not permissible for the ancillary purpose of improving the applicant's position in respect of the claims against the respondents themselves, since to do so would permit the claimants to circumvent the restrictions on information which can be required from a defendant to a claim. Further the refusal of the relief sought, namely the provision of information which could lead to the revelation of other wrong-doers, would not put at risk the fairness of the trial or the satisfactory conduct of the proceedings.

44. As I have already said, I do not accept that the latter is the test. When the freezing order was sought from Mr. Kealey there was an issue in one of the other proceedings against the first and second defendants (the Drey proceedings) as to whether or not the Bank had an arguable proprietary claim having regard to the alleged absence of the notion of any such claim under the law of Kazakhstan. Accordingly, before Mr. Kealey the Bank did not seek to rely on any proprietary claim for the purpose of obtaining the relief sought. Subsequently it has become apparent that a proprietary claim is arguable and such a claim appears on the pleadings in the present case.

45. Mr. Kealey QC dealt with the matter in this way at para.6:

"6. I add, however, that an application has been made for the disclosure of documentation and information in Schedule B to the draft order and indeed elsewhere in the draft order in accordance with the principles established in the case of *Norwich Pharmacal* as subsequently developed. In relation to that, I am guided by the judgment of Lightman J. in *Mitsui v. Nexen* [2005] EWHC 625, and in particular in paras.18 through to 24, where Lightman J. set out in detail the principles to be applied in relation to *Norwich Pharmacal*. I have also considered carefully, in view of Lightman J.'s observations in relation to the relationship or interrelationship between pre-action disclosure and the *Norwich Pharmacal* jurisdiction, whether in this case I should exercise my discretion in relation to the latter, and I have decided that I should.

"7. Finally, I should mention that I have also considered whether the *Norwich Pharmacal* jurisdiction extends to those cases where such relief as is ordered under *Norwich Pharmacal* principles is necessary to enable an effective freezing order to be made so that any judgment obtained against a wrongdoer is not rendered nugatory, and I am of the view that the jurisdiction does extend that far. It is a flexible remedy and if the interests of justice demand, which is normally dependent upon whether the relevant circumstances justify, then there is no reason why a *Norwich Pharmacal* order should not be made in aid of a freezing order jurisdiction."

8. In relation to the relevant criteria that have to be fulfilled in order to order *Norwich Pharmacal* relief, those are set out in para.21 of Lightman J.'s judgment. It seems to me clear that a wrong has either been carried out or has arguably been carried out by ultimate wrongdoers. It seems to me that there is a need in this case for an order to be made both to enable action to be brought against the ultimate wrongdoers, who might include others than the proposed respondents, and also to enable an effective relief and effective remedy against those wrongdoers by enabling effective freezing orders to be made. It seems to me that the respondents have at least arguably on the evidence so facilitated the wrongdoings as to fall within the third criterion set out in para.21 of Lightman J.'s judgment. The information from those respondents is necessary to enable the ultimate wrongdoers to be sued and is also to enable the monies that need to be frozen subject to a freezing order to be identified and frozen."

46. Relief having been granted on that footing, it appears to me that the question whether or not an "unless" order should now be made raises identical or not materially dissimilar considerations to those that arise in considering whether or not such an order should be made in relation to any other part of the disclosure order. It is also apparent to me that although Schedule D has the heading which I have mentioned,

some of the questions in it are not directed solely to the question of what other wrong-doer can be sued - in particular questions in relation to where the money has gone.

47. Then it is said that an "unless" order should not be made if it would render nugatory the respondents' jurisdictional challenge. The order proposed would not do so. If the challenge succeeds, the action will not continue. What the order will do is require the production of information before the challenge is determined and, if it is obeyed, will foreclose the possibility of the respondents avoiding providing information because the jurisdiction is successfully challenged before the order is obeyed.

48. Lastly it is said that the court should have regard to the fact that the making of any such order would infringe or interfere with the sovereignty of a foreign jurisdiction such that comity should give one cause to pause before making any such order. I do not regard that as a consideration which in this case should have any weight. As ***Dicey Morris & Collins*** observe at para.11-148: "*Today all countries exercise a degree of jurisdiction over persons abroad.*" In the case of alleged fraud crossing international boundaries it may be necessary, as in the present case it is, for a court in one country to order alleged participants in, or persons with knowledge about, the fraudulent activities, who are in another country, to supply information.

49. I propose to make the order sought since, as it seems to me, the considerations in favour of doing so are overwhelming. The factors relied on by Mr. Marshall (to which I have already referred) are compelling. By comparison the prejudice that the respondents will suffer if they are required to, and do, produce information and then succeed on the jurisdiction summons application seem to me minimal by comparison. A truthful affidavit would reveal the extent of the respondents' assets and where the money went. If all these transactions are regular and bona fide purchases by the borrowers from the intermediaries, the claim will fail and revelation of the details of what happened to the money and as to the assets of the respondents is unlikely to be very prejudicial, particularly as any information obtained will be subject to the usual implied obligation of confidentiality. If the transactions are what the Bank says they are, namely shams, the fact that details thereof have been revealed in, as it were, the wrong jurisdiction seems to me of limited significance.

50. I also regard it as relevant to take into account the likelihood of the jurisdiction challenge succeeding. Such a challenge seems to me, on the material presently before me, distinctly unpromising. The first and the second defendants are presumed domiciled in this country having, it would appear, been resident here for over three months see s.41 of the *Civil Jurisdiction and Judgments Act 1982*, although that presumption is rebuttable. If they are so domiciled no question of staying the proceedings against them on the grounds of *forum non-conveniens* can apply. (*Owusu v Jackson* [2005] QB 801.) In any event they are fugitives from Kazakhstan and have no wish to be tried in a criminal or a civil court there. In those circumstances, as the Deputy Judge held, England appears distinctly the most appropriate forum for the case against all the defendants. The present respondents are important but secondary parties. Proceedings against them involve the same issues as those that arise against the first and the second defendant. If the claim against the other defendants is hived off, there are obvious risks of inconsistent decisions, duplication and waste of costs.

51. I was also invited to take into account the prospect that the revelation of information might incriminate those who were connected with the respondents. I cannot regard this very generalised point as carrying any significant weight. For the purposes of the present application the privilege against self-incrimination was not invoked by the respondents. If invoked it would, as it seems to me, be relevant only in respect of the respondent in question and possibly the deponent to any affidavit. Since any relevant incrimination would not be in respect of offences committed under the law of England and Wales, there would in any event be no absolute right to invoke the privilege. The fact that truthful answers in the affidavit might, in circumstances yet to be explained, evidence some wrong-doing by persons other than the respondents is no good ground for refusing the order sought.

52. I turn then to consider the form of the order. Subject to a number of points, the draft appears to me to be in order. The points are these:

(i) In paras.1-4 the words "*the information*" should be inserted between "*and*" and "*specified*" in order to make clear that the information specified in the schedule to the order is in addition to the information provided in the faxes of 9th and 18th August;

(ii) The time for compliance should be by 4 p.m. London time on 3rd September 2010;

(iii) The word appendix should not have a "1" after it as there is to be no appendix 2. If the appendix is to be the "*appendix*" there should be a reference to the "*appendix*" and not to "*Schedule 1*" in the order. If it is to be a schedule then what is currently the appendix should become the schedule, otherwise confusion will undoubtedly arise;

(iv) The words "*but not limited to*" should be added after the word "*specifically*" in the appendix or schedule.;

(v) There is no need for a para.1 of the appendix or schedule since there is no para.2;

(vi) What is presently para.(1)(b)(i) and what will become (b)(i) of the appendix should read "*each respondent's ownership of shares which in aggregate constitute 50.12% of the shares of JSC North Caspian Shogan*" as opposed to the present draft which appears to contemplate the respondents owning more than 100% of the shares of the company.

53. The order allows the claimant to enter judgment against any of the respondents if and insofar as that respondent does not comply with the provisions applicable to it, but it provides that except with the permission of the court any such judgment against any of the respondents, other than the sixth respondent, shall not be enforced or executed pending the determination of the challenge to the jurisdiction by the respondents, other than the sixth respondent who makes no such challenge. That order is appropriate firstly in order to make clear that, if the order is not complied with, the claimant will be entitled to judgment or to apply for judgment (if necessary insofar as judgment is sought in relation to, for instance, a declaration). *Ipso facto* that is the sanction. The restriction on enforcement means that any challenge to the jurisdiction is not rendered nugatory. If the challenge is successful, the judgment will fall away. In addition, the respondents are not and could not by this order precluded from applying for relief from sanction.

54. Mr. Colton submitted that the appendix to the draft order went further than the original order and was inappropriate on that account. I have carefully considered that point. In my view the appendix draws attention to what is particularly needed and to the very limited extent to which it goes beyond the terms of the original order, it is justified in the light of the information so far provided. I draw attention to the fact that those advising the respondents will need to look carefully at the terms of paras.9(1)(a) and (b) of the original order, as well as the terms of the appendix or schedule to the order that I am making, to see that the order has been complied with. The Bank has made a number of comments on the inadequate compliance by the respondents to date. Particularly noticeable is the absence of any information about value in respect of any assets; the time when the money left the accounts at the bank in Latvia; and where it went and whether any equipment was delivered. That is in no sense intended as an exhaustive list. The intermediaries have, of course, provided no information at all.

55. I shall hear counsel as to what provision, if any, should be made for costs of the application.