Judgments

*JSC BTA Bank v Ablyazov

[2011] EWCA Civ 1386

CA, CIVIL DIVISION

Sir Andrew Morritt, Lord Justice Moses and Lord Justice Gross

28 November 2011

Contempt of Court – Committal – Application – Claimant commencing proceedings against defendant – Several allegations of contempt made against defendant – Claimant applying for permission to bring committal proceedings – Court directing one allegation from each category to be heard – Court directing committal application be heard before substantive proceedings – Whether judge erring in permitting claimant right to bring forward remaining allegations for future determination – Whether judge erring in directing committal application be heard before substantive proceedings where overlap existing.

Judgment

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

LORD JUSTICE GROSS:

INTRODUCTION

1. The Appellant ("Mr. **Ablyazov**") appeals from a Judgment, Ruling and Order of Teare J, dated the 21st June, 2011 and the 28th June, 2011 respectively ("the judgment", "the ruling" and "the order", as appropriate), giving directions for the hearing of a contempt of court application brought by the Respondent ("the Bank"), against Mr. **Ablyazov**. In a nutshell, Teare J granted permission to the Bank to proceed against Mr. **Ablyazov** in respect of a limited number of allegations of contempt of court, without requiring the Bank to abandon other allegations of contempt which it had raised. Further, Teare J approved the Bank's selection of the allegations to form the subject of the hearing ("the contempt application"), notwithstanding a degree of overlap between the contempt allegations to be proceeded with and substantive trials fixed or anticipated for late 2012 or 2013.

2. At the conclusion of the appeal, the Court indicated that the appeal would be dismissed for reasons to be given in due course. These are my reasons for reaching that conclusion.

3. At the outset of the appeal, Mr. Matthews QC, for Mr. **Ablyazov**, invited the Court to hear the appeal in private, given the background to this litigation (see further, below). The Court was not persuaded to take this exceptional step but indicated that the following safeguards were in place or would be made the subject of an order of this Court:

> i) As provided by para. 15 of the freezing order dated 12th November, 2009 (as amended), the restriction on the distribution of certain information furnished by or on behalf of Mr. **Ablyazov**, would remain in place.
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> ii) The Court would make such orders as appropriate under CPR 3.1(1)(m), to ensure that the material on the Court file would not be open for inspection, save with the leave of the Court and that any reference to material in a witness statement would not trigger the operation of CPR 32.12(2)(c). The precise drafting of such an order has been entrusted to counsel; the order should be incorporated in the order made at the conclusion of this appeal.

4. The background to the litigation, of which the present appeal forms part, was well summarised by Teare J in *JSC BTA Bank v Mukhtar **Ablyazov*** [2010] EWHC 1779 (Comm), one of several interlocutory judgments he has already given in this long running dispute:

> "1. This is an extraordinary case.
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> 2. The Claimant ('the Bank') is a bank in Kazakhstan, 75.1% of whose share capital has, since 2 February 2009, been owned by the State of Kazakhstan through a sovereign wealth fund, Samruk-Kazyna. On that date the State effectively took control of the Bank when, according to the evidence of the Bank, there was significant concern as to the ability of the Bank to continue as a going concern. The Bank's accounts for the year ending 31 December 2008 recorded a negative equity of about US$6.1 billion. Its debts, which are said to amount to US$12 billion, are being restructured according to the law of Kazakhstan.
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> 3. The Defendant ('Mr. **Ablyazov**') is the former chairman of the Bank and is accused by the Bank of 'widespread misappropriation of the Bank's funds'. It is said that he has treated the Bank 'as if it were his own private source of funds'. Four claims have now been issued in this jurisdiction against Mr. **Ablyazov**. The total sum claimed is in excess of US$1.8 billion. Further claims are anticipated which I was told will bring the total sum claimed to US$4 billion.
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> 4. Mr. **Ablyazov** denies these claims. He states that the claims are an attempt by the President of Kazakhstan, Nursultan Nazarbayev, to take control of his assets in support of a politically motivated claim against Mr. **Ablyazov**, who is a leading figure in Kazakhstan's democratic opposition. His evidence paints a chilling picture of life in Kazakhstan where power resides with the President and the members of his family and close associates, where the rule of law is not respected and where dissent is ruthlessly eliminated……..
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> 5. In late January 2009 Mr. **Ablyazov** was forced to leave Kazakhstan hurriedly. He arrived in London where he now lives with his wife and three of his four children…."

5. It may be noted that the application by the Appellant, to strike out or stay the English proceedings on the ground that the process of this Court was being abused by the Respondent at the behest of the President of Kazakhstan to promote his political fortunes, was dismissed by Teare J: see, [2011] EWHC 1136 (Comm), at [54-55]. Although the learned Judge held that it was arguable that the President of Kazakhstan had persuaded the Bank to sue Mr. **Ablyazov** for that purpose, he concluded (*loc cit*) that the Bank had a good arguable case against Mr. **Ablyazov** and a legitimate interest in taking proceedings against him – namely, to recover the assets it alleges were misappropriated. Moreover, the Bank was contractually obliged to pursue its claims, pursuant to a complex restructuring and negotiations with its creditors. Accordingly, even if there was a collateral purpose behind these proceedings, they did not amount to an abuse of process. It is unnec-

essary to say more as to these swirling cross-currents touching on Kazakhstan politics, other than to record that each party fundamentally disputes the allegations made by the other.

6. On the 21st August, 2009, Teare J granted the Bank an *ex parte* interim freezing order against Mr. **Ablyazov** and others, on the basis that without such relief there was a risk that Mr. **Ablyazov** would dissipate his assets. That order ("the freezing order") has since been continued *inter partes* and amended from time to time. Dating back to 2009, there have been continual skirmishes as to the disclosure provisions included in the freezing order. In the light of the inadequacies in disclosure, as held by Teare J ([2009] EWHC 2833 (QB)), Mr. **Ablyazov** was directed to attend for cross-examination and was cross-examined before Teare J in late 2009. Subsequent concerns led to the making of a receivership order in August 2010, a decision upheld by this Court: see, [2010] EWCA Civ 1141.

7. The Bank complains that Mr. **Ablyazov** has "routinely flouted" the panoply of court orders in place – the freezing order, including the order/s for disclosure and the receivership order.

8. Against this background, by Application Notice dated 16th May, 2011, the Bank applied to have Mr. **Ablyazov** committed to prison for contempt and for various other relief, including debarring him from defending the proceedings in the absence of full compliance with certain of the orders sought. Further, the Bank applied for permission to bring proceedings for contempt of court pursuant to CPR r.32.14, to be ruled upon (amongst other matters) at a directions hearing. Some 35 allegations of contempt of court were then advanced.

THE JUDGMENT, THE RULING AND THE ORDER UNDER APPEAL

9. *The judgment:* On the 10th June, 2011, the directions hearing came before Teare J who, as already underlined, was thoroughly immersed in this litigation.

10. In advance of the hearing, Teare J canvassed with the parties the need for the number of allegations for contempt to be reduced, for case management reasons. Complex directions had already been given for the trial of (what are known as) the *Drey, Chrysopa* and *Granton* actions to commence in November 2012. As the Judge observed (judgment, at [6]):

> "It would be undesirable to disrupt those directions by ordering that a long contempt hearing involving many allegations should take place during the period when the parties should be preparing for the trial of the actions."

Considerations of fairness towards Mr. **Ablyazov** pointed likewise to the limitation of the number of contempt allegations to be dealt with at the contempt application.

11. In the event, Teare J held (judgment, at [9]) that the contempt application should be limited to 3 allegations, one from each of the several categories of contempt relied upon, namely:

> i) A failure to disclose;
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> ii) A failure to tell the truth on oath;
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> iii) A wrongful dealing with assets.

It was not appropriate for the Court to make the selection; that was a matter for the Bank.

12. Teare J considered that the contempt application, thus limited, would neither unduly disrupt the substantive trial nor cause unfairness to Mr. **Ablyazov**. The Judge appreciated that Mr. **Ablyazov**'s credibility would be in issue on the contempt application "but that will often be the case where breaches of a freezing order are alleged": judgment, at [10]. So too, the determination of the contempt application might involve determination of one or more issues in the trial of one or more of the actions. Such considerations could mean that the hearing of the contempt application should be delayed until after the trial of the actions but that was not necessarily so. Here (*loc cit*):

> "… having regard to the limited number of contempt allegations to be heard and to the importance to the Bank of the efficacy of the freezing order, I consider that the potential overlap of issues between the contempt application and the trial does not require that the contempt hearing be determined after the trial of the main action."

13. After dealing with questions of particularisation and disclosure, Teare J went on to address the position of the allegations of contempt raised by the Bank but which would not form part of the contempt application: judgment, at [14] – [17]. The Bank wished to reserve those applications for future determination. Mr. **Ablyazov**, relying on *Villiers v Villiers* [1994] 1 WLR 493, argued that they should be abandoned at this stage – serial hearings of contempt allegations could expose him to increased penalties, in particular, the risk of facing a total sentence of imprisonment in excess of the statutory maximum of 2 years. In the event, the Judge held (at [17]) that:

> "…it would be inappropriate now to declare that any future attempt by the Bank to bring further allegations of contempt for a hearing would be an abuse of process. Whether that would be an abuse would depend on the circumstances then prevailing and I cannot know what they will be. However, the right of Mr. **Ablyazov** to seek to strike out any such further allegations on the grounds of *Villiers v Villiers* is preserved."

14. *The ruling:* Subsequently, on the 28th June, 2011 the parties again came before the Judge, to debate the identity of the allegations to be tried in the contempt application. The Judge reiterated his conclusion expressed in the judgment that, having avoided overloading the contempt application, it was not necessary to delay the hearing of the contempt application until after the main trial, despite the potential overlap. As he explained (at p. 22, lines 3 and following – references are to the Transcript of 28th June, 2011 hearing):

> "…the reason for my decision was primarily the importance of making the freezing order effective. To delay the hearing of the contempt allegation until after the trial would deprive the claimant of the opportunity of compelling the defendant to comply with the freezing order by bringing contempt proceedings."

15. Interposing there, the Bank's selection of allegations for the contempt application was as follows:

> i) Allegation A1 – non-disclosure of the shares in Bubris Investments Limited ("Allegation A1" and "Bubris" respectively). In breach of the freezing order and the receivership order, Mr. **Ablyazov** had failed to disclose that his assets included 100% of the shares in Bubris.
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> ii) Allegation B3 ("Allegation B3") – false evidence regarding (1) English real estate and (2) three "Schedule C" companies. In short, Mr. **Ablyazov**, on oath, had mis-described or omitted his interest in various properties (part (1) of this allegation). Furthermore, he had given false evidence on oath denying that he was the owner of and asserting that he was unable to give any information as to companies known as the "Schedule C" companies (namely, FM Company, Carsonway and Bergtrans). The true position to Mr. **Ablyazov**'s knowledge, the Bank alleged, was that Mr. **Ablyazov** was the ultimate beneficial owner of these companies.
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> iii) Allegation D1 ("Allegation D1") – dealing with the assets of Stantis Limited. Here the allegation was that in breach of the freezing order, Mr. **Ablyazov** had instructed and/or procured

> and/or encouraged and/or permitted various dealing with or disposals of or diminution of the value of his assets. For present purposes, the details do not matter.

16. Reverting to the 28th June hearing, there was no dispute as to the inclusion of Allegation D1 in the contempt application; no more need therefore be said of that allegation.

17. However, Allegation A1 gave rise to an overlap with an issue in (what is known as) the *AAA* action and Allegation B3, so far as it concerned the Schedule C companies, overlapped with an issue (or issues) in the Drey and Granton actions. As no date had yet been fixed for the trial of the AAA action, it was likely to be heard some time after November 2012 (the date fixed for, *inter alia*, the Drey and Granton actions). The Judge observed that it would require "very strong reasons" (p.22, line 16) to delay the hearing that a freezing order had been breached until some time in 2013. The Judge was not persuaded: the Court had already considerably reduced the number of allegations; it was not apparent that other participants in the AAA proceedings would have relevant evidence to give, alternatively that Mr. **Ablyazov** would be unable to adduce such evidence on the contempt application; an appropriate order for disclosure could be made before the hearing of the contempt application: p. 22, line 25 – p. 23, line 12. He went on to conclude (p. 23, line 13 – p.24, line 14) that it would not be appropriate to prevent the Bank from proceeding at the contempt application with either Allegation A1 or Allegation B3 (narrowed still further by the exclusion of two other companies).

18. *The order:* The order reflected the Judge's decision, limiting the number of allegations to be dealt with at the contempt application, together with the ramifications for the remaining allegations. Insofar as material, the order provided as follows:

> "2. Those allegations of contempt raised by the Committal Application as are listed in the Schedule hereto ('the Allegations') shall be determined at the hearing …..[These are Allegations A1, B3 and D1]…
>
> 18. Insofar as allegations raised by the Committal Application are not to be dealt with pursuant to paragraph 2, above, the Claimant shall have liberty to apply for permission to proceed with such allegations or to institute fresh contempt proceedings which include such allegations. The First Defendant's right to apply to strike out any such allegations pursuant to the principle in *Villiers v Villiers*….is preserved."

THE GROUNDS OF APPEAL

19. Two Grounds of Appeal remained live and were advanced on behalf of Mr. **Ablyazov** in the terms which follow:

> i) The decision of the Judge, to permit the Bank to reserve a purported right to bring forward for future determination those allegations of contempt which are not among the three allegations ordered to be heard at the Contempt Application, was wrong as a matter of fact and/or law and/or involved a serious procedural irregularity which caused the decision to be unjust. ("Ground I").
>
> ii) The decision of the Judge to permit the Bank to select three allegations of contempt to be heard before the trials in the substantive proceedings, where two of those allegations directly overlap with issues in dispute in those substantive proceedings, was wrong as a matter of fact and/or law and/or involved a serious procedural irregularity which caused the decision to be unjust. ("Ground II").

I take those Grounds in turn.

GROUND I

20. *(1) The argument:* In summary, Mr. Matthews developed Mr. **Ablyazov**'s case as follows. It had not been Mr. **Ablyazov**'s choice to limit the number of allegations to 3 out of 35; he had been prepared to face all 35 allegations. The Judge had imposed the limit for reasons of case management. The Judge's decision, however, had left Mr. **Ablyazov** exposed to the risk of consecutive prison sentences totalling in excess of the maximum 2 year sentence which could be imposed on "any occasion" (see below) and thus fell foul of *Villiers v Villiers* (supra). Further, Mr. **Ablyazov** was at risk of losing the benefit of the sentencing principle of totality. Still further, Mr. **Ablyazov**, a personal defendant, was left facing complex litigation with the balance of the contempt allegations hanging over his head. Case management was not everything; the Judge's consideration of the matter had left fairness to Mr. **Ablyazov** out of account. It should in any event not be overlooked that if Mr. **Ablyazov** was committed to prison it would play havoc with the trial timetable.

21. The safeguard contained in para. 18 of the order was not nearly as good as that provided in criminal proceedings by an order that charges were to be "left on the file". The Bank's concession, as expressed in its skeleton argument, that, if permitted to proceed with the other 32 heads of contempt in the future, "it would not press for a sentence which, when aggregated with any sentence passed at the forthcoming trial, exceeded 2 years in total…" did not assist; sentencing was for the Court not for the parties to resolve by agreement: see, *Re Innospec Ltd* [2010] Crim LR 665.

22. The Court had and should exercise the power to require the Bank to abandon those allegations not part of the contempt application: see, *Phillips v Symes (No.3)* [2005] EWCA Civ 533 and [2005] EWCA Civ 663; [2005] 1 WLR 2986. The Judge erred in not requiring the Bank to do so; it was by no means unusual to limit a party to its best points; he had not gone far enough.

23. *(2) Discussion*: With respect to the clarity of Mr. Matthews' submissions, the Court did not call upon Mr. Smith QC for the Bank to address it orally. Ground I accordingly failed.

24. *First*, in my judgment, the authorities will not bear the weight Mr. Matthews sought to place on them.

25. S.14(1) of the *Contempt of Court Act 1981* provides as follows:

> "In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not *on any occasion* exceed two years in the case of committal by a superior court….."
>
> (Emphasis added).

26. *Villiers v Villiers* (supra) was at the forefront of Mr. Matthews' argument on this Ground. The case involved repeated breaches by the husband of court orders made in the context of family proceedings. In August 1992, on the wife's application to commit the husband for further breaches of a November 1991 order, the Judge imposed a sentence of 12 months' imprisonment suspended on the terms of that order. In committal proceedings brought by the wife in January 1993 in respect of further breaches of the orders, the Judge imposed a sentence of 18 months' imprisonment and activated the suspended sentence, directing that it be served consecutively. Accordingly, the total term for which he committed the husband to prison was 2 ½ years imprisonment. The husband's appeal was allowed. For present purposes at least, the *ratio* of the decision may be taken from the head note (at p.494):

> "…section 14 of the Contempt of Court Act 1981 restricted the maximum sentence which might be imposed on any occasion to two years, and, on the true construction of the section, the relevant occasion was that on which the order of committal was made and the contemnor left court for prison, irrespective of the number of applications to which the order related; that, therefore, a judge could not on a single occasion activate a suspended sentence and impose a fresh sentence which cumulatively exceeded that limit…."

27. Before us, the focus was less on this *ratio* and more on the highly persuasive observations found in two of the judgments. In the course of his judgment, Sir Thomas Bingham MR (as he then was) said this (at p.499 E-G):

> "Mr. Munby…. [who had been instructed as *amicus curiae*]…has drawn attention to a number of situations which could give rise to argument and difficulty. For example, he has indicated that a judge might sentence for one contempt in the morning and another in the afternoon, or for one contempt one day and another contempt the next day in the belief that by doing so he would not be imposing the sentences on one occasion. I could imagine circumstances in which this court would have little hesitation in holding that there had been a manipulation of the timetable such as to amount to an abuse of process. On the other hand, where, in the ordinary course, different contempts came before the court on different occasions and without any manipulation of the timetable it may be that cumulative sentences of more than two years could be justified….."

28. Hoffmann LJ (as he then was) gave a short judgment agreeing with Sir Thomas Bingham MR; Henry LJ agreed with both judgments. Hoffmann LJ said this (at p.500 C-F):

> "I agree. Mr Munby's lucid submissions have satisfied me that there is no construction of section 14(1) which will avoid every possibility of anomaly. But…it should be possible in practice to give effect to the general intention of the Act of 1981.
>
> I agree with Sir Thomas Bingham MR that the 'occasion' in section 14(1) is the hearing at which the sentence is imposed or a suspended sentence is activated, irrespective of the number of contempts or applications with which the court is dealing. In order to make this principle work it is necessary to try to ensure that all the allegations of contempt which could at any time be brought before the court, are so far as possible, considered on a single occasion. Otherwise the maximum sentence will depend on the choice of the applicant as to whether to make a single application or multiple applications and the vagaries of the listing system as to when those applications are heard. This means that it may, for example, be prudent for a defendant charged with contempt to invite the applicant to move at the same time or not at all in respect of any other contempt which he thinks that he may have committed. The application of the principle will be very much a matter for the discretion of the judge at the hearing; but I have no doubt that, with common sense, it should be possible to give effect to the general intention."

29. For my part, at least for present purposes, *Villiers v Villiers* espouses a desirable aim rather than a fixed rule. While it is desirable, *so far as possible*, to consider on a single occasion all extant allegations of contempt of court, there is no fixed rule to such effect. The aim is desirable because of the wording of s.14(1), limiting the sentence for contempt of court which can be imposed *on any occasion* to a maximum term of two years imprisonment. Plainly the timetable should not be manipulated by the applicant with a view to multiple applications, in an attempt to procure a term of imprisonment in excess of 2 years; efforts to do so are overwhelmingly likely to fail. However and as made clear by Hoffmann LJ's wording ("so far as possible", at p.500), there is not and cannot be an invariable rule. *Villiers v Villiers* is <u>not</u> authority for the proposition that all extant contempt allegations must either be dealt with on the same occasion or, insofar as they are not, abandoned.

30. *Phillips v Symes* (supra) was also much pressed by Mr. Matthews. In that case, following repeated breaches of undertakings and court orders, the Judge imposed on the defendant the maximum term of 2 years imprisonment – but did not activate an earlier suspended sentence of imprisonment. The Judge had been motivated by the constraint of the statutory maximum sentence. The defendant's appeal was allowed in part, in essence, for the reasons expressed by Pill LJ as follows:

> "54. When a comprehensive application such as the present one is made and a substantial sentence of imprisonment is contemplated and imposed, it would….normally be wrong to leave matters over in that way. If the maximum sentence is insufficient….the remedy would be in a statutory or other power to imprison for a longer period and not the procedure followed here. I do not, however, exclude the possibility that circumstances could arise in which it may be appropriate to leave over consideration of alleged contempts.
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> 55. In my judgment, the other contempts alleged and not pursued should not be proceeded with upon a future application. As to the suspended sentence, I regard the choice as being between activating it concurrently with the existing sentence and discharging it. The better course in the circumstances, including the judge's decision not to activate it, is to discharge it. The judge had already imposed a sentence of nine months' imprisonment for breach of an undertaking given when the suspended sentence was imposed……"

31. In my view, there can be no quibble with the decision in *Phillips v Symes*. It is, however, noteworthy and perhaps more pertinent for the present dispute, that, as Pill LJ, contemplated, in terms (at [54] *supra*), there may be circumstances in which it would be appropriate to leave over consideration of some contempt allegations. It does not seem to me that *Phillips v Symes* provides any real assistance for Mr. Matthews' submissions.

32. *Secondly*, the application of the *desiderata* in *Villiers v Villiers* is a matter for the discretion or judgment of the Judge on a fact specific basis: *Villiers v Villiers*, at p. 500; see too, *In re W* [2011] EWCA Civ 1196, esp. at [40]. As such, a decision, whether or not to leave over for future consideration extant allegations of contempt, is a case management decision of the Judge, with which this Court should be slow to interfere, save on well-recognised grounds.

33. *Thirdly*, where alleged contempts arise in the context of a worldwide freezing order (coupled with a variety of ancillary and related provisions), there is likely to be a strong public interest in ensuring that the freezing order is appropriately policed, enforced and thus made effective; in this regard, the bringing of contempt proceedings may encourage improved compliance with its terms.

34. Considerations of this nature were elucidated in *Dadourian Group International Inc v Simms (No.2)* [2006] EWCA Civ 1745; [2007] 1 WLR 2967. There, the Court was concerned with an application by claimants for permission to use in committal proceedings information obtained pursuant to a freezing order. In the event, the Court dismissed the appeal from the Judge's decision to grant such permission. The judgment of Arden LJ contains observations of relevance here:

> "6. ….. a party who proposes to bring contempt proceedings may wish to bring contempt proceedings not simply to persuade the court to punish the alleged contemnor, but also in order to induce the subject of the order to produce more information about assets falling within the scope of the order than he has so far done, notwithstanding that he has been ordered to provide that information by the terms of the freezing order (or an order made in consequence of the freezing order). If this information is produced the party who obtained the freezing injunction will be able to identify the assets within the scope of the order and this will facilitate the enforcement of any judgment obtained at trial against the subject of the order. In the meantime he will also be able to ensure that the terms of the freezing injunction are observed….

> 17.……the court should provide significant protections for the subject of a freezing injunction who was cross-examined or provided information under a freezing order. None the less, subject to those protections, the court should….lend its weight to an application to use information obtained from such a person for the purpose of enforcing or policing the freezing order. A freezing order is an important tool in the court's armoury for the purpose of doing justice between the parties, or more precisely for the purpose of preventing or policing the disposition of assets which would inhibit the enforcement of an order. In the normal situation, failures too provide information about assets subject to a freezing order can be enforced by orders for further information. Litigants who are the subject of an order to produce further information will generally produce it to the best of their ability. But that is not always the case, and the court will in particular be astute to identify those defendants who are deliberately concealing assets. In some situations, a party who obtains a freezing order will have little option but to bring contempt proceedings to ensure that the order is properly observed…… ”

In his judgment, Longmore LJ expressed the matter in similar terms:

> “38. More often than not a court exercises its powers in contempt proceedings for the purpose of punishing a party for disobedience to or non-compliance with a court order. In the particular case of freezing injunctions, however, it is common to bring contempt proceedings in order to 'improve' a defendant's compliance with the original order. Under the pressure of a committal application, a defendant may feel obliged to reveal the whereabouts of assets the existence or amount of which he has hitherto concealed or the ownership of which he has hitherto misrepresented.”

35. *Fourthly*, against this background, the Judge exercised his discretion impeccably and there is no basis whatever upon which to impugn his case management decision as to leaving over the remaining 32 allegations of contempt. That is all the more so in the present case, where the Judge has had so significant an involvement in this litigation as a whole.

> i) As is plain from the judgment and ruling, the Judge had well in mind the importance of ensuring the efficacy of the freezing order. That provides the essential rationale for his decision.
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> ii) The Judge was right, or, at the very least, entitled to conclude that trying 35 allegations of contempt would seriously disrupt preparation for the substantive trial/s and, not least, would be unfair to Mr. **Ablyazov**. Accordingly, the choice for the Judge was either to try a limited number of contempt allegations as soon as possible or to defer a contempt application dealing with all the allegations until after the main trials – and so not before 2013. The latter option was deeply unattractive in the context of alleged breach of the terms of the freezing order and its ancillary provisions; to put it no higher, the delay would significantly reduce the prospect of benefiting from such improved compliance with the freezing order as the contempt application might induce. For completeness, there was no (certainly no serious) question of the timetable being manipulated here.
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> iii) As the Judge in effect observed (judgment, at [17]), it was premature to determine the fate of the 32 remaining allegations of contempt at this time; he could not know what would be the prevailing circumstances if, or when, the Bank applied to pursue those applications. Though not a matter currently arising for decision, the right time to consider the fate of those allegations may well be when the Judge has ruled on the 3 allegations of contempt which form the subject of the contempt application – though that will be for the Judge to determine. In passing, it was at the equivalent stage in *Phillips v Symes* (supra), when the comparable decision came to be taken.
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> iv) Though Mr. Matthews was right to say that para. 18 of the order furnishes less of a safeguard than that provided in criminal proceedings when charges are left on the file and that the

> parties cannot bind the Court on questions of sentence (*Innospec*, supra), I am not at all persuaded that fairness to Mr. **Ablyazov** has been overlooked or inadequately catered for. The terms of the judgment or ruling themselves suggest otherwise. Moreover and realistically, if it be assumed that the 3 allegations of contempt are established (to the criminal standard of proof) in the contempt application and that Mr. **Ablyazov** was committed to prison for a substantial term, any application to proceed with the remaining allegations would inevitably be subject to close scrutiny by the Judge considering the matter. Para. 18 reinforces and serves as an express reminder of the need for such scrutiny. Still further, while the Bank's concession (recorded above, as to not pressing for an aggregate sentence in excess of 2 years in total) could not bind the Court, I find it difficult to conceive of any Judge not taking it most carefully into account; it must, again realistically, be likely that the concession would only be overridden in circumstances where the authorities contemplate as justified consecutive sentences in excess of 2 years in total.

36. Overall, the circumstances of this case are such that the interests of justice point to the correctness of the Judge's decision to leave over the fate of the 32 allegations of contempt while directing that the committal application should proceed in respect of 3 allegations; on any view, the Judge was amply entitled to come to this conclusion. No more need be said of Ground I; I turn to Ground II.

GROUND II

37. *(1) The rival cases:* Mr. Matthews complained that the Bank had selected allegations of contempt which involved an overlap with issues to be determined at the main trial/s; there was no or no good reason to pursue these allegations when many others did not give rise to an overlap. There was a risk that the trial Judge would be placed in an invidious position, in the event that a finding made on the contempt application would bind Mr. **Ablyazov** but not other parties to the trial. Accordingly, the Judge had erred in permitting the Bank to proceed with allegations A1 and B3 (so far as it related to the Schedule C companies). The Judge's decision ran counter to the tenor of authority, which cautioned against the dangers of satellite litigation.

38. For the Bank, Mr. Smith QC submitted that the overlap related to most of the allegations of contempt and was not limited as suggested by Mr. Matthews; this was unsurprising given that some 636 off-shore companies had been involved. Allegations A1 and B3 were selected for the good reason that they went to the heart of the Bank's tracing claims. Authority did not tell against the Bank's selection and the Judge's decision; if anything, authority suggested that overlap was a reason for allowing the claim for contempt to proceed rather than stopping it in its tracks. In this litigation, third parties would not be prejudiced and, realistically, the evidential contribution from other parties to the trial/s was to be doubted.

39. *(2) Guidance from authority:* Our attention was drawn in argument to the following passage, taken from the judgment of Moore-Bick LJ in *KJM Superbikes v Hinton* [2008] EWCA Civ 1280; [2009] 3 All ER 76:

> "18. Paragraph 28.3 of the Practice Direction supplementing Pt 32 directs the applicant to consider whether proceedings for contempt would further the overriding objective and that is a matter which the court itself should plainly have in mind. It is important not to allow satellite litigation of this kind to disrupt the progress of the substantive proceedings and it may not be possible to assess the strength of the complaint until those proceedings have concluded. This danger was well described by David Richards J in *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch) at [80], as follows:
>
> '….Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair number of cases, the allegations are well founded. If parties thought that they could gain an advantage by singling out these statements and making them the subject of a committal application, the usual process of litigation would be seriously disrupted. In general the proper time for determining the truth or falsity of these

> statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under r32.14….'"

40. *KJM Superbikes v Hinton* was a case concerned with proceedings against a witness for contempt subsequent to a trial and arising out of the evidence he had given in it. It was thus somewhat removed from the context of dealing with contempt arising from the alleged breach of a freezing order. Nonetheless and with respect, these observations from Moore-Bick LJ (and David Richards J) helpfully highlight the dangers of satellite litigation and of carving out issues ahead of the trial of the action: see further, *per* David Richards J, in *Daltel Europe v Makki* (supra), at [78]. Such concerns plainly require careful consideration generally; the present context is no exception.

41. Subject, however, to keeping this caution well in mind, whether allegations of contempt should be determined before, during or after the main trial must be very much a case management decision for the Judge, on the facts of the individual case. Moreover, where the alleged contempt is said to relate to the breach of a freezing order, the public interest in ensuring the efficacy of such orders is likely to weigh heavily in the balance: see, *Dadourian v Simms* (supra). In *Daltel Europe v Makki*, where the alleged contempts related in part to breaches of a freezing order, it is to be noted that the decision was to permit the applications to proceed in advance of the trial; one reason for the Court's decision (see, at [79]) was that the overlap with issues in the trial was so central that findings adverse to the contemnor could bring the proceedings to an earlier conclusion.

42. Accordingly, as it seems to me, overlap, of itself and without more, does not necessitate postponing the determination of a contempt application until after the trial. It is, instead, a factor to be taken into account; the weight to be given to it – and the pointer, if any, it gives to the decision to be taken - must depend on the facts of the individual case.

43. *(3) Discussion:* In my view, Ground II can be taken shortly. I did not understand Mr. Matthews to go so far as to submit that the selection of the allegations to be heard at the contempt application was capricious; if he did, I am not persuaded.

44. Allegation A1 concerns Mr. **Ablyazov**'s alleged interest in Bubris; the Bank's case is that Bubris was a company secretly owned and/or controlled by Mr. **Ablyazov**. The Bank further alleges that Bubris received some US$68 million of the almost US$300 million in total which the Bank says was misappropriated from it in 2008 or early 2009. These allegations may turn out to be unfounded but the Bank's – legitimate – interest in Allegation A1 is plain and goes to its tracing claim in the AAA proceedings.

45. Much the same applies to the allegations concerning the Schedule C Companies forming part of Allegation B3. Mr. **Ablyazov** has denied on oath that he had any interest in Bergtrans, Carsonway and FM Company. The Bank's case is that this evidence was untrue. The importance of these companies is that some US$295 million is said to have passed through them. The significance of Allegation B3 to the Bank's proprietary claim, this time in the Drey proceedings, is apparent.

46. Accordingly, even if it be assumed that there a number of contempt allegations which would not result in an overlap with issues at the trial of the main actions, it does not seem to me that the selection of allegations A1 and B3 can be impugned. It is unnecessary to venture further into the debate between Mr. Matthews and Mr. Smith as to the number of allegations where there was or was not such an overlap.

47. What remains is the need to weigh the advantages and disadvantages of proceeding with these allegations in advance of the respective trials. This was pre-eminently a question for Teare J. For the reasons al-

ready set out, there is certainly no rule of law as to the timetable to be adopted; the matter is one for the Judge's case management discretion. The Judge here plainly had well in mind the risk of overlap and of satellite litigation. He was not, however, deterred. In the judgment, he decided in principle that the potential overlap of issues between the contempt application and the trials did not require postponing the contempt application until after the trials. In the ruling, he declined to interfere with the Bank's selection of the specific allegations for the contempt application – despite the arguments as to overlap developed in relation to those very allegations. He was not, it would seem, much impressed by the argument as to other evidence which might be available at trial. If I may say so, it can readily be understood why he was not; some of the witnesses to whom Mr. Matthews referred face warrants of arrest if they come within the jurisdiction; a number of others, it would seem, could already have assisted Mr. **Ablyazov**, if they indeed had assistance to offer. In all this, the Judge had the benefit of his detailed grasp of this litigation. Ultimately, the decisive factor for the Judge, as repeatedly emphasised in both the judgment (at [5] and [10]) and the ruling (at p.22) was the importance of making the freezing order effective.

48. For my part, I think Teare J was right. It was of paramount importance here for the Court to do and to be seen to be doing, all it could to ensure the efficacy of the freezing order. But it suffices that the Judge was amply entitled to reach the conclusion he did. Accordingly, in my judgment, Ground II fails and the appeal should be dismissed.

LORD JUSTICE MOSES:

49. I agree.

SIR ANDREW MORRITT:

50. I also agree.