Judgments

QBD, COMMERCIAL COURT

Neutral Citation Number: [2012] EWHC 455 (Comm)

IN THE HIGH COURT OF JUSTICE No: 2009-1099

QUEENS BENCH DIVISION

COMMERCIAL COURT

The Rolls Building

Fetter Lane

London

29 February 2012

Before:

MR JUSTICE TEARE

BETWEEN:

JSC BTA BANK

Claimant

-v-

MUKHTAR ABLYAZOV & 6 Others

Defendants

(Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400, Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

STEPHEN SMITH QC and **TIM AKKOUH**, **CALEY WRIGHT** (instructed by Hogan Lovells) appeared on behalf of the Claimant.

DUNCAN MATTHEWS QC, IAN WINTER QC, GEORGE HAYMAN and **JAMES SHEEHAN** (instructed by Addleshaw Goddard) appeared on behalf of the Defendant.

Judgment

As Approved by the Court

1. MR JUSTICE TEARE: This is an application by the claimant, the Bank, for a mandatory injunction requiring the defendant, Mr **Ablyazov**, to surrender himself to the tipstaff and to file a full and proper disclosure affidavit of assets and also for an order that, unless he does so, his defence to the several actions brought against him in this court shall be struck out and the Bank will be entitled to enter judgment against him.

2. The sums claimed in those actions amount to several billion dollars. The application is opposed by Mr **Ablyazov**. His counsel, Duncan Matthews Queen's Counsel, has described the orders sought as, "varying from the silly to the inappropriate".

3. The immediate history to this application is as follows: On 21 December 2011 I reserved judgment in a committal application brought by the Bank against Mr **Ablyazov**. The hearing had lasted over two weeks. I asked Mr **Ablyazov** through his counsel whether he would be present when judgment was given and for an undertaking that he would attend the judgment. In response his counsel, "Confirmed that he will be present."

4. Mr Stephen Smith Queen's Counsel, counsel for the Bank, submits that Mr **Ablyazov** undertook to be present at the judgment. Mr Matthews submits that Mr **Ablyazov** did not give such an undertaking.

5. If one construes my question and request as separate then Mr **Ablyazov** responded to the question by confirming that he would attend the judgment but did not respond to the request. If one construes my question and request as one, namely whether Mr **Ablyazov** undertook to attend the judgment then he answered that question in the affirmative. Both are possible interpretations but, since breaches of undertakings to the court can have certain consequences, I consider that any doubt should be resolved in favour of Mr **Ablyazov**.

6. However, the distinction does not seem to me to be of much significance in the context of the present application. It is undeniable that Mr **Ablyazov** gave a clear and unequivocal confirmation to the court in answer to a specific question from the court that he would attend the judgment. In the event, he did not attend court when judgment was given on 16 February 2012. He gave no notice to the court, to the Bank or to his own lawyers that he would not attend the judgment. His own counsel's skeleton argument for the judgment hearing stated that Mr **Ablyazov** would attend the judgment.

7. Mr **Ablyazov** was found to have acted in contempt of court. He was sentenced to 22 months' imprisonment for contempt of court in his absence. Since then he has gone into hiding. Not even his own solicitors, who continue to act for him in this matter and to receive instructions from him, know where he is. They have told me, through Mr Matthews, that they do not even know whether he is within or without the jurisdiction.

8. It was in those circumstances that the Bank issued the present application. It was issued with the minimum of notice required by this court and the Bank was only able to have it heard on 24 February 2012 because the Bank had another application against Mr **Ablyazov** fixed for hearing on that day which was settled.

9. A time estimate of two hours was given. Because time estimates in this case are rarely accurate, the court sat at 9.30 am to allow three and a half hours for the application, but it was not completed by 1 pm. The court had other applications in other actions in the afternoon and so the hearing was adjourned.

10. The hearing resumed today, 29 February 2012, and has now been completed. Rather than cause further delay in the determination of this application, which the Bank regards as urgent, I have decided to give judgment today rather than to reserve my judgment. My reasons will be shorter than they would have been had I reserved judgment, but since I have reached a clear conclusion as to how the application should be determined it is right that the parties should be informed of my decision today and without further delay.

11. The argument between the parties has focused on four matters.

12. First, whether the court has jurisdiction to make an order requiring Mr **Ablyazov** to surrender to the tipstaff and, if so, whether it is appropriate to make such an order.

13. Second, whether it is appropriate to make the order for disclosure of assets.

14. Third, whether it is appropriate to make either order an unless order.

15. Fourth, whether the sum of £45 million paid into court by the Bank by way of fortification of its undertaking in damages should be paid out to the Bank.

16. I first deal with the question of surrender to the tipstaff. Mr Smith submits that the court has jurisdiction to make the orders sought pursuant to section 37 of the Senior Courts Act 1981 which empowers the court to grant an injunction in all cases in which it appears to be the court to be just and convenient to do so. He also submits that the court has power to make the orders sought pursuant to its inherent jurisdiction to grant ancillary orders to make an order it has already made effective; see **Bekhor v Bilton** [1981] Queen's Bench 923**, Maclaine, Watson & Co Limited v The International Tin Council (No 2)** [1989] Chancery 286 and **BTA Bank v Solodchenko** [2011] EWHC 2163 Chancery.

17. Mr Smith says that the orders sought will help to ensure the effectiveness of the warrant of committal.

18. Mr Matthews submits that there is no jurisdiction to make the orders sought. He says that whilst it is accepted that ancillary orders may be made to support injunction orders, it is to strain that principle beyond its proper ambit to make an order that Mr **Ablyazov** surrender to the tipstaff. He says that section 37 does not cover the situation of making a warrant of committal effective, that the order sought is unprecedented and that no authority has been cited to support the making of such an order.

19. In my judgment, where the court has issued a warrant for the committal of a contemnor and where the contemnor has gone into hiding, being careful whilst giving instructions to his solicitors not to reveal his whereabouts to them, it is just and convenient to issue a mandatory injunction ordering the contemnor to surrender himself to the tipstaff so that he may execute the warrant of committal. There is, therefore, jurisdiction to make the order sought pursuant to section 37 of the Senior Courts Act 1981. I do not consider that in this context the Bank needs to establish a legal or equitable right.

20. If that is wrong, then in my judgment the court has inherent jurisdiction to issue ancillary orders designed to make effective orders which it has previously issued. That jurisdiction is confirmed by the authorities to which Mr Smith referred. The court had undoubted jurisdiction to issue the warrant for the committal of Mr **Ablyazov**. He has decided to go into hiding, either here or abroad and has thereby sought to frustrate the court's order. An order that he surrender to the tipstaff will enable the tipstaff to execute the court's warrant.

21. Mr Matthews made two further points. First, he said that neither section 37 nor the court's inherent jurisdiction could justify an order designed to deprive a person of his liberty. He described such an order as a "reverse habeas corpus". This point is in my judgment misconceived because it overlooks the circumstance that it is the warrant of committal that seeks to deprive Mr **Ablyazov** of his liberty. The order sought on the present application is designed to make that order effective.

22. Second, he said that the order is unnecessary because the court has made all appropriate orders by committing Mr **Ablyazov** to prison and ordering that a warrant of committal be issued. Mr Matthews submitted that it is for the tipstaff to execute the warrant, a submission which is perhaps encapsulated in the phrase, "Catch me if you can".

23. The current position is that Mr **Ablyazov** has gone into hiding and so it is unlikely that the warrant can be executed. If Mr **Ablyazov** surrenders to the tipstaff then the warrant can be executed. The order is, therefore, appropriate and necessary.

24. If Mr **Ablyazov** has fled abroad, which must be a possibility, then surrender is essential because the tipstaff's jurisdiction ends at Dover.

25. I have therefore concluded that a mandatory injunction should be issued requiring Mr **Ablyazov** to surrender himself to the tipstaff.

26. I shall next deal with the disclosure order. There is no dispute that the court has jurisdiction to make the disclosure order. Disclosure of assets is a necessary adjunct of a freezing order to make such order effective. The dispute is whether such an order should be made when an order for disclosure for assets has already been made.

27. Mr Smith submits that such an order should be made in circumstances where (a) Mr **Ablyazov** has been found to have acted in contempt of the disclosure order made in August 2009 when the freezing order was granted and (b) when there are reasons to believe that Mr **Ablyazov** has not disclosed his ownership of assets not included within the contempt application.

28. Mr Matthews submits that no such order should be made because an order for disclosure having already been made, and Mr **Ablyazov** having been found to have acted in contempt of it, he is entitled, if he chooses, to purge those findings of contempt and it is only in those circumstances that a renewed disclosure process limited to the assets which are the subject of the contempt findings should be undertaken.

29. Further, any renewed order would be pointless in circumstances where Mr **Ablyazov** intends to appeal the findings of contempt. He cannot both appeal and purge his contempt. The court should not make orders which have no value.

30. The application was, said Mr Matthews, a bare attempt, by means of attaching a penal notice, to bring forward a further contempt allegation arising out of the same facts.

31. Mr Matthews made a number of other points. The disclosure order had not been sought in the Bank's committal application notice. The order sought required Mr **Ablyazov** to state whether his assets have been encumbered and, if so how, without any evidence before the court that they have been, or are likely to be, encumbered. In any event, Mr **Ablyazov** was not in a position to swear an affidavit because to do so would reveal his whereabouts.

32. When sentencing Mr **Ablyazov** for contempt I observed, based upon my findings in my judgment on the contempt application, that he had determined not to disclose all of his assets, to lie about his ownership of assets and to deal with his assets in breach of the freezing order. As Mr Smith has observed, the history of this litigation has revealed grounds to believe that Mr **Ablyazov** owns companies which he has not disclosed. I refer to my orders extending the receivership order to a further 600 companies and to the observations of Mr Justice Christopher Clarke at 2011 EWHC 2664 Comm at paragraph 71 and 72 with regard to the companies Wintop Fitcherley and Green Life.

33. These matters in combination seem to me to provide ample justification for ordering Mr **Ablyazov** again to file an affidavit of his assets.

34. It is true that Mr **Ablyazov** can himself choose to purge his contempt and amplify the list of assets he has already disclosed. However, in the particular circumstances of this case, summarised in the last paragraph, it remains appropriate to order Mr **Ablyazov** to swear a further affidavit of his assets, rather than let him do so only if he chooses to do so.

35. I am told that Mr **Ablyazov** intends to exercise his right of appeal against my findings of contempt. If he does so then he is unlikely to swear a further affidavit of assets revealing more assets than those disclosed in August 2009. For this reason, Mr Matthews submits that the proposed order will have no value and be pointless.

36. In my judgment the answer to this point is that the court ought to make such further orders as appear to it to be appropriate, valuable and useful on the basis of, amongst other things, the findings it has made on the contempt application.

37. If the contempt findings are set aside on appeal then such further orders, if also appealed, can also be set aside if the Court of Appeal considers that the appropriate course.

38. The court ought not to be dissuaded from making such further orders as appear to it to be appropriate, valuable and useful merely because there is, or may be, an appeal from the contempt findings.

39. There is a further point: if there are additional assets to disclose, then Mr **Ablyazov** should disclose them in order that the freezing and receivership orders can be made more effective. If that damages his appeal against the findings of contempt, that is hardly a matter of which he can complain.

40. Whilst the making of this further disclosure order, coupled with a penal notice, will give the Bank, in theory, an opportunity to bring forward a further contempt application arising out of the same facts which were the subject of the earlier contempt application, any such application would face formidable problems because Mr **Ablyazov** has already been sentenced for failing to disclose the assets which were the subject of the first contempt application and has received almost the maximum available sentence.

41. I will deal very briefly with Mr Matthews's other objections. I do not consider that the Bank's failure to include this disclosure order in its contempt application is a bar to making the order sought. It has been included in their later application. If any assets have been encumbered between August 2009 and the date of the further affidavit, I do not see why it is inappropriate for Mr **Ablyazov** to give particulars of such encumbrances.

42. Any such encumbrances will have been a breach of the freezing order unless protected by the exception for dealings in the ordinary course of business. I do not consider that the court should be dissuaded from making the order sought because Mr **Ablyazov** would be compelled to reveal his whereabouts by rea-

son of the notary public before whom he swears his affidavit stating where the affidavit is made. The court is under no obligation to assist Mr **Ablyazov** to remain in hiding and Mr **Ablyazov** cannot claim any right to avoid the execution of the warrant for committal.

43. I shall, therefore, make the further disclosure order which is sought.

44. I shall next deal with the application for an unless order. The Bank has applied for an order that, unless Mr **Ablyazov** complies with the two orders which the court proposes to make, his defences to the actions against him shall be struck out and the Bank will be at liberty to enter judgment in default.

45. Mr Smith submits that this is an appropriate order to make because it is a means of bringing pressure to bear upon Mr **Ablyazov** to comply with the order for his committal and a final means of bringing pressure upon Mr **Ablyazov** to disclose his assets so that the freezing order is made more effective.

46. In support of making this order he relies upon **Derby v Weldon (No's 3 and 4)** [1990] 1 Chancery 65 at page 81, letters D to E, per Lord Donaldson, Master of the Rolls, and upon two decisions of the Commercial Court and Chancery Division in this very litigation in which unless orders were made against other defendants**; BTA Bank v Ablyazov (No 3)** [2010] AER Comm 1093 at paragraph 38 per Christopher Clarke J and **BTA Bank v Shalabeyev** [2011] EWHC 2903 at paragraph 60 to 62 per Mr Justice Henderson.

47. Mr Matthews submits that such an order should not be made. There is no principle that a contemnor should not be entitled to defend proceedings brought against him. On the contrary, he says, because the application for an unless order is, "akin to a (deferred) application to strike out" Mr **Ablyazov**'s defences on account of his anticipated failure to comply with the two mandatory injunctions being sought against him, the overarching principle is the same as that which applies when a party applies to strike out a defence for breach of a court order, namely whether the breach gives rise to a substantial risk of injustice.

48. Mr Matthews submits that there is no such risk in the present case because Mr **Ablyazov**'s alleged (and now proved) breaches of the freezing order, do not in any way impede the court from conducting a fair trial of the issues in the action. A failure to give disclosure of assets in aid of a freezing order may, at most, hamper a claimant's ability to enforce any judgment it obtains, but will not jeopardise the fairness of the trial of the issues in the action.

49. In support of this submission Mr Matthews relies upon **Hadkinson v Hadkinson** [1952] Probate 285 at pages 289 to 290 and 296. **Midland Bank v Green (No 3)** [1979] Chancery 496 at page 506. **Logicrose Limited v Southend United Football Club Limited**. The Times Law Report for 5 March 1988, re Swaptronics Limited, the Times Law Report, 17 August 1998, **Arrow Nominees Incorporated v Blackledge** [2001] ECC 591 paragraph 54. **Douglas v Hello! (No 2)** [2003] EMLR 29, **Raja v Van Hoogstraten** [2004] EWCA Civ 968 and **Polanski v Conde Naste Publications Limited** [2005] 1 Weekly Law Reports 637.

50. Mr Matthews said that the decisions of the Commercial Court and the Chancery Division in **BTA Bank v Ablyazov (No 3)** and **BTA Bank v Shalabeyev** were to be distinguished on the grounds that the judges in those cases were faced with persistent non-compliance with disclosure orders which were capable of being complied with. He reserved the right to contend that those decisions were wrongly decided. Indeed, he submitted that the judges in those cases had not properly understood, or taken into account, that **Marcan Shipping v Kefalas** [2007] 2 Weekly Law Reports, 1864 concerned the effect of an unless order rather than the circumstances in which it was appropriate to make such an order.

51. In the present case it is not suggested that Mr **Ablyazov**'s failure to comply with the order for disclosure of assets will impede the court's ability to conduct a fair trial of the issues in the action. The unless or-

der is sought in order to bring further pressure on him to comply with the disclosure order. That appears to me to be legitimate in principle and to be supported by the authorities relied upon by Mr Smith. Were it otherwise, the court would be powerless when faced with a defendant who refused to comply with an order for the disclosure of his assets and when sentenced to be imprisoned for his contempt of court went into hiding in order to avoid the execution of that sanction.

52. The unless order would not be made because the court is indignant that the defendant has flouted the court's disclosure order, but because the unless order may cause the defendant to reconsider his position and comply, belatedly, with the disclosure order. Whether it is appropriate to make such an order in any particular case will depend upon a consideration of the particular circumstances of the case.

53. The authorities relied upon by Mr Matthews do not, in my judgment, suggest that it is illegitimate to make an unless order for such purposes. The principle which they establish is that a defence may be struck out if there is a substantial risk of injustice.

54. Whilst the cases essentially deal with a risk of an injustice by reason of the difficulty of there being a fair trial of the issues in dispute, a risk of injustice can also arise by reason of the difficulty of enforcing a judgment caused by a defendant hiding his assets or dealing with his assets prior to trial. If a judgment cannot be enforced for such a reason, any claimant would consider the proceedings, "unsatisfactory", the adjective used by Mr Justice Millett in **Logicrose Limited**. The court is entitled to have regard to, "the overall fairness of the proceedings", see Marcan Shipping v Kefalas 2007, 2 Weekly Law Reports, 1864, paragraph 19, per Lord Justice Moore-Bick. That includes taking into account the risk that if an unless order is not made, the Bank may be restricted in the recovery it might otherwise make; see **BTA Bank v Ablyazov** (No 3) [2011] 1 AER Comm 1093 at paragraph 42, per Mr Justice Christopher Clarke.

55. That approach reflects what I said when sentencing Mr **Ablyazov** for contempt. I observed that the purpose of freezing orders is to enable the court to do justice between the parties.

56. I do not regard **Raja v Van Hoogstraten** as a decision to the contrary. Striking out the defence in that case could not be justified on the grounds that failure to make disclosure of assets would lead to any success in the action being rendered nugatory, because the freezing order could not stand in circumstances where Mr Van Hoogstraten had not been heard on it; see paragraph 113 of Lord Justice Chadwick's judgment. That was a case in which there were some very unusual features. See Marcan Shipping v Kefalas at paragraph 48 in the judgment of Lord Justice Pill.

57. Reliance was also placed on Article 6 of the European Convention on Human Rights, which provides that everyone is entitled in the determination of his civil rights and obligations to a fair hearing.

58. I do not consider that if Mr **Ablyazov**'s defence is struck out for failing to provide a full affidavit of assets he has been denied a fair hearing of his civil rights and obligations. Such an affidavit is required to ensure a fair resolution of the Bank's claim against him. He will have a fair hearing of his civil rights and obligations if he provides a full affidavit of his assets. If he chooses not to provide a full affidavit of his assets, then his defence will be struck out by reason of his own actions, not because the court has denied him his entitlement to a fair hearing of his civil rights and obligations.

59. What then is the appropriate order in this case? Should an unless order be made and if so on what terms? The authorities relied upon by Mr Matthews show that, where there are failures to disclose documents relating to the issues in the action or other defaults in relation to such documents, the court will carefully examine the circumstances with a view to determining whether the failure or default gives rise to a substantial risk that a fair trial of those issues cannot take place. Where there is a failure to give full disclosure

of assets, the court must also carefully consider whether the failure has given rise to a substantial risk that overall the proceedings would be unfair or unsatisfactory.

60. This is not a case where there has been a total failure to give disclosure of assets, as was the case in the application before Mr Justice Henderson in **BTA Bank v Shalabeyev**. Rather, it is a case where there has been a partial failure to disclose assets. Thus Mr Matthews has submitted that it cannot be said in this present case that any success the Bank has on its claims will be rendered nugatory. He has also submitted that there is no evidence before the court to enable the court to know whether the partial failure to disclose assets in this case will restrict the Bank's recovery.

61. This submission seems to me to be unrealistic, at any rate in circumstances where the question is whether there is a risk that partial disclosure of assets will restrict the Bank's ultimate recovery.

62. The Bank's claims are very large indeed. They run to several billion dollars. The Bank's efforts since August 2009 to ensure that Mr **Ablyazov** complies with the freezing order, summarised in paragraph 26 of Mr Smith's skeleton argument, show that the Bank does not consider that it has frozen sufficient assets to enable the judgment it seeks to be fully enforced.

63. Mr **Ablyazov**'s own estimate of the value of the 17 assets which he has disclosed was itself much less than the total value of the Bank's claims. There would therefore appear to be a risk, and a substantial risk, that the judgments the Bank seeks will not be fully enforced by execution on the 17 assets disclosed by Mr **Ablyazov** and, therefore, a substantial risk that justice cannot be done to the Bank without further disclosure.

64. In **BTA Bank v Ablyazov (No 3)**, the case before Mr Justice Christopher Clarke, there was also a partial failure to comply with an order for disclosure of assets; see paragraphs 12 and 14 of the judgment of Mr Justice Christopher Clarke. In deciding whether an unless order should be granted in that case Mr Justice Christopher Clarke weighed the risk of unfairness or prejudice to the Bank, in the event that an unless order were refused, with the risk of prejudice to the defendant if the unless order were granted, but later set aside following a successful challenge to the jurisdiction.

65. In the present case there is a risk that if an unless order is refused the Bank's ultimate recovery will be restricted. If ultimately the Bank's claims fail, Mr **Ablyazov** will have been compelled to disclose information as to his assets. That is unlikely to be prejudicial to Mr **Ablyazov**, given that the information provided will be subject to the usual implied obligation of confidentiality and, in this particular case, any necessary regime of restricted information.

66. It thus appears to me that, in the interests of overall fairness, the unless order should be granted in respect of the disclosure obligation.

67. There is, however, a further aspect of this matter. If Mr **Ablyazov** exercises his right of appeal against my judgment on the contempt application, he will be saying that my decision is mistaken and/or unjust. If at the same time he swears another affidavit of his assets maintaining, consistently with his appeal, that he owns only the 17 assets which he disclosed in August 2009, the Bank will presumably say that he has not given full disclosure of his assets and will apply to the court to enter judgment against him.

68. It would not, it seems to me, be appropriate to accede to that application on the basis that he had not disclosed the assets which I have found are owned by him and have not been disclosed in circumstances where that very finding was under consideration by the Court of Appeal. Nor would it be appropriate to have another lengthy and expensive hearing to determine whether he owns other assets in circumstances where, for case management reasons, three allegations only of contempt have been ordered to be tried and those allegations were under consideration by the Court of Appeal.

69. If the court did accede to the Bank's application for judgment on the basis that Mr **Ablyazov** had not disclosed the assets which were the subject of the contempt hearing, the position would be that following the striking out of Mr **Ablyazov**'s defence and the entering of judgment against him, preparation for the three month trial of the action against him, commencing in November 2012, would stop.

70. If, subsequently, the Court of Appeal concluded that I was mistaken and set aside my contempt judgment and the orders which the Bank is seeking in this application there would be a risk that the trial of the action against Mr **Ablyazov** in November 2012 could not proceed because the parties would not be able to be ready for it.

71. Whilst the Bank and the defendants other than Mr **Ablyazov** would continue to prepare for that trial, it is most unlikely that it would go ahead in November 2012 without Mr **Ablyazov**.

72. Thus, making the orders sought by the Bank gives rise to the risk that a three-month trial due to commence in November 2012 might have to be vacated and directions given for a trial at a much later date. That would be most unsatisfactory for all parties and for the court.

73. I consider that the appropriate order to make having regard to that risk is as follows. The court should make the orders sought by the Bank but the unless order should operate in this way. A date should be fixed for the service of a further affidavit of assets by Mr **Ablyazov**. If he fails to give full disclosure of assets by that date, his defence shall be struck out and the Bank may enter judgment against him.

74. But if he has exercised his right of appeal against my contempt judgment, then his defence shall not be struck out and the Bank may not enter judgment against him until seven days after the determination of his appeal. Such an order will enable preparation for the trial to continue and, in the event that the Court of Appeal sets aside my judgment on the contempt application and the orders being sought on this application, the three month trial date in November 2012 will not be at risk by reason of preparation for the trial against Mr **Ablyazov** having stopped.

75. If the court dismisses the appeal then if the Bank considers that the affidavit filed by Mr **Ablyazov** did not give a full disclosure of his assets, it may apply for judgment on the basis that the defence has been struck out seven days after the determination of the appeal.

76. So far as the surrender order is concerned, an unless order will be an incentive to comply with that order. Since compliance will enable the tipstaff to execute the warrant of arrest, it is appropriate that it be imposed. If the warrant is not executed, the proceedings will, in that respect, be unsatisfactory because the committal is designed to persuade Mr **Ablyazov** to comply with the freezing order and so ensure a fair trial in the full sense of that phrase.

77. Mr Matthews submitted that the making of an unless order in respect of the surrender order was contrary to the majority opinion in the House of Lords in Polanski. However, the House of Lords was not concerned in that case with the question whether an unless order should be made as a means of persuading a defendant to comply with an order designed to ensure the overall fairness of the proceedings. I do not, therefore, consider that the making of an unless order in the present case is contrary to the majority opinion in Polanski.

78. However, since the unless order in respect of the asset disclosure order should not, for the reasons I have given, be effective until seven days after the determination of any appeal, I consider that the same should apply to the unless order attached to the surrender order.

79. A question has arisen as to whether the unless order should apply to all eight of the actions commenced in this court or to a lesser number. The freezing order has been made in the first action, Folio 1099, the Drey action. However, in the particular circumstances of this case separate freezing orders have not been sought in each case. Rather, the figures in the freezing order have been increased to account for the claims made in other actions. That has not been done in respect of all of the actions, I am told, because the order made in the Drey action extends to all of Mr **Ablyazov**'s assets abroad and will continue to do so, so long as Mr **Ablyazov** has not brought £450 million within the jurisdiction.

80. There has been no suggestion that he is likely to do that and, accordingly, the Bank has been content with the freezing order made in the Drey action. In those somewhat unusual circumstances it does seem appropriate that the unless order should apply to all of the actions brought in this court.

81. Finally, I should deal with the question of the return of the £45 million paid into court by the Bank. If Mr **Ablyazov**'s defences are struck out, it is unlikely that the Bank's undertaking in damages will be called upon. I will, therefore, order that if the defences are struck out and judgment entered for the Bank, then the sum paid into court by the Bank shall be paid out to the Bank unless Mr **Ablyazov** files a statement evidencing the facts and matters which he says might nevertheless cause the undertaking to be called upon. If he does file such a statement, the sufficiency of those matters will have to be considered by the court in the absence of agreement between the parties. Any such statement should be served by a date to be fixed after discussion with the parties.