Judgments

[2011] All ER (D) 128 (Feb)

*JSC BTA Bank v Ablyazov and others

[2011] EWHC 202 (Comm)

QBD, COMMERCIAL COURT

Teare J

10 February 2011

Constitutional law – Act of State – Acts of foreign government – Justiciability in English courts – Main proceedings brought by Kazakhstani bank against number of defendants – Main defendant alleging action politically motivated intending to undermine democratic opposition in Kazakhstan – Defendants applying to stay main action – Claimant applying to dismiss stay applications – Whether claimant asserting claim which was governmental in nature – Whether claim should be stayed on application of 'act of state' doctrine.

Judgment

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE TEARE:

1. This is my judgment on part of an application by the Claimant ("the Bank") to dismiss applications by Mr. **Ablyazov** and three other defendants to stay four actions in this court (the "Stay Applications"). On 2 August 2010 I ordered that the following issues be tried, namely, (i) whether the Stay Applications raise issues which are not justiciable by this court and (ii) whether it is arguable that the actions involve the indirect enforcement of a foreign penal, revenue or other public law. Having determined those two issues it will then be possible to consider how what remains of the Stay Applications should be dealt with.

2. In my judgment dated 16 July 2010 [2010] EWHC 1779 Comm ("the receivership judgment") I summarised the claims in these actions and the response of Mr. **Ablyazov** to them as follows:

> "2. The Claimant ("the Bank") is a bank in Kazakhstan, 75.1% of whose share capital has, since 2 February 2009, been owned by the State of Kazakhstan through a sovereign wealth fund,

> Samruk-Kazyna. On that date the State effectively took control of the Bank when, according to the evidence of the Bank, there was significant concern as to the ability of the Bank to continue as a going concern. The Bank's accounts for the year ending 31 December 2008 recorded a negative equity of about US$6.1 billion. Its debts, which are said to amount to US$12 billion, are being restructured pursuant to the law of Kazakhstan.
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> 3. The Defendant ("Mr. **Ablyazov**") is the former chairman of the Bank and is accused by the Bank of "widespread misappropriation of the Bank's funds." It is said that he has treated the Bank "as if it were his own private source of funds". Four claims have now been issued in this jurisdiction against Mr. **Ablyazov**. The total sum claimed is in excess of US$1.8 billion. Further claims are anticipated which I was told will bring the total sum claimed to US$4 billion.
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> 4. Mr. **Ablyazov** denies these claims. He states that the claims are an attempt by the President of Kazakhstan, Nursultan Nazarbayev, to take control of his assets in support of a politically motivated claim against Mr. **Ablyazov**, who is a leading figure in Kazakhstan's democratic opposition. His evidence paints a chilling picture of life in Kazakhstan where power resides with the President and the members of his family and close associates, where the rule of law is not respected and where dissent is ruthlessly eliminated. In 2003 Mr. **Ablyazov** was arrested and imprisoned and his assets seized after what he and others have said was a politically motivated trial. Whilst imprisoned on what he says were "trumped-up" charges he says that he was subjected to mistreatment, torture and an unsuccessful plot to assassinate him and that his assets were "distributed to the President's coterie". He says that political assassination is used in Kazakhstan as a means of silencing opposition and that there was a further attempt to assassinate him in 2004 in Moscow. His evidence suggests that Kazakhstan has much in common with Ancient Rome."

3. The Stay Applications were issued on 23 April 2010 (in 2009 Folio 1099, "the Drey proceedings"), on 4 May 2010 (in 2010 Folio 93, "the Chrysopa proceedings" and in 2010 Folio 362, "the Tekhinvest proceedings") and on 3 September 2010 (in 2010 Folio 706, "the Granton proceedings"). Mr. **Ablyazov** is a defendant to each set of proceedings. Mr. Solodchenko and Drey Associates Limited are defendants to the Drey proceedings. Mr. **Ablyazov**, Mr. Solodchenko and Drey Associates Limited are all represented by Mr. Trace QC. Mr. Zharimbetov is a defendant to the Drey and Granton proceedings. He is represented by Mr. Girolami QC. There are other defendants to the various proceedings who have not sought a stay.

4. The grounds of the Stay Applications were described in the applications in similar terms. It was said that Mr. **Ablyazov** was the victim of an illegal scheme by the Kazakhstan authorities to eliminate him as a political opponent, that a key step in the implementation of the scheme was the forced nationalisation of the Bank and that the implementation of the scheme involved breaches of Kazakh and international law and breaches of human rights. The several reasons for seeking a stay were put in this way:

> "(i) As the claim is part of the Scheme, it is an abuse of the process of the English court and/or is oppressive and/or to permit it to proceed would be contrary to public policy.
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> (ii) To allow the claim to proceed would be to give effect to, or be tantamount to giving effect to, a flagrant breach of international law, namely the Expropriation, which should not be permitted as a matter of English public policy.
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> (iii) The claim is brought (or brought predominantly) for the collateral purpose of political oppression and/or persecution of the First Defendant and/or the elimination of the First Defendant as a political force in opposition to the present regime in Kazakhstan and is therefore an abuse of the process of the English court.
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> (iv) The action involves the indirect enforcement of a penal, revenue or other public law of the Republic of Kazakhstan, namely the decree by which the said forced nationalisation was ef-

> fected and/or the “Financial Stabilisation Law” of 23 October 2008 and/or any and all laws making back-dated legislative changes to legitimise the Expropriation and/or any other law employed by the Kazakhstan authorities to effect the Expropriation and/or to advance the Scheme.
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> (v) In all the circumstances, it will be impossible to have a fair trial of this action in breach of the Applicants' rights at common law and under Article 6 of the European Convention on Human Rights. In particular, the Applicants will not have a reasonable opportunity of presenting their case to the court under conditions which do not place them at a substantial disadvantage vis-à-vis the Claimant by reason of the illegal and/or illegitimate activities of the Kazakhstan authorities and/or the abuse by the Kazakhstan authorities of their powers in Kazakhstan in relation to the availability or willingness of witnesses to give evidence and the availability of documents, information and/or disclosure and otherwise.”

5. On 9 July 2010 (in the Drey, Chrysopa and Tekhinvest proceedings) and 11 November 2010 (in the Granton proceedings) the Claimant sought to dismiss the Stay Applications on six grounds, one of which was that the issues raised were non-justiciable and another was that the actions in this court did not involve the indirect enforcement of a foreign penal, revenue or other public law.

6. On 2 August 2010 I ordered that the Defendants serve their evidence in support of their applications and particularise the allegations they were seeking to prove by 30 September 2010. Permission to adduce evidence from a banking expert was given. I ordered that the non-justiciablity issue and the issue regarding the enforcement of a foreign penal, revenue or public law be determined on 21 and 22 October 2010.

7. On 28 September 2010 I extended the time for service of the evidence and particulars until 25 November 2010 and relisted the hearing of the two issues for 31 January and 1 February 2011.

8. Particulars of the allegations made in support of the Stay Applications were served by Mr. **Ablyazov** and considerable evidence contained in many lever arch files (over twenty I was told) was served in support. In addition expert evidence was also served, some of which was served out of time and without leave.

9. The Particulars run to some 16 pages. Mr. Trace, in his Skeleton Argument, summarised the allegations as follows:

> “10. The central allegation on which the Applicants rely is that Mr **Ablyazov** is the victim and principal target of the Scheme, a continuing oppressive and illegal scheme carefully orchestrated by the Kazakhstan authorities, the purpose of which is to expropriate Mr **Ablyazov**'s assets and/or to destroy their value, and to eliminate him as a political force in opposition to the present regime in Kazakhstan, headed by Nazarbayev.
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> 11. Since late 2001, Mr **Ablyazov** has been a democratic political force in opposition to Nazarbayev's increasingly authoritarian regime, in particular through significant political and financial support for the pro-reform movement, the DCK. Through his continued political activity, and his wealth (the major source of which was, by the time of the Expropriation, BTA), Mr **Ablyazov** was and remains a major threat to Nazarbayev's dictatorial hold on power.
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> 12. All significant power in Kazakhstan is concentrated in the hands of, and exercised by or at the direction of Nazarbayev, who maintains that power by controlling not just the organs of state (including the courts) but also major business and industrial assets in Kazakhstan, including its major banks.
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> 13. From as far back as 2000-2001, pressure was repeatedly applied to Mr **Ablyazov** by Nazarbayev and his accomplices to transfer to Nazarbayev a controlling interest in BTA, either for free or for significantly less than its true value.

14. In 2002, Mr **Ablyazov** was imprisoned on false charges following a politically-motivated and widely condemned prosecution. Whilst in prison, shares in BTA, and Mr **Ablyazov**'s other assets, were illegally seized at Nazarbayev's direction without compensation. Mr **Ablyazov** was released in May 2003, but only on the condition that he renounce all further political activity. Following his release, however, Mr **Ablyazov** cautiously resumed opposition political activity.

15. Nazarbayev's demands for a substantial stake in BTA continued from early 2005. In February 2008, Nazarbayev presented Mr **Ablyazov** with the ultimatum that, unless shares in BTA were handed over to him quickly, they would be seized, and Mr **Ablyazov** would be arrested on new criminal charges.

16. Thereafter, the pressure from Nazarbayev on BTA increased, including through the Kazakhstan bank regulator, the FSA (which imposed unreasonable regulatory requirements with which it was impossible for BTA to comply), and associates of Nazarbayev. Mr **Ablyazov** was told that he was to be stripped of his assets, and his position at the head of BTA, to prevent him from supporting the democratic opposition or otherwise being a political threat to the Nazarbayev regime.

17. After repeated delays to his plans to acquire BTA by other means, Nazarbayev had new legislation introduced in October 2008 to enable the Government to nationalise the country's banks, including BTA, under the guise of spurious legitimacy. Thereafter, various proposals were announced by the Government for the acquisition of stakes in BTA and the country's other major banks. Instead of implementing those proposals as regards BTA, though, the Government and the FSA (under Nazarbayev's control) implemented an obvious campaign to destabilise and undermine BTA, with a view to taking control of it.

18. This campaign culminated in the forced nationalisation of BTA in February 2009. Through the Samruk-Kazyna fund, the Government acquired a 75.1% stake in BTA, just over a super-majority stake, through a forced share issuance. This, and the subsequent restructuring carried out in relation to BTA, represented a total (or near total) expropriation of Mr **Ablyazov**'s interest in BTA, without any compensation. This was the Expropriation.

19. The Applicants say that the Expropriation was:

(i) Unwarranted and inconsistent with prudent bank supervisory policies;

(ii) In breach of, and invalid under, Kazakhstan law;

(iii) In violation of Mr **Ablyazov**'s human rights; and

(iv) A flagrant breach of international law.

20. BTA is now, through Samruk-Kazyna and through the individuals appointed by the Government to BTA's management, a creature or instrument of, and under the control of, Nazarbayev and the Kazakhstan authorities. Indeed, as of January 2011, Nazarbayev has become, personally, the chairman of Samruk-Kazyna's management committee. Post-Expropriation, BTA is being used by Nazarbayev and the authorities to continue to prosecute the Scheme.

21. The Scheme was and is being carried out in accordance and consistently with a carefully crafted confidential strategy for preserving Nazarbayev in power, entitled “Project SuperKhan”. That strategy aims to separate so-called “oligarchs” (including Mr **Ablyazov**) from their assets, including through the creation of special “funds”, and through prosecution and direct action in foreign courts.

> 22. The prosecution of the Scheme includes criminal investigations and proceedings in Kazakhstan, based on false charges, and brought against Messrs **Ablyazov**, Solodchenko and Zharimbetov, as well as against a large number of Mr **Ablyazov**'s associates. A number of those associates were convicted on false charges and following unfair trials. The purpose of these criminal proceedings was to silence opposition, obtain false evidence against Messrs **Ablyazov**, Solodchenko and Zharimbetov, and to provide an apparently legitimate basis for their later conviction.
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> 23. Further criminal proceedings based on false charges have, with the connivance of BTA and its officers, been brought against Messrs **Ablyazov** and Zharimbetov in Ukraine, and against Mr **Ablyazov** in Russia, with the ultimate aim of achieving or assisting in the elimination of Mr **Ablyazov** as a political force for democratic reform in opposition to Nazarbayev and the current regime in Kazakhstan. Attempts are also being made to expropriate Mr **Ablyazov**'s assets in Russia and Georgia.
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> 24. As part of, and in furtherance of, the Scheme, these proceedings in the English court have been brought by BTA and are being prosecuted for the collateral purpose of undermining Mr **Ablyazov**'s reputation, facilitating the expropriation of his assets, and thereby achieving or assisting in the elimination of Mr **Ablyazov** as a political force in opposition to Nazarbayev and the current regime in Kazakhstan.
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> 25. As a further part of the Scheme, by reason of the abuse or threatened abuse by the Kazakhstan authorities of their powers by taking steps (including, *inter alia*, the actual or threatened prosecution and persecution of witnesses) to prevent Mr **Ablyazov** from obtaining evidence, documents, information and/or disclosure, and otherwise as set out in the Application Notices, it will be impossible for the Applicants to obtain a fair trial of BTA's claims."

10. The President of Kazakhstan is not party to these proceedings and so has not responded to them. The Bank "takes no position" on the allegation that the President has formulated a scheme to persecute Mr. **Ablyazov** but says that the allegation is irrelevant and not justiciable. With regard to the allegation that the nationalisation of the Bank was part of that scheme the Bank's evidence is that the nationalisation was to save it from bankruptcy but that the allegation is in any event irrelevant and not justiciable. With regard to the allegation that the proceedings before this court are part of the scheme the Bank denies that allegation and says that the proceedings are being brought primarily for the benefit of its independent creditors who have a security interest in any recoveries.

11. Mr. Smith QC, on behalf of the Bank, has summarised the Bank's evidence on the reasons for these proceedings in his Skeleton Argument as follows:

> "18. The Bank's case is a case of fraud and embezzlement on an almost unprecedented scale. Essentially what is alleged is that Mr **Ablyazov**, on occasion with the assistance of the other Respondents, helped himself to huge amounts of the Bank's cash resources by causing the Bank to make substantial transfers of funds to (or for the benefit of) a considerable number of overseas companies which he secretly owned.
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> 19. Soon after the Respondents left the Bank, the Bank was obliged to undergo an insolvency process because its deficit of assets versus liabilities was in the region of US$16 billion[1]. This was the largest insolvency procedure which the Kazakh Republic has experienced.
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> 20. The insolvency restructuring has now been completed. As part of it, the Bank's creditors have had to write off US$ billions of debt (Hardman 22, para. 15 [6.1/13]). Those creditors include a number of well-known Western financial institutions (Hardman 22, para. 19), not least the Royal Bank of Scotland (which was itself subject to a similar nationalisation process in the UK at about the same time).

> 21. The restructuring has been approved in courts across the world, including the Chancery Division of the High Court in London (Hardman 22, paras. 36-37 [6.1/13]). Under the agreements entered into as part of the restructuring, the Bank is obliged to pursue all possible avenues to recover its losses from those who are believed to have been responsible for those losses (Hardman 22, paras. 20-24). The creditors are entitled to receive 50% of any recoveries (Hardman 22, para. 22).
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> 22. The Bank is obliged to retain professional assistance to help it pursue those responsible for the losses (Hardman 22, paras. 20-24 [6.1/13]). The Bank's asset recovery process is required to be monitored by a Recovery Sub-Committee, which is a sub-committee of the main Board of the Bank and must include at least one director appointed independently by the Bank's creditors (and in fact includes two such creditor directors) (*ibid.*). The Bank has an obligation to report regularly to an independent recovery assets auditor and an obligation to justify certain key decisions to that auditor (*ibid.*).
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> 23. The 7 actions which the Bank has commenced against one or more of the Respondents in the High Court in England (6 in the Commercial Court and one in the Chancery Division) are part of this recovery exercise. They are pursued on the authority of the new management[2] and pursuant to the Bank's obligations undertaken towards its creditors upon the restructuring. Major beneficiaries of any success in the actions will be the former creditors of the Bank. The suggestion that the actions are part of a pet project of the President to crush the Respondents could hardly be further from reality. The governance protections granted to the Bank's creditors under the restructuring (including the asset recovery programme) are enshrined in the Bank's charter which was amended for this purpose as part of the restructuring (Hardman 22, paras. 29-30 [6.1/13]); the Bank's super-majority shareholder, Samruk-Kazyna, has undertaken to ensure that the governance and other rights of the creditors are maintained (Hardman 22, paras. 31-35)."

12. The basis of the claims brought by the Bank against Mr. **Ablyazov** and the other defendants in this court is alleged fraud and breach of duty committed by them prior to the nationalisation of the Bank in February 2009. The Bank has, of course, a separate legal personality from that of its shareholders. After and as a result of the nationalisation the shareholders of the Bank were changed. Instead of the shares being owned (wholly or in part) by Mr. **Ablyazov**, the Kazakh Government, through the Samruk-Kazyna fund, now owns a majority of the shares in the Bank. Prior to the nationalisation the Bank could have advanced its claims against Mr. **Ablyazov** and the other defendants. After the nationalisation the Bank has advanced those claims. The change in shareholders does not alter either the legal personality of the Bank or the nature of the claims which it can bring against Mr. **Ablyazov** and the other defendants. However, it is that nationalisation which is relied upon by Mr. **Ablyazov** and the other defendants to say that the proceedings being brought in this court to establish the Bank's claims should be stayed. If Mr. **Ablyazov** and the other defendants are right it follows that, even if the Bank's claims of fraud and breach of duty by Mr. **Ablyazov** and the other defendants prior to nationalisation are true, the Bank is unable to proceed against Mr. **Ablyazov** and the other defendants in this court to recover compensation for that fraud and breach of duty. That is a remarkable consequence.

13. Before considering the submissions which have been made on this application it is necessary to mention a case management point addressed by both Mr. Trace and Mr. Girolami. In essence it is that the court should not determine the questions which have been ordered to be determined until the evidence in support of the Stay Applications has been heard.

14. Relying upon observations in *Williams & Humbert Ltd. V W & H Trade Marks (Jersey) Ltd.* [1986] AC 368, *Total E & P Soudan v Edmonds & others* [2006] EWHC 1136 and *Tajik Aluminium Plant v Ermatov* [2006] EWHC 2374 it was submitted that unless determination of the questions would obviate the necessity of a trial of the Stay Applications or substantially reduce the burden of preparing for a trial of the Stay Appli-

cations they should not be determined. It was said that issues of non-justiciability depend on the facts of each case and require a close examination of the specific issues said to be non-justiciable. It was further said that non-justiciability is a far from straightforward area of the law which does not lend itself to summary determination one way or the other.

15. The reason for the order made on 2 August 2010 was that determination of the points of law identified by the Bank in favour of the Bank would make a hearing of the Stay Applications either unnecessary or at any rate much shorter. In order that there be no uncertainty as to what factual allegations were being made by Mr. **Ablyazov** in support of the Stay Applications and to avoid what Mr. Girolami has described as a "procedural cul-de-sac" Mr. **Ablyazov** was ordered to provide Particulars of those allegations. If the points of law raised by the Bank lead to the conclusion that all, or at any rate some of those allegations, cannot support the Stay Applications then it will be unnecessary to have a trial of those allegations. That approach appears to me to be consistent with the advice to the court in *Williams & Humbert Ltd. v W & H Trade Marks (Jersey) Ltd.* [1986] AC 368 and holds out the prospect of saving the parties considerable time and costs. I will however keep the warnings made by Mr. Trace and Mr. Girolami well in mind.

Is it arguable that the Bank's actions involve the indirect enforcement of a foreign penal, revenue or other public law?

16. In the Stay Applications the penal or public law relied upon is identified as "the decree by which the said forced nationalisation was effected and/or the Financial Stabilisation Law of 23 October 2008 and/or any and all laws making back-dated legislative changes to legitimise the Expropriation and/or any other law employed by the Kazakhstan authorities to effect the Expropriation and/or to advance the Scheme."

17. However, the arguments of Mr. Trace and Mr. Girolami did not dwell on those or any particular laws of Kazakhstan. Any such argument would have faced the insuperable difficulty that the claims in this court do not require the court to enforce those laws. Instead they submitted that the relevant principle, of which the court's unwillingness to enforce penal or revenue laws of another state is an example, is that a claim will not be enforced where the claimant is asserting a sovereign right or where the central interest of the claimant is governmental in nature. Reliance was placed on *The Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217, 45 ER 861, *In re State of Norway's Application* [1990] 1 AC 723, *A-G for the UK v Heinemann Publishers Australia Pty Ltd.* (1988) 165 CLR 30, *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7, *Mbasogo v Logo Limited* [2007] QB 846 and *Government of Iran v The Barakat Galleries Ltd.* [2009] QB 22. In deciding whether that test is satisfied the court will look at the substance of the matter and not at the technical form of the claim; see *Peter Buchanan Ltd. and Macharg v McVey* (Note) 1955 AC 516 and *QRS 1 ApS v Frandsen* [1999] 1 WLR 2169.

18. The relevant authorities were reviewed by the Court of Appeal both in *Mbasogo v Logo Limited* [2007] QB 846 and *Government of Iran v The Barakat Galleries Ltd.* [2009] QB 22. The effect of those decisions is that a claim which involves the exercise or assertion of a sovereign right will not be enforced. Consideration of whether the central interest in bringing the claim is governmental in nature is consistent with the authorities and a useful test; see the judgment of Lord Phillips CJ in *Government of Iran v The Barakat Galleries Ltd.* at paras.112-125. The principle or rationale for the rule is that the courts will not enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. Where the state pursues a right that could equally well belong to an individual such right will be enforced. The test however is one of substance. The court will not be misled by appearances; see the judgment of Sir Anthony Clarke MR in *Mbasogo v Logo Limited* at paras. 41, 42 and 50.

19. It was submitted that since the claims in this court are, arguably, part of the President of Kazakhstan's scheme to eliminate Mr. **Ablyazov** as a political opponent those claims are an exercise of the sovereign authority of Kazakhstan for public purposes outside Kazakhstan. It was submitted that the aim of the proceed-

ings in this jurisdiction is the preservation of the security of the state and its ruler and the central interest in bringing the claims is governmental in nature.

20. The claims which the Bank seeks to enforce are claims based upon the alleged conduct of Mr. **Ablyazov** and the other defendants before the Bank was nationalised. They are private law claims of a type which may be brought by an individual. Had the Bank sought to enforce those claims before it was nationalised Mr. **Ablyazov** could not have asserted that the claims were an exercise of the sovereign authority of Kazakhstan or that the central interest in bringing the claims was governmental in nature. The nature of the claims did not change upon nationalisation of the Bank. The claims which are now brought by the Bank are the very same private law claims which the Bank could have brought before it was nationalised. The shareholders of the Bank have changed; the shareholders, or a majority of them, are now the government of Kazakhstan through the Samruk-Kazyna fund. But that change in shareholding has not changed the nature of the Bank's claims.

21. The case of Mr. **Ablyazov** and of the other defendants is that the President of Kazakhstan has an interest in the Bank's claims because they will assist him in eliminating Mr. **Ablyazov** as a political opponent and has procured the Bank and its officers to bring those claims for that purpose. Mr. Girolami put the matter this way: the “Bank dances to the tune of the President.” He has caused the proceedings to be brought by the Bank, not for the purpose of pursuing an arguable claim but as a part of a political campaign for his own purposes. Mr. Girolami said that the refusal of the court to rule on the merits of an arguable claim by granting the stay which has been sought should not be regarded as an injustice because the proceedings have been brought, not to enforce that arguable claim, but to advance the political fortune of the President of Kazakhstan.

22. The President's alleged interest is governmental in nature. It is said that he wishes to strengthen his government by eliminating the opposition to it. However, that interest is an interest of the shareholders of the Bank. It is not the interest of the Bank which is a legal entity separate from that of its shareholders. The interest of the Bank, notwithstanding that the President of Kazakhstan may have his own reasons for causing the Bank to bring its claims, is to recover compensation for losses it claims to have suffered as a result of the unlawful actions of Mr. **Ablyazov**. It has not been said that the Bank does not have reasonably arguable claims to recover those losses. Moreover, the Bank is obliged to bring such claims for the benefit of its creditors. (Mr. Girolami pointed out that the Drey proceedings were commenced before the restructuring process was approved by the court in Almaty, Kazakhstan on 16 October 2009 but the Bank is obliged to maintain those proceedings for the benefit of its creditors.) This interest of the Bank, as a legal entity distinct from that of its shareholders, cannot be ignored and is not governmental in nature. To regard the Bank's interest as governmental in nature would be to disregard the separate legal personalities and interests of the Bank and its shareholders.

23. My approach to this matter is, I think, supported by the decision and reasoning of the House of Lords in *Williams and Humbert Ltd. v W&H Trade Marks (Jersey) Ltd.* [1986] 1 AC 368. In that case actions were brought by companies against former shareholders whose shares had been compulsorily acquired by the Spanish Government (because, it was said, the Rumasa group had embarked on rash speculations and reckless expansions of credit on a scale which threatened the stability of the Spanish economy, the livelihood of Spanish workers and the savings of bank depositors). The companies alleged that the former shareholders had misappropriated trade marks and $46m. The House of Lords held that the actions brought by the companies were private law claims against the former shareholders and were not to enforce the Spanish decree by which the shares were compulsorily acquired. The argument that the actions were attempts by the Spanish government indirectly to enforce the Spanish decree was contrary to the principle established by *Salomon v A Salomon & Co. Ltd.* [1897] AC 22, namely, that the legal personality of a company is separate from that of its shareholders. These matters are discussed by Lord Templeman at pp.428-429 of the report.

24. In *Williams & Humbert* the defendants had alleged that the plaintiffs were “not seeking to enforce their own rights but rather those purportedly acquired by the State of Spain under its Decree Law of 23 February

1983 and the law of 29 June 1983". The defendants said that those laws were discriminatory being "directed specifically and exclusively at the Rumasa Group and the Mateos family"; see p.374 of the report. Lord Templeman referred at p.431 to the defendants seeking to "attack the motives of the Spanish legislators, to allege oppression on the part of the Spanish government and to question the good faith of the Spanish administration." Whilst these allegations lack the political dimension and perhaps the ruthlessness attributed to the President of Kazakhstan by Mr. **Ablyazov** there is nevertheless some similarity with the allegations in this case. However, the suggested interest of the Spanish state in the claims did not provide any defence to the claim.

25. Lord Templeman (at p.430) thought such interest was irrelevant:

> "If the Mateos family had remained in charge of the Rumasa group of companies perhaps no action would have been brought by any of the companies comprised in the Rumasa group against the appellants. But that consideration is irrelevant to the actions which have now been brought."

26. Lord Mackay (at p.441, in a passage to which it will be necessary to return in more detail) did not accept that "a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law" would provide a defence to the claim.

27. Mr. Trace sought to distinguish *Williams & Humbert* on the basis that the claims and the preceding compulsory acquisition in that case were as a matter of fact divorced from each other whereas in the present case both the claims and the nationalisation are an integral part of the President's scheme to eliminate Mr. **Ablyazov** as a political opponent. Mr. Girolami said that there was no allegation in *Williams & Humbert* against the Spanish Government similar to the allegation made in this case against the Kazakh Government. I am not sure that *Williams & Humbert* can be distinguished in this way having regard to the allegation in *Williams & Humbert* that the Spanish laws were discriminatory and directed specifically at the Rumasa group. But if it is a distinction on the facts, I am not persuaded that it is a material distinction. The claims which the Bank wishes to bring against Mr. **Ablyazov** and others arose before nationalisation. In that sense they are divorced from the nationalisation as they were in *Williams & Humbert*. Also, the Bank and its shareholders have separate legal personalities as did the companies and their shareholders in *Williams & Humbert*.

28. Both Mr. Trace and Mr. Girolami relied heavily on *QRS 1 ApS v Frandsen* [1999] 1 WLR 2169. They submitted that it was an example of a claim which in its origin was a private law claim unconnected with any government interest but which, when pursued in support of a foreign government interest, could not succeed because to allow it to succeed would give effect to that foreign government interest.

29. For present purposes the facts of *Frandsen* may be stated as follows. In 1992 the defendant disposed of the assets of the plaintiff companies for cash which was used to acquire the defendant's shares in the plaintiff companies. In 1994 the companies were put into liquidation on the ground that they had been engaged in asset-stripping. In 1995 the Danish tax authorities claimed some 40m Danish Kroner in respect of corporation tax and interest. The companies had no assets and the only creditors were the Danish tax authorities. They had appointed the liquidator and funded an action against the defendant for restitution based upon a provision in Danish law prohibiting companies from providing financial assistance for the acquisition of their own shares. The Danish tax authorities limited their claim to the sum claimed in respect of tax and interest.

30. The Court of Appeal held that the liquidator's claim was the indirect enforcement of a foreign revenue law. The Court of Appeal reached that conclusion because the facts were indistinguishable from those of *Peter Buchanan Ltd. and Macharg v McVey* (Note) [1955] AC 516, an Irish decision, which had been approved by the House of Lords in *Government of India v Taylor* [1955] AC 491. One of the arguments addressed to the Court of Appeal was that the claim before the court did not involve the assertion of sovereign authority because what was being asserted was the claim of the plaintiff companies in liquidation. This ar-

gument failed because the court was entitled to have regard to the substance of the matter and, on the authority of *Buchanan*, the court had to reject the argument that the claim was a private law claim not only in form but in substance.

31. *Frandsen* was therefore said by Mr. Trace and Mr. Girolami to be an example of a private law claim being barred when, as a matter of substance, it was sought to be enforced by a foreign government for its own interests. It was further said that the consequence of their argument that the Bank could have advanced its claims before nationalisation of the Bank but could not do so after nationalisation was not remarkable but was the recognised effect of the rule which prevents this court from giving effect to assertions of sovereign authority outside the territory of the sovereign.

32. *Buchanan* was considered in *Williams and Humbert*. It was relied upon by counsel, Mark Littman QC, who submitted that "it applies to the present case [*Willams & Humbert*] because the object of the plaintiffs in the trademark action and the banks' action is to collect assets which will indirectly enure for the benefit of a foreign government." Lord Templeman was unimpressed. He said (at p.433) that *Buchanan* "only concerns a revenue claim" and could not "contradict the principle that the courts of this country will recognise the law of compulsory acquisition of a foreign country and will accept and enforce the consequences of that compulsory acquisition." Lord Mackay dealt with the submission based on *Buchanan* at rather greater length. He said at pp.440-441:

> "From the decision in the *Buchanan* case [1955] A.C. 516 counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal revenue or other public law of the foreign State relief cannot be given. It has to be observed that in the *Buchanan* case the action was being pursued by a person whose title as liquidator of the company depended on his having been appointed by a petition to the court in Scotland on behalf of the Inland Revenue, that the ground of action was that the transactions being attacked in the proceedings in Dublin were ultra vires and dishonest because there existed at the time that they were effected in Scotland a claim by the Inland Revenue which the transactions were designed to defeat, and that if no such claim existed the defendant would have been entitled to retain the subject matter of the claim. Most important there was an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. That this was regarded as of critical importance appears from what was said in the decision on appeal by Maguire C.J., at p. 533.
>
> Having regard to the questions before this House in *Government of India v. Taylor* [1955] A.C. 491 I consider that it cannot be said that any approval was given by the House to the decision in the *Buchanan* case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in *Government of India v. Taylor*, in *Rossano's* case [1963] 2 Q.B. 352 nor in *Brokaw v. Seatrain U.K. Ltd.* [1971] 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the *Buchanan* case [1955] A.C. 516 for refusing to allow the action to succeed.
>
> In the present case there is no allegation of any unsatisfied claim under the law of the Kingdom of Spain on which counsel for the appellants found. No provision of that law would provide a foundation for making any of the claims in question in the actions with which this appeal is concerned. The decision in the *Buchanan* case gives no basis for the substitution in place of

> such an unsatisfied claim, of a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law. Counsel for the appellants were completely unable to point to any claim unsatisfied under the law of Spain of 29 June on which this aspect of their defence is founded and I consider that it has been clearly demonstrated that it was right for the judge to strike out the pleading which has been impugned in the trademarks action on the ground that it disclosed no reasonable defence and to refuse the proposed amendment in the banks' action on the same ground. Once this conclusion is arrived at I consider that the course taken by the judge under R.S.C., Ord. 18, r. 19 is justified by the terms of that rule."

33. In my judgment, when considering the ambit of *Buchanan* and *Frandsen* (which followed *Buchanan* being indistinguishable from it), I should be guided by the approach of Lord Mackay which was more extensive than that of Lord Templeman. The other members of the Appellate Committee agreed with both Lord Templeman and Lord Mackay. It is to be noted that Lord Mackay did not accept the proposition that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. A general desire on the part of the foreign state to secure a particular result, object or purpose could not take the place of an unsatisfied claim. In *Buchanan* and *Frandsen* there was an unsatisfied claim, namely the claim for unpaid taxes. In the present case there is no unsatisfied claim on the part of the Government of Kazakhstan. Instead, the Bank has a claim and Mr. **Ablyazov** alleges that the object or purpose of the Government of Kazakhstan in ensuring that such claim is brought is to eliminate him as a political opponent. Furthermore, unlike *Buchanan* and *Frandsen*, the whole proceeds of the actions will not go to the Bank (or indirectly to the Government). 50% of the recoveries will go to the major Western financial institutions who are creditors of the Bank. I therefore consider that there are material distinctions between the present case and *Buchanan* and *Frandsen*. I do not consider that those cases assist Mr. Trace and Mr. Girolami in their arguments.

34. For these reasons I have concluded that it is not arguable that the Bank's actions involve the indirect enforcement of a foreign penal, revenue or other public law or of a sovereign or governmental interest.

Are the Stay Applications justiciable?

35. Mr. Trace has identified the following reasons why the claims in this court should be stayed as an abuse of process:

> i) the claims are part of, and a continuation of, the President's illegal scheme to eliminate Mr. **Ablyazov** as a political opponent;
>
> ii) the claims are brought for the collateral purpose of eliminating Mr. **Ablyazov** as a political opponent;
>
> iii) the nationalisation of the Bank or, as the defendants put it, the expropriation was unlawful and invalid with the consequence that the proceedings have been brought without authority;
>
> iv) the claims would give effect to the nationalisation of the Bank which was a flagrant breach of international law and/or an infringement of human rights.
>
> v) it will be impossible for Mr. **Ablyazov** and the other defendants to obtain a fair trial because the Kazakhstan authorities have abused or will abuse their powers by preventing them from obtaining evidence.

36. Mr. Smith submits that arguments (i)-(iv) are non-justiciable. He does not say that argument (v) is non-justiciable but he submits that it can only be resolved at trial. Only then will it be apparent whether such evidence as is proved to have been wrongfully withheld from Mr. **Ablyazov** renders a fair trial impossible. At

any rate no point on the topic of a fair trial arises for decision on this application. He also says that argument (iii), the question whether these proceedings have been brought without authority, is an entirely new point not covered by the Stay Applications.

37. In so far as the arguments advanced in support of the Stay Applications include an attack on the legality of the nationalisation of the Bank Mr. Smith submits that the court is precluded from ruling upon the legality of the nationalisation because of the “act of state” doctrine. The expression “act of state” is used in several different senses; see *Dicey, Morris & Collins on the Conflict of Laws* 14th.ed.para.5-041-044. The sense in which it is used by Mr. Smith in this case is that of a foreign sovereign act and its effect within the territory of that foreign sovereign. In this sense the doctrine is “concerned with the applicability of foreign municipal legislation within its own territory and with the examinability of such legislation” (see Lord Wilberforce in *Buttes Gas & Oil Co. v Hammer* [1982] AC 888). “It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country” (see Warrington LJ in *Luther v Sagor & Co.* [1921] 3 KB 532 at p.548). However, the principle is not absolute. In particular, there is a public policy exception. Also, the doctrine has no application where it is clear that the relevant acts were done outside the sovereign's territory; see *Dicey* para.5-046. The doctrine prevents the court from determining the constitutionality of foreign legislation where that is the object of the proceedings. Where however that is not the object of the proceedings but the validity of a foreign law arises incidentally in an action upon a contract to be performed abroad or in an action alleging that a tort has been committed abroad, the court may consider the validity of the foreign law; *Buck v Attorney General* [1965] Ch.745 and *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758.

38. The Skeleton Arguments also addressed the wider principle of judicial restraint explained by Lord Wilberforce in *Buttes Gas & Oil v Hammer*. However, Mr. Smith made clear in his oral argument that he was not relying upon this principle which he accepted related more to dealings of one state with another than with the circumstances in the present case. I shall therefore not address that wider doctrine of judicial restraint.

39. Mr. Smith submitted that the nationalisation of the Bank was an act of state that took place in Kazakhstan and so cannot be questioned by this court. He said that the actions in this court are not properly to be regarded as enforcement of the nationalisation outside of the territory of Kazakhstan.

40. Both Mr. Trace and Mr. Girolami submit that the actions in this court are to be regarded as the enforcement abroad of a Kazakh act of state; an exercise in “extra-territorial sovereignty”. Mr. Girolami says that the actions “cannot sensibly be separated from the act of state occurring within Kazakhstan.” In this regard reliance was placed on *The Playa Larga* [1983] 2 Lloyd's Reports 171. “Where, however, it is clear that the acts relied on were carried out outside the sovereign's own territory, there seems no compelling reason for judicial restraint or abstention” (per Ackner LJ at p.194).

41. They further submitted that the doctrine of act of state was of very limited application. They submitted that the act of state doctrine applies only to acts of state properly so called so that the applicability of the doctrine is premised on the validity of the relevant act of state as a matter of the law of the foreign state concerned. Accordingly, the court must be able to determine whether the act of state is valid. Mr. Smith said that this submission was contrary to all authority.

42. Finally, Mr. Trace and Mr. Girolami said that the public policy exception applied in this case. Mr. Smith accepted that there was a public policy exception but said that the facts of the present case were not within it.

43. It seems to me that it is necessary to consider each of the heads of abuse of process identified by Mr. Trace in his argument in order to examine whether it raises issues which are non-justiciable by reason of the act of state doctrine.

Illegality

44. The first argument advanced by Mr. Trace is that the proceedings are an abuse because the court would be party to or assisting in the furtherance of an illegal scheme of the President of Kazakhstan. I am not strictly concerned on this application with the question whether, assuming the scheme of the President of Kazakhstan is illegal, the proceedings here would be an abuse. Mr. Smith says it would not be. That issue, if it has to be decided, must be determined at a later stage though I suspect little further argument is really needed.

45. The first question which arises for decision now is whether *The Playa Larga* extra-territoriality principle applies. That applies "where the acts relied on were carried out outside the sovereign's own territory". In the present case it is said that the acts relied on are the commencement of proceedings in this jurisdiction, that is, outside the territory of the President of Kazakhstan. It is of course true that the proceedings were commenced in this jurisdiction. But, for the reasons I have given when dealing with the penal/public law issue, the proceedings were commenced by the Bank and not by the President of Kazakhstan, they are not seeking the enforcement of a sovereign right and the central interest in bringing them is not governmental in nature, notwithstanding that the President may have had an interest in pursuing the proceedings and may have procured the commencement of the proceedings by the Bank. The proceedings are said to be an abuse because they assist in the furtherance of an illegal scheme in Kazakhstan. The acts said to be illegal are actions of the President of Kazakhstan in his own territory. In my judgment that argument engages the act of state doctrine. Mr. **Ablyazov** seeks to invite this court to consider whether actions of the President in his own country are in breach of Kazakh law or not.

46. The second question is whether the act of state doctrine only applies to acts of state which are valid acts of state. Whilst the authorities relied upon by Mr. Smith state that the act of state doctrine applies whether the act of state relied upon be valid or not by the local law, other authorities show, as *Dicey* suggests at para. 5-046, that there are circumstances in which the court may investigate the validity of a foreign legislative or other sovereign act.

47. Mr. Smith relied on *Duke of Brunswick v King of Hanover* (1848-50) 2 HLC 1. In that case there was a contention that a foreign decree was void and invalid (see pp.5,9 and 10). Lord Cottenham said (at p.17):

> "a foreign Sovereign coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; *whether it be an act right or wrong, whether according to the constitution of that country or not*, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign." (emphasis added)

48. Mr. Smith also relied upon *Princess Paley Olga v Weisz and others* [1929] 1 KB 718 in which the court considered that property in Russia had lawfully passed to the Russian Government under local decrees. But the court went on to say that even if that had not been the case the seizure of the property was an act of state into which the validity of the court would not enquire; see Scrutton LJ at pp.723-725 and Russell LJ said at p.736:

> "This court will not inquire into the *legality* of acts done by a foreign Government against its own subjects in respect of property situate in its own territory." (emphasis added)

49. The first authority, chronologically, relied upon by Mr. Trace and Mr. Girolami was *A/S Tallina Laevauhisus v Estonian State Steamship Line* (1947) 80 Lloyd's List Law Reports 99. The issue in that case concerned whether the plaintiff or the defendant had title to the proceeds of an insurance policy on the vessel Vapper which had been lost at sea on 6 July 1940. The English underwriters had interpleaded. The plaintiff,

an Estonian company, had been the owner of the vessel, had insured her with the English underwriters and claimed to be entitled to the insurance proceeds. In June 1940 Estonia had been occupied by Russia and Estonia was declared to be a Soviet Socialist Republic. The defendant, which had taken over shipping in Estonia, claimed to be entitled to the insurance proceeds in England on the grounds that the plaintiff had been dissolved by decrees issued by the Estonian Soviet Socialist Republic and that the title to the insurance proceeds had passed to it. The plaintiff established its claim to the insurance proceeds. The defendant appealed and its appeal was dismissed. The question on appeal was whether the defendant had proved the decrees relied upon and if so whether they were effective to transfer title to the insurance proceeds in London to the defendant. Scott LJ considered that the decrees had never been proved in evidence but if they had been proved considered that they did not establish a transfer to the defendant company of the title to the insurance proceeds; see pp.107 and 110. In any event, had the right to claim the insurance proceeds passed that would have amounted to the compulsory acquisition of assets in England without compensation and the court would not enforce a penal law of a foreign state; see p.111. Tucker LJ considered that some of the decrees were sufficiently proved but not the decree relied on as vesting title to the insurance proceeds in the defendant; see pp.112-113. He went on to consider the construction and effect of those decrees he considered to have been proved and concluded that they would not suffice to transfer title to the defendant; see p.113. Cohen LJ agreed that the appeal should be dismissed and dealt with a separate procedural question. Since this case dealt with property situated in England, the insurance proceeds, title to which was said to have been passed to the defendant by virtue of a foreign decree, I do not consider that it engages the act of state doctrine relied upon by Mr. Smith. That doctrine concerns the effect of foreign acts of state within that foreign country.

50. The second authority relied upon was *Dubai Bank Ltd. v Galadari* and others, an unreported decision of Morritt J. dated 20 June 1990 of which a transcript was available. The question for decision in that case was whether the plaintiff, Dubai Bank, had any legal status to commence or maintain the action before the court. The writ had been issued on 14 March 1989. The defendants, the Galadaris, maintained that Dubai Bank had ceased to exist on 1 January 1987. Dubai Bank relied on one or more certificates by certain authorities in Dubai to the effect that Dubai Bank continued to exist. The Bank relied on the act of state doctrine so as to make such certificates conclusive. Morritt J. referred to *The Duke of Brunswick* and said (at p.11) that it was clear authority for the proposition that the Court cannot enquire into the validity of acts done in a sovereign capacity. “But it is no authority for the proposition which [Dubai Bank] must establish that the Court cannot in any case enquire into the legal validity of an act done by a citizen purporting to act on behalf of the sovereign or sovereign state.” Morritt J. referred to *Buttes Gas* and noted (at p.12) that “the principle of non-justiciability has to be determined by reference to the issues in dispute and the class of sovereign act involved.” He also referred to the American Third Restatement of Foreign Relations Law of the United States which stated in terms that an action or declaration by an official may qualify as an act of state “but only upon a showing (ordinarily by the party raising the issue) that the official had authority to act for and bind the state.” After referring to other authorities (including *A/S Tallina Laevauhisus v Estonian State Steamship Line*) he approved (at p.14) the statement in *Dicey* (now at para.5-046) that “there may be circumstances in which foreign legislation may be held by the English court to be unconstitutional under the foreign law.” He held (at p.15) that that the certificates were not conclusive by reason of the act of state doctrine.

51. I accept, based upon that authority, that where a person claims to act on behalf of a foreign sovereign the court can enquire into whether that person does indeed have authority to act on behalf of the sovereign. However, if he does have the required authority and the court is asked to recognise the validity of his act within the territory of the sovereign, I do not consider that the court can enquire whether his actions were valid in accordance with the local law. To do so would be contrary to the authorities on which Mr. Smith relied.

52. The third authority relied upon was *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758. That was a case in which the claimant sought damages for unlawful imprisonment by British forces in Iraq. One issue was whether questions as to the meaning and effect of provisions of the Iraqi Constitution were justiciable; see para.21(ii). The argument was that the court should not enter into such questions because to do so would breach the obligation of comity between friendly nations and there was no clear and managea-

ble standard which an English court could apply to answer them; see para.71. The argument was rejected. Arden LJ said at para.74 that the action did not involve a challenge to the validity of the Constitution of Iraq. The court would only be reaching conclusions as to the meaning of the Iraqi Constitution for the purposes of a private law claim in damages. The provisions of the Constitution provided judicial and manageable standards by which to interpret the Constitution. Elias LJ also rejected the argument at paras.184-191 essentially for the same reasons. It does not appear to me that this case touches on the scope of the act of state doctrine relied upon by Mr. Smith. No act of a foreign state was being questioned. The court was merely deciding whether the actions of the British forces in Iraq were unlawful under Iraqi law for the purposes of determining the action in tort brought by the claimant against the British forces. (Another issue in the case concerned whether the “defence of act of state” was available to the British force (the second of the meanings of act of state referred to by Dicey at para.5-042) but that was a different issue from the doctrine of act of state which is raised in this case; see paras.21(v), 93-110 and 192-226 of the judgments.)

53. There were two other authorities relied upon in this context. The first was *Marubeni Hong Kong and South China Ltd. v The Government of Mongolia* [2004] All ER (D) 257 (Mar), [2004] EWHC 472 Comm. However, although the court adjudicated upon issues sensitive to the internal workings of the Mongolian Government it did so (albeit with a sense of restraint) when investigating an assertion by the Mongolian Government itself that it was not bound by a letter of guarantee apparently signed on its behalf; see para.58(ii). The second was *Donegal International Ltd. v Zambia* [2007] 1 Lloyd's Reports 397. This was another case where a government disputed that the person who had signed a settlement agreement apparently on its behalf had authority to do so.

54. It was also said that the decision in *Korea National Insurance Corp. v Allianz* [2008] 2 CLC 837, [2008] EWCA Civ 1355 supported the submission made by Mr. Trace and Girolami. However, I do not consider they can derive assistance from that decision. First, Waller LJ said expressly that the decision should be regarded as limited to the facts of the case (see paragraph 5). Second, the case did not concern an allegation with regard to a sovereign act carried out in the sovereign's jurisdiction but allegations against the state in relation to acts which affected the rights of a party under a commercial contract (see paragraph 32).

55. Having reviewed the principal authorities relied upon by the parties my conclusions are:

> i) The act of state doctrine prevents the court from enquiring into the validity of a foreign sovereign act within the territory of the foreign state.
>
> ii) However, before applying that doctrine the court must consider the circumstances in which the court is being invited to enquire into the validity of the act of state for there are some circumstances, not inconsistent with the principle underlying the doctrine, in which the enquiry is permitted.
>
> iii) Those circumstances include:
>
> a) Where the issue is whether a person who purports to act on behalf of a foreign sovereign has authority to do so; see *Dubai Bank Ltd. v Galadari*.
>
> b) Where the effect of a foreign law arises incidentally in an action upon a contract to be performed abroad or in an action alleging that a tort has been committed abroad; see *Buck v Attorney General* and *Al-Jedda v Secretary of State for Defence*.
>
> c) Where the foreign sovereign itself questions the validity of its own apparent act; see *Marubeni Hong Kong and South China Ltd. v The Government of Mongolia* and *Donegal International Ltd. v Zambia*.

56. The respects in which it is said that the nationalisation of the Bank was invalid were not set out in the Particulars which Mr. **Ablyazov** served at the end of November 2010. That is possibly because the expert report of Professor Maggs on Kazakh law was not available until 24 December 2010. Since no permission had been sought or granted for such expert evidence I looked at the report of Professor Maggs *de bene esse*. I was referred to parts of it which suggested that the nationalisation was not in accordance with Kazakh law, in particular with the Constitution, the Law on Banks, the Law on Normative Acts and the Civil Code.

57. The court is therefore being asked to determine that actions of the President of Kazakhstan within the territory of Kazakhstan breached the law of Kazakhstan for the purpose of saying that the nationalisation was not valid in Kazakhstan. The circumstances of the present case and the purpose for which the court is being asked to enquire into the validity of a foreign act of state do not, in my judgment, fall within the circumstances in which such an enquiry has been held to be permissible. I am not persuaded that those circumstances should be extended to include those of the present case. As Morritt J. held in *Dubai Bank Ltd. v Galadari* there is "clear authority [*The Duke of Brunswick*] for the proposition that the Court cannot enquire into the validity of acts done in a sovereign capacity" and in *Williams & Humbert* Lord Templeman stated in clear terms (at p.431) that the court will recognise the compulsory acquisition law of a foreign state.

58. I have therefore decided that the applications to stay on the ground that the claims are part of, and a continuation of, the President's illegal scheme to eliminate Mr. **Ablyazov** as a political opponent are non-justiciable on the grounds that it is inviting the Court to decide whether the nationalisation of the Bank in Kazakhstan was illegal and invalid.

International law and human rights

59. The fourth argument advanced by Mr. Trace (I shall return to the second and third arguments later) is that the claims would give effect to the nationalisation of the Bank which was a flagrant breach of international law and/or an infringement of human rights.

60. For the reasons which I have given in respect of the "illegality" argument this argument also engages the act of state doctrine. However, it is said by Mr. Trace and Mr. Girolami also to engage the public policy exception.

61. Reliance was placed on an exception to the act of state doctrine to the effect that the court will enquire into the acts of a foreign sovereign state where public policy requires it to do so. Reference was made to *Oppenheimer v Cattermole* [1976] AC 249, *Kuwait Airways Corpn. v Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883, *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Abbasi* [2003] UKHRR 76 and *Jones v Ministry of Interior of Saudi Arabia* [2005] 1 QB 699. It was submitted that flagrant breaches of human rights or of international law fall within the public policy exception. It was said that the public policy is that the English courts should not be expected to refrain from adjudication of the acts of foreign sovereigns which do not accord with the laws of nations and internationally agreed minimum standards to which the global community expects all sovereigns to adhere.

62. Mr. Smith accepted that flagrant breaches of international law or of human rights are exceptions to the principle that the courts of this country do not sit in judgment on the acts of a foreign government within its own territory. However, he noted that in *Kuwait Airways Corpn. v Iraqi Airways Co. (Nos. 4 and 5)* the House of Lords said that the courts should be slow to find an exception to the principle of act of state. Thus at paragraph 18 Lord Nicholls said that the residual power to refuse to recognise a foreign law should "be exercised exceptionally and with the greatest circumspection….when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country". At paragraph 138 Lord Hope said that "it is clear that very narrow limits must be placed on any exception to the act of state rule."

63. Before considering whether the circumstances of the present case as alleged by Mr. **Ablyazov** and the other defendants fall within this exception it is instructive to consider the circumstances of the cases referred to by Mr. Trace and Mr. Girolami.

64. In *Oppenheimer v Cattermole* [1976] AC 249 the court was concerned with Nazi legislation dating from 1941 which deprived Jewish émigrés from Nazi Germany of their citizenship and property. In the event the decision was not founded upon that legislation but on later legislation dating from 1949. However, Lord Cross explained how he would have decided the case had it depended upon the 1941 legislation. Lords Hodson and Pearson agreed with him. Lord Cross said at p.278:

> "What we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."

65. In *Kuwait Airways Corpn. v Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 the court was concerned with an Iraqi decree which purported to dissolve a company (Kuwait Airways) in a different country (Kuwait) and to transfer its property to Iraqi Airways. The decree was part of the seizure of Kuwait by Iraq which was held by the UN Security Council to be null and void. Lord Nicholls said at para. 28:

> "An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today."

66. In *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Abbasi* [2003] UKHRR 76 the court was concerned with the detention of a British national by the United States government in Guantanamo Bay. Lord Phillips said (at para.57) that Lord Cross's speech in *Oppenheimer v Cattermole* supported the view that, "albeit that caution must be exercised by this court when faced with an allegation that a foreign State is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."

67. In *Jones v Ministry of Interior of Saudi Arabia* [2005] 1 QB 699 the court was concerned with allegations that the claimants had been systematically tortured while imprisoned in Saudi Arabia. The issues before the court concerned questions of state immunity but Mance LJ, who had earlier referred to the doctrine of act of state and the exceptions to it (see para. 10), said (at para.90) "while the courts of one state should not lightly adjudicate upon the internal affairs of another state, there are many circumstances, particularly in the context of human rights, when national courts do have to consider and form a view on the position in or conduct of foreign states."

68. Mr. **Ablyazov** condemns the nationalisation of the Bank as being not only in breach of Kazakh law but also in violation of his human rights and a flagrant breach of international law. Mr. Trace has summarised the allegations in this way:

> "…the Expropriation took place without any compensation, was carried out for political and discriminatory purposes, and involved a massive deprivation of Mr. **Ablyazov**'s property…. The purpose of the Scheme as a whole is to expropriate the assets of Mr. **Ablyazov** and/or to destroy their value, and to eliminate him as a political force in opposition to the present regime in Kazakhstan. Thus, both the Expropriation in particular and the Scheme as a whole constitute flagrant breaches of international law, and grave infringements of the human rights of Mr. **Ablyazov**….."

69. Mr. Smith from time to time said in his submissions that there was no evidence, or no admissible evidence, in support of these allegations. Whether or not that is so this application was not intended to be the occasion on which the sufficiency of Mr. **Ablyazov**'s evidence was to be assessed. On the contrary, on this application it is to be assumed that the aim of the President of Kazakhstan is and has been to eliminate Mr. **Ablyazov** as a political opponent and that the nationalisation was in breach of international law and Mr. **Ablyazov**'s human rights. The authorities relied upon by Mr. Trace and Mr. Girolami support the proposition that where there has been a flagrant breach of international law or of human rights the court can in appropriate circumstances consider those breaches as an exception to the act of state doctrine.

70. The question for the court to decide is whether it is, arguably, contrary to public policy to permit the Bank to claim compensation from Mr. **Ablyazov** and the other defendants for fraud and breach of duty alleged to have been committed before the nationalisation of the Bank.

71. There is evidence that the Bank was insolvent. It may be that this is challenged (because Mr. Trace says that the nationalisation (or expropriation) was “unwarranted and inconsistent with prudent bank supervisory policies”). But there is no challenge to the fact of the insolvency restructuring process which was approved by a Kazakh court in Almaty on 16 October 2009. That process has also been approved by other courts, in particular, the Chancery Division of this court. As part of that process major Western financial institutions have written off debt and in return the Bank is obliged to recover compensation from those alleged to have been responsible for the Bank's losses. The Bank's creditors are entitled to receive 50% of any recoveries made by the Bank and have a charge upon them. Thus, the actions in this court, whilst said by Mr. **Ablyazov** to be orchestrated by the President of Kazakhstan to assist him in his campaign to eliminate Mr. **Ablyazov** as a political opponent, are also required to be pursued by and for the benefit of the major Western financial institutions who were substantial creditors of the Bank.

72. I have given anxious consideration to the submissions of Mr. Trace and Mr. Girolami because the complaints of breaches of international law and human rights are very serious indeed. However, even if the court assumes that there have been serious and flagrant breaches of international law and human rights I do not consider that the maintenance of the actions in this court by the Bank is contrary to public policy. That is because the nature of the claims before the court is not such as to engage the public policy exception. My reasons are as follows:

i) The actions are based upon claims which originate from conduct alleged to have taken place before the nationalisation.

ii) The nationalisation has not created those claims nor is it an integral part of those claims. Those claims are therefore unsullied by the alleged unlawful nature of the nationalisation and the breaches of international law and human rights alleged to have been committed when the nationalisation was effected.

iii) The claims are those of the Bank. They are not the claims of the Government of Kazakhstan which is said to have brought about the nationalisation in breach of international law and human rights.

iv) The Bank seeks compensation for losses it allegedly suffered before nationalisation and is obliged to pursue such claims for the benefit not only of itself but also of the major Western financial institutions who were creditors of the Bank.

v) The claims are part and parcel of the insolvency restructuring of the Bank which has been approved by many courts including this court. (The Drey proceedings were commenced before the decision of the Almaty court approving the restructuring process but the process must apply to it.)

vi) The court is not being asked to enforce the nationalisation of the Bank or to give effect to the alleged breaches of international law and human rights.

vii) On the contrary the court is being asked to give effect to claims of the Bank based upon alleged wrongdoing by Mr. **Ablyazov** and the other defendants which is said to have occurred before and independently of the nationalisation of the Bank.

73. I have in mind Mr. Girolami's submission that Mr. **Ablyazov** and the other defendants intend to prove that the Bank is not bringing these claims to recover losses which it says it has suffered but that it is the President of Kazakhstan who is bringing these claims for his own political purposes. However, even if it is established that the President has his own interests for maintaining these actions and has procured the Bank to bring and maintain them I consider that this submission ignores (i) the separate legal personalities and interests of the Bank and of the Government of Kazakhstan as shareholder of the Bank and (ii) the interest of third party creditors of the Bank who require the claims to be maintained by the Bank. The facts which Mr. **Ablyazov** and the other defendants intend to establish cannot, in my judgment, cause the maintenance of these actions by the Bank to be in breach of the public policy of this jurisdiction.

74. I am mindful that questions of public policy will often be fact sensitive and that it will usually be appropriate to consider such questions after all the evidence has been heard. This was one of the reasons why Mr. Trace and Mr. Girolami suggested that the issue of non-justiciability should not be determined on this application. My order of 2 August 2010 that Mr. **Ablyazov** serve particulars of the facts on which he intended to rely was designed to ensure that there was no doubt as to the factual basis upon which the issue of non-justiciability was to be argued. However, I accept that even when the factual case has been pleaded nuances may arise from the evidence which are not apparent from the pleading. I have therefore sought to stand back from the detail of the issues which have been debated before me and have considered again whether the fair just and appropriate course is indeed to reach a conclusion on non-justiciability rather than postpone such decision until after the many witnesses Mr. **Ablyazov** wishes to call have been cross-examined and after the voluminous documentary evidence he wishes to adduce has been considered. It seems to me that the important features of this case to be borne in mind in this regard are:

i) the separate legal personalities of the Bank and its shareholders;

ii) that the claims being brought in this court are based upon alleged wrongdoing of Mr. **Ablyazov** and others before the Bank was nationalised by the Government of Kazakhstan;

iii) that the interests of the Bank and of the Government of Kazakhstan are different;

iv) the interest which creditors of the Bank, including Western financial institutions, have in the claims and any recoveries which are made; and

v) that the Government of Kazakhstan has no claim against Mr. **Ablyazov** which might be satisfied by recoveries in these actions.

75. I consider that those features clearly show that giving effect to the act of state doctrine would not be contrary to public policy even if the facts which Mr. **Ablyazov** seeks to prove are proved. Those features are in essence the very same reasons why it is not appropriate to regard the actions in this court as an indirect enforcement of foreign sovereign or governmental interests. I therefore continue to think that it is appropriate to rule on this matter now rather than permit the parties to spend considerable further time and costs on this issue. Just as there were special circumstances in *Williams & Humbert* making it right to strike out the pleading in that case so here there are very similar special circumstances which make it right to strike out certain of the allegations made in support of the Stay Applications.

76. For the reasons I have given I do not consider that the circumstances of this case fall within, or engage, the public policy exception to the act of state doctrine. It follows that I consider that the applications to stay on the ground that the court would give effect to the nationalisation of the Bank which was a flagrant breach of international law and/or an infringement of human rights are non-justiciable.

Collateral purpose

77. The second argument advanced in support of the Stay Applications is that the claims are brought for the collateral purpose of eliminating Mr. **Ablyazov** as a political opponent. The Skeleton Arguments (to varying extents) addressed the question of the circumstances in which a collateral purpose in bringing an action amounts to an abuse of the court's process. However, that issue is not before the court on this occasion. Nor is the question whether the argument can succeed on the facts alleged by Mr. **Ablyazov**, which was addressed by Mr. Smith in his oral submissions. Those arguments will have to be addressed hereafter though it may be that little additional argument will actually be required. The question that I must address on this occasion is whether the argument is non-justiciable by reason of the act of state doctrine.

78. It does not appear to me that it is non-justiciable. Mr. **Ablyazov** seeks to allege that the Bank has a collateral purpose in bringing the claims, namely, to continue the President's alleged campaign of eliminating Mr. **Ablyazov** as a political opponent. This involves alleging that the President has a scheme to eliminate Mr. **Ablyazov** as a political opponent and has procured the Bank to bring the claims as a means of assisting in achieving that aim. This does not involve a challenge to the lawfulness or validity of the President's actions. It involves proof of what he has done and why. Lawfulness and validity are irrelevant. I do not understand the act of state doctrine to require the court to close its eyes to such matters. There may however be reasons based on comity for the court to proceed with caution when examining the motives or conduct of a friendly sovereign; see *Dicey* para.5-047 and *Mbasogo v Logo Ltd.* [2007] QB 846, [2006] EWCA Civ 1370 at paras.65-66 per Sir Anthony Clarke MR.

Actions brought without authority

79. This is the third argument identified by Mr. Trace in support of the abuse argument. However, lack of authority is a different complaint from abuse and was not included in the Stay Applications or in the order of 2 August 2010. I will therefore say nothing about the complaint unless and until it is properly raised for decision.

Stay in the event of non-justiciability

80. It was submitted that if the Stay Applications or part thereof are non-justiciable then, consistently with what happened in *Buttes Gas*, the Bank should not be permitted to maintain its claims. In *Buttes Gas* the defendant was unable to prove his defence of justification by reason of the doctrine of act of state. In those circumstances it was thought unjust that the slander action should be maintained. However, I consider the present case to be materially different. Mr. **Ablyazov**'s complaints about the conduct of the Government form no part of his defence to the Bank's claims. They are advanced in support of a stay application. I do not consider that it would be an injustice to Mr. **Ablyazov** if he is unable to pursue these complaints in the Stay Applications. If the Bank's claims of fraud and breach of duty are made good he cannot complain of that.

Conclusion

81. My conclusions on the two issues which the court is to determine on this occasion are:

i) It is not arguable that the actions in this court involve the indirect enforcement of a foreign penal, revenue or public law or of a sovereign or government interest.

ii) The Stay Applications, save for the arguments based upon collateral purpose (and the need for a fair trial), raise issues which are non-justiciable.

1 Considerably greater, for example, than the total deficit in the BCCI liquidation in the 1990s.

2 The authority of the new management has been effectively blessed by the insolvency courts (Hardman 22, para. 37 [6.1/13]).