Judgments

JSC BTA Bank v Ablyazov and others

Practice – Pre-trial or Post-judgment relief – Bank bringing claim against various defendants, including applicant (A) for fraud – Trial of claim being imminent – Trial judge also being involved in previous interlocutory applications concerning case – A applying for order that trial judge recuse himself – Whether application to be granted

Natural justice – Judge – Bias – Apparent bias – Bank bringing claim against various defendants, including applicant (A) – Trial of claim being imminent – Trial judge also being involved in previous interlocutory applications concerning case – A applying for order that trial judge recuse himself on grounds of bias – Whether application to be granted

[2012] EWHC 3023 (Comm), 2009 Folio 1099, 2010 Folio 93, 2010 Folio 706, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

25, 26 OCTOBER, 1 NOVEMBER 2012

1 NOVEMBER 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, T Akkouh and E Gillett for the Claimant

D Matthews QC, G Hayman and J Sheehan for Mr Ablyazov

J Chapman QC for Mr Khazhaev

Hogan Lovells International LLP; Addleshaw Goddard LLP; Olswang LLP

TEARE J:

[1] This is an application by Mr **Ablyazov** for an order that I recuse myself from trying three actions which have been commenced against him by the Claimant Bank. The trial, which is expected to last some three months or more, is due to start on 6 November 2012 with the trial judge pre-reading in the previous week. Thus the application has been made at almost the last possible moment. Indeed, the Claimant's Skeleton Argument for the trial has already been served and I am writing this judgment on the day when, according to the trial timetable, I should be commencing my pre-reading. The application is opposed not only by the Bank but also by the other represented Defendants, Mr Zharimbetov, Mr Khazhaev and Usarel Investments Ltd ("Usarel").

[2] There was a pre-trial review at the beginning of October 2012 and, although Mr **Ablyazov** was represented for part of that hearing, no suggestion was then made that I would be asked to recuse myself.

[3] The application is put on two bases. First, it is said that it is inappropriate for me to hear the trial because I have heard and determined a committal application against Mr **Ablyazov**. To conduct the trial in those circumstances would give rise to a risk of justice not being seen to be done. Second, it is said that a fair-minded and informed observer would conclude that there was a real possibility that I was biased in relation to issues to be considered at the trial having regard to my previous involvement in this case and in particular (a) previous findings made by me, (b) issues which have been previously considered by me or on which I have expressed a view and (c) material which has previously been considered by me.

[4] In this litigation I have been one of two judges designated to deal with interlocutory matters. At a lengthy CMC in March 2011 I decided when the trial should take place and which of the many actions commenced by the Bank against Mr **Ablyazov** should be heard at that time. Shortly afterwards the trial was listed to be heard before me. That was in accordance with the Admiralty and Commercial Courts Guide which provides, at para D4.3, that the designated judge will be the trial judge; see the White Book vol 2 at p 319. However, such a system may give rise to a heightened risk of the judge having to recuse himself; see the White Book vol 1 at p 31.

[5] The litigation commenced in August 2009 and since then I have, according to the calculations of Mr **Ablyazov**'s solicitor, given 26 judgments. It is therefore undoubtedly the case that I have had a long and extensive involvement with this case.

[6] In particular, I continued the Freezing Order which had been made against Mr **Ablyazov**, [2009] EWHC 2840 (Comm), I appointed receivers over his assets [2010] EWHC 1779 (Comm), and I found him guilty of contempt of court [2012] EWHC 237 (Comm). In my judgment on the committal application I found that Mr **Ablyazov** had acted in contempt of court by breaching the Freezing Order. For that contempt I sentenced him to 22 months imprisonment. Mr **Ablyazov** gave evidence on oath on the committal application but I was unable to accept that evidence.

[7] Over the last three years I have heard some applications without notice to Mr **Ablyazov**. They were applications to extend the receivership order to further assets said to belong to Mr **Ablyazov**. In the course of hearing those applications I read extensive evidence from Mr Hardman of the Claimant's solicitors and took into account detailed skeleton arguments and oral arguments from counsel for the Bank. In the event they

did not lead to *inter partes* hearings though all the evidence and skeleton arguments were served on Mr **Ablyazov**.

[8] It is not said that I am actually biased against Mr **Ablyazov**. Rather, it is said that there would be an appearance of bias (the phrase used by both Lord Bingham and Sir Anthony Clarke MR, see *Home Secretary v AF* [2008] EWCA Civ 117 at para 53, [2008] 1 WLR 2528) were I to hear the trial because a fair-minded and informed observer would conclude that there was a real possibility that I was biased in relation to issues to be considered at the trial. Mr Matthews QC, on behalf of Mr **Ablyazov**, submitted that the requirement that there should be no appearance of bias is one aspect both of the common law requirement that there should be a fair trial and of Mr **Ablyazov**'s right under art 6 of the ECHR to a fair trial and, in particular, to a trial by an impartial tribunal. I accept that submission. There is no difference between the common law test of bias and the requirements of art 6 of the ECHR of an impartial tribunal; see *Lawal v Northern Spirit* [2003] UKHL 35, [2004] 1 All ER 187, [2003] IRLR 538 at para 14. Indeed, in my judgment, both strands of Mr Matthews' argument (as summarised in para 3 above) are aspects of the same requirement that there should be no appearance of bias. The principal form of bias relied upon under the first strand was that which may result from “pre-judgment”; see *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at pp 293-294 and 298. Whether there is such apparent bias depends upon the test set out in the second strand which is derived from *Porter v Magill* [2002] 2 AC 357, [1999] LGR 375, [2000] 2 WLR 1420.

PRELIMINARY POINTS

[9] Mr Smith QC, on behalf of the Bank, took three preliminary points.

[10] The first preliminary point was that unless the Applicant for recusal, Mr **Ablyazov**, subjectively believed that there was an appearance of bias (as to which there was no evidence) the claim for recusal must fail. This submission was derived from a passage in *Porter v Magill* [2002] 2 AC 357 at p 495 in the speech of Lord Hope at para 104 “The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated.”

[11] It was suggested by Mr Smith that the effect of that statement was that unless there was evidence of the complainer's fears the court would not investigate the allegation of bias.

[12] I was not persuaded that that was the effect of Lord Hope's statement. If there were a requirement that the Applicant for recusal must subjectively believe that there was apparent bias such that in the absence of such subjective belief the application must fail, one would have expected such requirement to have been clearly stated by the House of Lords but it was not. An Applicant, through ignorance or lack of appreciation, may not himself perceive that there is a real possibility that the judge may be biased. If, however, the position is that the fair-minded and informed observer would conclude that there was such a real possibility I cannot think that the Applicant would be denied the remedy of recusal merely because the Applicant himself had not perceived such risk. The passage in the judgment of Lord Hope on which reliance is placed probably means no more than that the subjective fears of the complainer may well persuade the court that the complaint is one that should be investigated. Lord Hope was not saying, in my judgment, that the subjective fears of the complainer were a necessary pre-requisite of a successful application to recuse. The need to investigate a complaint may be shown by matters other than the complainer's subjective fears though the absence of a subjective fear by the complainer may be a factor which the fair-minded observer would take into account in deciding whether there was in truth an appearance of bias; cf *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 p 488 at para 57, [2000] 1 All ER 65, [2000] IRLR 96.

[13] The second preliminary point was that counsel must not lend himself to alleging an appearance of bias unless he is conscientiously satisfied that there is material upon which he can properly do so. I do not doubt that this is so. Sir Thomas Bingham MR so stated in *Arab Monetary Fund v Hashim* (at p 10 of the unreported transcript dated 28 April 1993). However, the hearing of the application to recuse is not the occasion to

investigate whether counsel is so satisfied. On the hearing of the application the court is concerned with considering whether counsel's submission that there is an appearance of bias is correct, not with his beliefs. In any event I have no reason to think that Mr Matthews was not conscientiously satisfied that there was material upon which he could make the submission of apparent bias. His submissions, which were careful and detailed, suggest that he was so satisfied.

[14] The third preliminary point was that applications for recusal can in appropriate cases be dismissed on the grounds of delay. In argument this submission was refined by saying that where there was delay in making a recusal application the Applicant could be regarded as having waived his right to complain of an appearance of bias. This submission is supported by two authorities to which it is necessary to refer.

[15] In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at para 15 the Court of Appeal (which consisted of the Lord Chief Justice, Master of the Rolls and Vice-Chancellor) said that a party with an irresistible right to object to a judge hearing a case may waive his right to object. The waiver must be clear and unequivocal and made with full knowledge of all the facts relevant to the decision whether to waive or not. At para 26 the Court of Appeal said this, in the context of waiver:

> "If, appropriate disclosure having been made by the judge, a party raised no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

[16] Although that statement of principle was made in the context of a judge who discloses a direct personal interest in the outcome of the proceedings before him, there is no reason to suppose that any different principle applies in the context of a judge in respect of whom there might be a possibility of bias by reason of pre-judgment.

[17] In *Baker v Quantum Clothing Group* [2009] EWCA Civ 566 at para 36 Jacob LJ said:

> "Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable."

[18] In the light of those authorities I accept the submission that delay in making an application for recusal may be regarded as a waiver of the right to make such an application. The language of waiver is apt because it explains why the right to an impartial tribunal under art 6 of the ECHR may be lost.

[19] In *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163 Mummery LJ said that inconvenience, costs and delay do not count where the principle of judicial impartiality is properly invoked. However, he was there referring to the delay in trying a matter which might be caused by a judge recusing himself. He was not referring to the delay in seeking recusal which might evince a waiver of the right to an impartial tribunal. In *AWG Group Ltd v Morrison* there was no question of any delay in the making of the application. In that case the judge had informed the parties one week before a trial was to commence that a witness in the case was a long standing family acquaintance.

DELAY AND WAIVER IN THE PRESENT CASE

[20] The findings and observations made by me in previous proceedings in this litigation upon which reliance is placed in support of the recusal application date from October 2009 until September 2012. The hearings in question were an application by the Bank for an order that Mr **Ablyazov** be cross-examined as to his affidavit of assets [2009] EWHC 2833 (QB), an application by the Bank that a receiver be appointed over Mr **Ablyazov**'s assets [2010] EWHC 1779 (Comm), an application to adjourn the hearing of the committal application [2011] EWHC 2545 (Comm), the committal application [2012] EWHC 237 (Comm) and an application that Mr **Ablyazov** reverse certain pledges he had made [2012] EWHC 2543 (Comm).

[21] Although Mr Matthews emphasised that he was relying upon the totality of the proceedings the most important proceeding in this context was undoubtedly the contempt judgment in February 2012 when I found myself unable to accept Mr **Ablyazov**'s evidence on oath and held that he had acted in contempt of court by failing to disclose his assets in breach of the Freezing Order. The importance of that judgment in this context is reflected in the fact that it forms the subject-matter of Mr Matthews' first submission (see para 3 above). Yet no application was made that I should recuse myself from the trial in the months following that judgment notwithstanding (a) that it was known that I was to be the trial judge and (b) that a pre-trial review was listed to be heard on 13 June 2012. In the event the parties, including Mr **Ablyazov**, agreed to vacate the date fixed for the pre-trial review. On 26 – 30 July 2012 I heard applications by both the Bank and Mr **Ablyazov**. The Bank sought a declaration that Mr **Ablyazov** had acted in breach of the Freezing Order and an order that he reverse certain pledges he had made. Mr **Ablyazov** requested the court to grant permission, retrospectively, for such pledges. Although the Long Vacation was about to start with much pre-trial work to be done and it was known that a pre-trial review had been fixed for 2 October 2012 no suggestion was then made that Mr **Ablyazov** intended to make an application that I should recuse myself.

[22] On 21 September 2012 I gave judgment on the applications heard at the end of July 2012.

[23] On 2 and 3 October 2012 there was a pre-trial review. A detailed trial timetable was discussed. For part of that hearing Mr Bear QC attended on behalf of Mr **Ablyazov**. He provided the court with a Skeleton Argument dated 28 September 2012 in which he stated that Mr **Ablyazov** would not be participating in the pre-trial process because he would not be participating in the trial. It was stated that it was anticipated that Mr **Ablyazov** would seek an adjournment of the trial. No suggestion was made that Mr **Ablyazov** intended to make an application that I should recuse myself.

[24] The application for recusal was issued on 19 October 2012 and was heard by me on 25 and 26 October 2012. By that time the Bank's Skeleton Argument for the trial had been provided to me and I was due to start my pre-reading on Monday 29 October 2012.

[25] There was no explanation by Mr **Ablyazov** as to why he had delayed making the application until 19 October 2012. There was no explanation by his solicitor in his witness statement in support of the application as to why Mr **Ablyazov** had delayed making the application until 19 October 2012. I asked Mr Matthews whether he wished to say anything about the delay. He said that a decision to ask a judge to recuse himself is made with extreme caution, that the last piece of the jigsaw was the court's decision of 21 September 2012 and that Mr **Ablyazov** required a reasonable amount of time to reach his decision whether to make the application or not. Had he made the application earlier it might have been said that he did not have sufficient material upon which to found such an application.

[26] I am unable to regard the decision of 21 September 2012 as significant in this context. Both the Bank's applications and Mr **Ablyazov**'s application which were heard at the end of July 2012 concerned pledges which had been made by Mr **Ablyazov**. His counsel was unable to argue that they had not been made in breach of the Freezing Order. Accordingly, my grant of a declaration to that effect cannot on any view be any indication of bias. There was a dispute as to whether certain other assets belonged to Mr **Ablyazov**, which dispute I resolved in favour of the Bank. But that was the same type of decision which I had made on the contempt application in February 2012. I refused Mr **Ablyazov**'s application for retrospective validation of his

pledges because his evidence was incomplete, because he had gone ahead with the pledges notwithstanding the judgment of the Court of Appeal that he could not rely upon the "Angel Bell" ordinary course of business liberty and because he had not purged his contempt. None of those matters could be denied and so could not be indicative of bias. Whilst the decision of 21 September 2012 was part of the "totality" of evidence on which Mr Matthews relied the suggestion that Mr **Ablyazov** was unable to make up his mind whether to make an application that I should recuse myself until he had received 21 September 2012 judgment lacks any realism. In any event, if the matter of recusal was under consideration on 2 October 2012, it ought to have been mentioned at the pre-trial review on 2 October 2012.

[27] By not seeking an order that I recuse myself at the pre-trial review on 2 October 2012 Mr **Ablyazov** represented that he had no objection to my trying the case. By that time he had had full knowledge of my findings on the contempt application since February 2012. If ever there was a time when he would be expected to give notice of an application that I should recuse myself from the trial if that were his intention then the pre-trial review was it. (Indeed, I consider that he should have given notice of his intention at the time he agreed to vacate the pre-trial review fixed for June 2012 but it is unnecessary to base my decision on that in the light of the pre-trial review on 2 October 2012.) By failing to do so he represented that he had no such intention and must be regarded as having waived his right to apply for my recusal on the basis of those findings (and on the basis of such decisions and comments as I had made before February 2012). Since he also had full knowledge of my findings on the applications heard at the end of July 2012, by 21 September 2012 he must also be regarded as having waived his right to apply for my recusal on the basis of those findings on 2 October 2012 when he appeared by counsel at the pre-trial review and gave notice of an intention to seek an adjournment but no notice of any intention to seek my recusal.

[28] For these reasons I must dismiss Mr **Ablyazov**'s application that I should recuse myself. To permit the application to be made at this very late stage would be unfair to the other parties and would undermine both the reality and the appearance of justice, as the Court of Appeal said in *Locabail*.

APPEARANCE OF BIAS

[29] It is strictly unnecessary to consider this application any further but I shall do so in deference to the arguments addressed to the court.

[30] Whether or not there is an appearance of bias (in the sense of a real possibility that I am biased) depends upon how the matter would be viewed by the fair-minded and informed observer having considered the facts. Guidance as to the characteristics of the fair-minded and informed observer is to be found in the judgment of Lord Hope in *Helow v The Home Secretary* [2008] UKHL 62, [2009] 2 All ER 1031 at paras 2-3, [2008] 1 WLR 2416. The fair-minded and informed observer reserves judgment until he has seen and heard both sides of the argument. He is neither unduly sensitive nor suspicious. He takes a balanced approach to information which he is given and will take the trouble to inform himself of all relevant matters. He reads not only the headline but also the text of an article. He puts what he learns in its context.

[31] Both Lord Phillips MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at para 85, [2001] ICR 564 and Sir Anthony Clarke MR in *Home Secretary v AF (No 2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528 at para 53 have stated that the court must first ascertain all the circumstances which bear on the suggestion of apparent bias and then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was subject to bias.

[32] The principal facts or circumstances to be considered in this case are as follows:

> i) The allegations made by the Bank against Mr **Ablyazov** in the three actions which are shortly to be tried relate to his conduct in Kazakhstan as Chairman of the Bank prior to February 2009.

The Bank alleges that Mr **Ablyazov** procured the Bank to make loans to off-shore companies owned or controlled by him without disclosing his interest in those companies and that such conduct was in breach of duty, dishonest and fraudulent.

ii) The applications which I have determined over the past three years have focused upon Mr **Ablyazov**'s conduct in London after the Freezing Order was made against him in August 2009, in particular whether, in breach of the Freezing Order, he has failed to disclose assets owned by him.

iii) There is an overlap between the subject-matter of the actions and the subject-matter of the investigations into Mr **Ablyazov**'s conduct post-August 2009 because the latter investigations have required the court to consider whether certain companies, which also feature in the actions, are and were owned by him. Thus to that extent I have seen and commented upon documents dating from pre-2009 which will, or may, be relevant to the issues in the actions.

iv) The findings I made on the contempt application can be divided into the following categories:

a) The credibility of Mr **Ablyazov** and certain of his associates.

b) Mr **Ablyazov**'s concealment of and dealing with his assets in breach of the Freezing Order.

c) Mr **Ablyazov**'s involvement in the fabrication of documents to conceal his own contempts of court.

v) Examples of the overlap between the issues in the action and the findings already made include the following:

a) Mr **Ablyazov**'s credibility will (assuming there is evidence from him) be relevant to issues in the three actions (eg the reason for the involvement of Drey in the transactions which are the subject of the Drey proceedings, whether Mr **Ablyazov** was the owner of Chrysopa, and whether Mr **Ablyazov** was the owner of the Recipients, the Real Borrowers, the Borrowers or the Intermediaries as defined in the Granton action).

b) Certain aspects of the evidence already commented upon by me in the contempt judgment will be relied upon by the Bank in support of its case on matters which have not yet been the subject of a decision by me. For example, reliance will be placed on the role of certain individuals in the administration of certain companies, namely Mr Udovenko and Mr Syrym Shalabayev, as indicative of Mr **Ablyazov**'s ownership of the assets which are the subject matter of the Granton and Chrysopa proceedings.

vi) The overlap between the issues in the contempt proceedings and the issues in the trial was noted by the Court of Appeal at the time directions were given for the trial of the contempt allegations (see the discussion by the Court of Appeal when considering Mr **Ablyazov**'s appeal against those directions, [2011] EWCA Civ 1386 at paras 37 – 48) and was not regarded as an obstacle to the committal application being heard.

vii) The issues determined between the Bank and Mr **Ablyazov** in the committal judgment are capable of giving rise to an issue estoppel as between the Bank and Mr **Ablyazov**.

viii) No allegation has been made by Mr **Ablyazov** that my conduct of the applications which I have heard in this matter over the last three years has been unfair.

ix) Some of my decisions over the past three years have been in favour of Mr **Ablyazov** and against the arguments of the Bank. They included:

a) Refusing the Bank's application to try all 35 of the Bank's allegations that Mr **Ablyazov** had acted in contempt of court, [2011] EWHC 1522 (Comm) at paras 7 – 9.

b) Permitting Mr **Ablyazov** to adduce evidence by video link from Mr Syrym Shalabayev in support of his defence to the contempt application, notwithstanding that he had been found to have acted in contempt of court, in a ruling dated 23 November 2011.

c) Dismissing the allegation that Mr **Ablyazov** was the owner of Elizabeth Court, [2012] EWHC 237 (Comm) at para 163.

d) Dismissing the Bank's application that Addleshaw Goddard disclose the contact details used by Mr **Ablyazov**, [2012] EWHC 1252 (Comm) at para 38.

x) No suggestion was made by Mr **Ablyazov** at the pre-trial review on 2 October 2012 that I should recuse myself. That application was not made until 19 October 2012, shortly before the trial was due to commence, notwithstanding that he was fully aware of all my decisions over the last three years and that it had been known since 2011 that I was to be the trial judge.

xi) Mr **Ablyazov** has stated that he will be taking no part in the trial of the action and so will not be giving evidence at the trial either in person or by video link.

xii) The recusal application is not supported by the other parties represented at the trial, namely, Mr Zharimbetov, Mr Khazhaev and Usarel. It is supported by Mr Solodchenko (who will be representing himself) and, I am told by Mr Matthews, by the corporate Defendants in the Drey action.

[33] In considering whether a case of apparent bias has been made out I am mindful of the following considerations:

i) As the judge nominated to hear this trial I have a duty to try it. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, [2000] IRLR 96 the Court of Appeal referred at para 22, with approval, to a comment by Mason J in the High Court of Australia in *In re JRL* (1986) 161 CLR 342 at p 352 that:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

ii) However, the Court of Appeal also stated in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at para 25 "But if in any case there is real ground for doubt, the doubt should be resolved in favour of recusal."

iii) That guidance was expressed with clarity by Mummery LJ in *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163 as follows:

> "Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry."

[34] With that guidance in mind I shall discuss first the manner in which the fair-minded observer would view the findings made in the contempt judgment (the subject-matter of the first strand to Mr Matthews' submissions, see para 3 above).

[35] Findings against a person do not by themselves give rise to an appearance of bias; see *Bahai v Rashidian* [1985] 3 All ER 385, [1985] 1 WLR 1337 at pp 1342H and 1346F, [1985] NLJ Rep 1033 per Sir John Donaldson MR and Balcombe LJ, *Symphony Group v Hodgson* [1994] QB 179 at p 193D, [1993] 4 All ER 143, [1993] 3 WLR 830 per Balcombe LJ and *Home Secretary v AF (No 2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528 at paras 54 – 57 per Sir Anthony Clarke MR. However, the observer would note that certain of my findings, in particular those concerning Mr **Ablyazov**'s ownership of certain companies, are or may be relevant to issues in the trial of the actions. But the fair-minded observer would also know, or be informed, that those findings were likely to give rise to an issue estoppel between the Bank and Mr **Ablyazov**. To the extent that they did so they would therefore be binding upon the Bank and Mr **Ablyazov** and so at trial the court would not be required to revisit those findings. Upon being informed of the effect of an issue estoppel (for the observer is one who informs himself of all relevant matters) the observer would conclude that the circumstance that I had already determined (or "pre-judged") such issues was no bar to a fair trial and could not amount to an appearance of bias because the issues which were the subject of an estoppel would not be an issue in the trial. Reliance upon an issue estoppel would not, in my judgment, be reliance upon a matter "extraneous to the legal or factual merits of the case" capable of giving rise to bias; see *Home Secretary v AF (No 2)* [2008] 1 WLR 2528 at para 53 per Sir Anthony Clarke MR.

[36] Mr Matthews submitted that my decisions on the contempt application could not be side-stepped in that manner. He made two points. First, the reasoning which I had followed to reach those decisions would be urged upon me by the Bank at the trial with regard to other companies which feature in the actions but which did not feature in the contempt application. Second, there were other Defendants, namely Mr Solodchenko and the Drey corporate Defendants, who supported the recusal application but would not be bound by any issue estoppel.

[37] It is likely that the reasoning which I followed to reach decisions as to Mr **Ablyazov**'s ownership of certain companies on the contempt application will be urged upon me by the Bank with regard to other companies which feature in the actions but which did not feature in the contempt application. However, the fair-minded observer would also bear in mind the following matters. First, whether or not a particular company was owned by Mr **Ablyazov** pre-2009 will depend upon whether an inference to that effect can be drawn from the circumstantial evidence available in relation to that company. The evidence in relation to each company may not be the same; cf the evidence in relation to Bubris, the English real estate and the Schedule C companies which I had to consider on the contempt application, see paras 84-206 of my judgment at [2012] EWHC 237 (Comm) (and note paras 127 and 187 of that judgment concerning the need to treat each property separately). Indeed, it was because the evidence differed in relation to each alleged asset that I was not persuaded that Mr **Ablyazov** owned Rocklane Properties Ltd the owner of the flat in Elizabeth Court. Second, the issues which I determined on the contempt application were much narrower than the matters which will have to be proved by the Bank to establish its cause of action against Mr **Ablyazov**. Ownership of a company is part of what must be proved at trial but is not the entirety of what must be proved. The other matters which must be proved (eg the provisions of Kazakh law which governed Mr **Ablyazov**'s conduct and Mr **Ablyazov**'s conduct pre-2009 with regard to the disputed transactions) have not been considered by me at all. The importance of considering the difference, if any, between the issue which has already been determined by a judge and the issue which he will later be called upon to determine has been both emphasised and illustrated by the European Court of Human Rights in *Hauschildt v Denmark* (1989) 12 EHRR 266 at paras 51-52 and *Morel v France* (2000) 33 EHRR 47 at paras 45 – 48.

[38] The fair-minded observer, noting the above matters and also noting that (a) no allegation had been made that I have unfairly determined any of the previous applications and that (b) up to and beyond the pre-trial review on 2 October 2012 Mr **Ablyazov** gave no indication that he feared that I had or would pre-judge the case against him, would conclude, in my judgment, that there was no real possibility that I

would be biased against him at the trial by reason of pre-judgment. That the fair-minded observer might be influenced by the absence of a complaint by the person seeking recusal when deciding whether there was a real possibility of bias is suggested in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at para 57.

[39] Mr Matthews submitted that the circumstances of the present case were akin to a judge hearing an appeal against his own decision which possibility Laws LJ in *Sengupta v Holmes* [2002] EWCA Civ 1104 at para 32 found unthinkable. I am unable to accept the suggested analogy. For the reasons already given, the scope of the trial is much wider than the scope of the contempt hearing.

[40] Mr Matthews also relied upon the decision of the Court of Appeal in *Phillips v Symes (No 3)* [2005] EWCA Civ 533, [2005] 1 WLR 2986 that a judge who had heard a disclosure application against a third party in the Defendant's absence and without his knowledge ought to have recused himself from hearing an application that the Defendant be committed for contempt. The circumstances of that case are distinguishable from the present case because in the present case the first set of proceedings, the contempt proceedings, were heard in the presence of Mr **Ablyazov** and will give rise to one or more issue estoppels. There were other cases on which Mr Matthews relied (*R v A*, The Times, April 13 1998; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and *Symphony Group v Hodgson* [1994] QB 179, [1993] 4 All ER 143, [1993] 3 WLR 830) but these were distinguishable on the same grounds. Finally reliance was placed on *Breeze Benton Solicitors v Miss Weddell* UKEAT/0873/03/SM, 18 May 2004 (unreported) but that was a somewhat exceptional case on the facts which does not assist in the determination of the present case.

[41] It is true that Defendants other than Mr **Ablyazov** will not be bound by such issue estoppels as bind Mr **Ablyazov** and the Bank. However, there has been no suggestion that any other Defendant has material evidence to give as to the findings made against Mr **Ablyazov** on the contempt application. Nor has there been any suggestion that I have pre-judged any matter concerning the involvement of any other Defendant in the alleged wrongdoing of Mr **Ablyazov**. The fair-minded observer would take these matters into account, along with the fact that the other represented Defendants (Mr Zharimbetov, Mr Khazhaev and Usarel) oppose the recusal application, and would, in my judgment, conclude that there was no real possibility that I would be biased against those Defendants not bound by any issue estoppels.

[42] Mr Matthews pointed out, correctly, that my conclusions in the contempt judgment as to Mr **Ablyazov**'s credibility would not be the subject of an issue estoppel. In that judgment I had concluded that his evidence could only be accepted if it was supported by reliable contemporaneous evidence (see paras 78 – 80 of my contempt judgment at [2012] EWHC 237 (Comm)). As a result, when determining the applications heard at the end of July 2012, I proceeded on the basis that I had to approach his evidence with caution (see [2012] EWHC 2543 at para 19). It was submitted that there was a real possibility that at trial I would be biased against him by reason of my pre-judgment as to his credibility.

[43] In circumstances where I have found that Mr **Ablyazov** did not tell the truth on oath when he had been accused of acting in contempt of court it seems to me that I, in common with any other judge who presided over the trial of the Bank's actions, would have to have regard to that fact and therefore approach his evidence with caution. His lies on oath are a fact which cannot be ignored. My approach would be no different from that of any other judge who heard the actions. His lies would not be a matter “extraneous to the legal or factual merits of the case” (see *Home Secretary v AF (No 2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528 at para 53).

[44] Moreover, the fact that Mr **Ablyazov** lied when confronted with allegations as to his conduct after the Freezing Order had been issued in 2009 does not mean that any evidence he gives at the trial as to his conduct prior to 2009 in relation to the disputed transactions must be untrue. The fair-minded observer, noting that it has not been suggested that I approached his evidence on the contempt hearing unfairly, would conclude, in my judgment, that I would approach his evidence as to his pre-2009 actions with regard to the

disputed transactions fairly and conscientiously, albeit with caution, such that there would be no possibility of bias.

[45] In any event, the question of Mr **Ablyazov**'s credibility seems to me to be academic in circumstances where he has said that he will take no part in the trial and where, therefore, there will be no evidence from him. The fair-minded observer, on being told that, would surely conclude that any views I had expressed on the contempt application as to Mr **Ablyazov**'s credibility were irrelevant to his assessment of the possibility of bias because I will not be called upon at the trial to assess any evidence of his.

[46] For these reasons I have concluded that the fair-minded observer would conclude that there was no real possibility that I would be biased against Mr **Ablyazov** by reason of pre-judgment.

[47] Mr Matthews also submitted that there was a real possibility of bias by reason of my having read much evidence on without notice hearings which will not be in the trial bundle of evidence. There was a possibility therefore that my judgment would be affected by matters not in evidence. That would not be a fair trial. The evidence which Mr Matthews had in mind were the extensive statements of Mr Hardman, the solicitor at Hogan Lovells International LLP who has the conduct of this matter on behalf of the Bank.

[48] There are several reasons why, in my judgment, this matter would not cause a fair-minded observer to conclude that there was a real possibility that I might be biased by reason of something I had read at, or in preparation for, the without notice applications to extend the receivership order (which were the only without notice hearings I have heard in this matter).

[49] First, the issue on the applications to extend the receivership order was whether there was reason to believe that Mr **Ablyazov** owned the companies which the Bank sought to be added to the receivership. The issues on the trial of the actions are more extensive than that and, in so far as they include the ownership of the same companies, the question will be whether the Bank has proved that Mr **Ablyazov** was the owner of them, not whether there was reason to believe that he was. Forming a view as to whether there was reason to believe that Mr **Ablyazov** was the owner does not give rise to a real possibility that I will be unable fairly to determine the claim sought to be made good at trial; cf *Hauschildt v Denmark* (1989) 12 EHRR 266 at paras 51-52 and *Morel v France* (2000) 33 EHRR 47 at paras 45 – 48.

[50] Second, Mr Smith informed me that, whilst the statements of Mr Hardman are not in evidence, the underlying documentary material upon which he relied will be in evidence, where it is relevant to the actions being tried.

[51] Third, the fair-minded observer would know that it is usual for judges of this court (and indeed of all divisions of the High Court) to hear without notice applications and later to hear the trial and that a judge, when hearing the trial, would put out of his mind (assuming he could remember it) what he had read at earlier hearings and decide the action on, and only on, the evidence called at the trial. The fair-minded observer would know that the business of the court would be slowed and disrupted if the fact that a judge had heard a without notice hearing were sufficient to disable him from conducting the trial. That such practical considerations affecting the business of the courts may be relevant to art 6 of the ECHR and so to the common law on apparent bias is illustrated by *Thomann v Switzerland* [1996] ECHR 17602/91 at para 36.

[52] Fourth, the fair-minded observer is one who makes relevant enquiries. An enquiry of any judge would cause him to learn that judges have to read much material in preparation for without notice hearings which material, once the without notice hearing is over, is rapidly forgotten as the judge carries out his reading for the next case. He would also learn that the prospect that a judge, who is hearing a three month trial about an alleged banking fraud in Kazakhstan and is struggling to understand the documentary and other evidence

(for example of Kazakh law) which is placed before him, would recall (let alone rely upon) some evidence placed before him at some time in the last two years, is fanciful.

[53] Finally, Mr Matthews submitted that the course of events in the post-committal proceedings would give rise to a legitimate apprehension on the part of the fair-minded and informed observer that I may be unconsciously predisposed against Mr **Ablyazov**. This submission was said to be supported by the "extraction of a stated intention to attend the handing-down of the committal judgment" together with orders made "for the expressed purpose of ensuring that the court's authority over Mr **Ablyazov** proves effective", in particular the surrender and disclosure orders and the debarring sanction attached to those orders.

[54] The fair-minded observer would appreciate that Mr **Ablyazov** was asked whether he intended to attend the handing down of the committal judgment in circumstances where there was going to be some delay before judgment was to be handed down. The fair-minded observer would not regard the stated intention as having been "extracted". The question was asked for Mr **Ablyazov**'s benefit. As a result of his stated intention it was unnecessary for me to consider whether he should be remanded in custody pending judgment. So far as the orders made after judgment are concerned the fair-minded observer would not regard me as having any "predisposition" against Mr **Ablyazov**. The observer would appreciate that the position was simply that the Bank had applied for certain orders and that the court, having considered the reasons advanced in support of them, concluded that they should be granted. I was merely exercising my judicial function on the basis of matters relevant to the exercise of that function. That was a proper exercise of my judicial function rather than bias, which, as Balcombe LJ said in *Bahai v Rashidian* [1985] 1 WLR 1337 at p 1346, is the antithesis of the proper exercise of a judicial function. In those circumstances there was in my judgment no basis for any conclusion by the fair-minded observer that I might "unconsciously be predisposed against Mr **Ablyazov**."

CONCLUSION

[55] In the result, having considered Mr Matthews' submissions, I am not persuaded that the fair-minded observer would conclude that there is a real possibility that I would be biased when deciding the issues at trial in the sense of being influenced against Mr **Ablyazov** for reasons extraneous to the legal or factual merits of the case. I naturally accept Mummery LJ's wise advice that it is better to be safe than sorry but I have not been persuaded that there is even a real doubt as to whether the fair-minded observer would conclude that there is a real possibility that I would be biased when deciding the issues at trial.

[56] In any event, had I concluded that there was either a real possibility that I would be biased, or a real doubt as to whether I might be biased, I would have been compelled to dismiss the application that I should recuse myself on the grounds that Mr **Ablyazov** had waived his right to make such an application.

[57] I will therefore not recuse myself.

Judgment accordingly.