Judgments

*JSC BTA Bank v Ablyazov and others

[2011] EWHC 2506 (Comm)

QBD, COMMERCIAL COURT

Christopher Clarke J

4 October 2011

Practice – Pre-trial or post-judgment relief – Freezing order – Claimant bank issuing proceedings alleging unlawful schemes used by defendants to channel monies to themselves – Court granting relief from sanction to eight of twelve defendants (order) – Claimant seeking to have order set aside – Whether appropriate in circumstances to set order aside.

Judgment

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

MR JUSTICE CHRISTOPHER CLARKE:

1. This is an application on behalf of the Claimant, JSC BTA Bank ("the Bank"), that I should set aside the relief from sanction which on 10th December 2010 I granted to each of the Third to Seventh, Ninth to Tenth and Twelfth Defendants (together the **"Respondents"**1, individually **"Granton"**, **"Branden"**, **"Aldridge"**, **"Zafferant"**, **"Forest"**, **"Incompro"**, **"Perspective"** and **"Maden"**); and that I should enter judgment against all the Respondents. The Bank contends that in making that order I was misled by the Respondents into believing that they had made a genuine, if belated, effort to comply with the terms of a freezing order made on 9th June 2010 as continued and reinforced by subsequent orders.

The Bank's case

2. The Bank is a Kazakhstan joint stock company. It was until February 2009 majority owned by Mukhtar **Ablyazov** ("Mr **Ablyazov**"), the first defendant. Since that date it has been majority owned by the Kazakh sovereign wealth fund, Samruk-Kazyna. In effect it has been part nationalised although there is a substantial (c 25%) minority stake held by Western interests. Mr **Ablyazov** is a Kazakh national who was from 20th May 2005 to February 2009 the Chairman of the Bank. Mr Zharimbetov, the Second Defendant, is also a Kazakh national. He was between 3rd May 2005 and February 2009 First Deputy Chairman of the Bank's Management Board and Chairman of the Credit Committee of the Bank which approved what are said to be unlawful loans.

3. The Bank complains of two schemes:

(i) the Unlawful Loans Scheme; and

(ii) the Misappropriation Scheme.

The Unlawful Loans Scheme

4. The Bank contends that under the Unlawful Loans Scheme Mr **Ablyazov** channelled monies from the Bank to companies ultimately owned and/or controlled by him ("**Ablyazov** companies") and did so with the assistance of Mr Zharimbetov. The Credit Committee, acting under the direction or control of Mr **Ablyazov**, authorised loans which totalled $ 1,428,840,000. The monies were paid into the accounts of a number of companies ("the Recipients") held with Trasta Komercbanka ("Trasta") in Riga, Latvia. On their face the loans were for the purpose of providing or replenishing working capital. They were then advanced by the Recipients to the Real Borrowers, being **Ablyazov** companies. The identity of the latter is unknown.

5. The Recipients were: (i) Astrogold Corporation ("**Astrogold**"); (ii) Balgaven Invest Inc ("**Balgaven**"); (iii) Bergtrans Contracts Corporation ("**Bergtrans**"); (iv) Berit Ltd ("**Berit**"); (v) Brotex Group Ltd ("**Brotex**"); (vi) Business Code Ltd ("**Business Code**"); (vii) Calernen Finance Inc ("**Calernen**"); (viii) Carsonway Ltd ("**Carsonway**"); (ix) Ditron Solutions Ltd ("**Ditron**"); (x) Global Team Company ("**Global Team**"); (xi) Grundberg Inc ("**Grundberg**"); (xii) Kinmate Trading Ltd ("**Kinmate**"); (xiii) Lingard Industry Ltd ("**Lingard**"); (xiv) Mabco Inc ("**Mabco**"); (xv) Topgeo Holdings Ltd ("**Topgeo**"); (xvi) Trionfale Ltd ("**Trionfale**") and (xvii) Westrade Ltd ("**Westrade**"). The monies were advanced between November 2007 and August 2008. The Loans were unlawful under Kazakh law being made to connected counterparties without the necessary declarations of interest.

6. In April 2008 the FMSA, the Kazakh monetary authority, discovered this high volume of loans, which exposed the Bank to considerable credit risk. Following a report from it Mr **Ablyazov** and Mr Zharimbetov agreed with the FMSA to reduce the Bank's exposure to such lending. This was done by the Misappropriation Scheme.

The Misappropriation Scheme

7. Between the end of October and the end of November 2008 the Bank lent to Granton, Aldridge, Branden and Zafferant ("the Borrowers") over $ 1 billion pursuant to a number of loan facilities. The credit applications stated that the facilities were for the purchase of oil and gas equipment. The Borrowers purportedly entered into 16 contracts pursuant to which the Seventh to Twelfth defendants ("the Intermediaries") undertook to find and deliver such equipment. In October and November 2008 the Credit Committee approved financing limits for the Borrowers and the Bank entered into general credit agreements with them. The Borrowers then applied for letters of credit and the Bank entered into letter of credit agreements with them. The Bank then issued letters of credit and made Payments totalling $ 1,031,263,000 to accounts of the Intermediaries held at Trasta.

8. The contracts for the supply of equipment were shams. The Intermediaries never had any equipment to sell and it was never intended that they should deliver any. Of the $ 1,031,263,000 paid to the Intermediaries $ 972,195,871.84 was transferred by the Intermediaries to the Recipients and applied to repay the Unlawful Loans.

9. All the companies involved in both Schemes, save for Loginex, were off shore companies, registered in either the British Virgin Islands or the Seychelles. Loginex is an English company. The Loans were only made because Mr **Ablyazov** controlled the Bank and was able to implement the Unlawful Loans and Misappropriation Schemes with the assistance of Mr Zharimbetov. The Loans were shams, not being intended, in the case of the Unlawful Loans Scheme, for working capital for the Borrowers but to provide liquidity to **Ablyazov** companies, nor, in the case of the Misappropriation Scheme, to finance the purchase of equipment, but to pay back the monies advanced under the Unlawful Loans Scheme. Mr **Ablyazov**'s link to the Recipients and the Borrowers was never disclosed to the Bank as it ought to have been.

10. The net effect of the Schemes was that the Loans which had concerned the FMSA were, for the most part, repaid. But the money for repayment was provided by the Bank and the Real Borrowers kept what they had received.

*Mr **Ablyazov**'s defence*

11. Mr **Ablyazov** has fled to this country fearing persecution in Kazakhstan. He says that he was not responsible for the implementation of either Scheme, the relevant decisions having been made by the Credit Committee, of which he was not a member. He was not an affiliate of the Borrowers, the Intermediaries or the Recipients, nor did he have any power to direct what they did. The FMSA was used by the President of Kazakhstan as a tool to assist him unlawfully to expropriate the Bank. The April 2008 FMSA report was politically motivated. The Borrowers were pre-existing trusted clients of the Bank, which had stakes in substantial oil and gas exploration contracts.

The Respondents' defence

12. The Respondents' case is that they were beneficially owned and ultimately controlled by Mr Georgy Timichev ("Mr Timichev"). He, acting through his representative Mr Mukhtar Kuatbekov, made an agreement – the Bank Assistance Agreement – on behalf of himself and the Respondents with the Bank (acting through Mr Kairat Sadykov, a managing director) pursuant to which the Intermediaries would receive the payments and forward the sums received to certain identified companies - the Recipients. This enabled the Bank to advance loans to the Recipients which under the Bank's regulations and policies they would not have received. Mr Timichev and the Respondents understood that the Bank Assistance Agreement was for the Bank's benefit and that the sums would be repaid (directly or indirectly) to the Bank by the Recipients.

13. Although the payments by the Bank to the Intermediaries and by the Intermediaries to the Recipients were in the form of loans it was understood that these "loans" would not be repayable by the Recipients to the Respondents.

14. As a result of this assistance there was an understanding ("the Future Loan Understanding") that the Bank might in future secure funds for the Respondents for the acquisition of equipment similar to that identified in the contractual documentation for the Bank Assistance Agreement. In that event, if the Bank was the lender, the Respondents would be obliged to repay the Bank broadly in accordance with the contractual documents drawn up for the scheme involving the Borrowers and the Intermediaries.

15. It is apparent from this summary of the Respondents' case that there was a sham – in the sense described by Diplock, LJ in *Snook v London & West Riding Investments Ltd*2 [1967] 1 AER 518,524 - but of a different kind. That is my characterisation, not the Respondents.

The history of the proceedings

The Freezing Order

16. On 9th June 2010 Mr Gavin Kealey QC (sitting as Deputy Judge of this Court) granted a freezing order against, among others, the Respondents (the "Freezing Order"). Under paragraph 9 (i) of the Freezing Order each of the Respondents (being the Borrowers and Intermediaries (with the exception of Austin and Loginex) was ordered:

"(b) to the best of its ability after making reasonable inquiries, [to] provide the answers in writing to the questions set out in Schedule D; and

(c) [to] *supply to the* [Bank's] *solicitors copies of all documents in its control (which for these purposes shall mean documents which are or were in its physical possession and/or to which it has a right to possession and/or to which it has a right to inspect or take a copy) which evidence the matters set out in ... (b) above)."*

17. As well as requiring information as to what had become of the funds alleged to have been misappropriated Schedule D required, inter alia, the following information to be provided within 5 working days of service:

"3. For the period 1 September 2008 to the date of answering these questions:

a) Who is the legal owner of the shares of the Respondent?

b) Who is known to be or understood to be (stating which applies) the beneficial owner of the shares of the Respondent?

c) Who gives instructions to the directors or agents of the Respondent concerning the decisions and actions they should take and generally concerning the activities of the Respondent?

d) Who is known to be or understood to be (stating which applies) the person who ultimately controls the Respondent?

e) Does anyone else other than the directors have power to act on behalf of the Respondent and, if so, who and how/why?"

18. On **2nd July 2010** the Freezing Order was continued until trial by Burton J. The application for such continuation was unopposed. Only Zafferant and Incompro were represented.

Compliance with the disclosure provisions of the Freezing Order

19. Between 9th June and 3rd August 2010 there was no compliance with the disclosure provisions of the order. On **4th August 2010** the Bank issued an application for an "unless" order.

20. On **9th August 2010**, a letter was sent by iLaw to Hogan Lovells, the Bank's solicitors, purporting to provide the requisite information on behalf of Granton, Branden, Aldridge and Zafferant i.e. the Borrowers. Their shares were stated to be owned by different legal owners, but Mr Timichev (whose name appears in some documents transliterated as Heorhi Tsimichau) was said to be:

(i) the beneficial owner;

(ii) the person who gives instructions as in question (c); and

(iii) the person in ultimate control

of each of these Respondents. It was said that no one other than the directors had power to act on behalf of the companies. Documents evidencing these answers were to follow.

21. On **10th August 2010** Hogan Lovells wrote to iLaw and drew attention to a number of significant deficiencies in the evidence provided in their letter of 9th August, including the fact that no information had been provided in relation to any of the Intermediaries; no affidavit had been sworn; the answers failed to account for the fact that various individuals were known to have held powers of attorney to act on behalf of some of the Borrowers; and no documents had been produced. On **13th August 2010** Blair J adjourned the Bank's application for an "unless" order to enable the Respondents to address these deficiencies.

22. This led to a fax from iLaw dated **18th August 2010** which (among other things) confirmed that, according to their instructions, Mr Timichev was known and understood to be the beneficial owner and ultimate controller of Granton, Branden Aldridge and Zafferant and had signatory powers to act on their behalf. To the best of their clients' knowledge at the date of the letter the Borrowers did not have valid powers of attorney "*allowing them to make actions with the assets, money rights and other ownership rights of the Borrowers*".

The judgment and order of 24th August 2010

23. On **24th August 2010**, following a hearing on 20th August 2010, I found that, despite the additional information that had been provided by iLaw, the Respondents had failed to provide the information required under the Freezing Order. Insofar as their ultimate beneficial ownership, control and direction were concerned, the information provided about Granton, Branden, Aldridge and Zafferant had not been confirmed in an affidavit and no information had been provided about the other Respondents at all.

24. I ordered that, in the case of each Borrower, unless it served an affidavit setting out the information provided in relation to it in iLaw's faxes of 9th and 18th August 2010 and exhibiting the documents referred to in paragraph 9 (1) (c) of the order of Gavin Kealey, QC, and the information specified in a Schedule to my order, by 3rd September 2010, it should be debarred from defending these proceedings and the Bank should be at liberty to enter judgment or, as appropriate, apply for judgment against it. The Schedule required, inter alia:

"(c) In respect of each of [the Borrowers]:

...

(ii) Full particulars of the basis on which Georgy Timichev is authorised to act on behalf of the relevant Respondent and/or to act as the signatory of the relevant Respondent's account or accounts at Trasta;

(iii) Confirmation and full particulars of any and all persons authorised to act on behalf of the relevant Respondent, whether as director or under any other authority including Powers of Attorney"

25. In the case of Forest, Loginex, Incompro, Perspective and Maden, I ordered that, unless each of them served an affidavit setting out the information specified in 9 (1)(a) and (b) of Mr Kealey's order and exhibiting the documents referred to in paragraph 9 (1) (c) by the same date, the same consequence would follow.

26. On **13th September 2010** Longmore, LJ, refused permission to appeal, expedition and a stay.

Mr Silyutin's affidavit – Silyutin 1

27. On **3rd September 2010** Mr Denis Silyutin, a Moscow lawyer from Law Office SPB Limited, swore an affidavit in purported compliance with the 24th August Order. He said that where matters were not within his own knowledge he was stating facts on the instructions of Mr Timichev. He exhibited powers of attorney dated 30th June 2010 on behalf of all the Respondents signed by Mr Timichev and gave an address for Mr Timichev in Belarus.

28. In this affidavit, much of which deals with the Respondents' assets, Mr Silyutin said the following:

a) in relation to each of the Respondents Mr Timichev was (i) the legal and beneficial owner, (ii) the sole director, (iii) the instructor of its agents and (iv) the person who ultimately controlled the company;

b) various nominees who had been the legal owners of the shares in the Borrowers had transferred legal title to their shares to Mr Timichev on 29th June 2010 (Granton), 18th June 2009 (Branden), 1st December 2009 (Aldridge) and 12th November 2009 (Zafferant) respectively. This information was inconsistent with iLaw's letter of 9th August in which the Borrowers were said to have several different legal owners other than Mr Timichev. Mr Timichev was said to have become the director of the Borrowers on those dates;

c) the nominees who had been the legal owners of the shares in Forest, Incompro, Perspective and Maden were said to have transferred legal title to the shares in these entities to Mr Timichev on 15th June 2007 (Forest), 26th November 2009 (Incompro) and 28th June 2010 (Perspective and Maden). Mr Timichev was said to have become the director of those companies on 15th January 2010 (Forest), 26th November 2009 (Incompro), 28th June 2010 (Perspective and Maden); and

d) Mr Timichev had been granted powers of attorney over the Respondents and no other "*material*" power of attorney had been granted in respect of them.

Exhibited to Silyutin 1 were a number of copy documents purportedly evidencing these matters. These included documents purporting to be copies of registers of shareholders and directors, certificates of incumbency, board resolutions, share transfers (Branden, Aldridge and Zafferant) and declarations of trust (Granton, Zafferant and Incompro).

29. A number of oddities were apparent on the face of the documents exhibited to Silyutin 1. In particular:

a) share transfers which were said to evidence Mr Timichev's legal ownership of the shares in Branden, Aldridge, Zafferant and Incompro had not been signed by him although they had been signed by the transferor; and

b) the exhibited copy of Forest's register of directors dated 14th July 2010 had been signed by a Ms Antat, ostensibly in her capacity as sole director of Forest. The self-same register of directors recorded that she had been replaced by Mr Timichev as sole director of Forest just under six months previously on 15th January 2010.

Assets

30. Silyutin 1 stated that Granton owned a 51% stake in two Kazakhstan LLPs – Caspioilgas LLP and Buzachi Neft LLP - which owned valuable oil and gas contracts3 , that Branden owned a 16% stake in a Kazakhstan company named JSC North Caspian Petroleum ("JSC") which had the benefit of 6 oil and gas exploration contracts; and that Aldridge owned an 18.12% stake and Zafferant a 16% stake in JSC. In a later 4th Affidavit Mr Silyutin expressed the belief that the value of Granton's interest in the two LLPs was $ 24.9 million and $ 357 million respectively; and the value of the interests of Branden, Aldridge and Zafferant in JSC was $ 536,032,000, $ 607,056,240 and $ 536,032,000, although he said that he could not confirm the liabilities of the relevant companies.

31. As a consequence of these and other matters, the Bank applied for judgment on **24th September 2010**. On **4th October 2010** the Respondents applied for a declaration that they had complied with the terms of the unless order. This was supported by the second witness statement of Mr Culbert on behalf of the Respondents. In that he stated that the absence of signatures on the share transfers relating to Branden, Aldridge, Zafferant and Incompro arose as a result of a *"secretarial error";* and that the appearance of the signature of Ms Antat on Forest's register of directors was due to a *"clerical error"*.

Silyutin 2

32. On **8th December 2010** an undated and unsworn affidavit of Mr Silyutin ("Silyutin 2") was served. Much of it was concerned with assets. Silyutin 2 repeated Mr Culbert's explanation as to how Ms Antat's signature had appeared on the share register of Forest. Exhibit DS3 thereto contained a copy of a previously undisclosed document purporting to be a statement from Ms Antat which bore the date 5th October 2010. This stated that the register of directors and share register of Forest had *"mistakenly been signed by me as the Director of the Company";* and requested that they be considered *"null and void"*. This affidavit was eventually sworn on **17th December 2010**.

33. Silyutin 1 clearly attested to the supposed fact that Mr Timichev was the beneficial and legal owner of the Respondents. The Skeleton Argument for the hearing of the two applications filed on behalf of the Respondents did likewise. It relied on the documentary material attached to Silyutin 1 which, it submitted, was prima facie to be presumed to be valid. Reliance was also placed on the fact that the documents in the form of the share register of Forest and the declarations of trust from 2008 for Granton, Zafferant and Incompro were said to pre-date the transactions that formed the subject of the present litigation.

34. Express reliance was also placed on the disclosure of copies of documents which were purportedly share registers showing Mr Timichev's legal ownership of the shares in Zafferant and Incompro (para. 32). It was specifically submitted on behalf of the Respondents that they had *"made a genuine attempt, and intended, to comply with the provisions of the Unless Order by serving Silyutin 1 a 53-page document (including exhibits) which systematically dealt with each of the questions which they were required to answer"* at para. 62(1) and that the *"breaches of the Unless Order, if any, are unintentional, and may fairly be described as minor, technical breaches"*. (para. 67(3)).

The December 2010 judgment

35. In my judgment of **10th December 2010** I found that there had been material non-compliance with the terms of the freezing order:

a) On the part of Granton, Branden, Aldridge and Zafferant in respect of their failure to provide any valuation of their assets at all and as to the nature of their shareholding or stake in the three oil companies in which they held interests and the rights attached thereto; and

b) On the part of Maden by virtue of its failure to explain what had happened to about $ 2.5 million of the monies received by it from the Bank;

c) On the part of Forest because:

"it must have been within Forest's control to obtain a proper copy of its share register and register of directors and not one which was signed by somebody who purported to be, but plainly was not, a director at the time of signature" (para. 70);

36. I granted relief against sanction and unconditional permission to defend the claim to Incompro and Perspective and conditional relief against sanction to Granton, Branden, Aldridge, Zafferant, Forest and Maden. I also gave judgment against Loginex, the eighth defendant.

37. The conditions which I imposed upon Granton, Branden, Aldridge and Zafferant required them to swear and file – by 22nd December 2010 - affidavits stating the nature of their stakes in the 3 oil companies referred to in para 30 above and the value thereof. For Forest, the condition was that duly authenticated copies of its register of shareholders and register of officers and directors were to be exhibited to an affidavit. The Respondents purported to comply with these conditions by Mr Silyutin swearing Silyutin 3 on 17th December 2010 and Silyutin 4 on 22nd December 2010. As regards Maden, it was required to produce a power of attorney enabling the Bank to request documents relating to the untraced sum from Trasta where the monies had been paid.

Events following the December Order

38. After the December order the Bank discovered two sets of documents which it contends show that, whilst Mr Timichev was presented to the Court as the owner and director of all the Respondents and, indeed all the Borrowers and Intermediaries, and the person who instructed the companies' agents, in truth they were controlled and directed by a Mr Syrym Shalabayev, who is Mr **Ablyazov**'s brother in law, under the auspices of two companies: first Eastbridge Capital Limited and, secondly, Euroguard Assets Ltd. Given the link between Mr Shalabayev and Mr **Ablyazov** it is, the Bank submits, legitimate to infer that the person who ultimately owns the Respondents is not Mr Timichev but Mr **Ablyazov**.

39. On **26th January 2011**, in the light of this material, Teare J made an order in 2009 Folio 1099 ("the Drey Proceedings") that the Receivership Order obtained therein by the Bank on 6th August 2010 in relation to Mr **Ablyazov**'s disclosed assets should be extended to companies administered by Eastbridge, which included Branden, Aldridge, Zafferant and Austin. On 8th April 2011 he also ordered that the Receivership be further extended so as to encompass companies administered by Euroguard, including Perspective and Maden. These extensions were not based on findings that those companies were assets of Mr **Ablyazov** but that there was a good arguable case that they were.

40. The Bank has brought proceedings which are called "the AAA proceedings" because they concern an alleged misappropriation of certain AAA rated Bonds. Documents disclosed by Mr Kythreotis in those proceedings (see para 81 below) show Mr **Ablyazov** as being responsible for fees due in relation to work done for Austin, the eleventh defendant and an Intermediary but not one of the Respondents. Austin was due to be represented by iLaw but in the event was not; and on 22nd March 2011 I gave judgment in default against it. That disclosure, it is submitted, confirms that Austin is in truth owned, controlled and directed by Mr **Ablyazov**. The Bank says that it is not, however, essential for it to establish that Mr **Ablyazov** is the ultimate

beneficial owner of the Respondents. It is sufficient to show that they have falsely claimed to be owned controlled and directed by Mr Timichev when they are controlled by Mr Shalabayev, at least in part.

Personnel and companies

41. Mr **Syrm Shalabayev** is, as I have said, Mr **Ablyazov**'s brother in law, being the brother of his wife. Mr Brown's 12th witness statements records that he has in the past held himself out on "*True Beneficiary Ascertainment Cards*" for accounts as being the beneficial owner of assets belonging to companies that Mr **Ablyazov** has admitted owning. He has been found by Briggs J to be in contempt of Court by reason of his failure to comply with the disclosure provisions of a freezing order made against him in November 2010 in the AAA proceedings. For that he has been sentenced, in his absence, to 18 months imprisonment and is now unlawfully at large.

42. Another associate of Mr **Ablyazov** is said to be a Mr **Alexander Udovenko. Eastbridge Capital Limited ("Eastbridge")** is an English company. It is the Thirteenth Defendant in the AAA proceedings. The Bank alleges that it has assisted Mr **Ablyazov** to misappropriate the AAA Bonds. It has a London and a Moscow office – as appears from its email addresses - *eastbridgecapital.com* and *eastbridgecapital.ru*. It is apparent from the emails which have been discovered that its personnel included:

London Mr Alexander Udovenko

Moscow *Anna Volodina* (Bo**?**o**???**a A**??**a)

Daria Kabanova (Ka**?**aHOBa **?**ap??)

Yana Konyushenko

Nikolay Michailov

Yana Biryukova

43. Mr Brown's 12th witness statement records that in mid 2009 Mr **Ablyazov** regularly attended at Tower 42 (formerly the Natwest Tower) in London at premises leased by Eastbridge4 and latterly by a company called Park Hill Capital, the 16th Defendant in the AAA proceedings, to which the Bank believes Eastbridge's operations were transferred. He also records that Mr Udovenko, an associate of Mr **Ablyazov**, was a director of Eastbridge; was at one stage the beneficial owner of Austin as appears from documents disclosed by Austin's former corporate agent in the BVI – Commonwealth Trust Ltd. He also refers to Mr Udovenko's links with Mr **Ablyazov** recorded in para 71.3 of the Amended Particulars of Claim, although I note that some of the matters there recorded are simply the Bank's case.

44. **Euroguard** is a Cypriot company. Its staff include:

Tatiana Sergievskaya

Anna Volodina

Daria Kabanova

Victoria Kolyasova

Olesia Catruc

45. **Paul Kythreotis** is a Cypriot nominee corporate service provider who provides services through two Cypriot companies – **Starport Management** Limited and **PKM Management Limited**. He is a director of Austin and purports to hold shares in that company on trust for Mr Timichev under a Deed purportedly executed on 1st August 2008. He is a defendant in the AAA proceedings.

The Cypriot documentation

46. On **10th November 2010** the Bank executed a search order in Cyprus, made by the Limassol District Court, at the premises of a Mr Jason Hercules. He is a defendant in the AAA Proceedings. As a result of that order the Bank came into possession of a large number of documents, including many emails showing how Mr **Ablyazov**'s assets had been administered both before and after the granting of the receivership order in the Drey action. Five documents are presently material. In view of the extensive submissions that have been made to me as to their significance, or the lack of it, it is necessary to examine each with some care.

The email of 9th October 2008

47. On **9th October 2008** Mr Udovenko sent to Mr Kythreotis from Eastbridge an email whose subject was "*Change of UBO*". UBO must mean "Ultimate Beneficial Owner". The email, which was copied to Anna Volodina and Daria Kabanova of Eastbridge read:

"Dear Paul,

As you can understand our Group is growing and we need some intergroup restructuring. So in accordance with the current policy of the Group we would like to have in all companies under your administration Mr Shalabayev as UBO. Could you send us all papers we need to sign in order to make necessary changes. After that we would like you to issue new Trust Declarations. Anna and Daria will provide you with information and [a] *copy of* [the] *passport of Mr Shalabayev if necessary. The procedure of sending you orders for signing and issuing documents on behalf of the companies remains the same. Could you receipt instructions from Mr Shalabayev to be sent from email instructions@eastbri*[d]*gecapital.com. The contact people you can ask for information and ask questions are Daria Kabanova, Anna Volodina, Alexander Udovenko, Nikolay Michailov, and Yana Biryukova.*

Below there is a list of companies under your administration.

[There followed the names of 102 companies]

Thank you,

Alexander Udovenko

Eastbridge Capital Limited,

Level 16, City Tower ... London"

48. Six of the 102 names have been redacted as a result of a restricted information regime imposed in the Drey proceedings. One of the 102 names - Molyneux Ltd - is a company which in 2010 Folio 362 Mr **Ablyazov** has accepted is 90% owned by him. Another of the companies is Austin, an Intermediary. Others are AstroGold, Bergtrans, and Carsonway which are Recipients.

The email of 25th November 2008

49. On **24th November 2008** Julia Salyuleva at the Bank emailed Mr Udovenko and others with a copy to Anna Volodina and Daria Kabanova of Eastbridge and someone else at the Bank saying (in Russian as are all the succeeding emails):

"Good day, attached is a list of companies-non-residents, which are borrowers of BTA Bank Kazakhstan. The replacement of directors results in affiliation between these companies. Keep this in mind during replacement.

50. On the same day Daria Kabanova of Eastbridge emailed to Anna Volodina and Yana Konyushenko, both of Eastbridge Capital Moscow:

"*Please provide a selection by these companies, who are their current directors, taking into account the transfers"*.

I infer that by "*a selection*" the translator meant "a list".

51. On **25th November 2008** Yana Konyushenko of Eastbridge replied;

"Attached is a selection from the register. Our register has no record of two companies – Brotex Group Ltd and Ditron Securities Ltd".

52. Also on **25th November 2008** Daria Kabanova emailed Julia Salyuleva at the Bank and Mr Udovenko, with a copy to Anna Volodina at Eastbridge and 3 others at the Bank:

"Ladies and gentlemen

Attached is the list of borrowers including the directors 4 companies have experienced changes

[She then listed Astrogold, BergTrans, Carsonway and Zafferant]

In view of this, please inform us if we need to resort to any further replacements and, if necessary, provide a list of persons who must not be directors in the specified companies

I would also like to draw your attention to the fact that two companies on the list Brotex Group Ltd and Ditron Solutions Ltd are not part of the Group and are not under the control of Eastbridge.

53. Included in the list were 3 of the borrowers – Aldridge, Branden and Zafferant and all of the Recipients except Brotex and Ditron. I infer that this was the list attached to the email set out in the previous paragraph since (a) the original email of 24th November 2008 must have included Brotex and Ditron – hence East-

bridge replied saying they were not part of the Group; and (b) the list has the four companies named in that email highlighted and Brotex and Ditron omitted.

54. On **25th November 2008** Mr Udovenko emailed back to people at Eastbridge Moscow and at the Bank:

"Greetings,

Can you please tell me what kind of companies are Brotex Group Ltd and Ditron Solutions Ltd?"

That was sent from offices in City Tower, Basinghall Street.

The email of 9th March 2010

55. On **9th March 2010** Anna Volodina at Eastbridge emailed Mr Kythreotis with copies to Mr Shalabayev and Daria Kabanova and others at Euroguard. The March 2010 Email sought the removal of Mr Shalabayev's name from services agreements prepared in relation to ten companies including two Recipients – Bergtrans and Carsonway - and further companies of which Mr **Ablyazov** has admitted ownership.

The first email of 24th April 2010

56. On **22nd April 2010** at 12:05 Mr Shalabayev [instructions0102@googlemail.com5] emailed Mr Kythreotis with copies to Anna and Daria and another at Eastbridge as follows:

"Dear Paul,

I would like to make changes concerning beneficial owners in some companies registered with your help.

I kindly ask you to change the UBO backdated from me to the mentioned people by the same dare that I became the UBO of those companies.

The previous Trust Declarations issued in my name in this case should be considered invalid

For these companies we will need backdated Trust Declarations"

57. There then followed a list of 48 companies, of which 36 are in the 9th October 2008 email, with the name of the person to whom ultimate beneficial ownership was to be transferred. The email continued:

"The companies listed below were sent to strike off, but I need to change the UBO ... without stopping this process. The change shall be also backdated [to] *the same day that I became the UBO of the companies, so that the Trust Deeds issued in my name can be considered invalid.*

[The names of four companies follow, of each of which a "Mrs Degtyareva" was to become the new UBO.]

Please find attached the copy of passports and Bank References of the new UBOs.

Best regards,

SS"

The second email of 22nd April 2010

58. At 19:41 the same day Mr Shalabayev sent Mr Kythreotis another email which read:

"Dear Paul,

Please find below the list of companies for which I kindly ask you to reissue the Trust Declarations for people mentioned in the list.

The Trust Declarations should be the same date as I became the UBO of the companies, so that the Trust Declaration issued in my name shall be considered invalid.

We will also need the trust documents reissued is [sic] *any.*

Here is the date of the Trusts we have and the dates we need.

[There then followed a list of 9 companies with details of their place of incorporation, the new UBO, "*the date we have in the Trust declaration*" and "*the date we need*". One of the companies was Astrogold, a Recipient, and another was Austin, an Intermediary. In the case of Austin "*the date we have in the Trust declaration*" was 16.9.08 "*the date we need*" was 2.8.08 and the UBO Ms Degtyareva. The Deed of Trust in favour of Mr Kythreotis was date 1.8.08.]

Please rename the companies below and provide us with the relevant document confirming the change of name.

[The names of five companies were then set out and they included Bergtrans and Carsonway6, both of which are Recipients and Molyneux Ltd.]

Thank you,

SS"

The email of 26th July 2010

59. On **26th July 2010**, 10 days after Teare J's judgment on the Receivership, Mr Shalabayev sent Mr Kythreotis an email which informed him that

"*we are going to transfer some companies to the third parties therefore we need to change a Contact Person for these companies and also make some changes concerning the Beneficiary Owner. Please be informed that all companies for which we change the Contact Person are not under our administration from now.*

Some other companies we are not going to transfer and I still remain the only contact person but I would like to ask you to change the UBO".

The email went on to say "*The details of the new Contact People are the following*" and then set out 4 names with copies of their passports, email address and a bank reference. It went on to say "*Please also find attached the documents for the new UBO*" and referred to four names with, in each case, a copy of the passport, and in three a bank reference. There was then set out a list of 123 companies (70 of which were in the 9th October 2008 email), their place of registration, Contact Person and UBO, with instructions either to change the Contact Person, the UBO or both for all 123 companies. In 94 cases the declarations of trust were to be backdated. Included in these companies were Astrogold, Bergtrans and Carsonway, all of which were Recipients and Molyneux, an **Ablyazov** Company, together with a number of other companies of which Mr **Ablyazov** has admitted ownership. These included ZRL Beteiligungs AG, Drey Associates Limited, Interfunding Facilities Limited and Strident Energy Limited. Mr **Ablyazov** has admitted in his Amended Defence in the Drey proceedings that these companies held assets on his behalf (see paragraphs 67(d), 72(b), 75 and 77).

60. A further company, GEM Equity Management Holding AG has been reported in the press as having brought an arbitration claim against the Kazakh government for the purported wrongful acquisition of a 75.1% stake in the Bank through Samruk-Kazyna. The arbitration claim is brought on the basis that GEM Equity Management Holding AG was previously a shareholder in the Bank. Since Mr **Ablyazov** has admitted in his Amended Defence to the Drey Proceedings that he *"owned the majority of the shares in the Bank"* it can reasonably be inferred that he further owns and/or controls GEM Equity Management Holding AG.

61. The Bank contends that these communications show:

a) that Eastbridge was acting as the organiser of the corporate arrangements of a large group of companies in the sense that it was specifying:

i) who should be the agent/administrator for the companies in the group (hereafter "the agent") i.e. the person/entity which would sign and issue, or procure the issue of, documents on behalf of the company relating to its ownership such as share certificates, registers, and declarations of trust; and

ii) who should the UBO and Contact Person and from what date;

b) that this group included not only a company admittedly 90% owned by **Ablyazov** (Molyneux) but also (i) Austin, an **Intermediary**, (ii) Branden, Aldridge and Zafferant, all **Borrowers**, and (c) 14 out of the 16 **Recipients** (Astrogold, Balgaven, Bergtrans, Business Code, Calernan, Carsonway, Global Team, Grundberg, Kinmate, Lingard, Mabco, Topgeo, Trionfale and Westgrade);

c) that the inclusion within the group of an Intermediary, three Borrowers and 14 Recipients shows the link that you would expect between the companies involved in the two Schemes which were orchestrated by the same conductors);

d) that the individuals giving the instructions on behalf of Eastbridge were Mr Udovenko, behind whom stood Mr Shalabayev; and Mr Shalabayev himself;

e) that these instructions involved changing the UBO and Contact Person and included doing so retrospectively; and

f) that the instructions given tied in with what was happening in the litigation. Thus, in the **9th October 2008** email Mr Udovenko had requested that all of the companies in the group under the administration of Mr Kythreotis should have Mr Shalabayev as the ultimate beneficial owner. But on **9th March 2010** (a few weeks after the Bank had issued its application for the Receivership Order), an email was sent from Euroguard to Mr Kythreotis, the purpose of which was to orchestrate the removal of Mr Shalabayev's name from services agreements prepared in relation to ten companies, including two companies which were Recipients, and further companies which Mr **Ablyazov** has admitted to owning. Further, on **22nd April 2010** Mr Shalabayev sent two emails to Mr Kythreotis requesting him to prepare backdated trust declarations changing the ultimate beneficial ownership of 65 companies (including some which were in the process of being struck off the register) from him to various named individuals. These included Austin and three of the Recipients. Further backdating instructions in respect of the UBO were given by Mr Shalabayev on 26th July 2010 including in respect of Molyneux and other **Ablyazov** companies and three Recipients - Astrogold, Bergtrans and Carsonway.

The Yahoo Disclosure

62. The Bank became aware from the Cypriot documentation that Mr Shalabayev used a number of email accounts to give instructions in respect of the companies administered by Eastbridge. These email accounts included two held with Yahoo. Between 28th January 2011 and 2nd March 2011 the Bank successfully applied for various orders pursuant to which it obtained disclosure from Yahoo of a substantial volume of emails sent to and from these (and other) accounts (the "Yahoo Disclosure").

63. The Yahoo Disclosure revealed that Eastbridge's role had latterly been taken over by Euroguard and that Mr Shalabayev, with the assistance of Euroguard, had been providing instructions to a large number of corporate service providers in relation to companies, certain of which were disclosed assets of Mr **Ablyazov**. Many of these instructions were to backdate documents evidencing the beneficial ownership and the persons holding directorships of these companies. The documents discovered included those referred to in the following paragraphs.

The first email of 30th November 2010

64. On **30th November 2010** Tatiana Sergievskaya of Euroguard sent an email to Mr Shalabayev ["*Myr Yslt;ys_myr@yahoo.co.uk*>"7] partly in Russian and partly in English on the subject of Maden, Perspective, Aldridge and Branden. Those passages which are in English in the original are in bold in the quote below:

"You need to forward 2 letters – one to the agent, one – to us.

In relation to the companies MADEN HOLDING INC, PERSPECTIVE COMMUNICATIONS INC, ALDRIDGE VENTURES LTD, BRANDEN & ASSOCIATES LTD. It is necessary to get the following:

1) Get the Instrument of Transfer with the signature from Timichev himself. The table refers to some UBO forms– have these already been signed, if yes, where are the scans?

2) To write a letter to the agent and request the following documents from Timichev's address (if these have not already been sent to you):"

Profdept@gmail

Dear Elizabet,

Please be aware that I need the following original documents for the companies MADEN HOLDING INC, PERSPECTIVE COMMUNICATIONS INC, ALDRIDGE VENTURES LTD, BRANDEN & ASSOCIATES LTD:

1) Apostilled resolutions re change of Director and Shareholder

2) New Share Certificate

3) Trust Declarations in my favour

Thank you

3. It would be better to write a letter to all of us with notification and attach the scans. To notify that change of the director and the shareholder took place, but we are waiting for the documents from the agent. We are also waiting for the change of the Beneficiary and indicate the dates, so that Chaeva would be able to record this in the general register as well as we with our table (provided that the dates are already precise and you have checked everything).”

Please find attached scans re change of shareholder and Director in the following companies MADEN HOLDING INC, PERSPECTIVE COMMUNICATIONS INC, ALDRIDGE VENTURES LTD, BRANDEN & ASSOCIATES LTD. We are still waiting for the originals from the agent and also Trust Declarations for Mr Heorhi Tsimichau.

4. Do the companies remain active?”.

65. The scans, i.e. attachments, contained in relation to the four companies the same documents as were attached to iLaw's letter of 9th August and exhibited to Silyutin 1 together with, in the case of Aldridge and Branden and Perspective, a director's resignation. The documents which were sought were documents which were not included in the exhibits to Silyutin 1 viz (i) Instruments of Transfer signed by Mr Timichev, the omission of which had been pointed out at the August 20th 2010 hearing; (ii) *apostilled* resolutions re change of Director and Shareholder: (iii), actual share certificates reflecting the changes; and (iv) the earlier trust declarations in Mr Timichev's favour – such declarations had been provided in respect of Granton, dated 9th July 2008, and Zafferant and Incompro, dated 18th April 2008 but not in respect of Aldridge, Branden, Perspective and Maden.

66. There was also attached a Table which read as follows:

Dates concerning Mr Heochi Tsimichau

The historical dates in the second and third columns are identical to those set out in Silyutin 1.

67. This email shows – so the Bank contends – the following:

a) Mr Shalabayev is the person who is in a position to give instructions to Euroguard and to the agent in relation to the companies the subject of the email; Euroguard is advising him what those instructions should be;

b) the message which it was suggested should be sent ("*Dear Elizabet*..") was to be sent by Mr Shalabayev from an email address in Mr Timichev's name purporting to come from him;

c) Euroguard was also suggesting that a letter should be written to their personnel ("*all of us*") and, perhaps, others, notifying them that a change had taken place in the director and shareholder of Maden, Perspective, Aldridge and Branden. The email enclosed pdf attachments of documentation relating to those 4 companies; and

d) the fact that the documents in the attachments were the same as the documents relating to Maden, Perspective, Aldridge and Branden exhibited to Silyutin 1 shows that it was Mr Shalabayev or someone acting on his instructions who must have provided the documents to Mr Silyutin to corroborate the false assertion (contained in Silyutin 1) that the various nominees specified held shares on trust for Mr Timichev as the ultimate beneficial owner at the time of the Unlawful Schemes. In relation to these companies Mr Timichev had been said in Silyutin 1 to be the beneficial owner prior to the date on which he became legal owner of the shares, the legal owners being as follows:

Company	**Legal Ownership**
Trustees before then	
Maden Chanelle Latoya Sturge	28.6.10
Stanley Edward Williams	
Perspective Sarah Petre-Mears	28.6.10
Aldridge Andrew Moray Stuart	1.12.09
Branden Andrew Moray Stuart	18.6.09

The second email of 30th November 2010

68. In response, later on the same day Mr Shalabayev sent to 4 personnel at Euroguard the email ("*Please find attached*..") which Euroguard had suggested be sent to them with accompanying attachments and the table set out in paragraph 66.

The email of 1st December 2010

69. On **1st December 2010** Ms Sergievskaya of Euroguard emailed Mr Shalabayev by way of reply to his email of 30th November 2010 the following partly in Russian and partly in English (words originally in English in bold):

"Please, be reminded that we are looking for the following documents to be submitted by the agent in original copies

1) Apostilled resolutions re change of Director and Shareholder

2) New Share Certificate

3) Trust Declarations in favour of Mr Heorhi Tsimichau.

4) Instrument of Transfer signed by Mr Heorhi Tsimichau"

Please, note that we have already received the Trust in respect of PERSPECTIVE COMMUNICATIONS, INC. from Sarah Petre-Mears (dated 05.04.06). Earlier Anna asked you a question about the trust from the first shareholders – Stanley Edward Williams and Kelle France (dated 08.02.06). Do we wait for these trusts?"

It appears, therefore, that the Perspective Trust Declaration was received by Euroguard overnight: between 30th November and 1st December 2010.

The email of 13th December 2010

70. On 13th December 2010 Olesia Catruc from Euroguard emailed Mr Shalabayev to say "*Please advice Heorhi Tsimichau that the following documents were sent to him for signature and waiting to be sent back to us fully signed*". The documents listed (and attached) were the instruments of share transfer in respect of Aldridge and Branden signed, so far, only by the transferees.

The emails of 24 November 2010

71. On **24th November 2010** Euroguard sent Mr Shalabayev a series of emails partly in Russian and partly in English (in bold) which read:

"*Please find below the letter instructing the agent to change the contact person and the list of the companies by beneficiaries. We need to forward, on behalf of each beneficiary, the same letter with the list of companies. Note: it is required to insert a contact e-mail of each UBO (also being a contact person). The total number of letters must be equal to 5 (five)"* Please find below

profdept@gmail.com

Dear Elizaveta and Svetlana,

By this letter I would like to inform you that from now on I will be myself the contact person for the companies listed below. I will send my instructions as the beneficiary owner from the following email:_____ . Please do not hesitate [to] *contact me if you have any questions.*

Companies:"

72. There was then set out in relation to five specified individuals (three of whom – Pakhomov, Kossayev and Burkitbaev - were some of the new UBOs specified in the e-mail of 26th July 2010) the companies in relation to which they, as purported beneficial owner, were to become the contact persons as well. This was the first in a sequence of emails in which the addressees of the communication (Elizaveta and Svetlana in the first;

other names including that of Mr Kythreotis in the others), the companies concerned and the identity of the beneficiaries differed from email to email although the same names often reappeared, the intention being that the beneficiaries specified would communicate with the agents of the companies concerned. One of the beneficial owners in the first email was Mr Timichev in respect of a company called Aurland Productions Ltd. This indicates, the Bank contends, that Mr Timichev was following the instructions of Mr Shalabayev in relation to a company other than the Respondents.

73. Two of the companies in the emails are ones which Mr **Ablyazov** has admitted owning as nominee holders of his assets. The timing of these emails is, the Bank contends, significant. It was shortly before the Supreme Court refused Mr **Ablyazov**'s application for permission to appeal the decision of the Court of Appeal appointing a Receiver over his assets.

The email of 13th January 2011

74. On **13th January 2011** Mr Shalabayev emailed Euroguard to say:

"*Few days ago I requested from DS Express* [a Russian service provider] *to Sign attached POA and they did. Please put stamp of appropriate company on it and send me scan*."

75. Attached to the email was a Power of Attorney from Maden purportedly dated 30th July 2009 in favour of one Adilov Dauletbay. This shows, the Bank submits, that Mr Shalabayev was able to control the affairs of Maden without, apparently, any reference to Mr Timichev, and that Euroguard kept Maden's company stamps, the use of which Mr Shalabayev was able to require.

76. The emails which follow the first email of 30th November 2010 demonstrate, so the Bank contends:

a) that Mr Shalabayev put into effect the suggestion made in the latter email and confirmed to Euroguard the changes in respect of Aldridge, Branden, Maden, and Perspective, and the Table with its instruction as to backdating of the first trust declarations in respect of the four companies mentioned;

b) that Mr Shalabayev was the person to whom Euroguard were reporting what needed to be done in relation to giving instructions to the agent/service provider on behalf of the purported beneficial owners of a large number of companies; and he was the person to whom they communicated in relation to the despatch of documents in relation to Aldridge and Branden to Mr Timichev; and

c) that in relation to Maden Mr Shalabayev had been able to obtain from DS Express (another agent) a power of attorney in respect of Maden and he was in a position to require the agent to stamp it.

The email of Friday 3rd December 2010

77. On **3rd December 2010** Olesia Catruc of Euroguard emailed to Mr Shalabayev a number of attachments consisting of two letters from Peters & Peters, Mr Zharimbetov's solicitors, to Zafferant, one enclosing a Notice of Change and the other an order extending their client's time for service of a defence. From this, the Bank submits, it is to be inferred that Mr Shalabayev has been giving, or was in a position to give, instructions in respect of Zafferant.

The emails of Friday 4th February and Thursday 3rd March 2011

78. On **4th February 2011** someone (I infer at Euroguard) whose email address was corp.otdel@yahoo.com emailed to Mr Shalabayev and personnel at Euroguard what was described as "*just the 1st pages of the big correspondence that we received today from VictoryLand. Please note that there are 3 big file boxes besides the pages attached*". Attached were the orders made on 9th June 2010 and a letter of 8th July 2010 from Hogan Lovells to Forest at Victoria House, Victoria, Mahé, in the Seychelles informing it of the order of Burton J of 2nd July 2010.

79. On **3rd March 2011** the same sender sent Mr Shalabayev and personnel at Euroguard an email saying that "*the following correspondence was received from DS Express for the following companies*." 14 companies were then listed. One of them was Zafferant; and the others included Berit, Global Team, Mabco and Westrade, which were Recipients. The correspondence enclosed was the letters from KPMG of 31.1.11, following their appointment as Receivers by Teare J's order of 6th August 2010 as amended on 10th November 2010 and 26th January 2011, requiring the addressees to take various steps. The email asked whether the material needed to be sent to someone else.

80. The upshot of all this material, the Bank submits, is that it is Mr Shalabayev and not Mr Timichev who controls Aldridge, Branden, Zafferant, Forest, Perspective and Maden and that documentation has been fabricated to mislead the Bank and the Court into believing that the Borrowers were at all material times (i.e. from September 2008) owned and controlled by Mr Timichev. The emails presently discovered do not refer to Granton and Incompro. But they can be in no different position. The case always put forward by the Respondents has been that the Borrowers and the Intermediaries are all under the common ownership and control of Mr Timichev. The relationship shown to have existed between Mr Shalabayev and the companies other than Granton and Incompro must also exist as between him and the latter two. The Bank also submits that, although it is not necessary for them to show that Mr **Ablyazov** is the ultimate owner and controller of the Respondents, the Yahoo Disclosure shows that to be so given the connections Mr **Ablyazov** has with Mr Shalabayev, his brother in law, Mr Udovenko and, thus, Eastbridge/Euroguard.

Mr Kythreotis' email of 12th October 2010

81. The application which is currently before me was made on **22nd June 2011. On 4th July 2011** Mr Kythreotis, with a view to purging a contempt of court which he had committed by failing to comply with the terms of a freezing and disclosure order made on 26th July 2010 in the AAA proceedings, disclosed a substantial volume of material to Hogan Lovells. One of the documents was an email of 12th October 2010 from Mr Kythreotis to Mr Shalabayev on the subject "*Fees and Settlement*". The first paragraph reads:

"As you are probably aware, we have been negotiating with Mukhtar in connection to the legal fees, indemnities and compensations due to the BTA law suits against Mukhtar and his companies. It is now apparent (or for a long time now) that Mukhtar is not able to keep his word or make good his obligations". Bold added.

82. Mr Kythreotis then explains that an agreement had been reached pursuant to which certain fees were to be paid, following which Mr Kythreotis would *"as a show of good will execute the backlog of documents"*. He then states that Mukhtar has not made good his promise and that It would be better that they go their separate ways. He continues:

"In order to do this amicably you must settle all outstanding invoices, as those attached hereto, fee notes below and invoices to be followed (tomorrow) from me on time spent basis for ALL court cases plus the remainder of the agreed indemnity of GBP 4.5m by WEDNESDAY 13th October 2010"

83. The invoices attached include an invoice from a BVI company – Totalserve Trust Company – for $ 25,000 for professional services in relation to 6 companies for "*professional legal services for dealing with all*

court cases in the BVI". Two of the six companies are Astrogold and Austin. The "*fee notes below*" include € 223,000 for the transfer of 223 Starport companies. Starport being Mr Kythreotis' company.

84. The bank submits that there can, in the light of this, be no doubt that the ultimate owner and controller of Austin is Mr Mukhtar **Ablyazov**. Austin is one of the Intermediaries. But it is Mr Timichev's contention that he is the owner and controller of Austin – see Response 27 to the Bank's Request for Further Information which reads:

"The Eleventh Defendant [Austin] was a party to the Bank Assistance Agreement and the Future Loan Understanding in the same way as the other Represented Corporate Defendants. The Eleventh Defendant is owned and controlled by Mr Timichev".

This Response, dated 20th June 2011 is supported by a Statement of Truth signed by Mark Culbert stating Mr Timichev's belief in the facts set out in the Response.

85. At the hearing before Burton J in July 2010 iLaw said that they expected to be instructed by, inter alia, Austin. At one stage in August 2010 they confirmed that they acted for Austin but, when Hogan Lovells queried that, they explained that they were mistaken. By their letter of 4th January 2011 iLaw informed Hogan Lovells that they anticipated receiving instructions to act on behalf of Austin but had not yet done so. In a letter of 17th January 2011 this was said to be because they were awaiting release of the current Register of Directors and Register of Shareholders by Austin's registered agent and that their client had been chasing the registered agent for this. Should the registered agent continue to fail to release the requested documents they would have to seek an order from a BVI court compelling him to comply with their client's requests. In a letter of 28th January 2011 iLaw said:

"We understand that the current director, Mr Kythreotis, is refusing to sign the necessary resolutions to appoint Mr Timichev as a director. As a result we may be forced to obtain a court order in the BVI to forcibly remove Mr Kythreotis and have Mr Timichev appointed. Naturally this may take some time."

86. It is apparent from that that Mr Kythreotis was the registered director. The email of 12th October 2010 reveals that the, or a, reason for his refusing to sign was that his fees had not been paid by Mr **Ablyazov**.

CPR r. 3.1(7): The Court's power to vary or revoke an order

87. CPR r.3.1(7) provides that: "*a power of the court under [the CPR] to make an order includes a power to vary or revoke the order*". In *Kojima v HSBC* [2011] 3 All ER 359 Briggs J noted that:

"Save that the power to revoke is to be exercised having regard to the fulfilment of the overriding objective, the CPR contain no other guidance as to the principles upon which the discretion may be exercised, or as to the circumstances to be taken into account." (at 365, paragraph [20])

88. In *Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen* [2003] EWHC 1740 (Ch) Patten J, as he then was, proffered non-exhaustive guidance that:

" ...the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way whether innocently or otherwise." (paragraph [7])

That these circumstances may justify revoking or varying an earlier order was approved by the Court of Appeal in *Collier v Williams* [2006] 1 WLR 1945 at paragraphs [39]-[40] and [119]-[120] and in *Roult v North*

West Strategic Health Authority [2010] 1 WLR 487 at 493. In the case of a final order, however, the public interest in finality will generally mean that the conditions referred to by Patten J are insufficient to justify revocation.

What approach should the Court take?

The alleged intimidation of Mr Timichev

89. Mr Saul Lemer, for the Respondents, submitted that Mr Timichev had been intimidated from giving evidence by what was said to him at a visit to his home by a lawyer on behalf of the Bank in July 2011 and that, in those circumstances, the only option available to me was to dismiss the Bank's application because, as a result of the Bank's actions, the Respondents could not have a fair hearing. Alternatively, if I felt unable to determine whether he had been intimidated without the trial of an issue, then I should assume that he had been and ask myself whether, in that case, it would be appropriate to allow the application to proceed. If the answer was "no" then the application could not proceed until the issue as to the existence and extent of the threats had been determined. The answer should be "no" because it would be grossly unfair to allow judgment to be given against the Respondents when they had not been able to answer the case because of the illegitimate tactics adopted on the part of the Bank.

Mr Timichev's witness statement

90. In a Witness Statement signed by him on 9th August 2011 Mr Timichev, who gives his address in Belarus, confirmed in paragraph 1 that he is the ultimate beneficial owner of the Respondents.

91. He then recounts how on 25th July 2011 at about 6 pm a car with Ukrainian plates drove up to his house. Out stepped Mr Solovyov who claimed to be a representative of a law firm. A conversation took place at his house. Mr Solovyov said that he represented the interests of the Bank. He said he had come round to convince Mr Timichev that he should deny that he was the owner of the Respondents and should say that they were owned by Mr **Ablyazov**. When Mr Timichev asked why he should relinquish companies that he owned Mr Solovyov said that several people had already changed their position and denied that they were the real owners, stating that the companies belonged to Mr **Ablyazov**. But he said that one man from Kiev had not "given up" and he suffered a bad fate i.e. extradition to Kazakhstan. Mr Solovyov said "*You know what prisons in Kazakhstan look like: do you really need it?*" Mr Solovyov said that it was his firm who helped prosecute that person.

92. The meeting lasted for over an hour and a half. When Mr Solovyov's attempt at persuading him to relent failed he suggested that Mr Timichev should have independent advice from a lawyer in Minsk which his firm would pay for. That lawyer, he said, would confirm that he should admit that he only owned the companies nominally, after which he, Mr Solovyov, would be prepared to meet with Mr Timichev and his lawyers anywhere in the world to legalise his denial of ownership which would be used against Mr **Ablyazov**. When Mr Timichev did not accept this Mr Solovyov said that Mr Timichev had not disclosed to the Belarus Foreign Ministry the fact that he owned the Respondents and received profits from them. Mr Timichev said that that was not Mr Solovyov's business.

93. Mr Solovyov then said that Mr Timichev might lose his property, his companies and even his family home and referred to someone in the Ukraine whose property had been taken from him with the help of Mr Solovyov's law firm. Mr Solovyov left, urging Mr Timichev to take the right decision and said he would return in a fortnight.

The October 2010 interrogation

94. Mr Timichev refers in his statement to being summoned for interrogation on **6th October 2010** by the Belarus authorities as a result of the Banks's claim. He said it was clear that he was summoned for questioning as a direct result of being named in these proceedings as the beneficial owner of the Respondents. He was told that the information about his status had been obtained as a result of the English court ordering disclosure about the identity of the beneficial owner. He invoked his right under Article 27 of the Constitution of Belarus to refuse to answer any questions.

The alleged effect on Mr Timichev

95. Mr Timichev says that he is "*worried that anything may happen to me from now on"* and says that he relies on the expert report of Professor Bogush, an Associate Professor at the Department of Criminal Law and Criminology at Moscow State University, that under the current regime in Belarus there is not sufficient protection against extradition for residents in Belarus. He also expresses concern that the evidence against him could be used by the Bank to bring criminal proceedings against him. He refers to Professor Bogush's opinion that he could be prosecuted in Belarus for acts committed outside Belarus which were criminal in the territory where they were committed. He repeats his fear that he might be extradited.

Professor Bogush

96. On **27th July 2011** Mr Culbert signed his fourth witness statement, which exhibited the report of Professor Bogush signed by the latter in Moscow on 25th July 2011. This gives his expert opinion on the risk of criminal prosecution of Mr Timichev in the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan. The key point of the Report was that the disclosure of information to representatives of the Bank significantly increased the risk of Mr Timichev being criminally prosecuted and that there was a high risk of the use of any such evidence in a criminal trial that "*violates the right of Timichev not to testify against himself*".

97. The Report has 44 paragraphs followed by 5 paragraphs of conclusions together with 22 footnotes containing detailed references. It must have been in preparation for some time before 25th July and was not a result of Mr Solovyov's visit on 25th or 26th July. It is plain that, even prior to that visit, Mr Timichev did not intend to file any evidence himself but to invite the Court not to revoke any order on account of the risk of prosecution that he ran if he gave any evidence responsive to that of the Bank. It is noticeable that he does not suggest that prior to that visit he was poised to give such evidence.

Mr Solovyov's account

98. Mr Solovyov's witness statement of **19th August 2011** gives a somewhat different picture. First, he says that the meeting took place on 26th July and he produces a receipt from a hotel in Posta for that date, which confirms to me that the meeting took place on that date. The purpose of his visit was to find out whether Mr Timichev had been the victim of identity theft and, if not, to understand the extent to which he was aware of the present proceedings and aware that he had been put forward as the beneficial owner of the relevant companies and of their business and their involvement in these proceedings. He did not indicate that Mr Timichev should deny that he was the owner of the Respondents. What he did was to put the Bank's position to him and ask him to confirm or deny whether it was true. At no stage did Mr Timichev state positively that he was the true beneficial owner of the Respondents or deny Mr Solovyov's suggestions to the contrary.

99. Mr Timichev's house was in a small rural town. When he was invited in (he had suggested that they go to a restaurant) he told Mr Timichev that the Bank's case was that he was not the true beneficial owner of the Respondents, but only a nominee, the real owner being Mr **Ablyazov**. He showed him a Ukrainian newspaper article relating to the litigation against Mr **Ablyazov**, which Mr Timichev did not read, saying that he knew all this. He explained that the Borrowers owed the Bank over $ 1 billion and that there were on-going criminal

proceedings in Kazakhstan, Russia and the Ukraine into the activities of Mr **Ablyazov** and his accomplices. This was not intended as a threat but was mentioned because of the Bank's concern that Mr Timichev had not been made aware of the situation that he was involved in.

100. Mr Solovyov explained that the Bank could not bring criminal proceedings itself but was entitled to join as a civil complaint in jurisdictions such as Russia and Ukraine. It seems from his statement that his firm had acted for the Bank as civil complainant in such proceedings but he does not state the jurisdiction, which is probably Ukraine. Mr Solovyov explained that two individuals had fled Kazakhstan after the nationalisation of the Bank and had ended up in the Ukraine. Both had been put forward as the beneficial owners of or contact person for companies in fact owned by Mr **Ablyazov**. They had explained that their roles were confined to signing official documents and that they had simply followed instructions of others in acting on behalf of those companies and in some cases had been put forward as beneficial owner of companies linked to Mr **Ablyazov** without their knowledge. As far he was aware neither had been extradited to Kazakhstan although one had returned there voluntarily. Mr Solovyov mentioned these individuals to illustrate the Bank's concerns that Mr Timichev was acting in a similar role in relation to the Respondents. He did not make any reference to Kazakh prisons or indicate that his firm had assisted anyone to take property from an individual. His firm had not been involved in any such cases; what they had been involved in was the enforcement of court judgments.

101. In the light of Mr Timichev's tacit admission that he was not the real owner of the Respondents Mr Solovyov asked him what he thought he stood to gain by being involved and said that the money which he assumed Mr Timichev was being paid was unlikely to compensate him adequately if the Bank's claims succeeded. He told him that if he was indeed acting as a nominee the people who were asking him to act were really using him as a fall guy, to which Mr Timichev responded that not everything in life is done for money.

102. Mr Solovyov said that, as far as he knew Mr Timichev had not obtained the consent of the Belarusian National Bank for investments in his alleged overseas holdings nor informed the Belarusian tax authorities of these investments and said that that seemed to confirm that Mr Timichev was not the real owner of the companies. This was not by way of threat. Mr Solovyov thought it reasonable to point out that, if Mr Timichev really was the beneficial owner, why should he risk criminal prosecution by not registering his investments with the appropriate authorities?

103. Mr Timichev said that he believed that the case against Mr **Ablyazov** was politically motivated. Mr Solovyov said that whatever he might think of proceedings in Russia, Kazakhstan or Ukraine, it was very unlikely that the Courts of England could be used to pursue a groundless claim. He said that serious measures had been imposed on Mr **Ablyazov** by the English Court as a result of the claims against him which suggested that there was merit in them. He suggested that Mr Timichev should learn about the real situation by seeking advice from independent lawyers. Whether or not he actually asked Mr Timichev to do the right thing he did try to convey that the Bank simply wanted Mr Timichev to tell the truth about his role.

104. Mr Timichev then likened Mr **Ablyazov**'s position to a man whose house is worth $ 1,000 and is being asked to sell it for $ 10, impliedly suggesting that Mr **Ablyazov** had been made such an offer and was being pursued because he had said “no” to it.

105. The conversation was civil and non-threatening; there were no personal attacks or insults. Other people were in the house. They parted on good terms and on the basis that Mr Solovyov would contact him in 2- 3 weeks' time and Mr Solovyov stressed that the Bank was only interested in truthful information and that this was not an attempt to obtain a fabricated story in support of its case.

106. Mr Solovyov's statement records that Mr Timichev lived in a modest home in a rural area, to which he had obtained title in 1988 at a time when he was chairman of the local collective farm. He did not appear to

be particularly wealthy as might be expected from someone with large interests in substantial oil and gas companies.

107. He also records that which appears in other evidence that no mention is to be found on the Bank's files of Mr Timichev, although according to para 20 (3) of the Respondents' defence, Mr Timichev was known by the Bank to be their owner. The Bank has carried out an electronic search under various terms which include several variants of the spelling of his name. Mr Lemer submits that the fact that Mr Timichev's name does not appear on the Bank's documents is not surprising given that he was not the legal owner of the Respondents at the material times; nor does the fact that he is said to have been known to at least one Bank official mean that there should be documents with his name on. The former point seems to me to have force; the latter less so, although, given that on either side's case a sham transaction (my characterisation) was being put into effect the absence of reference to his name may be less significant than would otherwise be the case.

What approach to take in the light of the alleged intimidation?

108. I regard the account given by Mr Solovyov as distinctly more plausible than that given by Mr Timichev. It seems to me inherently likely that he would have been seeking, on behalf of the Bank, to discover whether Mr Timichev knew that his name was being used, and to what extent and on what basis, and unlikely that he threatened him with extradition to and prison in Kazakhstan and loss of his property or sought to induce him to say that Mr **Ablyazov** was the beneficial owner of the companies whether he was or not. At the same time it seems to me inherently likely that he stressed the enormity of the situation in which Mr Timichev had become embroiled, the need for him to tell the truth, and that, so far as the Bank was concerned, the truth was that Mr **Ablyazov** was behind it all.

109. However, without hearing from at least one of them I cannot regard Mr Timichev's account of the meeting as fanciful. I say “at least one of them” because, although Mr Timichev could, no doubt, attend to be cross examined here or by video link from Belarus it is plain from the stance taken by him that he will not do so.

110. I am, however, entirely satisfied that there is nothing unfair or unjust to Mr Timichev or the Respondents (who are, on his evidence, his vehicles) in proceeding with this application. Mr Timichev does not in fact say that he is so intimidated that he cannot deal with the evidence bearing on his beneficial ownership of those defendants. Indeed in para 1 of his August statement he repeats that he is their ultimate beneficial owner. His case is that the companies, which he owned, were engaged in unorthodox transactions which were in fact (or, at any rate, were believed to be) for the benefit of the Bank. If that is so, then it is entirely in his interests (a) to adduce evidence (beyond mere assertion) that supports that proposition (such as evidence as to how he came to be the *sole* beneficial owner of corporations which are said to own major shares in oil and gas contracts worth hundreds of millions of dollars), and (b) to refute any inferences that might otherwise be drawn from evidence which suggests the contrary. To repeat the bald assertion of beneficial ownership without responding to material suggesting the opposite would, if he is the true beneficial owner, seem the worst course.

111. Further Mr Timichev is not the only possible source of evidence. As will appear below personnel at two companies (Eastbridge and Euroguard) and individuals connected thereto would be material witnesses as would Mr **Ablyazov** himself.

112. Paradoxically, if he is in fact a mere nominee for Mr **Ablyazov**, it would be to his benefit to say so because (a) it will be true; and (b) it will enable the bank to proceed more easily against Mr **Ablyazov** and reduce the prospect that it might seek relief against him.

113. Mr Lemer submitted that what Mr Timichev legitimately feared was that, if he provided further evidence, this would be used to support trumped up charges against him. I regard this as a specious excuse for not adducing evidence, which, if he be right (as the submission assumes), must exist, establishing beneficial ownership. A judgment of this court to the effect that he was, or appeared on solid ground to be, the ultimate beneficial owner would place him in a strong position.

114. It is, moreover, instructive to look at how things have developed chronologically. In October 2010 Mr Timichev was interviewed by the Belarus authorities. On 21st October 2010 Teare J rejected an application by the Bank for an order for the cross examination of Mr Timichev for the purposes of this application whilst granting the Bank permission to reapply at the December 2010 hearing. In the Respondents' Skeleton Argument for that hearing, dated 9th December 2010, I was told that they did not oppose permission being given to cross examine in principle, although reference was made to the risk of a roving cross examination and the delay involved. That position can only have been taken with the approval of Mr Timichev.

115. On 21st February 2011 a very detailed defence was served on the part of the Respondents which was supported by a Statement of Truth signed by Mr Ellis of iLaw recording the belief of Mr Timichev in its truth. Since October 2010 evidence has been served by Mr Silyutin (Silyutin 3 – 17th December 2010 and Silyutin 4 – 22nd December 2010); and by Mr Timichev (Timichev 1 – 1st June 2011 and Timichev 2 – 9th August 2011). It is apparent that the prospect of proceedings in Belarus has not inhibited the continued presentation of the contention of beneficial ownership.

116. The decision of the ECHR in *Kaboulov v Ukraine* [2010] 50 EHRR 39 illustrates the extent of human rights abuses in Kazakhstan. But, in relation to any possible extradition to Kazakhstan from Belarus Mr Timichev's statement shows that in Belarus he has successfully relied on his right to silence. The evidence of Professor Bogush is that the Constitution of Belarus precludes extradition. He qualifies this by observing that in the territory of the CIS there has been at least one reported case of breach of a prohibition against extradition. But the case in question is one of extradition from Russia to Turkmenistan: *Garabayev v Russia* [2009] 49 EHRR 12. There is no evidence of extradition from Belarus, nor evidence that the Belarus tax authorities have made any threat against Mr Timichev – nor do I regard what Mr Solovyov is said to have said as a threat. As to threats to his property, he is not a defendant in these or, so far as I am aware, any other proceedings.

117. Reliance was placed on the *Solicitors Code of Conduct 2007* which provides:

> *"10.04 Contacting other party to a matter*
>
> *You must not communicate with any other party who to your knowledge has retained a lawyer, or a business carrying on the practice of lawyers, to act in a matter, except:*
>
> *(a) to request the name and address of the other party's lawyer;*
>
> *(b) where it would be reasonable to conclude that the other party's lawyer has refused or failed for no adequate reason either to pass on messages to their client or to reply to correspondence, and has been warned of your intention to contact their client direct;*
>
> *(c) with that lawyer's consent; or*
>
> *(d) in exceptional circumstances."*

118. This Code is not applicable to Mr Solovyov. The view could be taken that in the circumstance that there was good reason to believe that Mr Timichev might be the victim of identity theft or used as a stooge or, even, that he might not exist, and that he was not in reality the owner of the party concerned was exceptional. Even if the Code had applied to Mr Solovyov, and he would have been in breach of it, I would not have regarded that a sufficient ground to refuse to entertain the application.

119. I decline, therefore, to forbear from further consideration of the application.

The approach of the Court to revocation

120. Mr Lemer submitted that the Bank must show that the material on which it relies is sufficient to prove that the Respondents' case that Mr Timichev is their beneficial owner is fanciful and without substance. He relied in particular on the observations of Lord Hope in *Three Rivers DC v Bank of England* [2001] UKHL 16; [2001] 2 All ER 513, (at paragraph 95) where he said:

"The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

121. *Three Rivers* was a case in which the Bank of England sought to strike out the Claim. I do not accept that an identical approach is necessarily to be taken in relation to all interlocutory applications.

122. Whether a Court granting relief against a sanction imposed for breach of an interlocutory order has been misled and should revoke the order on that account is likely to be an issue which it will be necessary or appropriate to determine before trial. If that issue is only to be determined before trial in cases in which, on the material presented, the suggestion that the Court was not misled was fanciful, the coercive powers of the Court would be unacceptably diminished. Were it so, a person ordered to produce information as to the whereabouts of assets but who failed to do so could, when required to do so as a condition of relief from forfeiture, escape sanction so long as he provided an affidavit which could not be regarded as fanciful, even though the Court was satisfied (a) that it was highly probable that what was said was untrue; and (b) that there was no unfairness to the defendant in reaching that conclusion.

123. If it is to revoke its order the Court must be satisfied, to the civil standard (having regard to the nature of what is alleged), that it has been misled, or that there has been a change of circumstances, the nature and extent of which is such that, having regard to all relevant considerations, the right course is to revoke relief. It must also be satisfied that it can fairly reach that conclusion. It will need to consider whether, before doing so, it needs to direct the trial of an issue or the cross-examination of witnesses or the production of documents; or whether the resolution of the issue must or should await the trial.

124. In the present case Mr Timichev has chosen to produce no factual evidence in response to the evidence put in by the Bank (other than a repetition of the assertion of beneficial ownership) and it is plain that he has no intention of giving evidence until, perhaps and possibly, a time of his own choosing. There is no point in ordering him to attend for cross-examination. The material upon which the Bank relies is, for the most part, documentary material obtained on searches that the Court has authorised or on disclosure. No useful purpose is served by ordering cross examination of Mr Brown from Hogan Lovells to whose statements the material is exhibited. Some of the evidence is hearsay. But it is not inadmissible on that account: *Civil Evidence Act 1995*, sections 1 and 2; although the weight to be given to it may be reduced. I turn, therefore, to consider, that of which I can, on the evidence, be satisfied.

Mr Lemer's submissions on the documents

The Cypriot documents

The email of 9th October 2008

125. Mr Lemer made a number of submissions on the documentation relied upon by the Bank. In relation to the 9th October 2008 email he pointed out that there was no mention of any of the Respondents in the list of 102 companies and submitted that that email provided no evidence that they were part of any group. The email included Austin but Austin is not one of the Respondents. The reference to Austin does not show that the Respondents are part of the group referred to; if they were they would no doubt have been mentioned. Further Austin appears to be something of a “rogue” company apparently controlled at the whim of Mr Kythreotis – as appears from the circumstances set out in paras 81 ff above. There is no clear suggestion in the email that the group of 102 companies is part of the “Eastbridge Group”, an expression that does not appear in the email, and the language used is consistent with the group in question being limited to the 102 companies named.

The email of 25th November 2008

126. The 25th November email is in no way inconsistent with the Respondents' case which is that they entered into the Bank Assistance Agreement under which the Intermediaries (i.e. Forest, Loginex, Incompro, Perspective, Austin and Maden) would receive Payments and forward them to the Recipients and that, in pursuance of the Bank Assistance Agreement, the Bank Assistance Contractual Documents were created which made it look as though the Loans giving rise to the Payments had been taken out by the Borrowers (i.e. Granton, Branden, Aldridge and Zafferant). The fact that Ms Kabanova said that two of the 36 companies on the “*list of borrowers*” were not under the control of Eastbridge does not establish that all of the other companies were part of the Eastbridge Group. It is not clear why she pointed out that the two companies were not within the Eastbridge Group and therefore, not possible to say whether the remaining companies were or were not within it.

127. Even if Ms Kabanova intended to suggest that all the companies on the list, save two, were within the Eastbridge Group, all that shows is that she thought there was an Eastbridge Group and that Aldridge, Zafferant and Branden were part of it. She may have thought that these companies were part of the group because, due to the Bank Assistance Agreement, they were considered to be part of the same group as the Recipients.

The email of March 2010

128. It is not clear what the March 2010 Email is saying. What it may be saying is that Mr Shalabayev was *not* the beneficial owner of the companies but was recorded as a contact on certain Service Agreements and, because he was not the beneficial owner, his name should be removed from those Agreements.

Bergtrans and Carsonway's presence on the list of ten companies only shows that there was a connection between Mr Shalabayev and those companies. The Respondents have never claimed to know the exact nature of ownership of the Recipients. Their case is that they paid money to the Recipients pursuant to the Bank Assistance Agreement and not that they had any direct connection with the Recipients. If Bergtrans and Carsonway were connected with Mr **Ablyazov** that does not affect the Respondents.

The two emails of April 2010

129. The first makes no mention of any of the Respondents. The second does refer to Bergtrans, Carsonway and Astrogold, as to which the submission set out in the previous paragraph applies. It also refers to Austin, as to which the submission set out in para 125 above applies. At best the existence of Austin is weak inferential evidence in support of the Bank's case.

The email of 26th July 2010

130. None of the 123 companies listed is a Respondent. The email therefore does not provide any or any sufficient support for the Bank's case.

The first email of 30th November 2010

131. This email does not establish that the documents attached to this email were fabricated. All that it shows is that Euroguard was sending documents to Mr Shalabayev for him to arrange to be sent back to Euroguard. It is entirely possible that all the email was seeking to do was to establish a paper trail for genuine documents. The requirement to "*Get the Instrument of Transfer with the signature from Timichev*" does not show that any change in beneficial ownership was afoot: it is perfectly consistent with Euroguard asking for forms which already existed to be sent to it. The passage:

"We are also waiting for the change of Beneficiary and indicate the dates, so that Chaeva would be able to record this in the general register as well as we with our table (provided that the dates are already precise and you have checked everything)."

does not suggest any backdating or fabrication. It is consistent with Mr Shalabayev being asked to provide documentation that already existed to allow Chaeva (whoever she is) to amend the general register (whatever that is) in accordance with the table that stated Euroguard's understanding of what the documents would show. The heading in the penultimate column of the Table to "*First Trust Declaration will be dated*" may be poor English from someone whose first language was Russian. The author of the table may have been intending to indicate that dates listed were the dates to be recorded in the register (i.e. "*will be recorded*") rather than intending to indicate an intention to fabricate the dates.

132. The instruction:

"To write a letter to the agent and request the following documents from Timichev's address (if these have not already been sent to you)"

does not show that Mr Shalabayev was to write an email purporting to come from Mr Timichev as opposed to Euroguard suggesting that Mr Shalabayev should ask Mr Timichev to send an email.

133. Lastly the request for trust declarations for the 4 companies coupled with the fact that such declarations were not exhibited to Silyutin 1 does not mean that they had not yet been fabricated. It is equally consistent with Euroguard requesting to seek documents already in existence which had not yet been located.

The second email of 30th November 2010

134. The fact that Mr Shalabayev followed the instructions given to him does not show that the documents that were sent were fabricated either. It is consistent with him following those instructions in order to provide a paper trail for genuine documents.

The email of 1st December 2010

135. The first half of the email is simply a request for documents. There is no reason to regard it as a request for fabricated documents. The reference to receipt of "*the Trust in respect of PERSPECTIVE COMMUNICATIONS, INC. from Sara Petre-Mears (dated 05.04.06)*" indicates receipt of that document by Euroguard between 30th November and 1st December 2010 but does not show that it was backdated. The fact that the date – 5th April 2006 – is the date recorded on the Table does not mean that there has been fabrication. It is perfectly possible that the table recorded the date of the Perspective trust deeds that Euroguard thought was correct and that Euroguard were seeking confirmation of that date by obtaining the original trust deeds.

The email of 13th December 2010

136. This email does no more than ask Mr Timichev to sign the instruments of share transfer; there is no suggestion that he is being asked to backdate them. Mr Cole's first witness statement in support of the Bank's 24th September 2010 application had pointed out that the Aldridge and Branden instruments of transfer were not signed. In his 2nd witness statement on behalf of the Respondents Mr Culbert had explained that this was due to a secretarial error. In those circumstances it would have made no sense to procure a backdated share transfer when it was widely known that the instruments had not been signed by Mr Timichev by September 2010. The logical explanation is that this was an attempt to perfect the transfer of the shares under instruments that had not been signed by Mr Timichev due to a secretarial error.

The email of 24th November 2010

137. This email does not mention any of the Respondents and does not therefore advance the Bank's case that they were beneficially owned by Mr **Ablyazov**.

138. Mr Brown of Hogan Lovells comment on this email in his 12th Witness Statement was that it showed that, as well as following Mr Shalabayev's instructions in respect of Aldridge, Branden, Perspective and Maden, Mr Timichev followed Mr Shalabayev's instructions in respect of Aurland as well; and, also, showed that Mr **Ablyazov** was the beneficial owner of Aurland as well as the Respondents. But the Yahoo Documents only show correspondence between Euroguard and Mr Shalabayev about what Mr Timichev should do. There is no direct evidence as to whether or not Mr Timichev followed the advice he was given by Euroguard and Mr Shalabayev. Mr Silyutin attached documents that appear to be copies of the documents sent back and forth between Euroguard and Mr Shalabayev. That does not show that Mr Timichev simply followed Mr Shalabayev's instructions. That fact is equally consistent with Mr Timichev being advised by Mr Shalabayev and then deciding, of his own accord, to act. Even if it were correct that Mr Timichev followed Mr Shalabayev's instructions it does not follow that by Mr **Ablyazov** is the ultimate beneficial owner of Aurland or any of the Respondents.

The email of 12th January 2011

139. This email is too short, and its context too uncertain, to show with any clarity how Maden's affairs were administered and is unlikely accurately to portray the nature of the relationship between Mr Shalabayev, Mr Timichev and Euroguard. Nor can it be treated as signifying that Mr Shalabayev had in 2011 obtained a power of attorney backdated to 30th July 2009 (the date the power bears). The language

"Few days ago I requested from DS Express to Sign attached PoA and they did. Please put stamp of appropriate company on it and send me scan"

is obscure. On the Bank's approach the "*from*" is superfluous. An alternative analysis of the email would be to read the email as saying that "*I requested from DS Express the signed attached PoA which they sent me"*. The Court should not adopt the Bank's analysis simply because it requires the least change. The dispute should be dealt with at a trial at which, if necessary, Mr Shalabayev could be called to give evidence to explain what he meant.

The emails of 3rd December 2010, February 4th and March 3rd 2011

140. All these show is that Mr Shalabayev was one of the several persons to whom documents relating to Zafferant, Forrest and the Receivership were sent.

The email of 12th October 2010 from Mr Kythreotis

141. It is impossible to know whether Mr Kythreotis was entitled to invoice Mr **Ablyazov** in respect of Austin. Mr Timichev has been prevented from responding by intimidation and Mr **Ablyazov** has not had the chance to respond, so far as Mr Timichev is aware. Even if Mr **Ablyazov** is the owner of Austin that does not prove that he is the owner of the Respondents.

Evidence in Mr Solovyov's statement

142. The Bank ought not to be entitled to rely on evidence in Mr Solovyov's statement other than in respect of the meeting in July because it was within the Bank's knowledge before the service of Brown 12 and should have been served on time. In any event the fact that Mr Timichev lives in a rural area of Belarus and appears to be involved in small scale agriculture and possibly road haulage does not mean that he cannot be the beneficial owner of the Respondents. The fact that he has not been able to produce a single document relating to the valuation of the companies of which he owns just over 50% through the Borrowers is attributable to the fact that all of the documents relating to ownership of assets in the Kazakh subsidiaries were kept in Kazakhstan with Mr Timichev's representative, Mr Kuatbekov. Following the forcible nationalisation of the Bank, Mr Kuatbekov destroyed all of the documents that he held and informed Mr Timichev that he intended to have no further communication with Mr Timichev. Mr Lemer reminded me that in my judgment of 10th December 2010 I said of this evidence that:

"I am not satisfied to the necessary standard that I can find that the evidence that has been given is literally incredible and I do not propose, therefore, to proceed upon the basis that there has been a wholesale breach [of the Unless Order] by reason of the failure to produce further documentation"

143. In short, Mr Lemer submits that the evidence does not establish that the Borrowers and Intermediaries are part of an Eastbridge Group or that that Group is controlled by Mr **Ablyazov**. Nor does it establish that the Respondents were in fact controlled by Mr Shalabayev who acted for Mr **Ablyazov**.

Discussion

144. The order of 9th June 2010 required answers in writing from the Borrowers and Intermediaries to questions in two categories:

a) who was the legal and beneficial owner and the ultimate controller of each of them; and

b) who gave instructions and was authorised to act on their behalf.

In respect of (b) the questions were:

"c) Who gives instructions to the directors or agents of the Respondent concerning the decisions and actions they should take and generally concerning the activities of the Respondent?

d) ...

e) Does anyone else other than the directors have power to act on behalf of the Respondent and, if so, who and how/why?"

145. The order of 24th August 2010 required, as a condition of relief against sanction, the provision in the case of the Borrowers of information in the Schedule including:

"(iii) Confirmation and full particulars of any and all persons authorised to act on behalf of the relevant Respondent, whether as director or under any other authority including Powers of Attorney."

and, in the case of the Intermediaries, the answers to the questions.

146. In addition, the 24th August 2010 order required the Respondents to exhibit the documents referred to in paragraph 9 (1) (c) of the 9th June 2010 order which required them:

(c) [to] supply to the Applicant's solicitors copies of all documents in its control (which for these purposes shall mean documents which are or were in its physical possession and/or to which it has a right to possession and/or to which it has a right to inspect or take a copy) which evidence the matters set out in ... (b) above)."

["*(b) above*" required "*the answers in writing to the questions set out in Schedule D"]*

147. The material to which I have referred (including the Cypriot documentation and the Yahoo disclosure and the email from Mr Kythreotis) establishes to my satisfaction the following:

a) Eastbridge and Euroguard organised the corporate arrangements of several hundred companies ("the companies"). For that purpose they made use of different agents (in the sense described in para 61 (a) above) for different sets of companies: see the emails of 9.10.08; 25.11.08; 22.4.10; 26.7.10; 30.11.10; 24.11.10.

b) Eastbridge personnel reported to Mr Udovenko, who was a director, and Mr Shalabayev, one of whose email addresses for the purpose of giving instructions to Mr Kythreotis was instruc-

tions@eastbridgecapital.com: 9.10.08; 25.11.08. Eastbridge and Euroguard shared common personnel. Euroguard also reported to Mr Shalabayev: 9.3.10; 22.4.10; 26.7.10; 30.11.10.

c) Mr Udovenko and Mr Shalabayev were the persons who controlled what the companies did at least so far as ownership, governance and agency was concerned. They gave or procured the giving of instructions to the companies' registration agents: 9.10.08; 9.3.10; 22.4.10; 26.7.10; 24.11.10; 30.11.10.

d) Instructions to the agents from Eastbridge and Euroguard extended to changing (i) the ultimate or apparent ultimate beneficial owner of the companies (see 9.10.08; 22.4.10; 26.7.10), including making backdated changes in the UBO (22.4.10 x 2; 26.7.10); (ii) the contents of Services Agreements with the companies; and (iii) the Contact Person (9.3.10; 26.7.10). Mr Udovenko and Mr Shalabayev, and particularly Mr Shalabayev, organised or were in a position to organise the affairs of the companies so far as those matters were concerned.

e) There was an Eastbridge Group or Groups (9.10.08 and 25.11.08) but to what extent there was (true) common beneficial ownership of all or sets of those companies is unclear. The companies listed in the attachment to Ms Kabanova's e-mail of 25th November 2008 (see para 52 above), which included Austin, 3 of the Borrowers and 14 Recipients constituted a Group, or part of a Group, under Eastbridge control. The obvious meaning of the sentence

"*I would also like to draw your attention to the fact that two companies on the list ... are not part of the Group and are not under the control of Eastbridge*"

in an email from Eastbridge in response to an email asking Eastbridge to keep in mind the need to avoid replacing directors in a way which might result in affiliation between companies is that the other companies in the list *are* part of the Group under Eastbridge control – a fact of which Eastbridge must have been aware.

f) The companies in relation to whom Mr Shalabayev was in a position to give and did give instructions included Maden, Perspective, Aldridge, and Branden: 30.11.10.

i) The advice given in the email of 30th November was that Mr Shalabayev should procure a series of documents which would vouch for what Mr Silyutin had said in Silyutin 1 but which had not been exhibited to that affidavit. The proposal was that First Trust declarations in favour of Mr Timichev would be created which would be dated several years earlier. I regard as fanciful the proposition that the words:

"*First Trust Declaration will be dated"*

in a table (in which other columns are headed "*Date of*...") which, itself, is referred to in the sentence:

"We are also waiting for the change of the Beneficiary and indicate the dates so that Chaeva would be able to records this in in the general register as well as we with our table (provided that the dates are already precise and you have checked everything)"

were meant to mean that trust declarations with the specified dates already existed.

ii) I cannot however be satisfied that the legal owners of those companies did not in fact hold the shares in trust on the date of the declaration, whether documented or not – they may well have done for someone; or that the apostilled resolutions and New Share Certificate did not exist. Even if they did not then exist, it does not follow that it would be wrong to create them.

g) By the second e-mail of 30th November 2010 Mr Shalabayev sent to Euroguard the documents in relation to the four companies which had been exhibited to Silyutin 1. He was thereby instructing them that they could regard the ownership and directorship details in those documents as authentic. By including the table he also confirmed what would be the date of the First Trust declaration. On 1st December 2010 Euroguard asked him for some further instructions.

h) I am also satisfied that the companies in relation to whom Mr Shalabayev was in a position to give, and did give, instructions included the other Borrowers and Intermediaries. I say that for these reasons:

(i) 3 of the Borrowers appear in the list attached to the email of 25th November 2008; Branden is referred to in the email of 30th November 2010;

(ii) the email of 30th November 2010 is obviously intended to plug the gaps in the evidence relating to the Respondents. That is why it only refers to two Borrowers and two Intermediaries;

(iii) Mr Shalabayev's email of 13th January 2011 shows that he was in a position to procure a backdated power of attorney for Maden. The email may be short but its import is clear. It is only just ungrammatical. He was also in a position to have it stamped by Euroguard, whether it was backdated or not;

(iv) Austin appears in the email of 9th October 2008 and 12th October 2010;

(v) In the email of 3.12.10 Mr Shalabayev is supplied with documents relating to Zafferant; in the email of 4.2.11 he is provided with documents from Forest; in the email of 3.3.11 he is supplied with the Receiver's letters including one to Zafferant; no doubt because he is the person from whom instructions in relation to those companies derive;

(vi) the Borrowers and Intermediaries have always been presented by Mr Timichev as companies under the same beneficial ownership (his). In those circumstances the obvious inference is that Mr Shalabayev organises the affairs of and gives instructions on behalf of all the Borrowers and Intermediaries; and

(vii) If Mr Timichev was the ultimate beneficial owner, itself doubtful, he left much of the control of the organisation of the Borrowers and the Intermediaries to Mr Shalabayev, who had a central role.

148. The evidence presented by Silyutin I was that it was Mr Timichev alone who was the legal and beneficial owner and controller, director, and instructor of agents of all the Borrowers and Intermediaries. No mention was made of the existence or role of Mr Shalabayev or of anyone else except Mr Kuatbekov who was said to have destroyed all his documents. In the light of the material which I have reviewed I regard this picture as seriously misleading. The Respondents have failed to give truthful information as to:

"*who gives instructions to .. their agents concerning the decisions and actions they should take and generally concerning [their] activities"*

and as to:

"whether anyone else other than the directors have power to act on[their] behalf and, if so, who and how/why?"

or to give

"*Confirmation and full particulars of any and all persons authorised to act on behalf of the relevant Respondent, whether as director or under any other authority including Powers of Attorney"*

or to provide:

"... copies of all documents in its control (which for these purposes shall mean documents which are or were in its physical possession and/or to which it has a right to possession and/or to which it has a right to inspect or take a copy) which evidence [these] matters"

149. I regard this failure as very serious. Mr Timichev cannot have been ignorant of the role of Mr Udovenko, Mr Shalabayev, Eastbridge and Euroguard or of the existence of documents, such as, but no doubt not limited to, those so far discovered, to which, if he is the ultimate beneficial owner, he would have had access, whatever may have been the position about the destruction of documents by his Kazakhstan agent.

150. I am fortified in reaching those conclusions by the fact that Mr Timichev has failed to file any evidence which deals with the matters to which I have referred either from himself, Mr Shalabayev, other personnel of Eastbridge or Euroguard or Mr **Ablyazov**, or anyone. I can, in my judgment, take that into account in support of my conclusions. But if I must for any reason regard his silence as providing no support for any conclusion or, even, if I must be astute to contemplate the possibility of alternative explanations, I reach the same conclusions.

151. The material to which I have referred is consistent with, and points to the following state of affairs being the case (which is the Bank's case):

a) Mr **Ablyazov** has under his ultimate beneficial ownership and control a very large number of companies. They are organised by service providers such as Eastbridge and Euroguard under the superintendence of Mr Shalabayev, his brother in law, and Mr Udovenko, his associate; different sets of companies have different agents;

b) The Borrowers, Intermediaries and Recipients are all part of this set of companies. Those companies are the vehicles through which Mr **Ablyazov** carried out both Schemes. Austin is included: hence the 9th October 2008 email;

c) The 30th November and 1st December 2010 emails were part of an exercise in adding verisimilitude to the false contention that Mr Timichev had been, since well before the two Schemes, the beneficial owner and controller of the Borrowers and Intermediaries but not of the Recipients;

d) Austin is only a "rogue" company in the sense that Mr **Ablyazov**'s failure to pay Mr Kythreotis' fees has led to the revelation that it, like its fellow Recipients and Borrowers, is another **Ablyazov** vehicle; and

e) The instructions given in the 9.3.10 and 22.4.10 and 26.7.10 emails were part of a plan retrospectively to distance Mr **Ablyazov** from any link to companies whose existence he had not disclosed, at a time when the application for a Receivership order was pending;

or, alternatively

f) that, even if Mr **Ablyazov** is not shown to be the ultimate beneficial owner of the Borrowers and Intermediaries, then, at the lowest, Mr Timichev is not such an owner but a mere stooge, purporting from some agrarian backwater in Belarus to be the sole beneficial owner of a very large interest in oil and gas contracts worth hundreds of millions of dollars.

152. However, whilst that may very well be true, I am not, at this juncture, satisfied to the requisite degree, that that is the position. I do not think that I can wholly discount the possibility that the Recipients are companies which were at arm's length from Mr Timichev in that, so far as he was aware, they were the companies through whom the Bank intended to make the bona fide loans which it sought to make in a way that would circumvent the regulations and that it is for that reason that they appeared on the list of borrowers sent by the Bank to Eastbridge, and returned by the latter.

153. Nor am I prepared, on the present material, wholly to discount the possibility

a) that Austin was a company which was at the material times in the beneficial ownership of Mr Timichev, as the declaration of trust of 1st August 2008 purports to show;

b) that it was wrongly included in the 9.10.08 and 22.4.10 emails;

c) that because Mr Kythreotis had, in circumstances which are obscure, paid for legal services provided to it and others in the BVI and expected to be paid (whether justifiably or not) by Mr **Ablyazov** for that, he was not prepared to do what iLaw required in order for them to be able to represent it;

d) that the email of 30th November, even with backdating, is not an attempt to establish that Mr Timichev was the ultimate beneficial owner of the companies referred to in it at the relevant times, when he was not, but to evidence the truth that he was; and

e) that Mr Timichev is the beneficial owner which he claims to be of the Borrowers and Intermediaries.

What is to be done?

Mr Lemer's submissions

154. Mr Lemer submits that, whilst the Bank's application is framed as one which seeks revocation of the Relief Order it is, in reality an application to strike out the defence on the basis of noncompliance with the Unless Order. Accordingly the Court should take into account the same factors as arise on a strike out application in deciding what order to make.

155. As to that, even if the Bank was able to establish that Mr **Ablyazov** was in fact the beneficial owner of the Respondents the Bank would still have to establish its case against Mr **Ablyazov** and the Respondents would, he submits, still have the following defences under Kazakh law:

a) It is denied that Articles 8, 9 and 917 of the Kazakh Civil Code give rise to any entitlement to compensation;

b) The Bank's claim to have the transactions declared invalid pursuant to Article 159(9) or 159(10) of the Kazakh Civil Code is time-barred pursuant to Article 162(2);

c) The General Credit Agreements and the Letter of Credit Agreements cannot be brought to an end pursuant to Article 159(11) of the Kazakh Civil Code because the proceedings have not been brought by the founder or shareholder of the Bank as required by Article 159(11);

d) The transactions cannot be declared invalid pursuant to Article 157(3) of the Kazakh Civil Code because the Borrowers received no benefit from their dealings with the Bank, and, accordingly, even if the transactions were invalidated the Borrowers would not be liable to the Bank under Article 157(3), or otherwise;

e) The transactions cannot be declared invalid against the Intermediaries because the Intermediaries were not party to any of the supposed transactions and accordingly even if the transactions were invalidated the Intermediaries would be not be liable to the Bank under Article 157(3), or otherwise;

f) The Payments were not transactions within the meaning of Article 160 of the Kazakh Civil Code and hence the loan and payments cannot be treated as invalid pursuant to Article 160;

g) The Bank cannot reclaim the amounts advanced under the Unlawful Loans or alternatively the Payments pursuant to Article 157(3) Kazakh Civil Code because Article 157(3) does not permit such a claim for the reasons set out at points 4 and 5 above;

h) The Bank cannot reclaim the amounts advanced under the Unlawful Loans or alternatively the Payments pursuant to Article 953 and 958 of the Kazakh Civil Code because:

i) those claims provide for claims in unjust enrichment and the Respondents were not enriched;

ii) alternatively, even if they were enriched, they paid away the sums before discovering that the enrichment was unjustified; and

iii) alternatively, if the Recipients repaid the sums to the Bank, then any enrichment was not at the expense of the Bank.

i) The Bank cannot reclaim the Payments pursuant to Article 260 and 262 of the Kazakh Civil Code because the articles apply exclusively to the ownership of “things” and money, when not in tangible form, is not a “thing” for the purpose of the relevant article of the Kazakh Civil Code; and

j) The Bank cannot succeed in any action under Articles 263, 917 or 953-958 of the Kazakh Civil Code for the reasons set out above.

156. If the Court were, in effect, to strike out the Respondents' defence because they had lied to the Court the effect would be to punish them for their lies notwithstanding the existence of defences which were valid, even if Mr **Ablyazov** or someone other than Mr Timichev was the UBO, and which were unaffected by those lies. That, it is submitted would be wrong in principle.

157. My attention was drawn again to authorities that were relied on at the August 2010 hearing.

158. In *Logicrose Ltd v Southend United Football Club Ltd*, The Times, March 5th, 1988 Mr Justice Millett stated that:

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

159. In *Raja v Van Hoogstraten* [2006] EWHC 1315 (Ch)8 Mr Justice Lightman said that:

"28 Striking out Mr van Hoogstraten's Defence and Counterclaim and barring him from defending the action and prosecuting his counterclaim and proceeding with his application challenging Master Bowman's order is a draconian step which can only be ordered in extreme circumstances and as a last resort. Article 6(1) of the European Convention on Human Rights provides that in the determination of his [illegible text]ghts and obligations everyone is entitled to a fair and public [illegible text] within a reasonable time by an independent tribunal established [illegible text] The right of access to the court constitutes an element inherent in[illegible text]ht, but it is not an absolute right and may be subject to limitations [illegible text] respect of vexatious litigants, security for costs, statutory limitation periods and special provision in case of minors and persons of unsound mind: the right of access calls for regulation according to the needs and resources of the community and individuals: Ashingdane v UK (1985) 7 EHRR 528, paragraph 57...

[illegible text] The authorities establish that there are two separate (though [illegible text] grounds on which the jurisdiction may be exercised: see Arrow as Inc v Blackledge [2000] BCLC 187 and Asiansky v Bayer-[illegible text]1001] EWCA 1792 . The first ground is where the conduct of the [illegible text] question has jeopardised a fair trial or prevented the court [illegible text]ing justice...

[illegible text] The second ground is that the conduct of Mr van Hoogstraten is [illegible text] flagrant abuse of process and such a challenge to the [illegible text] tration of justice that (irrespective whether a fair trial is possible) an order to this effect is required in the interests of the administration of justice" (emphasis added).

160. In the light of those authorities Mr Lemer submitted that whatever lies might have been told by his clients they were not such as to prevent a fair trial. In *Van Hoogstraten* a fair trial was prevented because Mr Van Hoogstraten had arranged for the Claimant to be killed. In *Arrow Nominees Inc v Blackledge* an unfair prejudice petition was struck out (partly by Evans-Lombe J and partly by the Court of Appeal) not because documents had been fabricated but because the Court could not be certain that it had all of the relevant documents before it. In that case Chadwick, LJ said:

"I adopt, as a general principle, the observations of Mr Justice Millett in Logicrose Ltd v Southend United Football Club Limited (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

161. In addition, Mr Lemer submits, there are powerful factors which made an exercise of the discretion to revoke inappropriate in that:

a) the claim is enormous;

b) the allegations are allegations of fraud in respect of which the Court should be reluctant to deprive the Respondents of an opportunity to defend themselves at a full trial in which Mr **Ablyazov** can give evidence and be cross examined about whether he had any links with the Respondents;

c) even if the Respondents' defence is struck out the case will proceed to trial against the First and Second Defendants and, if so, there is unlikely to be any significant cost saving because of the absence of the Respondents. The fraudulent scheme and the Respondents' part in it will still have to be established;

d) if the defence of the Respondents is struck out there will be a risk of inconsistent judgments if at trial Mr **Ablyazov** is not shown to be their beneficial owner; and

e) it would be unfair to reach a conclusion against the Respondents before disclosure is complete and the universe of documents is known.

Discussion

162. These submissions are something of a reprise of submissions made at the August 2010 hearing as to why no unless order should be made. They equate revocation of an order giving relief against the sanction of debarment of a defence to an order striking out a defence. The two are not the same. A court which is invited to strike out a defence or a statement of case e.g. for failure to give proper discovery (as was the case in *Logicrose, Arrow Nominees* [2004] EWCA Civ 994. [2004] EWCA Civ 994 and the *Raja* decision referred to in para 159 above) is deciding what order to make in relation to the breach or non-performance of a procedural obligation. As Moore Bick LJ pointed out in *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864, the Court will inevitably have to consider the circumstances in which the default occurred and its consequences. In a case such as the present the court is concerned with the effect of noncompliance with an order granting conditional relief from a sanction imposed for noncompliance with an earlier unless order. Both such orders have the disciplinary function of ensuring compliance with the orders of the Court.

163. In *Marcan* an order was made that, unless the claimant gave disclosure by a specified time, the action would be dismissed and the claimant would have to pay the defendants' costs. The order was not complied with and the defendants applied for judgment. The Court held that, in accordance with CPR 3.8, the sanction embodied in an “unless order” took effect without the need for any further order if the party to whom it was addressed failed to comply with it in any material respect and that, on an application to enter judgment under CPR 3.5. the court's function was confined to deciding what order should properly be made to reflect the sanction which had already taken effect. It also held that, since the claimant had not applied for relief under rule 3.8 and the court had not decided to grant relief of its own initiative, the question whether the sanction ought to apply did not arise. Accordingly the action stood dismissed and the claimant became liable to pay the defendants' costs. The Court rejected the submission (in support of which reliance was placed on *Logicrose*, *Arrow Nominees* and *Raja*) that striking out a claim for failure to comply with an order of the court could not be justified unless the breach was so serious as to prevent there being a fair trial.

164. It is apparent from *Marcan* that if, after the making of the August Order, the Respondents had failed in any material respect to provide any information as to who had authority to instruct agents, the sanction would take effect without further order and the only question would be what order, by way of a judgment, was needed to reflect that sanction. No question would arise as to whether the Court should have made an “unless” order in the first place; nor would it be material that giving effect to the sanction might deprive the Re-

spondents of a defence they might otherwise have, or lead to a judgment against them even though the First and Second Defendants might establish at trial that Mr **Ablyazov** was not the owner of the Borrower and the Intermediaries. Such consequences will often be the case when an unless order is made against one of several defendants and is not complied with. It was no doubt for that reason that it was submitted that I should not make an unless order in the first place.

165. In my view the position is the same if, although information is provided, it is materially false and must be known to be so. The Respondents cannot be better off by putting untruths before the Court than they would have been if they had said nothing at all.

Relief against sanction

166. No relief against sanction was sought prior to the hearing. Mr Lemer submitted that, since the application was brought for revocation, which is a discretionary power, the same or similar considerations would apply as if further relief was sought against sanction. He suggested that the Bank's correct course was to apply for a finding that Mr Silyutin's evidence was insufficient and on that basis seek judgment under the *Marcan* principles. Since it appeared that the application was now being pursued on the basis of *Marcan*, he applied for further relief. Such relief has to be supported by evidence. Mr Lemer submitted that the evidence which is before me was sufficient to justify me in granting it.

167. I can well understand why the Bank thought it appropriate to apply for revocation. Revocation would in any event have been necessary in relation to the two defendants in respect of whom relief against sanction had been granted unconditionally. The fact that it was sought against all the Respondents does not, in my view, alter the approach which the Court should take from that which the Court of Appeal took in *Marcan* in relation to the other defendants, especially when the application also included a claim for judgment against all of them.

168. I am not disposed to grant any such relief for a number of reasons.

169. **First**, the Court has been seriously misled. **Second**, no explanation, let alone any hint of regret, has been expressed as to how this has come about. **Third**, no offer has been made to explain the nature of the arrangements involving Eastbridge and Euroguard or who else (if anyone) is involved in giving instructions on behalf of the Borrowers or Intermediaries or to produce any documents, which are inherently likely still to exist, showing how such instructions are given. **Fourth**, no useful purpose will be served in ordering Mr Timichev to file a further affidavit and produce further documents. He has indicated that he has no intention of providing any evidence for reasons which are not, in my judgment, acceptable. **Fifth**, there has been a history of non-compliance with orders of the Court and Mr Timichev has actively misled it before: see the Appendix. **Sixth**, the application was made at the last moment, without proper notice, without any evidence specifically in support of it (e.g. evidence explaining why Mr Shalabayev's role was hidden from view and explaining what is to be done to remedy the position), and without adequate opportunity for consideration by the Bank.

170. Rule 3.9 provides that, in deciding whether to grant relief against sanction the court will consider a number of factors. I set out below my consideration of them:

(a) the interests of the administration of justice;

171. It is in the interests of the administration of justice that the Court's orders are obeyed and that sanctions for disobedience take effect unless solid grounds are advanced for the Court to grant relief against sanction for a second time. They have not been. The sanction of debarment of the defence in the event of noncom-

pliance with the Order of 24th August 2010 was imposed following full argument. Permission to appeal was refused on the basis that an appeal was almost totally without merit.

(b) whether the application for relief has been made promptly;

172. It has not. It was made at the last minute.

(c) whether the failure to comply was intentional;

173. It was. There is no evidence that reference to the position of Mr Shalabayev, Eastbridge and Euroguard and the documents which illustrate it was omitted by accident or misunderstanding.

(d) whether there is a good explanation for the failure;

174. None has been put forward.

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;

175. There has been delay in compliance with the freezing order and non compliance with it, requiring relief from sanction. The default in the present case is a failure to comply with the conditions of that relief.

(f) whether the failure to comply was caused by the party or his legal representative;

In the absence of any explanation it is difficult to tell whether the failure was caused by the Respondents' legal representative. The extent to which their Russian lawyers have been given the requisite information is unclear. The failure is very unlikely to have been the fault of iLaw.

(g) whether the trial date or the likely trial date can still be met if relief is granted;

176. A trial date has been fixed for November 2012.

(h) the effect which the failure to comply had on each party;

177. Failure to comply has prevented the Bank from obtaining significant information about the arrangements relating to the Borrowers and Intermediaries and has caused the Bank to incur substantial costs in gathering information and in bringing this application. The absence, even now, of a proper explanation of the role of persons other than Mr Timichev in organising their affairs is prejudicial to the proper and expeditious resolution of the claim.

(i) the effect which the granting of relief would have on each party.

178. It would deprive the Bank of the judgment to which, on account of noncompliance, it would otherwise have been entitled. The Bank would, in all probability, continue not to have provided to it the information and documents to which it is entitled. It would allow the Respondents to avoid the consequences specified for their noncompliance by paying costs.

179. The grant of relief would mean that the Respondents did not have a judgment of over 1 billion dollars against them. I do not accept that I should, on that account, be deterred from refusing further relief. This circumstance should make Mr Timichev, if innocent, all the more eager to refute the claim with evidence and to comply with the orders of the Court. The armoury of the Court in cases of very large international fraud is likely to be seriously weakened if, when it makes orders which are not obeyed and grants relief against sanction the conditions for which are not complied with, the size of the claim and the alleged iniquity of the alleged participants is likely to preclude the Court from giving effect to the sanction. Mr Lemer's suggestion that I should order the Respondents to pay costs on an indemnity scale is not an adequate sanction.

Conclusion.

180. Accordingly, despite Mr Lemer's able submissions, I propose to revoke the order which I made granting relief against sanction and enter judgment, the terms of which I shall discuss with Counsel, against the Respondents.

Maden

181. In those circumstances it is not necessary to consider the separate position of Maden or the outstanding Request for Further Information. But, in case it should become relevant hereafter, I am satisfied that Maden has failed fully to comply with the conditions upon which I granted relief from sanction. If this was the only matter in issue I would have varied the order of 20th April 2011 insofar as it required affidavits from the lawyers and granted permission to defend and further relief against sanction conditional upon Mr Timichev swearing an affidavit complying with paragraph 9 (e) (ii) of my ruling of 20th April 2011, and exhibiting the documents there referred to. I set out my reasons in an Appendix to this judgment.

Request for Further Information of the Respondents' Defence contained in paragraphs 3 7-39 of the Bank's request of 26th April 2011

182. This is now academic. Had it not been I would have ordered the information to be given. The Bank, as is appropriate in a case of fraud, has pleaded the facts and matters relied on in support of its case. I do not regard the Respondents' general plea in relation to paras 70-73 as an acceptable response. It must, for instance, be possible – in relation to paras 71.1-4 and 4 (d) of the Particulars of Claim - to specify whether the relevant defendant's case in relation to the powers of attorney is that (i) it simply puts the Bank to proof of their existence; (ii) it denies ever executing them; (iii) it accepts that the powers were granted but makes some other averment in relation to them. Similarly it must be possible to state – in relation to para 71.7 - whether the Borrowers or Intermediaries accept that they were administered by the Eastbridge Companies as one group or what their case is in that respect. Similarly the Bank is entitled to know - in relation to paragraphs 71.4 (a) to (c) - whether the case of the Seventh Defendant (Forest) is simply a non admission or whether it makes any and, if so what, positive averment in relation to the matters alleged against it.

Appendix to the Judgment of Mr Justice Christopher Clarke in the matter of
JSC BTA Bank v Mukhtar ***Ablyazov*** *and Others* **2010 Folio 706 [2011] EWHC 2506 (Comm)**

1. By the time of the December hearing Maden had failed to account for $ 2,516,000 (“the untraced sum”) of the money which it had received from the Bank. On 10th December 2010 I granted Maden relief from sanction on condition that it produced within 7 days a power of attorney enabling the Bank to request documents relating to the untraced sum from Trasta.

2. According to Maden there were considerable problems in providing a power of attorney that would be effective in Latvia. On **5th January 2011** iLaw on behalf of Maden “*by way of evidence of Maden's good faith*” recorded Maden's offer to produce documentation which showed what had happened to the untraced sum

"*together with documentary proof of all these payments within the next seven days*" as a more efficient alternative to a power of attorney. They said that they were instructed to provide this information as soon as possible. A letter of **12th January 2011** from iLaw produced a Schedule which showed the disposition of $ 2,515,077 but not the underlying documentation.

3. The Schedule was as follows:

DATE	AMOUNT (US$)	PAYEE
PAYMENT REFERENCE		
10/1/2008 Under Loan Contract Dated 07/11/2008	1,315,000	Calernan Finance Inc
10/1/2008 Under Loan Contract Dated 10/11/2008	600,000	AstroGold Corp
04/11/2008-30/11/2008 Bank Commissions	324,000	TKB
21/01/2009 For design services	276,077	Mintex Trading

4. The Bank restored its application for judgment. At the hearing on **24th February 2011** Mr Colton, who then appeared for Maden, floated the idea that the letter of 5th January 2011, written on instructions may have been written in the hope that documentation would be obtained when it was not in fact available.

5. On **24th February 2011** I gave Maden permission to defend the claim and relief against sanction provided that it complied with the following orders:

a) that by 17th March 2011 it should provide documentary proof of the payments made out of its bank account as set out in the Schedule and pay the Claimant's costs in the sum of £ 17,500 (which were paid); and

b) that it should comply within the same time period with such further conditions as the parties should agree or the Court determine in order to obtain for the Bank a power of attorney permitting its lawyers to obtain information and documentation from Trasta as to what had become of the unpaid sum.

6. I ordered that by 10th March 2011 Hogan Lovells should inform Maden of the steps it wished Maden to take to execute and authenticate the power of attorney in order for it to be valid and enforceable in Latvia and to provide evidence of what was required for recognition of a power of attorney in Latvia.

7. On **11th March 2011** Hogan Lovells sent to iLaw a note of the Latvian law advice they had received and indicated that their preferred route (of the two suggested by the advice) was for Maden to appoint a director in the BVI who would then sign the power in the presence of a BVI notary.

8. On **17th March 2011** iLaw stated that the underlying documents in relation to the payments from Maden's account were not in their client's hands and that, while Maden was prepared to appoint a BVI director a number of steps would need to be taken to achieve this which could not be complied with by 31 March 2001.

9. On **18th March 2011** Hogan Lovells expressed serious concern that Maden did not have the documents which it had previously indicated it did have and that the steps apparently required to appoint a BVI director appeared unnecessarily convoluted.

10. The Bank renewed its application for judgment. On **30th March 2011** iLaw wrote to my clerk explaining that documentary proof of payment which it had been ordered to disclose was not, and had not been since at least the commencement of the proceedings, in Maden's possession; and that their belief that the documentary proof was due imminently "*was based on instructions from Mr Timichev to his Moscow lawyers. However this now appears to have been a misunderstanding as Mr Timichev now says that these documents were not available to him and that he promised to undertake reasonable efforts to search for any information*". iLaw submitted that no judgment should be entered since the condition had been impossible to comply with. In relation to the power of attorney an impasse had been reached.

11. On **20th April** I gave a written ruling (q.v.) in which I gave further relief from sanction on condition that by 1st June iLaw filed a witness statement given by a partner or associate explaining what exactly were the instructions upon the basis of which I had been given the information contained in the letter of 5th January and iLaw had produced the 12th January Schedule; and, if the instructions were provided by Russian or other non-English lawyers, the person giving the instructions was to file an affidavit setting out what instructions they had given to iLaw and what were the instructions which they had received. It was also a condition of relief that the relevant documentation be produced. Mr Timichev was also to file an affidavit explaining what instructions he gave and to whom which led to the letter of 5th January 2011, how he came to have the information in the schedule and what efforts were made by him or Maden or on their behalf to obtain from Trasta documents relating to the $ 2,329,000 prior to 8th March 2011.

12. One of the reasons for imposing such conditions was, as I stated, that the court could have little confidence in anything said on instructions and, having been misled, it seemed to me necessary to understand how that had come about.

13. On **16th May** I specified the time for the production of this material as 1st June 2011.

14. On **1st June** iLaw wrote explaining that they would not be in a position to file Mr Timichev's affidavit until 2 June and indicating an intention to apply for a variation to the order excusing any other person than him from providing an affidavit or witness statement.

15. iLaw wrote to the Court on **2nd June 2011** asking (i) that my ruling of 21st April be qualified or restricted such that no further evidence be required to be disclosed on the basis that Mr Timichev's affidavit made clear that the miscommunication was one by Mr Timichev himself and not elsewhere in the chain between him and iLaw or (ii) if necessary, for relief from sanction

16. In his affidavit of 2nd June 2011 Mr Timichev stated:

a) that the letter of 5th January 2011 and the offer referred to therein and the letter of 12th January 2011 were written on his instructions given to Maden's Russian lawyers who passed them on to iLaw;

b) that what was said in the letter of 5th January 2011 was incorrect because Maden had never had documents evidencing the making of the payments;

c) that the letter of 5th January was the result of incorrect information provided by him and not because of any misinterpretation of their instructions by the lawyers. Until January his efforts were focused on attempting to secure the power of attorney and, when there were problems in doing so he looked again for information

in respect of the sum of $ 2,516,000. In doing so he looked at some files which he had not thought of looking at previously in which he found "*fragmented notes*" (para 8) relating to payments made by Maden on the basis of which he was able to give Maden's lawyers the information in the first 3 entries in the Schedule. He then thought that he might be able to find further information about the rest of the sum in files unrelated to the case and was able to find "*further notes*" (para 10) that enabled him to explain that $ 276,077 had been paid to Mintex (the fourth and last entry on the schedule). When he began looking for information about payment of the untraced sum in January 2011 he remembered that he had seen "*some SWIFT documents*" (para 12) which he thought related to Maden and which would prove what had happened to the untraced sum. He thought that he would find the documents within 7 days and that he would then be able to find documents evidencing the payments in the Schedule. It was for that reason that he gave the instructions in question. In fact the documents he thought he remembered turned out to be unrelated to Maden

17. On **3rd June 2011** Hogan Lovells asked for the fragmented notes and further notes referred to in paras 8 and 10 and the SWIFT documents referred to in para 12. On **28th July 2011** I ordered the production of these documents by 9th August 2011. On **10th August** iLaw told Hogan Lovells that the documents were in the process of being prepared for disclosure, which included redaction of irrelevant material. On **11th August 2011** iLaw said that it was Mr Timichev who was assessing their content and redacting, his concern being to excise any potentially incriminating material.

18. On **30th August** iLaw produced, apparently unredacted:

a) a single SWIFT document showing payment by Trasta on behalf of Lingard, a Recipient, of $ 40,000 to the Bank on 26th June 2008;

b) a difficult to decipher manuscript note which appears to record:

(i) a payment to Westrade on 8th December 2008;

(ii) the payments to Recipients in 2008 made by Incompro, Perspective, Maden (other than the untraced sum) as already revealed in Silyutin 1; and;

c) a further such note which appears to record payments received and made by Forest, one of which at least appears to be the same as one specified in Silyutin 1.

19. Although the poor quality of the script makes it difficult to decipher all of what is written, nothing in the notes appears to record or refer to the first three payments in the Schedule or the payment to Mintex. Only one SWIFT document was produced. None of the documentation appears to explain the figures in the Schedule or the Payment Reference referred to in it. There has been non-compliance with paragraph 9 (e) (ii) of my Ruling of 20th April 2011 which required the affidavit to state how Mr Timichev came to have the information contained in the Schedule, and when and where and by what means he obtained it, and exhibiting any documents which record it.

20. If the only matter in issue was compliance with the 20th April 2011 order I would have varied the order so as no longer to require an affidavit from iLaw or the Russian lawyers, and would have given Maden conditional permission to defend and relief from sanction. Now that it is clear that the Court was actively misled by Mr Timichev, himself, it is no longer necessary to explore whether or not there was a misunderstanding in the chain of communication between him, his Russian lawyers, iLaw and Hogan Lovells. The condition which I would have imposed is that Mr Timichev should swear an affidavit complying with paragraph 9 (e) (ii) of the 20th April 2011 order.

1All the corporate defendants except Loginex and Austin against whom judgment has already been given.

2 "...*acts done or documents executed by the parties ...which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create*".

3 A Kazakh court appears, however, to have set aside the transactions under which Granton acquired a stake in circumstances where Granton was apparently represented without Mr Timichev being aware of it: see paras 27 – 36 of my judgment of 10th December 2010.

4 That address appears in Eastbridge emails of 9th October and 25th November 2008 signed by Mr Udovenko – see paras 47 and 54 below.

5 I am quite satisfied that this is his email address: see for instance the email of 9th October 2008 referred to at para 47 above ("*Could you receipt instructions for signing and taking documentation from Mr Shalabayev to be sent from email instructions@googlemail.com*" and the email of 13th December 2010 which reveals the abbreviated name of "*instructions0102@eastbridgecapital.com*" as "Sha Syrym": see para 70 below,

6 Consistently with this email at or about this time Bergtrans was re-named Tramlanes Investments Limited and Carsonway was renamed Zathen Holdings Limited.

7 Which Clyde & Co have confirmed to be one of Mr Shalabayev, their client's email addresses.

8 Not to be confused with the earlier judgment of the Court of Appeal at [2004] EWCA Civ 994.