Judgments

JSC BTA Bank v Ablyazov

Practice – Pre-trial or post-judgment relief – Freezing order – Freezing order being made against defendant – Defendant pledging or mortgaging assets – Claimant bank seeking declaration of breach of freezing order – Claimant seeking order defendant reverse pledges – Claimant seeking further disclosure – Claimant alleging assets not disclosed in breach of freezing order – Defendant seeking retrospective permission for pledges – Whether declarations of breach of freezing order should be made – Whether reversal of pledges should be ordered – Whether retrospective permission for pledges should be granted – Whether further disclosure should be ordered – Whether declarations and orders should be made with respect to defendant's undisclosed assets

[2012] EWHC 2543 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

26, 27, 30 JULY, 21 SEPTEMBER 2012

21 SEPTEMBER 2012

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

S Smith QC and T Akkouh for the Claimant

D Matthews QC and G Hayman for the Defendant

Hogan Lovells International LLP; Addleshaw Goddard LLP

TEARE J:

[1] The court has heard three more applications in this matter. Two of them have been brought by the Claimant ("the Bank") and one has been brought by the First Defendant ("Mr **Ablyazov**"). It is unnecessary to set out the nature of the claims which have been brought by the Bank against Mr **Ablyazov** or the nature of his defence. I have summarised them before; see *JSC BTA Bank v **Ablyazov*** [2012] EWHC 237 (Comm) at paras 3 and 4.

[2] In the first application the Bank seeks (i) a declaration that Mr **Ablyazov** has acted in breach of the Freezing Order which this court made some three years ago in August 2009 and (ii) an order that Mr **Ablyazov** exercise his best endeavours to reverse certain dealings with his disclosed assets. In the second application the Bank seeks (i) a declaration that Mr **Ablyazov** owns certain assets which he has not disclosed and has acted in breach of the Freezing Order and (ii) an order that Mr **Ablyazov** exercise his best endeavours to reverse certain dealings with those undisclosed assets. The dealings consist of pledges of certain property by companies which he owns to the AMT Bank ("AMT") and, in one case, to the Central Bank of Russia ("CBR"). Where pledges appear to have been intended but it is unclear that pledges have in fact been made, orders for disclosure of what has happened are sought.

[3] Mr **Ablyazov** used to be the Chairman of, and a major shareholder in, AMT. But AMT is now in liquidation and Mr **Ablyazov** no longer has control over that bank. There is no suggestion that Mr **Ablyazov** has any interest in or control over CBR. Thus, although the Bank's keen interest in policing the Freezing Order is understandable, a striking feature of the Bank's applications is that it is not apparent that Mr **Ablyazov** can do anything to cause AMT or CBR to reverse the pledges of property which he has caused to be made in their favour. Another feature of the Bank's applications is that the orders which are sought are calculated to affect the rights of third parties, namely the liquidator of AMT (who, it is to be presumed, represents the interests of creditors of AMT) and CBR. The Bank's applications are designed to bring about an advantage to the Bank and a disadvantage to those third parties.

[4] In the third application Mr **Ablyazov** requests the court to grant permission, retrospectively, for the pledges made by his companies on the grounds that they were made for purposes which did not conflict with the purposes of the Freezing Order. This is an even more striking application. Mr **Ablyazov** has acted in contempt of this court and has not purged his contempt. His evidence on oath to this court about his assets has been found to have been untrue. He has been sentenced to 22 months imprisonment for his contempt of court but has gone into hiding. He refuses to tell the court where he is. His counsel has stressed that there is no evidence that he has fled abroad. But, as observed by Moore-Bick LJ, when hearing an application connected with Mr **Ablyazov**'s appeal against the finding of contempt, "there are strong grounds for believing that he has fled the jurisdiction and is living abroad"; see *JSC BTA Bank v **Ablyazov*** [2012] EWCA Civ 639, [2012] NLJR 751. Notwithstanding all of this Mr **Ablyazov** now applies for orders in his favour from an unknown and undisclosed location, which may well be abroad. Counsel for the Bank has submitted that the court should not hear Mr **Ablyazov**'s application. However, as his counsel has observed, Mr **Ablyazov**'s application raises very much the same issues as his defence to the Bank's applications raises.

[5] It appears to be common ground between the Bank and Mr **Ablyazov** that he has, through his companies, pledged or mortgaged certain assets to AMT and, in one case, to CBR. That is the premise of the Bank's applications and is also the premise of Mr **Ablyazov**'s application. There can also be no dispute, following the decision of the Court of Appeal in *JSC BTA Bank v **Ablyazov*** [2010] EWCA Civ 1141, [2011] Bus LR D119 (on the Bank's appeal from my ruling on Mr **Ablyazov**'s application for clarification as to whether certain proposed deals were in breach of the Freezing Order) that those pledges were made in breach of the Freezing Order. The Court of Appeal held that Mr **Ablyazov** was unable to rely upon the liberty in the Freezing Order to deal with his assets in the ordinary course of business because he had no relevant business. He was merely managing his investments. If Mr **Ablyazov** wished to deal with his assets he had to obtain the

permission of the court. Since he failed to do so it follows that he has acted in breach of the Freezing Order. However, the Court of Appeal observed that if the reasons for the pledges did not conflict with the purposes of the Freezing Order his breaches would be "technical" only; see paras 73 – 80 of the judgment of the Court of Appeal.

[6] The purposes of a Freezing Order are well known and do not require elaboration. For present purposes they are sufficiently described by the following observation in para 50 of the same judgment of the Court of Appeal:

> "The purpose of a freezing order is not to give a Claimant security for a possible judgment over the Defendant's assets but the more limited one of preventing a judgment from going unsatisfied due to the dissipation by the Defendant of his assets. The requirement that the disposal should not be one designed to avoid the satisfaction of a judgment sets the boundaries of protection."

[7] Mr **Ablyazov** has told the court in his witness statement that the reasons for the pledges he has made did not conflict with the purposes of the Freezing Order and were not designed to avoid the satisfaction of a judgment. For example, the pledge made in favour of CBR was security for loans made by CBR to AMT. They were not made to make the assets in question "judgment proof", that is, to ensure that the Bank could not, if and when it obtains judgment against Mr **Ablyazov**, enforce the judgment on those assets. The Bank's response to this evidence is that it does not accept that the evidence is true. However, it does not advance any evidence to the contrary. Rather, it points out that there are deficiencies in the evidence and submits that had an application been made in advance for permission to make the pledges the court would have wanted much fuller evidence than has been given, in the absence of which the court would have refused permission. For that and other reasons the court should refuse retrospective permission.

[8] The requirement that the Applicant for permission to deal with assets must adduce sufficient evidence to establish his case for permission is reflected in the following observation by the Court of Appeal in para 79 of its judgment:

> ". . . But where the Defendant chooses to seek guidance or clarification from the court as to whether certain transactions have contravened or will contravene the terms of the injunction, it seems to us that it is incumbent on him to provide the court with the evidence upon which it can properly answer the question posed by the application. Declaratory relief is discretionary and if the Applicant is unwilling to do this the judge should simply decline to make the order and leave it to the Claimant to decide in due course whether it wishes to pursue committal proceedings of its own . . . the court is not obliged to adjudicate upon the Defendant's application compliance or otherwise with its orders on the basis only of whatever material the Defendant chooses to put before it."

[9] It was also submitted on behalf of the Bank that the court has a wide discretion when deciding whether or not to permit a Defendant, prospectively, to deal with an asset and, *a fortiori*, when deciding whether to permit a Defendant to deal with an asset retrospectively. There was a conflict between the parties in this regard. On behalf of Mr **Ablyazov** it was submitted that the court should examine whether, on the evidence before the court, the objective purpose of the dealing in question conflicted with the purpose of the Freezing Order. If it did not then permission should be given. The Bank said that whilst that was one factor to take into account the court's discretion was much wider. It should seek to do that which was just and convenient having regard to all the circumstances of the case, especially where the application was for retrospective permission.

[10] The submission made on behalf of Mr **Ablyazov** was, it was said, supported by the approach of the Court of Appeal in *Normid Housing v Ralphs* [1989] 1 Lloyd's Rep 274 where the Plaintiff sought a freezing order restraining a firm of architects from compromising an insurance claim for a sum which was said to be less than its true value. The Court of Appeal held that the bona fide settlement of the claim was not the type of transaction which Freezing Orders were designed to prevent; see pp 275-6 per Lloyd LJ. The submission also gained some support from passages in the judgment of the Court of Appeal on Mr **Ablyazov**'s clarification application; see in particular paras 63 and 80:

> ". . . If what Mr A says about the transaction is correct, it would follow that he could have obtained permission to complete the transaction had he applied to the court to do so . . . .
>
> . . . If Mr A is right about the nature and purpose of the transactions then the breach of the Freezing Order is likely to be a technical one in the sense that permission for the transactions would have been granted . . . ."

[11] However, in making those comments the Court of Appeal was not specifically addressing the extent of the court's discretion when asked, prospectively or retrospectively, to approve a transaction. It is therefore unsafe to read too much into these statements. In any event Counsel for the Bank emphasised the court's reference in paras 74 and 75 to the need for the court to "scrutinise" the transaction in question and determine whether it is "objectionable" which, he suggested, indicated a broad discretion.

[12] The Court of Appeal cast no doubt on the correctness of the decision in *Normid Housing v Ralphs*. Indeed, the Court of Appeal observed at para 58 that the proposed settlement of the claim in that case was on any view unobjectionable and therefore not susceptible to the grant of a freezing order.

[13] The Court of Appeal also referred with apparent approval to *Atlas Maritime Co v Avalon Maritime (The Coral Rose)* [1991] 4 All ER 769, [1991] 1 Lloyd's Rep 563. In that case a Defendant, against whom a Freezing Order had been made, sought permission to transfer the frozen funds to its parent company as a business debt. The Court of Appeal held that it would not grant such permission because the sum owed to the parent company was not a debt incurred in the course of ordinary routine trading but represented funds advanced to the Defendant as trading capital and that the Defendant was seeking to take action designed to ensure that subsequent orders of the court were rendered less effective than would otherwise be the case or desired to use assets frozen by the injunction merely to evade its underlying purpose.

[14] Counsel for the Bank relied upon the following statement of principle by Neill LJ at p 776:

> ". . . But it remains important to ensure that the right balance is preserved between the rights of the parties. The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading. On the other hand, the court must have regard to the interests of the Plaintiff and consider whether the variation of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied. The court must look at all the circumstances of the case in order to try to do justice between the parties . . . .
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> . . . But when it comes to considering the exercise of a discretion and the scope of injunctive relief it is then legitimate to look at all the circumstances and to examine the nature of the debt and the identity of the creditor . . . ."

[15] Counsel for the Bank submitted that those statements indicated the broad nature of the court's discretion. He also relied upon the decision of this court in *Cie Noga D'Importation v Australian and New Zealand Banking Group* [2006] EWHC 602 (Comm). In that case a Defendant sought to vary a Freezing Order to

permit him to put up a bail bond for the brother of his business partner who had been charged with money laundering. It was submitted that he should be permitted to do so because a Defendant should only be restrained from making a payment if it "would constitute an artificial transaction carried out in response to the litigation whose effect may be to deprive the Claimant of the fruits of any judgment". Christopher Clarke J summarised the relevant principles as follows:

> "(i) The essential test is whether it is in the interests of justice to make the variation sought;
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> (ii) . . . it is for the Applicant to satisfy the court that it is appropriate to make the variation sought and to adduce any evidence that is necessary to persuade the court that that is so;
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> (iii) . . . the court is concerned to examine whether to do so would be consistent with the policy that underpins the jurisdiction, namely that a Defendant should be restrained from evading justice by disposing of assets otherwise than in the ordinary course of business with the result that any judgment goes unsatisfied . . . .
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> (iv) The correct test is:
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> 'to consider objectively the overall justice of allowing the payment to be made including the likely consequence of permitting it on the prospects of a future judgment being left unsatisfied, and bearing in mind that the assets belong to the Defendant and that the injunction is not intended to provide the Claimant with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgment': *Gee* paragraph 20.054;
>
> (v) . . .
>
> (vi) Because the court has already been satisfied of a risk of dissipation judges are entitled, on an application to vary, to have a healthy scepticism about the assertions made by the Applicant particularly where the Applicant, or those to whom his evidence or contentions relate, have been less than frank in dealing with the court or the Claimant."

[16] I recognise, as was suggested by counsel for Mr **Ablyazov**, that the facts of both these cases were somewhat special such that they can be distinguished from the present case where there are or are said to be sound business reasons for making the pledges in question. Nevertheless the approach of the Court of Appeal in the *Coral Rose* is binding upon this court. Moreover, the *Coral Rose* was referred to by the Court of Appeal in its judgment on the clarification application in this litigation in a manner which indicated approval of it. The approach in the *Coral Rose* requires the court not simply to ask whether the purpose of the transaction conflicts with the purpose of a Freezing Order, though that is obviously a most material consideration, but to look at all the circumstances of the case in order to try to do justice between the parties. Although Christopher Clarke J was not referred to the *Coral Rose* his approach in *Cie Noga D'Importation v Australian and New Zealand Banking Group* is, it seems to me, wholly consistent with the approach of the Court of Appeal in the *Coral Rose.*

[17] Counsel for Mr **Ablyazov** observed that *Normid Housing v Ralphs* was not cited in either of the cases relied upon by the Bank. However, *Normid Housing v Ralphs* was not a case where a freezing order had been granted and the Defendant had applied for permission to deal with his assets. By contrast, the two cases relied upon by the Bank were examples of such a case.

[18] I therefore accept the submission made on behalf of the Bank that the court's discretion is a broad one. The court does not simply ask whether the purpose of the transaction conflicts with the purpose of a Freez-

ing Order, though that is obviously a most material consideration, but looks at all the circumstances of the case in order to try to do justice between the parties.

THE PLEDGES

[19] With that introduction it is convenient to summarise the evidence in this case and, in particular, the evidence which Mr **Ablyazov** has given. In the light of the court's ruling on the Bank's contempt application and the reasons for it, in particular that Mr **Ablyazov**'s evidence on oath was not accepted, the court must exercise caution before accepting Mr **Ablyazov**'s evidence. His counsel criticized this approach but it seems to me that it is unrealistic not to expect the court to exercise caution in that regard when it is dealing with questions regarding Mr **Ablyazov**'s assets, the very subject on which Mr **Ablyazov**'s evidence on oath has been found wanting. Such an approach is, it seems to me, consistent with Christopher Clarke J's statement in *Cie Noga D'Importation v Australian and New Zealand Banking Group* that the court should have a “healthy scepticism” about the Applicant's evidence when he has been less than frank in dealing with the court.

[20] The pledges concern a number of assets. They have been referred to as the 1812 Business Centre (a substantial office building in the process of being built in Moscow), the Oceanarium (a large construction project in Moscow consisting of an oceanarium, hotel, shops, offices and rental accommodation), the Kaluga land (a large area of land outside Moscow in three plots where a gated executive community is to be built), Paveletskaya Square (an underground shopping centre under construction in Moscow) and the Cosmos Hotel (which I assume to be an hotel under construction in Moscow). Mr **Ablyazov** admits ownership of them. I shall deal separately with the pledge of undisclosed assets.

DECEMBER 2008 UNTIL MAY/JUNE 2010

[21] It is convenient to deal first with the period from December 2008 (long before the Freezing Order was granted in August 2009) until May/June 2010 when, on Mr **Ablyazov**'s evidence, there was a restructuring of loans made by CBR to AMT.

[22] On 4 December 2008 a Loan Agreement was entered into between AMT (then known as BTA Bank Moscow) with Finance Center Interbank Currency Exchange. A loan was made by AMT to finance the construction of the 1812 Business Centre. Clause 6 provided for security in the form of a Share Pledge Agreement. On 6 February 2009 DIK-Nedvizhimost pledged the shares in Financial Center-MVB (the company holding the 1812 Business Center) to AMT.

[23] On 5 December 2008 a Loan Agreement was made between AMT and Marine Gardens (the company holding the Oceanarium) to provide working capital to Marine Gardens. Clause 6 expressly stated that there was no security.

[24] In August 2009 the Freezing Order was made. In October 2009 Mr **Ablyazov** was cross-examined as to his assets. In December 2009 the Freezing Order was varied by removing the maximum sum limit; see *JSC BTA v **Ablyazov*** [2009] EWHC 3267 (Comm).

[25] On 24 February 2010 Marine Gardens pledged certain repayment rights to AMT as security for performance of its obligations under the Loan Agreement dated 5 December 2008.

[26] On 6 April 2010 Marine Gardens granted a mortgage over real estate in favour of AMT as further security for performance of its obligation under the Loan Agreement dated 5 December 2008.

[27] Both the pledge and mortgage were required, according to Mr **Ablyazov**, to provide finance to enable construction of the Oceanarium to continue. He said that when the Freezing Order became known in the market banks would not provide finance. Mr **Ablyazov** considered it his duty to maintain the construction programme so as to preserve the value of the project. The only bank willing to provide finance was AMT.

[28] On 16 April 2010 Mr **Ablyazov** served his Third Witness Statement in opposition to the Bank's application for a Receivership Order and in support of his application seeking clarification as to whether certain dealings were in breach of the Freezing Order. At paras 318 – 325 he referred to the Oceanarium. He made no mention of the pledge and mortgage made by Marine Gardens in February and April 2010. He did not seek clarification as to whether they were in breach of the Freezing Order or retrospective permission to make them if they were in breach.

MAY/JUNE 2010 UNTIL MAY 2011

[29] Mr **Ablyazov** has given evidence that in May/June 2010 there were negotiations between CBR and AMT. He said that AMT had the benefit of a loan of about $270m. from CBR but that, in the light of the Freezing Order, CBR threatened to call in the loan and demanded security in respect of it. Restructuring negotiations therefore took place. CBR not only required security for its loan to AMT but also required AMT to strengthen the security it had from Mr **Ablyazov**'s companies in respect of loans made by AMT to those companies. If AMT did not obtain that further security the loan from CBR would have been recalled. AMT therefore asked Mr **Ablyazov**, as its major shareholder, to support it by providing assets to be pledged to CBR. CBR required (i) a pledge of the Kaluga Land to CBR and (ii) a pledge to AMT of Mr **Ablyazov**'s shares in the Cosmos Hotel and the assets of Paveletskaya. These arrangements were agreed in May/June 2010 but, as a result of delay by CBR in approving the restructuring, the formal agreement was not signed until 28 September 2010. When he provided his evidence Mr **Ablyazov** did not have and was unable to obtain a copy of the agreement but very shortly before the hearing on 26 July 2012 a copy was provided by Mr **Ablyazov**.

[30] The agreement dated 28 September 2010 is entitled “Agreement on the Restructuring of Loans between [CBR] and [AMT]”. It is signed on behalf of each party to it. No suggestion was made by Mr Smith on behalf of the Bank that this agreement was not genuine. Clause 1 noted that AMT owed substantial sums to CBR pursuant to agreements variously dated between 2009 and 2010. Clause 2 stated that the parties had agreed to restructure those loans. Interest and repayment obligations were set out. Clause 4 provided:

> “[AMT] shall, within 60 calendar days from the date of entry into force of this Agreement, provide to the [CBR] the security to ensure the fulfilment of obligations under the restructured loan in the amount of the collateral value that shall be not less than the principal amount of the restructured loan by pledging to [CBR] the land plots in the Moscow region.”

[31] Clause 5 provided that in the event that AMT provided security in the form of units of a fund whose assets comprised the land plots to a certain value CBR might lower the interest rate. Clause 6 provided “The land plots and other security in pledge with [CBR] may be subsequently pledged by the pledgor as agreed with [CBR] in favour of [AMT] against the loans issued previously by [AMT] . . . .”

[32] Clause 7 entitled CBR to demand early repayment of the debt if the AMT failed to provide the security required by cl 4.

[33] This agreement therefore provides corroboration of some parts of Mr **Ablyazov**'s evidence. There clearly was a restructuring of the loans from CBR to AMT in 2010 pursuant to which AMT was obliged to pledge certain land plots in Moscow to CBR. However, the agreement does not appear to contain any obliga-

tion upon AMT to improve the security it had from Mr **Ablyazov**'s companies in relation to loans made by AMT to those companies.

[34] But there was also in evidence a letter dated 31 May 2011 from CBR to AMT entitled “Activity of AMT Bank”. It referred to “the obligations assumed in middle of last year” pursuant to which AMT undertook to take “all necessary measures to strengthen the security component of the loan portfolio as soon as possible”. The letter then made express reference to a pledge of shares in the Hotel Complex Cosmos and to the pledge of the Paveletskaya assets. That letter is consistent with and therefore corroborates Mr **Ablyazov**'s evidence with regard to AMT's obligation to strengthen the security it held from Mr **Ablyazov**'s companies. It has not been suggested that it is not a genuine letter from CBR.

[35] On 16 July 2010 I gave judgment not only on the Bank's application to appoint a receiver over Mr **Ablyazov**'s assets but also on Mr **Ablyazov**'s clarification application; see *JSC BTA Bank v **Ablyazov*** [2010] EWHC 1779 (Comm), [2010] NLJR 1718. With regard to the latter I held, at para 62, that the activity of holding and managing assets may be regarded as a business so long as any dealing in assets was not aimed at ensuring that any judgment will become unenforceable.

[36] On 29 July 2010 Pakhra Fields, which company held the Kaluga land plots, resolved to transfer the Kaluga land into a fund managed by Flemings.

[37] On 30 July 2010 Paveletskaya, which company held the Paveletskaya project, resolved to approve a loan agreement between it and AMT and the pledge of real estate as security for the company's obligations to AMT. Mr **Ablyazov** says that this funding was arranged because third party banks were unwilling to lend to Paveletskaya because of the Freezing Order.

[38] On 16 August 2010 Mr **Ablyazov** served an affidavit pursuant to an order that he confirm whether or not his disclosure of his assets remained accurate. He made no mention of any agreement with CBR to pledge assets of AMT or of any intention on his part that his companies would pledge assets to AMT. But it is likely that my judgment on his clarification application encouraged him to believe that such pledges were permissible pursuant to the “ordinary course of business” liberty.

[39] On 17 August 2010 the fund managed by Flemings was recorded as the owner of one plot of the Kaluga land. However, the deed of acceptance by Flemings was dated 10 September 2010.

[40] On 21 September 2010 AMT entered into a loan agreement with Paveletskaya to provide a short term loan. This was required, according to Mr **Ablyazov**, to demonstrate liquidity to the Moscow City Government which would not allow sites to lie dormant and not to be worked on. Clause 6 of the agreement required security in the form of a pledge of assets and a mortgage.

[41] On 19 October 2010 the Court of Appeal gave judgment on Mr **Ablyazov**'s appeal against the Receivership Order. That appeal was dismissed. The Court of Appeal also gave judgment on the Bank's appeal from my decision on Mr **Ablyazov**'s clarification application. That appeal was allowed. The latter decision probably made clear to Mr **Ablyazov** that he could no longer rely upon “the ordinary course of business” liberty and must instead apply to the court for permission to deal with his assets. In any event, once the Receivership Order came into effect (which it did on 9 November 2010 following the refusal of the Supreme Court to grant permission to appeal) Mr **Ablyazov** had to cooperate with the Receivers and seek their permission to deal with his assets.

[42] On 28 October 2010 AMT and Financial Center-MVB (who, it will be recalled, held the 1812 Business Centre) entered into a loan agreement and pledge of the shares in Financial Center-MVB as security for the loan. The pledge was described as a “subsequent pledge” no doubt because the shares had already been

pledged as security for the loan made in December 2008. The purpose of the loan was to fund a settlement of claims by a contractor, Codest.

[43] On 10 November 2010 the loan agreement contemplated by the resolution of Paveletskaya dated 31 July 2010 was signed. Its stated purpose was to provide working capital. The related mortgage was also dated 10 November 2010. It stated that it was to secure not only the obligations incurred under the agreement dated 10 November 2010 but also those incurred under an agreement dated 21 September 2010.

[44] Also on 10 November 2010 Simplecity Holdings agreed to pledge its shares in Paveletskaya to AMT. It is Mr **Ablyazov**'s case that this pledge was never executed. There is in evidence a statement dated 29 May 2012 by Mr Smirnov, the general director of Paveletskaya. He states that from 14 August 2009 100% of the shares in Paveletskaya have not been pledged.

[45] On 7 December 2010 Financial Center-Interbank Currency Exchange granted a pledge or mortgage over the 1812 Business Centre in favour of AMT as further security in respect of the loan agreement dated 4 December 2008 as subsequently amended. This was also related to the need to fund settlement of a further claim by Codest.

[46] In January and February 2011 various powers of attorney were circulated by Syrym Shalabayev for the purpose of procuring the grant of security over the shares in Cosmos in favour of AMT. No pledges were executed because Mr **Ablyazov** applied for permission from the Receivers and they refused permission.

[47] On 3 February 2011 a pledge was made of units in the fund managed by Flemings (which fund now contained one of the Kaluga land plots) in favour of CBR pursuant to the restructuring agreement dated 28 September 2010 between CBR and AMT. The making of this pledge had been delayed, according to Mr **Ablyazov**, by reason of arrest of the land by the Ministry of Internal Affairs.

[48] On 11 and 18 February 2011 the 1812 Business Centre pledge and Paveletskaya property pledge were registered.

[49] In May 2011 three pledge agreements of certain repayment rights were made in favour AMT for the purpose of demonstrating liquidity in connection with Paveletskaya. However, the underlying loans were repaid in July 2011 and so, according to Mr **Ablyazov**, the pledge agreements were cancelled.

SUBSEQUENT EVENTS

[50] In July 2011 AMT's banking license was revoked. A temporary administrator was appointed who reported in October 2011 that AMT was not insolvent. However, in the same month the court appointed a liquidator due to the revocation of its banking license and on 20 June 2012 AMT was declared insolvent.

SUMMARY OF PLEDGES

[51] After the maximum sum limit was removed from the Freezing Order on 11 December 2009 the following pledges or mortgages were made in breach of the Freezing Order:

> "(i) Oceanarium: A pledge of repayment rights and a mortgage over real property were made in favour of AMT on 24 February and 6 April 2010. These were security for repayment of loans required, according to Mr **Ablyazov**, to enable the construction of the Oceanarium to continue.

(ii) 1812 Business Centre: A pledge of shares and a mortgage over real property were made in favour of AMT on 28 October 2010 and 7 December 2010. These were security for repayment of loans required, according to Mr **Ablyazov**, to enable the claims of Codest, a contractor, to be satisfied. The pledge and mortgage were made after the Court of Appeal's ruling on Mr **Ablyazov**'s clarification application.

(iii) Paveletskaya: A mortgage over real property and a pledge over repayment rights were made on 10 November 2010 and in May 2011 in favour of AMT. These were required, according to Mr **Ablyazov**, by CBR in May/June 2010 as a condition of not calling in its loan to AMT. That was before I gave judgment on the clarification application but the mortgage and pledge were in fact made after the Court of Appeal's ruling on Mr **Ablyazov**'s clarification application. The security was also required for the short term loan required in September 2010 to demonstrate liquidity. Three further pledges of repayment rights were made in May 2011 to demonstrate liquidity.

(iv) Kaluga Highway: One of the land plots was transferred into the Fleming fund and then the units pledged to CBR on 3 February 2011. This was required by CBR as part of the restructuring of CBR's loan to AMT in the agreement of September 2010. However, as a result of the arrest of land, the pledge was not made until after the Court of Appeal's ruling on Mr **Ablyazov**'s clarification application."

THE BANK'S APPLICATIONS

[52] Having reviewed the evidence it is necessary to consider the Bank's application (i) for a declaration that Mr **Ablyazov**, by authorising the pledges and mortgages without seeking permission to do so from the court, has breached the Freezing Order and (ii) for an order that he exercise his best endeavours to reverse those pledges and mortgages.

[53] There is no doubt, following the decision of the Court of Appeal on the clarification application, that the pledges in favour of AMT and CBR were made in breach of the Freezing Order. Counsel for Mr **Ablyazov** was unable to argue against this conclusion. Declarations should only be made where they serve a useful purpose. In the present case there are at least two useful purposes in making declarations of breach. First, Mr **Ablyazov** does not himself appear to accept that he has acted in breach of the Freezing Order. It is therefore appropriate to make the declarations in order to make it clear to him that his conduct has been in breach of the Freezing Order. Second, the Bank is entitled to have a clear statement of the position so that it may, if it wishes, inform AMT, CBR and the Russian Court which is called upon to enforce the pledges that Mr **Ablyazov** created the pledges in breach of an order of the English Court. I shall therefore make the requested declarations of breach.

[54] So far as the orders for reversal of the pledges are concerned the position is more difficult.

[55] The Bank has no evidence that the pledges were made with the objective of protecting Mr **Ablyazov**'s assets from enforcement proceedings in the event that the Bank obtained judgment against Mr **Ablyazov**. Indeed, the only evidence before the court is that the pledges were for purposes which do not conflict with the purpose of a Freezing Order.

[56] Thus the Bank is unable to say that Mr **Ablyazov** must be ordered to reverse the pledges and security because they were made for purposes which conflict with the purposes of the Freezing Order. The Bank lacks the evidence to make that submission. What the Bank can and does say is that Mr **Ablyazov** has acted in breach of the Freezing Order, that he did so (save with regard to the Oceanarium) after he had had the

benefit of the Court of Appeal's judgment on his clarification application and that he has not apologised for breaching the Freezing Order. In circumstances where, as stated by Gross LJ on the occasion of Mr **Ablyazov**'s appeal against my direction for the trial of the Bank's contempt application (*JSC BTA Bank v **Ablyazov** (No 7)* [2011] EWCA Civ 1386, [2012] 2 All ER 575, [2012] 1 WLR 1988 at para 48), it is "of paramount importance here for the court to do and to be seen doing all it could to ensure the efficacy of the freezing order", it is appropriate (it is argued) that the court should order him to exercise his best endeavours to reverse the pledges and mortgages his companies have made.

[57] That argument has considerable force.

[58] However, the court must also take into account two countervailing arguments.

[59] First, the Bank is not able to identify any step which Mr **Ablyazov** could take to seek to undo the pledges. It is suggested that he might intervene "to the extent possible" in enforcement proceedings brought by AMT or CBR to enforce the pledges. But no indication is given of the extent to which such intervention is possible. I am reluctant to order Mr **Ablyazov** to use his best endeavours to undo the securities when no steps likely to be effective in that regard can be identified.

[60] Second, there is a clear indication in *Normid Housing v Ralphs* [1989] 1 Lloyd's Rep 274 at p 276 that the court, as is to be expected, must give consideration to third party interests. In the present case there are third party interests who might be affected by such action as Mr **Ablyazov** may take, namely, CBR and the liquidator of AMT who would, it is to be assumed, wish to enforce the pledges. Mr Smith's answer to this was that no third party interests are affected because any order the court might make would be *in personam* and not *in rem*. That is true but the objective of the Bank is that its own interests be advantaged by the reversal of the securities. If that happens it will be at the expense of the interests of third parties.

[61] I have not found the answer to the Bank's application either obvious or easy. In the end I have concluded that the interests of justice are best served by making an order that Mr **Ablyazov** use his best endeavours to intervene in any enforcement proceedings brought by CBR or the liquidator of AMT to ensure that the Russian court is informed by Mr **Ablyazov** that the pledges were created by Mr **Ablyazov** in breach of the Freezing Order issued by the English Court. Such an order will not be capable of causing injustice to Mr **Ablyazov** because it identifies the action he is expected to take. Moreover, in circumstances where the Bank has been advised by its Russian lawyers that, in the context of AMT's insolvency, court proceedings are necessary in order to enforce the pledges, the third party interests of AMT and CBR will only be prejudiced if the Russian court considers that the pledges should not be enforced in accordance with Russian law.

[62] I shall therefore make the above order (which is more limited than that sought by the Bank) in relation to the following pledges:

> "(i) In respect of Paveletskaya, item 1 on the Bank's Schedule 2 to the draft order.
>
> (ii) In respect of the Kaluga Land, items 1 and 2 on the Bank's Schedule 2 to the draft order.
>
> (iii) In respect of the Oceanarium, items 1 and 3 on the Bank's Schedule 2 to the draft order.
>
> (iv) In respect of the 1812 Business Centre, items 1 and 2 on the Bank's Schedule 2 to the draft order."

[63] Before considering the Bank's application for disclosure with regard to intended pledges which do not appear to have been made it is convenient to consider Mr **Ablyazov**'s application for retrospective permission to make pledges.

*MR **ABLYAZOV**'S APPLICATION*

[64] The schedule to Mr **Ablyazov**'s draft order lists 12 pledges in respect of which he seeks retrospective permission. This is more than the pledges listed in the Bank's application for reversal because it includes pledges which have been made and, according to Mr **Ablyazov**, subsequently discharged.

[65] I have reached the clear conclusion, after considering all the circumstances of this case, that it is not in the interests of justice to grant the requested retrospective permission.

[66] First, although evidence has been given by Mr **Ablyazov** (supported by some documents) that the pledges were made for purposes which do not conflict with the purpose of the Freezing Order, there are gaps in that evidence. For example, there is no contemporaneous documentary evidence supporting his evidence about the agreement allegedly reached in May/June 2010 between CBR and AMT. Furthermore, the restructuring agreement dated September 2010 between CBR and AMT does not contain any obligation upon AMT to obtain security in respect of loans made by AMT to Mr **Ablyazov**'s companies. Also, no accounting or other evidence has been provided by Mr **Ablyazov** to substantiate his fears for the Oceanarium and 1812 Business Centre in the event that no security were given to AMT. In those circumstances the court cannot properly or with confidence answer the questions posed by Mr **Ablyazov**'s application and the court should therefore follow the guidance given by the Court of Appeal when allowing the Bank's appeal in respect of Mr **Ablyazov**'s clarification application and dismiss Mr **Ablyazov**'s application.

[67] Second, Mr **Ablyazov** has not acknowledged that he has acted in breach of the court's order or apologised for doing so. He made the clarification application but when the Court of Appeal gave the requested clarification he appears to have ignored it. He made some of the pledges after he had been told by the Court of Appeal that he could not rely upon the “ordinary course of business” liberty. So far as I can see Mr **Ablyazov** simply went ahead with those pledges, notwithstanding the Court of Appeal's decision.

[68] Third, he has not purged his contempt of this court. I have decided to hear his application because it is the obverse of his defence to the Bank's application but his contempt is nevertheless one of the circumstances which the court must take into account when deciding whether or not to grant retrospective permission for dealing with his assets.

THE BANK'S DISCLOSURE APPLICATION

[69] This application is made in respect of pledges of which there is evidence of an intention to create but no evidence that they have in fact been created. The application is not pressed in respect of pledges which were created in May 2011 but which have been said to have been discharged. The jurisdictional basis of the application is that the orders are necessary to police the Freezing Order.

KALUGA LAND

[70] Disclosure is sought in respect of three plots of land and certain units in respect of which there are resolutions to create pledges but no evidence of any actual pledge (see (d), (g), (h) and (i) in Sch 1 to the Bank's draft order). The reasons why no further pledges were created is explained in paras 33 – 40 of Mr **Ablyazov**'s 19th witness statement. In short, he applied to the Receivers for permission and did not receive

it. I am not persuaded that an order for further disclosure will add to what has already been said by Mr **Ablyazov**.

PAVELETSKAYA

[71] A disclosure order is sought in respect of the intended pledge of shares in Paveletskaya held by Simplecity Holdings Ltd; see (a) in Sch 1 to the Bank's draft order.

[72] Mr **Ablyazov**'s evidence that there is no pledge of the shares is a statement by the director of the company. I consider that it is just and convenient to order Mr **Ablyazov** to produce a copy of the share register. There must be such a register even if it is not maintained by an independent registrar.

OCEANARIUM

[73] On 3 December 2008, by an amendment to a loan agreement, Marine Gardens promised to make a "pledge pursuant to the Equity Interest Pledge Agreement" no later than 3 February 2011. Mr **Ablyazov** has said that this pledge was not created and has exhibited a letter from the director of Marine Gardens to that effect. He has further said that AMT did not require this pledge because it had sufficient collateral. I consider that it is just and convenient to order Mr **Ablyazov** to produce a copy of the share register. There must be such a register even if it is not maintained by an independent registrar. Further, it is also just and convenient that he produce documentary evidence of AMT's determination that the pledge of shares was not required by it.

COSMOS HOTEL

[74] Mr **Ablyazov** has stated in his 19th witness statement that the intended pledge of share capital in Cosmos was not pledged because the Receivers did not permit to make the pledge. However, Mr **Ablyazov** told the Receivers that he had made the pledge; see the Receivers' Second Report at paras 152(d) and 224(c) and their Third Report at paras 90 – 95.

[75] I consider it just and convenient to order Mr **Ablyazov** to explain the disparity between his witness statement paras 114 – 117 and what he told the Receivers.

THE APPLICATION WITH REGARD TO UNDISCLOSED ASSETS

[76] The Bank's case is that Mr **Ablyazov** owns two companies, LLC Logopark Pyshma and LLC Logopark Kolpino, which hold real estate consisting of two logistics parks. Mr **Ablyazov** says that he does not own them. The Bank's case is also that pledges over the land plots held by Kolpino were granted in favour of AMT in February and March 2011. The Bank seeks an order that the pledge be reversed. The Bank says that there was an intention to create pledges in respect of Kolpino's land in favour of CBR and in respect of Pyshma's land in favour of AMT. Disclosure is sought in respect of those intended pledges.

OWNERSHIP

[77] The matters relied upon by the Bank to show that Mr **Ablyazov** owns Pyshma and Kolpino are set out in paras 49 – 56 of Mr Smith's Skeleton Argument. They include the following matters:

> "a. Pyshma and Kolpino are part of the Eurasia Logistics group of companies of which in October 2009 Mr **Ablyazov** accepted owning a 75% interest. He said he gave that interest to the

management. He has since told the Receivers that he had sold his interest to management. He has produced no documentary evidence of this transfer.

b. In February 2011 a Cypriot corporate services provider considered Mr Shalabayev to be the beneficial owner of Eurasia Logistics. That itself is an indication that Mr **Ablyazov** is the true owner; see paragraph 187 of my judgment on the contempt application; *JSC BTA Bank v* ***Ablyazov*** [2012] EWHC 237 (Comm).

c. In December 2010 Mr Shalabayev gave instructions for the execution of documents approving the grant of security over Kolpino's assets in support of AMT's indebtedness to CBR. That is an indication that Kolpino and AMT are in the common ownership of Mr **Ablyazov**.

d. Kolpino and Pyshma were added to the receivership and yet no challenge has been made to their inclusion in the receivership. That is an indication that they are not owned by a third party."

[78] Unless Mr **Ablyazov** is the owner of Pyshma and Kolpino the above matters would have to be mere coincidences. It is improbable that they are mere coincidences. Moreover, Mr **Ablyazov** has chosen to give no documentary evidence of his sale of Eurasia Logistics and has not explained why Kolpino's assets are being used as security for AMT's obligations to CBR. In the circumstances I am persuaded that it is more likely than not Mr **Ablyazov** is the owner of Kolpino and Pyshma. A declaration to that effect should be granted.

PLEDGES

[79] On 21 February 2011 Mr Shalabayev requested a Cypriot corporate service provider to send out ballot forms to Kolpino's shareholders seeking approval of a mortgage of Kolpino real estate in favour of AMT. That mortgage was registered on 2 March 2011. This was a breach of the Freezing Order. It is appropriate that the same order be made against Mr **Ablyazov** as is to be made in respect of the pledges of his disclosed assets.

[80] On 30 December 2010 Mr Shalabayev gave instructions for the execution of documents approving the grant of security over Kolpino's assets in support of AMT's indebtedness to CBR. On 25 January 2011 Mr Shalabayev requested a Cypriot corporate service provider to send out ballot forms to Pyshma's shareholders seeking approval of a guarantee by AMT in favour of MDM Bank in respect of Pyshma's liabilities. The guarantee contemplated a mortgage as security. It is appropriate that Mr **Ablyazov** state whether the pledges contemplated by these documents have in fact been executed and if so to give particulars of them.

CONCLUSIONS

[81] On the Bank's disclosed assets application:

"a. the declaration of breach of the Freezing Order should be made (see paragraph 53 above);

b. an order should be issued against Mr **Ablyazov** in the terms described in paragraphs 61 and 62 above;

c. orders for disclosure as described in paragraphs 72,73 and 75 above should be made."

[82] On the Bank's undisclosed assets application:

> “a. the declaration of ownership should be made (see paragraph 78 above);
>
> b. the declaration of breach should be made (see paragraph 79 above);
>
> c. an order should be issued against Mr **Ablyazov** in the terms described in paragraph 79 above;
>
> d. orders for disclosure as described in paragraph 80 above should be made.”

[83] Mr **Ablyazov**'s application must be dismissed.

[84] I shall ask counsel to prepare an order giving effect to my conclusions.

Judgment accordingly.