Judgments

*JSC BTA Bank v Ablyazov and others

[2011] EWHC 1136 (Comm)

QBD, COMMERCIAL COURT

Teare J

10 May 2011

Practice – Abuse of process – Stay of proceedings – Claimant state-controlled Kazakhstani bank alleging fraud committed against it by first defendant former bank chairman and others – Bank commencing actions against defendants in English court – Defendants unsuccessfully applying to stay proceedings on grounds of non-justiciability and indirect enforcement of foreign penal, revenue or public law – Defendants further applying to stay proceedings on abuse of process grounds – Whether claims against first defendant amounting to abuse of process – Whether proceedings against defendants constituting abuse of process – Whether proceedings should be stayed.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE TEARE:

1. This is my second judgment concerning the Claimant's application to dismiss the Defendants' application to stay the Claimant's actions on the grounds of abuse of process. This judgment concerns the question whether it is arguable that the actions should be stayed on the grounds that they have been pursued for a collateral purpose and so are an abuse of the process of this court. The alleged collateral purpose is that the actions have been brought to assist the President of Kazakhstan in his scheme to eliminate Mr. **Ablyazov** as a political opponent. I refer to paragraphs 1-15 of my earlier judgment reported at [2011] EWHC 202 (Comm) for the background to this application.

The law as to abuse of process on the grounds of collateral purpose

2. It is first necessary to consider what needs to be established by Mr. **Ablyazov** if he is to obtain a stay of the claims against him. In modern times at least two Masters of the Rolls have confirmed the principle that the pursuit of a claim for a collateral or ulterior purpose may amount to an abuse of the process of the court.

3. Thus in *In re Majory* [1955] Ch. 600 at pp.623-624 per Sir Raymond Evershed MR said:

> "The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

4. Similarly, in *Goldsmith v Sperrings Ltd.* [1977] 1 WLR 478 Lord Denning MR (who dissented on the result of the case) said at p.489:

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

5. However, there are, it seems, few cases in which proceedings have been stayed on this ground.

6. The question of what purpose may amount to an illegitimate collateral or ulterior purpose has arisen not only in the context of a stay on the grounds of abuse of process but also in the context of the tort of abuse of process. In the present case there is a particular dispute between the parties as to what the appropriate test is where a claimant has both a legitimate and an illegitimate purpose for commencing proceedings.

7. In *Goldsmith v Sperrings Ltd.* [1977] 1 WLR 478 an application was made to stay actions for defamation brought by Sir James Goldsmith against the distributors of Private Eye on the grounds that his purpose was not to protect his reputation but to destroy Private Eye by cutting off its retail outlets. The Court of Appeal, by a majority consisting of Scarman and Bridge LJJ, upheld the decision of Stocker J not to stay the actions. Scarman LJ explained what had to be shown in these terms:

> "In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out "to effect an object not within the scope of the process": *Grainger v Hill* (1838) 4 Bing.(NC) 212, 221 per Tindal C.J. In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought: see *In re Majory* [1955] Ch. 600, 623."

8. Bridge LJ addressed the question of what is meant by "collateral advantage". He said:

> "…….what is meant by a "collateral advantage"? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land — these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulte-

> rior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it. But on the view I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract."

9. Mr. Smith QC, counsel for the Bank, submitted that the final comments of Bridge LJ indicated that where a claimant had mixed purposes in bringing proceedings and one of them was legitimate then the proceedings would not be an abuse of process.

10. In *Broxton v McClelland* [1995] EMLR 485 an action for libel was brought and a stay was sought of the action on the grounds that the action was being maintained by a person whose ulterior or collateral purpose was to harass the defendant by any means available with the object of securing the financial ruin of the defendant. The Court of Appeal held that no stay should be granted and Simon Brown LJ (with whom the other two members of the court agreed) summarised the relevant principles as follows:

> "(1) Motive and intention as such are irrelevant (save only where "malice" is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in *Champtaloup v Thomas* (1976) 2 NSWLR 264, 271 (see *Rajski v Baynton* (1990) 22 NSWLR 125 at p 134):
>
> To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation.
>
> (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> (i) The achievement of a collateral advantage beyond the proper scope of the action - a classic instance was *Grainger v Hill* where the proceedings of which complaint was made had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever. The difficulty in deciding where precisely falls the boundary of such impermissible collateral advantage is addressed in Bridge LJ's judgment in *Goldsmith v Sperrings Limited* at page 503 D/H.
>
> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.
>
> (3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial."

11. When referring to the facts of the case before him Simon Brown LJ observed that:

> "a plaintiff is entitled to seek the defendant's financial ruin if that will be the consequence of properly prosecuting a legitimate claim."

12. In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.* [1990] 1 QB 391 the question was whether adducing false evidence and presenting false case to sustain or defeat a claim in legal proceedings amounted to the tort of abuse of process. It was held that such conduct did not amount to the tort of abuse of process. Slade LJ, who gave the judgment of the Court of Appeal, identified certain features of the tort in these terms at p.469:

> "(1) It consists of an abuse of the process of the law "to effect an object not within the scope of the process:" see, at p. 221, per Tindal C.J. The words just quoted were cited with approval by Scarman L.J. in *Goldsmith v. Sperrings Ltd.* [1977] 1 W.L.R. 478, 489.
>
> ……..
>
> (4) However, a person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed and that as a result he had caused him damage: see Halsbury's Laws of England, 4th ed., vol. 45 (1985), p. 630, para. 1381."

13. Mr. Howard QC, counsel for Mr. **Ablyazov**, submitted that this decision was an authority binding me to hold that if the claimant's predominant purpose for commencing proceedings is illegitimate then the proceedings are an abuse of the process of the court notwithstanding that the claimant had another purpose for commencing the proceedings which was legitimate. However, Mr. Smith submitted that it does not appear that the case involved mixed purposes and therefore is not to be regarded as an authority which binds me to hold that where a claimant has more than one purpose in bringing proceedings the claim will be an abuse of process if the predominant purpose was an illegitimate collateral purpose. Furthermore, he noted that reference to Halsbury's Laws (on which the Court of Appeal relied) shows that it does not in fact support the proposition that the collateral purpose must be the claimant's predominant purpose. (It is however to be noted that in *Kingdom of Spain v Christie Manson & Woods Ltd.* [1986] 1 WLR 1120 Sir Nicolas Browne-Wilkinson V.-C stated at p.1133A that the test was "predominant objective as opposed to a collateral benefit" though on the facts such an objective was not proved.)

14. In *Re Ross (a Bankrupt) (No.2)* [2000] BPIR 636 it was argued that a bankruptcy petition issued by a company against Mr. Ross was an abuse of process because the majority shareholder of the company wished the company to bring bankruptcy proceedings as means of preventing Mr. Ross from pursuing his claim to the shares in the company. Nourse LJ, with whom Mantell LJ agreed, held that the petition was not an abuse because "part at least of [the company's] purpose in presenting the petition was the lawful purpose of seeking to obtain a dividend in the bankruptcy."

15. Mr. Smith submitted that *Re Ross (a Bankrupt) (No.2)* was a mixed purposes case which was decided in the manner indicated by Bridge LJ in *Goldsmith v Sperrings* (though no reference was made either to that case or to *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*).

16. In *Wallis v Valentine* [2003] EMLR 8 a defendant to a libel action applied to have the claim struck out on the grounds that it was an abuse of process because the claimant was pursuing a vendetta against the defendant rather than a vindication of his reputation. The judge struck out the action. He held that the claim had been brought for the "dominant purpose of causing further harassment and expense to the defendants". He also considered that the publication was "most unlikely to have resulted in harm" to the claimant's reputation and that the claim was "wholly unmeritorious". The Court of Appeal, in upholding that decision, adopted the statement of principles by Simon Brown LJ in *Broxton v McClelland* and considered that the case fell within paragraph (2)(ii) of Simon Brown LJ's statement of principles. On that basis it does not appear to have been a case of mixed purposes, or at any rate one which raised such purposes in the context of paragraph 2(i) of Simon Brown LJ's principles.

17. In *Land Securities Ltd. v Fladgate Fielder (a firm)* [2010] Ch. 467 and [2009] EWCA Civ 1402 the Court of Appeal considered the scope of the tort of abuse of process and the extent to which it could apply to an application for judicial review. It had been alleged that the defendant's dominant purpose in seeking judicial review of a planning decision had not been to get the council's decision quashed but to put pressure on the claimants (the developers) to assist in the relocation of the defendant's business. The defendant obtained summary judgment on the basis that it had not acted for an improper or collateral purpose. At first instance the deputy judge assumed that the purpose of the defendant which drove its actions was to use its valuable negotiating position to assist it to get relocated at the expense of the claimants (see paragraph 32) but concluded that it was not an improper purpose "to use any negotiating position he may have to restore the value he believes he will lose by the development by getting it from the person who caused it" (see paragraph 33).

18. In the Court of Appeal Etherton LJ reviewed many of the authorities, including *In re Majory, Goldsmith v Sperrings, Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.* and *Broxton v McClelland*. Having done so he noted that in the only two cases where the tort of abuse of process had been established (*Grainger v Hill* (1838) 4 Bing NC 212 and *Gilding v Eyre* (1861) 10 CBNS 592) there was a "blatant misuse of a particular process, namely arrest and execution, within existing proceedings. In both cases the abuse of that process involved compulsion by arrest and imprisonment to achieve a collateral advantage." However, he recognised that there were broader, obiter, statements of principle (such as in *In re Majory*). He noted that there was no clearly accepted approach for identifying what is "sufficiently collateral" to establish the tort of abuse of process but said that the analysis which appeared to have received the most support is that of Bridge LJ in *Goldsmith v Sperrings* (see paragraph 67 but also paragraphs 47 and 52). He concluded that it was not necessary to decide the precise limits of the tort of abuse of process because there was no reasonably arguable case for extending the tort to cover all cases of economic loss beyond the limited classes of damage to which the tort of malicious prosecution applied (see paragraphs 68-71). On that basis the appeal was dismissed. In any event he agreed with the deputy judge that the interest of the defendant in relation to property relocation was "insufficiently collateral to the judicial review proceedings as to render those proceedings abusive" (see paragraph 73). He said:

> "What, in my judgment, emerges clearly from the authorities is that the tort is not committed by a person who institutes proceedings with a genuine interest in, and an intention to secure, their successful outcome, even if the claimant's motives are mixed and they hope that they may also achieve an objective not itself within the scope of the proceedings."

19. Moore-Bick LJ and Mummery LJ agreed with Etherton LJ but both reviewed the authorities and added comments of their own (see paragraphs 76 and 104). Moore-Bick LJ said (at paragraph 89) that it must be established that the "predominant purpose" in bringing proceedings "is not to obtain the remedy that the law offers ……but to achieve some other object that lies outside the range of remedies that the law grants". Mummery LJ said (at paragraph 108) that "as a general rule, the exercise of a legal right is not an unlawful abuse of that right merely by reason of a predominant improper purpose or ulterior purpose: *Bradford Corpn.v Pickles* [1895] AC 587."

20. Mr. Howard submitted that this case followed the lead of *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.* with regard to the question of predominant purpose (and relied not only on what Moore-Bick LJ said at paragraph 89 but also on Etherton LJ's reference at paragraph 50, without criticism, to what Slade LJ had said in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*). Mr. Smith submitted that the case was not decided on the issue of predominant purpose.

21. I agree that the case was not decided on that issue. It was decided on the two grounds to which I have referred at the end of paragraph 18 above. The judgments do not appear to give clear guidance on the question whether, in a case where there are mixed purposes, the proceedings will be regarded as an abuse of process if the predominant purpose was an illegitimate purpose. On the one hand Moore-Bick LJ appears to say that it will be (at paragraph 89) whereas Mummery LJ would not appear to agree (at paragraph 108).

Etherton LJ's statement (at paragraph 73) which I have quoted above at paragraph 18 suggests that it would not be an abuse of process, consistently with the approach of Bridge LJ in *Goldsmith v Sperrings*.

22. My conclusions from this review of the authorities are as follows.

i) There are two recognised types of abuse of process based upon collateral purpose, namely, those identified by Simon Brown LJ in *Broxton v McClelland*. The first limb, seeking a collateral advantage beyond the proper scope of the action, is relevant to this case. However, as Moore-Bick LJ observed in *Land Securities v Fladgate Fielder* at paragraph 77:

"The circumstances in which the court will regard conduct as amounting to an abuse of process are not narrowly defined, nor should they be. Although certain types of abuse are well recognised, it is necessary for the courts to have the power to control their own proceedings and to prevent abuse, whatever guise it may take."

ii) In the light of the approval given to Bridge LJ's guidance in *Goldsmith v Sperrings* both by Simon Brown LJ in *Broxton v McClelland* and by Etherton LJ in *Land Securities v Fladgate Fielder* as to when a purpose will be "sufficiently collateral" to amount to an illegitimate purpose I consider that I should follow that guidance. Thus no object which a claimant may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. I consider that I should also be guided by the comment of Simon Brown LJ in *Broxton v McClelland* that "a plaintiff is entitled to seek the defendants financial ruin if that will be the consequence of properly prosecuting a legitimate claim." That comment indicates that a purpose will not be regarded as illegitimate if it is no more than the natural consequence of the action succeeding.

iii) Where a claimant has two purposes for commencing proceedings, one legitimate and the other sufficiently collateral as to be illegitimate, the question arises whether the commencement of those proceedings in those circumstances is an abuse of process. In the light of *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.* it is of course arguable that the commencement will be an abuse if the illegitimate purpose is the claimant's predominant purpose. However, that question was not, it seems, at issue in that case and therefore I am persuaded that I should not regard that case as a binding authority on that question. It is also arguable that the commencement of proceedings will not be an abuse of process if one of the purposes is legitimate in the light of the approach or indication of Bridge LJ in *Goldsmith v Sperrings*. However, Bridge LJ also did not decide the point and so his approach or indication is also not binding upon me.

iv) I must therefore decide which approach I prefer. I consider that I should adopt the approach or indication of Bridge LJ, for these reasons:

a) If one of two purposes is legitimate it seems to me right in principle that the claimant should be entitled to proceed with his claim.

b) It avoids the need to embark upon the difficult exercise of establishing which of two purposes is the claimant's predominant purpose.

c) The approach of Bridge LJ has been commended by both Simon Brown LJ in *Broxton v McClelland* and by Etherton LJ in *Land Securities v Fladgate Fielder*.

d) The approach of Nourse LJ in *Re Ross (A Bankrupt) No.2* is consistent with the approach of Bridge LJ.

23. However, it is, I think, important to remember that what is in issue is whether it is arguable that the proceedings of this court are being abused by the Bank. The circumstances which give rise to litigation can vary from case to case and ultimately it must be necessary to ask oneself whether, in all the circumstances of the case, it is arguable that the claimant is abusing the process of the court. None of the cases to which I have been referred is similar to the present case and so I should be wary of mechanically applying the language which has been used in previous cases to decide this case. In this regard I have in mind the observation of Moore-Bick LJ in *Land Securities v Fladgate Fielder* at paragraph 77 which I have quoted above in paragraph 22 i).

24. Mr. Howard submitted that the merits of the claims sought to be brought are irrelevant and relied upon observations of Etherton and Moore-Bick LJJ in *Land Securities v Fladgate Fielder* to that effect at paragraphs 67 and 90. I accept that abuse of process is not concerned with the merits of a claim but with the purpose for which proceedings are brought. However, where it is suggested that proceedings are brought for mixed purposes and that one such purpose is to recover assets alleged to have been misappropriated it will or may be relevant to enquire whether there is a good arguable claim for the recovery of such assets. Thus the absence of a good arguable claim may indicate that the proceedings were not brought, even in part, to recover such assets. Conversely, where there is a good arguable claim that may indicate that the proceedings were brought, at least in part, to recover such assets.

The arguability of Mr. **Ablyazov**'s case on the facts

25. The case of Mr. **Ablyazov** remains what it was when I ruled on other aspects of the Bank's application to dismiss the stay application. At paragraph 21 of my judgment I said:

> "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."

26. Mr. Smith submitted that there is no sufficiently cogent evidence to support this case so that Mr. **Ablyazov**'s case on the facts is unarguable. This might be thought to be a bold submission in circumstances where the evidence relied upon by Mr. **Ablyazov** is voluminous. Indeed, the evidence traces Mr. **Ablyazov**'s turbulent relationship with the President of Kazakhstan since before 2000. However, what is relevant for the purposes of the collateral purpose argument is that evidence which relates to the purpose or purposes of the Bank in bringing these claims against Mr. **Ablyazov** in 2009 and 2010 and pursuing them thereafter.

27. Mr. **Ablyazov** says that, following the nationalisation of the Bank in 2009 pursuant to which the Government of Kazakhstan became the majority shareholder in the Bank, through Samruk-Kazyna, a sovereign wealth fund, the Bank is now "through Samruk-Kazyna and its management……the creature and/or an instrument of and/or otherwise to be identified with and/or otherwise under the control and direction (whether directly or indirectly) of" the President of Kazakhstan; paragraph 34 of the Particulars of the stay applications ("the particulars"). In his 12th witness statement dated 25 November 2010 at paragraph 629 Mr. **Ablyazov** says that "the President and his confidants are in complete control of the Claimant (through Samruk-Kazyna and its board appointees)".

28. It is said that it is plain, in particular from the documents evidencing “Project SuperKhan” (an alleged confidential strategy of the President of Kazakhstan said to be aimed at removing the power and influence of the oligarchs, of whom Mr. **Ablyazov** is one) that, through his control of Samruk-Kazyna as the majority shareholder of the Bank and his power and influence as President in a totalitarian state, the President has taken the opportunity to launch these proceedings as a means of eliminating Mr. **Ablyazov** as a political opponent and is pursuing them for that reason. In the Particulars of his case it is stated at paragraph 35(8) as follows:

> “BTA has brought and is prosecuting the present proceedings in the English Court with the collateral purpose of (i) undermining and damaging Mr. **Ablyazov**'s reputation in Kazakhstan and internationally (ii) facilitating the expropriation of Mr. **Ablyazov**'s assets worldwide and, thus, diminishing or eliminating his wealth; and (iii) thereby achieving or assisting the elimination of Mr. **Ablyazov** as political force in opposition to Nazarbayev [the President of Kazakhstan] and the current regime in Kazakhstan.”

29. In order to put Mr. **Ablyazov**'s evidence in context it is necessary to note the arrangements for the corporate governance of the Bank following the nationalisation of the Bank in February 2009 when Samruk-Kazyna became the majority shareholder of the Bank. All the actions by the Bank against Mr. **Ablyazov** were commenced after the Bank had been nationalised. The Drey Proceedings were commenced against Mr. **Ablyazov** in August 2009 and the other proceedings, Chrysopa, Tekhinvest and Granton were commenced in 2010. Yet further actions have been commenced in 2011.

30. The nationalisation was “a change of control” within the meaning of the Bank's loan agreements with Western financial institutions which led to many of the loans to the Bank being called in. That in turn led to the Bank becoming insolvent and so a restructuring of the Bank's capital base was required. That required the consent of the Bank's creditors.

31. Before the restructuring took place the Drey proceedings had been commenced in August 2009. At that time the Bank had a board of nine directors. The chairman was Mr. Dunayev, who was Vice-Chairman of Samruk-Kazyna. The other directors were three further representatives of Samruk-Kazyna, Mr. Saidenov, who had previously been Governor of the National Bank of Kazakhstan, Mr. Tatishev who had been a director of the Bank since 2005 and three independent directors (at least one of whom had previous involvement with Samruk-Kazyna). Executive decisions with regard to litigation were taken by the Management Board, of which the Chairman was Mr. Saidenov.

32. Negotiations between the Bank and its creditors began in September 2009 (when a Memorandum of Understanding was signed). By March 2010 the principal terms had been agreed. By May 2010 a detailed information memorandum for creditors was published. It ran to over 700 pages. On 26 May 2010 the restructuring plan was approved by over 90% of the creditors. On the same day the Almaty Specialised Financial Court in Kazakhstan approved the plan. It has since been approved by the US courts, the courts of the Russian Federation and the courts of the Ukraine. The Chancery Division of this Court recognised the restructuring in August 2010.

33. The Chrysopa, Tekhinvest and Granton proceedings were commenced on 2 March, 31 March and 3 June 2010 respectively.

34. The restructuring was implemented in about August 2010. As a result the Bank is now said to be solvent. It has been recapitalised by the conversion of US$5.6 billion of the Bank's indebtedness into shares and Global Depositary Receipts (GDRs) which entitle the holders to shares in the Bank. US$10.8 billion of the Bank's indebtedness has been cancelled in exchange for cash and notes issued by the Bank. Samruk-Kazyna has provided considerable financial support. The Bank's debt has been reduced from about US$16 billion to about US$4 billion and Samruk-Kazyna is now the holder of 81.5% of the shares in the Bank. The creditors of the Bank have agreed to give up their debts in return for, *inter alia*, “Recovery Units”

which entitle the holder to a share in the proceeds of the Bank's claims against third parties. In return the Bank must recover its assets from third parties.

35. I was referred to two of the documents which gave effect to the restructuring and to the arrangements with creditors. The first was a Trust Deed dated 25 August 2010 between the Bank and BNY Corporate Trustee Services Limited of London. Pursuant to this Trust Deed the Bank is obliged "with the full support of Samruk-Kazyna, [to] use its reasonable endeavours to maximise the recovery of any valuable asset of the Bank (including any claims available to it) whether in respect of debtors, former management or any party whatsoever" (clause 8(3)(e)). The Bank is to pay 50% of the claim proceeds into a Collection Account (clause 8(3)(a)) and to charge its right to such monies to the Trustee on behalf of the recovery unit holders (clause 4). The governing law of the trust Deed is English law and disputes are to be resolved by arbitration in London, though the Trustee has the option of electing for resolution by the English Court (clause 20)).

36. The second document was a Deed Poll executed by Samruk-Kazyna on 20 August 2010. Clause 2 provides for the Board of the Bank to consist of nine directors of whom four would be nominated by Samruk-Kazyna, two would be nominated by the creditors of the bank and three would be independent directors nominated by the Bank. The Independent Directors were to be persons who had not been a director or employee of the Bank or Samruk-Kazyna in the five years to March 2009, had not had a material business relationship with the Bank or Samruk-Kazyna within the last three years, had no close family ties with any of the current or former advisers, directors or senior employees of the Bank and held no cross-directorships or significant links with other directors. Clause 3 makes provision for voting at shareholders meetings. Certain matters, including the disposal of assets, require a supermajority, that is, the approval of 75% of the shareholders and, if the GDRs represent 5% or more of the shares, two-thirds of the votes cast by the GDRs. Other matters, including litigation in respect of sums in excess of US$30 million, require a qualified majority, meaning the approval of a majority of the Board including both creditor directors and at least one independent director. Thus the power of Samruk-Kazyna as the majority shareholder was substantially curtailed by these provisions. The Deed Poll is governed by English law and disputes are to be resolved by arbitration in London.

37. Following the restructuring Mr. Dunayev remains the Chairman of the Board of Directors. The other directors nominated by Samruk-Kazyna are Mr. Saidenov, Mr. Iskandirov and Mr. Karibzhanov. Two of the independent directors are Mr. Talvitie and Mr. Korishchenko who were deemed to be "independent" by the Deed Poll notwithstanding connections which would otherwise have excluded them from being independent. Thus Mr. Talvitie had been a member of the Board of the Bank from 2005 and so was a director whilst Mr. **Ablyazov** was chairman of the Bank. The third independent director is Mr. Babenov who had worked in the Kazakhstan Stock Exchange. The two creditor directors are Mr. Schoefboeck and Mr. Pronk. The former is an Austrian banker and the latter is a Dutch banker.

38. Mr. **Ablyazov** has said in his evidence that since nationalisation the Bank's directors are controlled "either directly, or through Samruk-Kazyna and its management, by" the President of Kazakhstan (see paragraph 9 of his 12th. witness statement dated 25 November 2010). He maintains that the majority of the board is "Government/Samruk-Kazyna appointed" (see paragraph 628 of his 12th witness statement) and that five directors are directly controlled by the head of Samruk-Kazyna, Mr. Kelimbetov (see paragraph 629 of his 12th witness statement). There is no dispute that four directors are nominated by Samruk-Kazyna. I infer that Mr. **Ablyazov** says that they are "directly controlled" by Samruk Kazyna. He appears to say that the fifth director "directly controlled" by Samruk Kazyna is Mr. Babenov but it is not clear why he says that. Mr. Babenov previously worked for the Stock Exchange and does not appear to have direct links with Samruk-Kazyna.

39. In order for Mr. **Ablyazov** to raise an arguable case that the directors of the Bank and/or the Management Board (which appears to have day to day control over litigation) have commenced and are pursuing the proceedings in this court in order to eliminate Mr. **Ablyazov** as a political opponent to the President of Ka-

zakhstan it is necessary for him to adduce evidence that the President has “directly or through Samruk-Kazyna” exerted his influence on the directors and/or Management Board to that end.

40. The membership of the Board both prior to restructuring and after restructuring does not sit happily with the notion that the Bank is a “creature or instrument” of Samruk-Kazyna since only a minority of the Board were or are current officers of Samruk-Kazyna. Moreover, the restrictions on voting after the restructuring do not suggest that the Bank is controlled by Samruk-Kazyna.

41. Mr. **Ablyazov** has not adduced any direct evidence from any director that the Board is controlled by the President. Instead he relies on, *inter alia*, (a) the widespread power and influence of the President in a totalitarian state, (b) the alleged (but as yet unchallenged) history of the President's antagonism towards Mr. **Ablyazov** (including demands for a controlling interest in the Bank, imprisoning him on false charges, and plotting to assassinate him), (c) the terms of “Project SuperKhan” (pursuant to which a scheme was allegedly devised to strip the oligarchs, including Mr. **Ablyazov**, of their wealth and influence), (d) the “forced nationalisation of the Bank” which was “the culmination of a four year (and more) process of demands and escalating threats” and (e) statements alleged to have been made to Mr. **Ablyazov** on behalf of the President in the Mandarin Hotel in London between February and September 2009 that if Mr. **Ablyazov** handed over to the President “half of his businesses in Moscow” and US$ 50million civil proceedings would not be brought against him. From those (and other matters) Mr. **Ablyazov** will invite the court to infer that the President exerted his influence on the directors of the Bank and/or the Management Board “directly or through Samruk-Kazyna” to commence and pursue the proceedings in this court in order to eliminate Mr. **Ablyazov** as a political opponent to the President of Kazakhstan.

42. Any such inference would be contrary to the evidence of the Bank. Mr. Dunayev, the Chairman of the board of directors, has said in his 2nd Witness Statement dated 11 May 2010 that the Bank brought proceedings against Mr. **Ablyazov** to recover monies that are believed to have been misappropriated by Mr. **Ablyazov** and his associates. He has said that, given the Bank's precarious financial position, the Bank would not have pursued this litigation for any other reason than to recover its money. Mr. Varenko, who is on the Management Board, has said in his witness statement dated 8 October 2009 that he does not receive instructions from the Government of Kazakhstan and that the Government is not controlling the litigation. He says that decisions are taken by the Bank's officers on advice from the Bank's lawyers. Mr. **Ablyazov** says that their evidence is “nonsense”, that they say what the President wants them to say and that “they simply would not possibly dare to tell the truth” (see paragraph 725 of his 12th witness statement). He says that he has been informed by sources whom he cannot name, for fear for their safety, that Mr. Varenko takes instructions concerning this litigation from the KNB (the Committee for National Security, Kazakhstan's secret services); see paragraph 631 of his 12th witness statement. In argument it was observed that there was no evidence from the independent or creditor directors of the Bank.

43. It was submitted on behalf of Mr. **Ablyazov** that there was *direct* evidence of the Bank's purpose, namely, the SuperKhan project and the President's “direct control over these proceedings.” I do not accept that the SuperKhan project is direct evidence of the Bank's purpose. The SuperKhan document is dated 2007 and the proceedings were commenced in 2009 and 2010. At most, the document is one of the matters from which an inference may be drawn as to the Bank's purpose in issuing these proceedings. So far as the President's direct control over these proceedings is concerned reliance is placed on his control over Samruk-Kazyna, the majority shareholder of the Bank, and on the statements made in 2009 in London to Mr. **Ablyazov** that if he handed over half of his Russian assets civil proceedings would not be brought against him. Those statements are said to show that the President believes that he can cause proceedings against Mr. **Ablyazov** to be instituted, continued or stopped. Again, I do not consider these matters to be direct evidence of the Bank's purpose in bringing these proceedings. They are, at most, matters from which an inference may be drawn as to the Bank's purpose.

44. Mr. Smith has drawn my attention to several matters in support of his submission that Mr. **Ablyazov**'s case on the facts is unarguable:

i) Properly construed the SuperKhan document does not evince an intention on the part of the President to rid himself and Kazakhstan of the oligarchs but merely a desire to control their wealth and influence through taxation and other lawful means.

ii) The nationalisation of the Bank was not part of the SuperKhan project but was brought about by the world financial crisis which engulfed banks in Kazakhstan as it did many banks in the West. In this regard reliance was placed on a book put in evidence by Mr. **Ablyazov**, *"Kazakhstan: Unfulfilled Promise?"* by Martha Brill Olcott, who is, according to Mr. **Ablyazov**, "an acknowledged academic expert on the affairs of central Asia." In that book, at pp. 264-268 the author describes how growth in Kazakhstan was fuelled by cheap foreign credit. When the credit crunch struck Kazakh banks raised interest rates but this led to a high rate of default by mortgage holders causing a drop in housing prices. This triggered further defaults and economic growth slowed. Samruk-Kazyna was reorganised with a view to addressing the country's financial crisis. By December 2008 some of the country's leading banks were on the verge of default. In February 2009 the local currency, the tenge, was devalued and the country's four largest banks, including BTA Bank, were nationalised by stock being transferred to Samruk-Kazyna in return for an injection of capital.

iii) As already noted the nationalisation led to insolvency and the restructuring of the Bank. None of this was part of the SuperKhan project.

iv) The concern of the directors of the Bank prior to the restructuring was to recover sums which it believed had been misappropriated by Mr. **Ablyazov**. The pursuit of such claims was an obligation of the Bank following reconstruction.

v) None of the principal witnesses relied upon by Mr. **Ablyazov** was in Kazakhstan after February 2009 and so cannot give evidence as to the purpose for which the Bank decided to sue Mr. **Ablyazov**.

45. I am not convinced by Mr. Smith's submission on project SuperKhan. Control through taxation is certainly one of the methods (or "technologies") mentioned in the SuperKhan document. But it also mentions political, economic and administrative methods and the aim of the SuperKhan project is described as being to take control of the political, economic and international resources of the oligarchs. The SuperKhan document is open to the interpretation that the President of Kazakhstan wishes to rid himself of the oligarchs. There is however, it seems to me, force in Mr. Smith's submission that the nationalisation came about, not by reason of the SuperKhan project but by reason of the world financial crisis. Against this Mr. **Ablyazov** is forced to say that the nationalisation was forced through "under cover of the developing international credit crisis" (see paragraph 21 of the Particulars).

46. Whatever the reason was for the nationalisation of BTA Mr. **Ablyazov**'s case requires evidence that the President, either directly or through Samruk-Kazyna, has exerted influence or pressure on the directors of the Bank to sue Mr. **Ablyazov** for the purpose of eliminating him as a political opponent. For this purpose he relies on an inference to be drawn from the circumstantial material to which I have referred. I am doubtful that any such inference can properly be drawn in circumstances where there is an obvious explanation for the Bank's actions, namely, to recover assets which it believes Mr. **Ablyazov** has misappropriated. The inference is certainly not a necessary inference for it is not necessary to draw that inference in order to explain the Bank's actions. In circumstances where the Bank was insolvent and the Bank had reason to believe that substantial assets have been misappropriated it is to be expected that the Bank would wish to recover those assets. Indeed, the Bank is now contractually obliged to use its reasonable endeavours to maximise the recovery of its assets. In those circumstances the suggested inference may also not be a reasonable inference. I have even more doubt as to whether it can be inferred that the Bank's *predominant* purpose in bringing proceedings against Mr. **Ablyazov** was to eliminate him as a political opponent of the President. The Bank had to be rescued from its insolvency but Mr. **Ablyazov** had already left Kazakhstan to settle in Lon-

don. However, I hesitate to decide on this application that no such inference can be drawn in the face of the tsunami of evidence which has been served by Mr. **Ablyazov** about political and economic life in Kazakhstan. It is extremely difficult for this court to make a judgment about that evidence without it (or at least the relevant parts of it) being tested and examined in detail. The inference which the court is being asked to draw may appear unlikely but I am not persuaded that it is unarguable.

47. I shall therefore address the Bank's application to dismiss the stay application on the basis that, although the Bank had an interest in and reason for bringing proceedings against Mr. **Ablyazov**, namely, to recover assets it believed Mr. **Ablyazov** had misappropriated, it is arguable that the President of Kazakhstan, through his control over Samruk-Kazyna and by reason of his presidential power and influence, has caused the directors of the Bank to bring and maintain the proceedings in this court for the collateral purpose stated in paragraph 35(8) of the Particulars of his case and that that was the Bank's "predominant" purpose.

Is it arguable that the claims against Mr. **Ablyazov** are an abuse of process ?

48. I have reached the conclusion that it is not arguable that the claims being brought against Mr. **Ablyazov** are an abuse, for several reasons.

49. Separate legal personality: The Bank has a separate legal personality from that of its majority shareholder, Samruk-Kazyna, and indeed from the President of Kazakhstan. The Bank has its own interest in and reason for pursuing its claims against Mr. **Ablyazov**. In my first judgment at paragraph 22 I described that interest as follows:

> "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."

50. This interest of the Bank is not illegitimate. To regard the Bank as having an illegitimate interest on account of the President's interest in the proceedings as a vehicle for eliminating Mr. **Ablyazov** as a political opponent would be to disregard the separate legal personalities and interests of the Bank, its shareholders and the President of Kazakhstan. For this reason I consider that the Bank is not pursuing this litigation for a collateral and illegimate purpose. This approach is supported by *Williams and Humbert Ltd. v W&H Trade Marks (Jersey) Ltd.* [1986] 1 AC 368; see paragraphs 23-27 of my earlier judgment.

51. The Bank could have brought these proceedings against Mr. **Ablyazov** before the Bank was nationalised and Samruk-Kazyna became its majority shareholder because they are based on alleged actions of Mr. **Ablyazov** prior to that date. There would have been no reason to stay them at that time. Mr. Smith asked rhetorically whether the proceedings would be stayed as an abuse of process if Samruk-Kazyna sold its shareholding in the Bank to a third party unconnected with the President of Kazakhstan. Mr. Howard answered that question by saying that the proceedings would not be stayed in those circumstances. It seems to me that that answer illustrates that the Bank's interest in the proceedings is legitimate.

52. Mixed purposes: If, however, the interest of the President in the proceedings is to be regarded as also the interest of the Bank then the Bank must be regarded as having two purposes for commencing and pursuing these proceedings against Mr. **Ablyazov**. First, the Bank has brought these claims against Mr. **Ablyazov** to recover the losses for which Mr. **Ablyazov** is thought to be responsible. It would be unrealistic to suppose in circumstances where the Bank was insolvent that the proceedings were not brought, at least in part, for the purpose of recovering those losses for the benefit of the Bank and its creditors. Second, the Bank has, arguably, been persuaded by the President of Kazakhstan to bring these claims for the purpose of eliminating Mr. **Ablyazov** as a political opponent of the President of Kazakhstan. The first of those purposes

is certainly legitimate and accordingly, for the reasons I have given when considering the law, the proceedings are not an abuse of the process of this court; see paragraph 22(iv) above.

53. Collateral purpose: If, contrary to the opinion I have expressed, proceedings will be an abuse of process in a mixed purposes case if the predominant purpose for which they have been commenced is an illegitimate collateral purpose the question arises whether the purpose identified in the Particulars at paragraph 35(8) is sufficiently collateral to be illegitimate. At first sight the elimination of Mr. **Ablyazov** as a political opponent would appear to be clearly illegitimate because it is far removed from the remedy which the law gives for misappropriation of assets and appears not to be "reasonably related to the provision of some form of redress" for Mr. **Ablyazov**'s alleged wrong. However, the elimination of Mr.**Ablyazov** as a political opponent is said to be the consequence of undermining and damaging Mr. **Ablyazov**'s reputation and facilitating the expropriation of Mr. **Ablyazov**'s assets worldwide. If the Bank succeeds in its actions, which are essentially for fraud, Mr. **Ablyazov**'s reputation is likely to be undermined and damaged and his assets are likely to be seized in order to execute the judgment. Thus those consequences cannot be an illegitimate purpose of the proceedings. If the likely effect of those consequences is to eliminate Mr. **Ablyazov** as a political opponent that consequence too cannot be an illegitimate purpose. As Simon Brown LJ said in *Broxton v McClelland* "a plaintiff is entitled to seek the defendants financial ruin if that will be the consequence of properly prosecuting a legitimate claim." So for this reason also I do not consider that the proceedings in this court are an abuse of process.

Abuse of process

54. As I said earlier in this judgment the ultimate question which I must determine is whether it is arguable that the process of the English High Court is being abused by the Bank, at the behest of the President of Kazakhstan, to promote the political fortunes of the President. Notwithstanding that it is arguable that the President has persuaded the Bank to sue Mr. **Ablyazov** for that purpose I do not consider that it is arguable that the process of this court is being abused. The reasons which persuade me that the process of this court is not being abused may be summarised as follows:

i) The Bank has a legitimate interest in and reason for taking proceedings against Mr. **Ablyazov**, namely, to recover its assets which it says that Mr. **Ablyazov** has misappropriated.

ii) It is not contended that the Bank does not have a good arguable case against Mr. **Ablyazov**.

iii) The Bank is contractually obliged to pursue that case pursuant to a complex restructuring of the Bank and its debts negotiated with its creditors.

iv) It is unrealistic, in circumstances where the Bank was insolvent, to suppose that the proceedings are not being taken at least in part for that purpose.

v) If the consequence of that case succeeding is that the President of Kazakhstan is assisted in eliminating Mr. **Ablyazov** as a political opponent that is an advantage to the President which, arguably, he has sought by persuading the Bank to take these proceedings against Mr. **Ablyazov**. But that collateral purpose or advantage does not make the proceedings an abuse of the process of this court because

a) it is the natural consequence of the Bank's case of fraud succeeding and so would follow even if the President had not persuaded the Bank to take proceedings against Mr. **Ablyazov** and

b) in the absence of the President's alleged reason for and interest in the Bank taking proceedings against Mr. **Ablyazov** the Bank would have a legitimate reason for and interest in taking such proceedings and, in circumstances where the Bank was insolvent, it is unrealistic to suppose that the Bank would not have taken those proceedings for that purpose.

55. For these reasons the application to stay the proceedings against Mr. **Ablyazov** on the grounds of collateral purpose must be dismissed. Other defendants also sought a stay on the grounds of collateral purpose but their applications do not raise any different issues and must be dismissed for the same reasons.

56. In the light of my decision it is unnecessary for me to deal with Mr. Smith's secondary argument based upon the need for “judicial restraint” when examining the motives or conduct of a foreign sovereign.