Case No: A3/2012/0661
A3/2012/0565

Neutral Citation Number: [2012] EWCA Civ 1411
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION COMMERCIAL COURT
MR JUSTICE TEARE
2009 FOLIO 1099

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2012

Before :

LORD JUSTICE MAURICE KAY
VICE PRESIDENT OF THE COURT, CIVIL DIVISION
LORD JUSTICE RIX
and
LORD JUSTICE TOULSON

- -

Between :

JSC BTA BANK	**Respondent / Claimant**
- and -	
MUKHTAR ABLYAZOV	**Appellant / Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Duncan Matthews QC, Mr Charles Béar QC, Mr George Hayman and James Sheehan (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
Mr Stephen Smith QC, Mr Tim Akkouh and Mr Caley Wright (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing dates : Monday 2nd July 2012
Tuesday 3rd July 2012
Wednesday 4th July 2012

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Judgment

Lord Justice Rix :

1. These appeals arise out of litigation (spread over many separate actions) which has been brought against Mr Mukhtar Ablyazov (and others) by a major Kazakhstan bank, JSC BTA Bank (the "bank"), which alleges that it has been brought to its knees by Mr Ablyazov's defalcations. Mr Ablyazov was the one-time chairman of the bank, but has fled to the UK, where he has been granted asylum. The claims allege that Mr Ablyazov has defrauded the bank of almost US$5 billion. The bank has since had to be rescued by its creditor banks, who have foregone much of the debt owed to them in exchange for a share in the proceeds of this litigation.

2. In the present round of appeals, Mr Mukhtar Ablyazov appeals from three judgments of Mr Justice Teare under which the judge has respectively (i) found him guilty of contempt of court; (ii) sentenced him on each of three proven contempts to 22 months in custody concurrently; and (iii) in consequence has made an "unless" order whereby Mr Ablyazov will be debarred from defending the claims made against him, and his defences will be struck out, unless within a stated period he both surrenders to custody and makes proper disclosure of all his assets and his dealings with them. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012. However, the judge's order also provided that, in the event of appeal, the sanctions for non-compliance would not take effect until seven days after any dismissal of the appeal. Mr Ablyazov had a right of appeal from the judgments committing him to prison, and obtained permission to appeal from the judge from his judgment imposing sanctions. I will refer to the three judgments as the "committal" judgment, the "sentence" judgment, and the "unless" judgment respectively.

3. Over the past few years the judge has had unrivalled experience of this litigation, and has been called upon to produce many judgments in it (although other judgments have also been authored by other judges, and by this court).

The claims and the defence

4. It is unnecessary to say much about the underlying claims. The essence of them is that the bank alleges that Mr Ablyazov conspired to make fraudulent loans to companies in which it is said that he was interested. The loans have not been repaid and the money has, for the most part, disappeared. The claims made include those of a proprietorial nature, asserting tracing remedies. Mr Ablyazov asserts that the claims are an unjustified attempt by the President of Kazakhstan, President Nazarbayev, to victimise and destroy him, as a political opponent and as a leading figure in Kazakhstan's democratic opposition.

5. Mr Ablyazov points to an earlier chapter of his personal history when in 2002 he was arrested in Kazakhstan on what he says were trumped up charges, and his assets seized. He was imprisoned, although released in 2003. He says he was also tortured, and attempts were made to have him assassinated. The judge remarked, in an earlier judgment of his, [2010] EWHC 1779 (Comm), that Mr Ablyazov's evidence suggests that "Kazakhstan has much in common with Ancient Rome".

6. However, Mr Ablyazov appeared to have made a comeback. After a period in Moscow from 2003 to 2005, he returned to Kazakhstan and acquired a controlling interest in the bank and became its chairman. He says that under his control it was hugely successful, but that he was constantly pressured to make a gift of his interest in it to the President's nominees, which he resisted. In 2007-2008, as the world moved towards and into economic crisis, Mr Ablyazov says that the President stepped up his efforts to wrest the bank from his control, and the bank says that Mr Ablyazov entered upon his scheme of looting the bank. Ultimately, the bank was nationalised and, in January 2009, Mr Ablyazov fled to London.

7. These allegations and counter-allegations have not been adjudicated. They remain allegations only. However, there have been attempts by both parties to stay or strike out each other's litigation.

8. Thus, Mr Ablyazov applied to stay the bank's claims as being brought as an abuse of the process of the court on the ground that they were being pursued for a collateral purpose, namely to damage his reputation and to eliminate him as a political opponent of the President of Kazakhstan. In response, the bank applied to dismiss Mr Ablyazov's application inter alia as being brought without any evidence to support it. Mr Ablyazov's application was dismissed, on the basis that it was not arguable that the process of the court was being abused. On the other hand, that was despite the judge being prepared to assume that Mr Ablyazov's case concerning the President's political animus against him was arguable, even if unlikely. The judge said (*JSC BTA Bank v. Ablyazov (No 6)* [2011] EWHC 1136 (Comm), [2011] 1 WLR 2996, at [46]):

> "In circumstances where the claimant was insolvent and had reason to believe that substantial assets have been misappropriated it is to be expected that the claimant would wish to recover those assets. Indeed, the claimant is now contractually obliged to use its reasonable endeavours to maximise the recovery of its assets. In those circumstances the suggested inference may also not be a reasonable inference. I have even more doubt as to whether it can be inferred that the claimant's *predominant* purpose in bringing proceedings against the first defendant was to eliminate him as a political opponent of the President…However, I hesitate to decide on this application that no such inference can be drawn in the face of the tsunami of evidence which has been served by the defendant about political and economic life in Kazakhstan. It is extremely difficult for this court to make a judgment about that evidence without it (or at least the relevant parts of it) being tested and examined in detail. The

inference which the court is being asked to draw may appear unlikely but I am not persuaded that it is unarguable."

See also [54], where Teare J said inter alia that "it is not contended that the claimant does not have a good arguable case against the first defendant".

9. Mr Ablyazov sought permission to appeal from that judgment, but he was refused by Jackson LJ on paper, and by Stanley Burnton LJ upon oral renewal, [2011] EWCA Civ 1588. The latter described the proposition, that a suit to enforce the disgorgement of ill-gotten gains could be stayed because the claim was actuated in part or principally by personal or political hostility on the part of the government of a foreign country, as "startling" (at [9]).

The freezing injunction and receivership order

10. This litigation was commenced by the bank obtaining a without notice freezing injunction from Blair J on 13 August 2009. The freezing order, affirmed inter partes, lies at the root of the subsequent proceedings to commit Mr Ablyazov, and thus of this appeal. On 21 August 2009, Teare J dismissed Mr Ablyazov's application to stay the standard disclosure aspects of the freezing order until after the return date, and on 30 September 2009 this court dismissed Mr Ablyazov's appeal: [2009] EWCA Civ 1124, [2011] 1 WLR 976. Mr Ablyazov's disclosure was so defective that the judge found it necessary to make an order for Mr Ablyazov's cross-examination: [2009] EWHC 2833 (QB). He described the disclosure's deficiencies as "extraordinarily inadequate" (at [5]). Mr Ablyazov was cross-examined on 27 October and 18 November 2009. In the meantime, on 12 November 2009, the freezing order was confirmed and continued inter partes.

11. Despite disclosure by Mr Ablyazov of assets which he originally said were worth several billion dollars, a figure which he subsequently revised to something in excess of one billion, by February 2010 the bank had concluded that Mr Ablyazov would not comply voluntarily with his disclosure obligations, and so on 16 February 2010 applied for the appointment of receivers over Mr Ablyazov's assets. The application was heard over 6 days in May and June 2010. On 16 July 2010 Teare J gave a 200 paragraph judgment in that application, and appointed receivers: [2010] EWHC 1779 (Comm). The judge said:

"[126] In summary therefore the circumstances which give reason to believe that the Freezing Order may not provide the Bank with adequate protection against the risk that Mr A's assets will be dissipated prior to any judgment that the Bank

> obtains are as follows…His initial disclosure of his assets can now be seen to have been seriously inadequate in that he failed to mention the crucial role of a nominee and the nature of the operating assets (save for one). There are grounds for believing that he wished to make it difficult for the Bank to enforce the Freezing Order…
>
> [161] Although Mr Ablyazov has stated that he will obey the orders of this Court that statement has to be considered in the light of his conduct in this action. He has stated that he can be trusted but I have to have regard not only to what he has said but also to what he has done. Consideration of his conduct with regard to disclosure of his assets in August/September 2009 and of his failure to inform Clyde & Co [his then solicitors] of dealings in the Eurasia Tower…has left me unable to trust him not to deal with his assets in breach of the Freezing Order."

12. Mr Ablyazov appealed that decision to this court, which rejected his appeal: [2010] EWCA Civ 1141. This court called upon Mr Ablyazov to understand that freezing orders are not made lightly, that a good arguable case of fraud had been made against him, and that as a litigant in England he was required to co-operate with the court to ensure that assets were preserved (at [26]). The terms of the receivership order were settled on 6 August 2010.

13. In the meantime the bank was taking steps of its own to police Mr Ablyazov's disclosure of, and dealing with, his assets. Thus it obtained wide-ranging *Norwich Pharmacal* and search orders from courts in England and Cyprus against organisations such as Yahoo!, which had been hosting anonymous email addresses used to administer Mr Ablyazov's assets, and English and Cypriot agency companies, such as Eastbridge Capital Limited and Euroguard Assets Limited, which were similarly used to administer those assets. A further search order was granted in respect of a lock-up at the Big Yellow self-storage facility in north London. These processes yielded much material which caused the bank further concern as to widespread non-disclosure and dissipation, and led to its decision to seek to enforce compliance by way of an application to commit Mr Ablyazov for contempt of court.

14. This further disclosure also led the bank, by stages, to add more than 600 further companies to those being administered by the receivers.

The application to commit

15. The bank made its application to commit on 16 May 2011. A series of 35 contempts were alleged, but as a matter of case management Teare J limited the application to three allegations, one each under the separate headings of (a) non-disclosure of assets,

(b) lying during cross-examination, and (c) dealing with assets: see [2011] EWHC 1522 (Comm) and, on appeal, [2011] EWCA Civ 1386.

16. The judge summarised the three alleged contempts as follows:

> "(i) Mr Ablyazov failed, in breach of the WFO [worldwide freezing order], to disclose his beneficial ownership of the shares in Bubris Investments Limited, a company incorporated in the British Virgin Islands.
>
> (ii) Mr Ablyazov, when cross-examined under oath as to his assets, lied to the court when (a) he stated that he was merely the short-term tenant of two properties in London and stated that all the residential properties he owned were included in his schedule of assets and (b) he denied that he was the beneficial owner of shares in FM Company Limited (a company incorporated in the Marshall Islands), Bergtrans Contracts Corp and Carsonway Limited (both being companies incorporated in the BVI).
>
> (iii) Mr Ablyazov, in breach of the WFO, dealt with an asset, namely loans held by Stantis Limited (a company incorporated in Cyprus) by assigning them to Nitnelav Holdings Limited in December 2010."

17. The judge found all three allegations of contempt proved, to the criminal standard of proof, so that he was sure.

The judge's findings regarding Bubris (the non-disclosure allegation)

18. As for the non-disclosure concerning Bubris Investments Limited ("Bubris"), the judge made the following findings.

(i). Bubris was incorporated in the BVI on 2 January 2008.

(ii). Shares in Bubris were registered in the name of Valen Limited, a company incorporated in the Bahamas ("Valen").

(iii). Until about 9 October 2008 Valen held the shares in Bubris in trust for Mr Alexander Udovenko. Mr Udovenko was a director of Eastbridge Capital Ltd ("Eastbridge"), an agency company in England used by Mr Ablyazov (and, he would say, by others) to provide corporate agency services for the administration of companies in which he was (and he would say others were) the beneficial shareholder. Thus during this period Mr Udovenko was, apparently, the so-called "ultimate beneficial owner" or "UBO" of

Bubris, but in truth he was the merely nominal UBO holding for its true UBO.

(iv). Mr Udovenko used Mr Paul Kythreotis in Cyprus to assist him in the activities of Eastbridge.

(v). Pursuant to an email of 9 October 2008 from Mr Udovenko to Mr Kythreotis, the declared UBO of the shares in Bubris was altered from Mr Udovenko to Mr Syrym Shalabayev. Mr Shalabayev is the brother-in-law of Mr Ablyazov. Pursuant to the same email, the declared UBO of the shares in another 101 companies listed in the email was similarly altered to Mr Shalabayev. Mr Udovenko spoke of all 102 companies as being in the same group ("So in accordance with the current policy of the Group we would like to have in all companies under your administration Mr Shalabayev as UBO").

(vi). In April 2009 the UBO of Bubris was changed again, this time to Mr Rinat Batyrgarejev. Mr Batyrgarejev, as was common ground, was Mr Ablyazov's man. He was his principal nominee, and acted exclusively for Mr Ablyazov. However, Mr Ablyazov said that this appointment was by mistake, as did Mr Shalabayev and Mr Batyrgarejev himself. Mr Shalabayev gave evidence by video-link from an unknown location. Mr Batyrgarejev gave evidence only in writing. The judge did not accept the evidence of any of these witnesses in this respect. The judge considered that the appointment of Mr Batyrgarejev was highly significant on the question of who was the true ultimate owner of Bubris. The appointment of Mr Batyrgarejev was backdated to 3 November 2008.

(vii). On 12 February 2010 the high court of the BVI, on the application of the bank, ordered the agent of Bubris (and four other companies) in the BVI to disclose the beneficial owner of those five companies. The order was served on 15 February. On 18 February the agent, Totalserve Management Limited, sought the name of the UBO from Mr Kythreotis. Totalserve was under the order of the court not to disclose the existence of the order, and therefore explained its request as originating from the "BVI Financial Investigation Authority". On 22 February Mr Kythreotis passed the request to Mr Shalabayev, saying "the matter is now very serious". That same day Mr Shalabayev emailed Mr Kythreotis to say that he would like to change the UBO of all five companies: the UBO of Bubris was now to be changed from Mr Batyrgarejev to Mr Vladimir Kovalenko. That was done and the change was backdated to 8 April 2008.

(viii). On 26 July 2010 Henderson J granted the bank a freezing order against Bubris in what are known as the AAA proceedings (one of the set of claims against Mr Ablyazov). The application was supported by a statement from Mr Kovalenko saying that he had no knowledge of Bubris.

(ix). On or about 23 September 2010 the UBO of Bubris was changed to Mr Kairat Sadykov. He gave written, but not oral, evidence to the judge that he was and had always been the true UBO of Bubris. The judge rejected Mr Ablyazov's case that Mr Sadykov had been declared Bubris's UBO in May 2010 (which is what a trust deed dated 7 May 2010 purported to show, but which the judge found had been backdated). Thus he also rejected the evidence of Mr Sadykov that he had declared his hand as UBO of Bubris in May 2010. Mr Sadykov, in his written evidence, referred to a letter signed by him and dated 7 May 2010 addressed to Mr Kythreotis which stated that he had been the beneficial owner of Bubris since 2008 but had been unable to reveal that earlier "for confidentiality reasons". However, Mr Kythreotis, when seeking in 2011 to avoid being imprisoned for contempt of court, had confessed that he had given false evidence in saying that he had learned of Mr Sadykov's beneficial ownership in May 2010 when in fact the letter from Mr Sadykov had been received by him only in September 2010. Moreover, that is what the documents show (see at paras 111-112 of the judgment). (Mr Kythreotis had been found guilty of contempt by Proudman J who had refused however to commit him to prison. However, this court on appeal imposed a sentence on him of 21 months: [2011] EWCA Civ 1241.)

19. The bank's case was that all these names, Messrs Udovenko, Shalabayev, Batyrgarejev, Kovalenko, and Sadykov, were nominees for Mr Ablyazov, who was the true beneficial owner of Bubris. Mr Ablyazov's case was that throughout the relevant period the true UBO of Bubris was Mr Sadykov, and that the previous names, Messrs Udovenko, Shalabayev and Kovalenko, had been nominees for him. Mr Batyrgarejev had simply been appointed by mistake. So ultimately, the issue was whether Mr Ablyazov or Mr Sadykov had all along been the true UBO of Bubris. It was in effect common ground that the other named UBOs were mere nominees, and there was an issue as to whether Mr Batyrgarejev was another nominee or just a rogue, mistaken, appointment.

20. The judge was sure that the bank's case was correct, and that Mr Ablyazov's case was a false one. He described the notion that Mr Batyrgarejev had been appointed by mistake as "fanciful". He set out his reasons at paras 100-124 of his judgment under appeal. Those reasons embrace the following considerations.

(i). The appointment was pursuant to a series of emails dated 24 April 2009 in which the request for a change of UBO specifically mentioned Mr Batyrgarejev as a replacement for Mr Shalabayev. Mr Shalabayev's own email to Mr Kythreotis asked for the change from himself to Mr Batyrgarejev. Mr Batyrgarejev's passport details were attached to an email on the same day. Mr Shalabayev's written evidence that he realised his mistake the same day and called Mr Kythreotis to cancel the appointment was rejected. There was no documentary evidence to support it. In his oral evidence Mr Shalabayev inconsistently stated that he had only realised his mistake in February 2010 (when Mr Kovalenko was substituted for him): but the judge rejected that account as well. It was plain to the judge that the February 2010 change had been generated by the enquiry as to the ownership of Bubris, purportedly coming from the BVI authorities. The reason for his replacement was not because he had been appointed by mistake, but because his close association with Mr Ablyazov would expose a link, through him, between his principal and Bubris, which had not been part of Mr Ablyazov's disclosure. As the judge said: "It is an inescapable conclusion that in directing a change of the UBO from Mr Batyrgarejev to Mr Kovalenko Syrym Shalabayev was intending to keep secret from the FIA the fact that Mr Batyrgarejev was the UBO of Bubris…Syrym Shalabayev removed Mr Batyrgarejev as UBO because he did not wish the identity of Mr Batyrgarejev as UBO of Bubris to get into the public domain in circumstances where Mr Ablyazov had not disclosed that Bubris was his asset but had revealed in cross-examination as to his assets that Mr Batyrgarejev was his trusted nominee".

(ii). The judge gave separate reasons for distrusting the evidence of the various witnesses who supported the case of mistake: I will refer to the judge's account of the witnesses below.

(iii). The judge was not impressed by the points made by Mr Duncan Matthews QC, who appeared for Mr Ablyazov at the trial as he does again on this appeal: that Mr Batyrgarejev had not been appointed UBO of the other four BVI companies whose UBO was also changed in February 2010; and that in a document dated 23 November 2009 which listed a number of companies with the words "Batyrgarejev, Trust for MK" (ie MKA, Mr Ablyazov), those words were not found against Bubris. Neither point, however, demonstrated that his appointment had been or may have been in error; on the contrary, a document of 25 November 2009 expressly referred to Mr Batyrgarejev as the "nominal beneficiary owner" of Bubris; and the concept of an express trust reflected cross-examination evidence of Mr Ablyazov in October 2009 about companies which he had admitted owning but which did not include Bubris.

(iv). The judge rejected Mr Ablyazov's case that Mr Sadykov was appointed in May 2010, as distinct from September 2010. The significance of these timings was that it was on 26 July 2010 that Henderson J had granted a freezing order against Bubris in the AAA proceedings. That was when Bubris entered as a name into this litigation, ie after May but before

September 2010. It appears that it was already in August 2010, that is to say not long after the late July 2010 entry of Bubris into the litigation, that Mr Sadykov was first made a "contact" for Bubris and subsequently a director. Then, on 23 September, a trust deed, backdated to 7 May, showing Mr Sadykov as the UBO, was sent to Mr Shalabayev; and on 24 September Euroguard sent Mr Sadykov's letter to Mr Kythreotis about being the true UBO of Bubris. The judge concluded: "I am sure that Mr Kythreotis did not learn that Mr Sadykov was the UBO of Bubris in May 2010 and that he only received the letter dated 7 May in September 2010. There can be no reason for [Mr Kythreotis] to admit having given false evidence to the court when faced with contempt proceedings other than that such admission was true…It must follow that the letter was not written in May 2010…" (at para 115). "It is difficult to conceive of any reason why Mr Sadykov's letter should have been backdated to May 2010 other than as part of an attempt to hide Mr Ablyazov's interest in Bubris, in circumstances where Bubris had been served with a Freezing Order on 29 July 2010 requiring disclosure of who ultimately controlled Bubris' affairs and also served with evidence that Mr Kovalenko knew nothing of being UBO" (at para 116).

(v). Mr Kovalenko made a second written statement on 26 July 2011, this time refuting his first statement (see para 18 (viii) above) in which he had said that he knew nothing about being UBO of Bubris, and now asserting that he had been indeed the official beneficiary of Bubris and subsequently transferred the beneficial ownership to Sadykov. (This conflicted not only with his first statement, but also with Mr Sadykov's statement that he had always been the beneficial owner of Bubris.) Thus it followed, on the judge's findings, that Mr Ablyazov, Mr Sadykov, and Mr Kovakenko, had all lied about Mr Sadykov's role.

(vi). The judge also observed that "neither Mr Ablyazov nor Syrym Shalabayev was able to explain how Mr Batyrgarejev had been appointed by mistake or what the nature of that mistake was", despite some speculations of Mr Matthews (at para 100); and further that "there is no credible reason why Mr Sadykov, if he were the true owner of Bubris and had remained hidden since 2008, should choose September 2010 to take centre stage after Bubris had been made a defendant to the AAA proceedings" (at para 121).

21. This is a powerful catalogue of reasons both for rejecting Mr Ablyazov's case that Mr Sadykov and not he was the true UBO of Bubris throughout the relevant period, and for accepting as proven to the criminal standard of proof the bank's case that he was that true UBO. Of course, Mr Ablyazov was not in principle required to make a positive (or any) case as to who was the true UBO of Bubris, although realistically it would have been extremely difficult for him simply to have rested on the bank's burden of proof. I will consider below the points which Mr Matthews now makes as to why the judge was wrong.

The judge's findings regarding the UK properties (the first of the lying allegations)

22. When in October 2009 Mr Ablyazov had faced cross-examination, he was asked about certain residential properties in London which he had not disclosed in his schedule of assets, and his evidence was that he owned none of them. The bank alleged that this evidence was untrue and deliberately false to his knowledge.

23. The four properties concerned were all owned by foreign companies, and the question was as to the true UBO of those companies. The four properties, the relevant owning companies, and Mr Ablyazov's case as to the true owner of the respective shares in the companies, are as follows:

(a) Carlton House, a grand house[1] in The Bishop's Avenue, Hampstead, was purchased in April 2006 for £15.5 million by Mount Properties Limited, a BVI company, whose shares are said by Mr Ablyazov to be owned by Syrym Shalabayev. Mr Ablyazov lived in Carlton House with his family. It is common ground that he did so since May 2009, and the bank says that was so since at least 2007. Mr Ablyazov says that he leased the house from his brother-in-law on a short-term basis. The purchase monies were provided by Sunstone Ventures Limited ("Sunstone").

(b) Oaklands Park Estate, a country house and 100 acre estate in Surrey, was purchased in about March/April 2006. The registered proprietor is Lafe Technology Limited, a Seychelles company, whose shares were purchased for £18.15 million with funds paid by Sunstone Ventures Limited, Mega Property Limited and Widley Worldwide Inc. The estate, that is to say the shares in Lafe, is said by Mr Ablyazov also to be owned by Syrym Shalabayev. It is common ground that Mr Ablyazov and members of his family visited Oaklands Park at weekends until the New Year of 2011.

(c) 17 Alberts Court is a flat bought on 27 June 2008 for £965,000. The registered proprietor is Bensborough Trading Inc, a BVI company. The declared UBO of Bensbourogh is Syrym Shalabayev's brother, Salim. Salim gave oral evidence at trial that he was the true beneficial owner of the company and thus the flat. The bank says that the true UBO is Mr Ablyazov. It appears (from Salim's evidence) that the only persons to have lived in the flat were Mr Ablyazov's driver and his wife, at any rate for a while. When they moved out, Salim did not move in: he was living at Carlton House and then at Elizabeth Court (see below, property (d)).

(d) 79 Elizabeth Court is a flat which was purchased for £650,000 in January 2002. The registered proprietor was Rocklane Properties Limited, a BVI company. The

[1] The judge describes it as containing inter alia a 50 foot ballroom, a library, 9 bedroom suites, and a Turkish bath.

bank said that the true UBO of Rocklane was Mr Ablyazov: the declared UBO was Mr Udovenko (up to October 2008) and Syrym Shalabayev thereafter. Mr Ablyazov, supported by Syrym's evidence, said that the beneficial owner was Syrym, from 2003 to December 2009, when Syrym sold it. The judge said that the changes of declared UBO from one trusted associate of Mr Ablyazov to another, in tandem with many other companies, suggested a single true UBO, namely Mr Ablyazov. Nevertheless, there was no evidence as to the source of the purchase monies, and the judge concluded that, despite matters which "strongly support" the bank's case and "odd aspects" of Mr Ablyazov's evidence, there was insufficient evidence to dispel all reasonable doubts. This appeal is therefore concerned only with the first three properties.

24. *Carlton House.* The judge was sure that the true beneficial owner of this property was Mr Ablyazov. He relied on the following main considerations:

(i) It was common ground that the purchase price was provided by Sunstone. Who owned Sunstone? Between 2004 and 2007 Sunstone was the shareholder of TechStroyAlyans, a Russian company, which Mr Ablyazov admitted owning. Mr Ablyazov accepted that Sunstone held his interest in TechStroyAlyans. That pointed to Sunstone as being Mr Ablyazov's company. However, Mr Ablyazov asserted that Sunstone was an agency company holding assets for different clients, with Mr Udovenko[2] holding his, Mr Ablyazov's, assets within Sunstone on his behalf.

(ii) Thus Mr Ablyazov suggested that other persons also held assets within Sunstone. For the purposes of Carlton House, however, such "other persons" came down to Mr Ablyazov's own brother-in-law, Syrym Shalabayev, because it was Syrym who both Mr Ablyazov and Syrym said had paid for Carlton House and owned it. However, the judge rejected the account of how Syrym had risen to such prosperity as enabled him to purchase not only Carlton House but also Oaklands Park. The rejection of Syrym's and Mr Ablyazov's evidence in this regard was critical both to the issue of the ownership of these properties and to their credibility.

(iii) Syrym said that his wealth derived in particular from a uranium business which he founded in 2003 based upon a joint venture with the government of Kazakhstan. In November 2005 he sold it with Mr Ablyazov's help for $350 million, of which Mr Ablyazov was entitled to a selling commission of $160 million. During this period Syrym also said that he obtained an MBA at Westminster University in London and started working for Mr Udovenko and his company Eastbridge in providing corporate and consulting services. He purchased Carlton House and Oaklands Park as investments in 2006, paying with his own money.

(iv) The bank said that the uranium business was Mr Ablyazov's not Syrym's, and the judge concluded that he was sure that that was right. Thus, on 14 January

[2] I comment: Mr Udovenko again, the first, 2008, UBO of Bubris.

2004 Mr Ablyazov had written to the President of Kazakhstan describing himself as "Head of the Board of Directors of Astana Kazakhstan Investment Group". Astana was the company which owned the uranium business, and Mr Ablyazov was head of its board. Syrym said that Mr Ablyazov was useful as a mere figurehead, but the judge rejected that explanation. Moreover, on 16 August 2005 Mr Udovenko wrote to Denton Wilde Sapte to answer their request as to who the client was who had instructed them in connection with the sale of the uranium business. Mr Udovenko explained that the uranium business was 70% owned by "our private Kazakhi company…Astana" which was in turn owned (through a Cypriot company) by Widley Worldwide Inc (of the BVI), and that Mr Ablyazov was "the beneficiary of the structure". The judge described these two documents as "compelling evidence that the uranium deal was Mr Ablyazov's deal, not Syrym Shabalayev's deal" (at [73]). It followed, said the judge, that Syrym's account of his uranium wealth as leading to the purchase of the English properties was untrue. The judge therefore rejected the account that Syrym had the wealth to pay for those properties.

(v) There was strong support for this conclusion in the fact that Mr Ablyazov's account of Syrym's business career contained in the former's third affirmation dated 16 October 2011, made in response to the committal application, did not even mention the uranium business or its sale.

(vi) The shares in Mount Properties (the registered proprietor of Carlton House) were in turn held by Mega Property Ltd. In October 2009, however, a new company, Smartwhere Limited, was purchased to hold the shares in Mount Properties. The transfer was made for a nominal consideration of $50,000, because, of course, the beneficial interests were the same. Syrym said that he was the owner of both Mega Property and Smartwhere, which evidence reflected that obvious point. However, it followed that this further evidence from Syrym was also viewed as lacking in credibility. The transfer was an attempt to distance the ownership of the property from Mr Ablyazov. It was in October 2009 that Mr Ablyazov faced cross-examination.

(vii) In October 2009 Mr Ablyazov said, in support of his evidence that he did not own Carlton House, that he had leased it and had a lease in writing. However, it was only on 11 November 2009 (but, significantly, shortly after that cross-examination evidence) that the lease, subsequently produced in November 2010, was sent for execution in Cyprus by Syrym. Equally significantly, the lease was backdated to 1 May 2009. The lease provided for a deposit, payable before the commencement of the term, of £60,000. That deposit was paid on only 20 December 2010 (after the lease's production to the bank). The judge concluded that the lease was a sham, and indeed that it had to be, given Mr Ablyazov's beneficial interest. A first rental payment purported to be made on 23 October 2009 was likewise a sham. A letter purported to be written on 1 October 2009 from estate agents Ashbury & Bloom demanding that first rental was therefore inexplicable: but, as the judge said, he did not have to be able to answer all the questions which arose in the trial "so long as I am sure that he is guilty of the alleged contempt, in particular that he was the true beneficial owner of the shares in Mount Properties and thus of Carlton House. I am so

sure. I do not consider that Syrym Shalabayev's evidence that he owned Carlton House may be true" (at [146]).

(viii) Syrym said that he had sold Carlton House in November 2010, (the same month in which the lease was produced) but refused to tell the judge to whom, or at what price, claiming that this information was confidential. He even refused to tell the judge which firm of lawyers had acted in the transaction. No documents were available at the trial to support the allegation. On 8 April 2011 Mount Properties was brought within the receivership order, and a note was placed on the Land Registry that no disposition by the proprietor could be registered without the consent of the bank or order of the court. The judge could not see how this event could have failed to come to the attention of any purchaser of the shares in Mount Properties. Yet as at the time of trial there had been no challenge by any purchaser to the inclusion of Mount Properties in the receivership order.

(ix) On 11 January 2012, that is to say after the conclusion of the trial, during which the bank had made the point described in (viii) above, and pending judgment, the judge received a second witness statement dated 10 January 2012 from Syrym Shalabayev. He then stated that the purchaser of Carlton House was Roland Koefer, a resident of Switzerland. He exhibited a Cypriot court document, dated 14 December 2011 (the last day on which Syrym gave evidence to the judge), in which Mr Koefer claimed to be the "essential and/or ultimate beneficiary of 100% of the authorised stock capital of [Smartwhere Limited] and/or [Mount Properties] pursuant to a written and/or oral and/or explicit and/or implied and/or resulting trust". No reference was made to any sale of shares in 2010. There was no explanation of why Mr Koefer then felt able to expose his identity, when he had been unwilling before. No further documentary evidence of any sale was even then produced, either by Mr Koefer or by Mr Shalabayev. As the judge remarked, if Mr Koefer had been a bona fide purchaser, he would have challenged the receivership order. The judge rejected this evidence as untrue.

25. *Oaklands Park.* This property was bought in the same year as Carlton House, 2006, and with money also coming, at any rate in part, from Sunstone. Mega Property, which it will be recalled held the shares in Mount Properties, the registered proprietor of Carlton House, also provided part of the purchase price. The third provider of the purchase price was Widley Worldwide, which in his letter to Denton Wilde Sapte Mr Udovenko had explained owned the Astana uranium business and of which Mr Ablyazov was the beneficiary (see at para 24 (iv) above). It is unsurprising therefore, in the light of the judge's findings in respect of Carlton House, that he came to the same firm conclusion in respect of Oaklands Park, that he was sure that it was owned, through its corporate registered proprietor, in this case Lafe Technology, by Mr Ablyazov. The judge also took into account the following additional considerations.

(i) Lafe Technology is a company administered by Mr Udovenko and Syrym Shalabayev, in the same manner as other Ablyazov companies.

(ii) Syrym Shalabayev alleged that he had sold Oaklands Park in late 2010. However, Lafe Technology had been included in the receivership order on 8 April 2011. Yet the judge pointed out that there had been no approach to the court to exclude Lafe Technologies or its property from the order. As in the case of Carlton House, in between the end of the trial and publication of the judge's judgment Syrym provided a statement that the purchaser of the estate was Mrs Fabienne Beaud, another Swiss resident, and that she has issued proceedings in Cyprus (but not in England). The judge rejected this evidence as he had done with the similar late evidence relating to Carlton House.

26. *Alberts Court.* The position of the flat at Alberts Court is somewhat different, because it is a much less grand property, cost only £965,000, and was bought in 2008, two years after Carlton House and Oaklands Park. The apparent UBO of the registered proprietor, Bensbourogh Trading, was said to be Salim Shalabayev, Syrym's brother: but he never appears to have lived at Alberts Court. Instead, Mr Ablyazov's driver and his wife lived there, for at any rate some of the time. The judge considered that he could not rely on the declared UBO, just as he disbelieved that Syrym Shalabayev, the declared UBO of the corporate owners of the other properties, held those properties for himself rather than Mr Ablyazov. The judge was also not impressed by the evidence that Salim never saw the flat before it was bought. His brother Syrym selected the property and negotiated the price. When asked about a draft lease of the flat, Salim said that he was proposing to rent the flat "from myself". After living in Carlton House, he moved to Elizabeth Court, a block in the same development, and paid rent for it. The judge said that was an odd thing to do, if he was the owner of the flat in Alberts Court. There was in any event no evidence that he had funded the purchase or was even capable of affording the million pound price. The purchase price was provided by Syrym. The judge reasoned that Syrym must therefore have purchased it on behalf of Mr Ablyazov: after all, Syrym did not claim to have purchased it for himself or someone else. The judge considered that the circumstantial evidence that Mr Ablyazov was the beneficial owner of this flat was less compelling than in the case of the other two properties, but even so he was sure that Mr Ablyazov was the owner.

The judge's findings regarding the Schedule C companies (the second of the allegations of lying)

27. The Schedule C companies are three companies named in Mr Ablyazov's Schedule C disclosure (which is explained in [2010] EWHC 1779 Comm at [86]ff, to which the judge made reference in passing). The three companies are, FM Company Limited, Bergtrans Contracts Corporation and Carsonway Limited (respectively "FM", "Bergtrans" and "Carsonway"). In cross-examination, Mr Ablyazov denied owning these companies. The bank submitted this was a lie.

28. I confess that even with the assistance of that earlier judgment (in which the judge gave his reasons for making the receivership order in respect of inter alia the Schedule C companies), the nature of this dispute remains obscure. It was however very familiar to the judge: he had already determined that these companies were probably in the beneficial ownership of Mr Ablyazov. He now had to determine if he was sure that that was the case (applying the criminal standard of proof).

29. The critical document for these purposes is a chart, part of the Schedule C disclosure, which shows the transmission of monies from a company called Drey, via the Schedule C companies (and others), to the bank. It appears that the bank had advanced $295 million to Drey. Drey then split this sum up between a number of other companies, who in turn transferred parcels of such monies to a greater number of still other companies, and so on, but ultimately the chart shows a large part of the monies (some $215 million) being returned to the bank. However, at least $41 million, paid to FM, is "missing" and is being traced as part of the bank's claims in this litigation. The transfers, the amounts of them, the dates of them, and the recipient and transferring companies are detailed in the chart. The period concerned is late June and early July 2008. Mr Ablyazov said that the chart had been provided to him by a third person (whose identity was kept anonymous hence "C") and that, in essence, he did not know the whys and wherefores of the transactions represented by the chart. He accepted that Drey and some of the other companies mentioned on the chart were his, but he denied that FM was his company (or Bergtrans and Carsonway), and denied any knowledge about the missing $41 million. He said that C was no longer contactable.

30. The bank said that the chart and its information had not been provided by C but by Mr Udovenko and Syrym Shalabayev, that the Schedule C companies were Mr Ablyazov's companies, and that Mr Ablyazov was lying in saying that they were not. The judge was sure that Mr Ablyazov had lied on oath in his cross-examination about these matters. He was also sure that Syrym Shalabayev was lying in saying that he was the beneficial owner of FM.

31. The essential findings and reasoning of the judge were as follows.

(i) Mr Ablyazov (and Syrym Shalabayev) had lied in saying that C had provided the chart. There were no reliable contemporaneous documents to support that case, even though Syrym had claimed to have kept a copy of Eastbridge's documents on a memory stick. The chart was supposed to have come forward in August 2009, but Mr Ablyazov could produce nothing to document that allegation.

(ii) The judge asked himself "Why did he lie?" and concluded that the only explanation was that Mr Ablyazov did not wish to reveal the roles of Mr Udovenko and Syrym Shalabayev in administering his assets. Bergtrans and Carsonway had been among those companies of which Mr Udovenko and Syrym

Shalabayev had been successively the declared UBO, and which they had administered under powers of attorney.

(iii) FM, in particular, must have been a company owned by Mr Ablyazov, because it was clear that FM made payments and loans to companies which were admittedly among his assets. The explanation of such payments proferred on behalf of Mr Ablyazov, namely that FM was Syrym's company, that he was wealthy from the uranium deal, owed money to Mr Ablyazov, and was in the habit of providing short-term finance to Mr Ablyazov, was rejected. The judge had already rejected the case that the uranium company belonged to Syrym. No documents evidencing such dealings between the brother-in-laws were available, even though Syrym said that he had supplied Mr Ablyazov with such documents.

(iv) As for Bergtrans and Carsonway, they were alleged to be companies belonging to a Mr Kossayev. As in the case of Bubris (see above), the declared UBO of these companies underwent a number of changes: first it was Mr Udovenko, then (in October 2008) Syrym Shalabayev, then (in March/April 2010) the UBO of Bergtrans was changed to a Ms Gracheva and that of Carsonway to a Mr Degtyarev (both appointments being backdated to the time of the companies' incorporation), and then there was a further switch (in July 2010) to Mr Kossayev in the case of both companies (again backdated). The judge went into these arrangements in detail. The forensic explanation proffered for these changes was that Mr Kossayev had always been the true owner, but that it was only in July 2010 that he had been prepared for it to be known publicly that he was. In the meantime Syrym Shalabayev said that the switches made earlier in 2010 had been to save Mr Kossayev the embarrassment of being connected with him through his involvement in this litigation. However, when the judge asked Syrym directly whether there came a time when Mr Kossayev was happy to be recorded as the "true" UBO of the companies, Syrym replied: "I don't know, my Lord, I don't know the facts of that. I don't know about any such facts." The judge commented therefore that there was nothing to explain why Mr Kossayev should suddenly in July 2010 have been prepared to be revealed as the true UBO of these two companies, having kept it a secret for two years. Although it was suggested that the use of nominal UBOs was a Kazakhstan device to protect the rich from the political dangers of being known to be rich, there was no evidence of any change in political conditions in Kazakhstan to make it safe for rich men to be revealed as the owners of their assets.

(v) To cap this, there was evidence that the wealthy Mr Kossayev had borrowed approximately £10,000 from the bank to buy a second-hand car. This was a man whose companies had borrowed over $200 million from the bank. It was submitted that the Kazakh wealthy borrowed everything in order to keep the source of their funds secret. The judge rejected that suggestion. I comment, even if the judge did not, that that submission, apart from being unrealistic, cannot explain how the source of the repayment of such loans is kept secret – unless one posits an infinite series of loans, never repaid.

(vi) The judge also laid stress on the speed with which the Schedule C chart showed that the payments between the companies were effected, on the monies' speedy, if complicated, journey from the bank through Drey and other companies back to the

bank. That could only be explained on the basis that the transactions and companies were all linked as part of the manipulations of a single directing mind, their owner.

The judge's findings regarding Stantis (the dealing allegation)

32. Stantis Limited is a Cypriot company which appears to have made advances in 2007 totalling some $80 million to three Ukrainian companies (Praym-Stroy LLC, Galena LLC, and Max-Well Medical Centers LLC). The bank alleged that Stantis is a creature of Mr Ablyazov, through which he holds assets, and that he is its true UBO. However, the gravamen of the bank's complaint under this heading was that Mr Ablyazov dealt with Stantis's assets, in breach of the freezing order, by assigning its rights to repayment of these advances made by it. In particular, the judge focussed on four agreements: (a) a series of agreements dated July through October 2010 but in fact executed in December 2010 (after the freezing order) under which Stantis assigned to another Cypriot company, Nitnelav Holdings Limited, its rights to repayment of these advances (the alleged dealing with frozen assets); (b) a loan agreement dated 13 April 2007 (the so-called "short form agreement"), whereby Alterson Ltd made a loan of $80 million to Stantis, due for repayment on 30 March 2014; (c) a loan agreement also dated 13 April 2007 (the so-called "long form agreement") whereby Alterson made the loan of $80 million to Stantis and was also given the rights (not found in the short form agreement) both to demand repayment at any time on 360 business days notice and to assign its rights at any time in its sole discretion; and (d) an agreement dated 1 June 2009 (prior to the freezing order) under which Stantis agreed with Alterson that Alterson can demand that Stantis immediately assigns to Alterson or to another entity determined by Alterson all Stantis's rights under the advances made by Stantis to the companies named above, in consideration for which assignments, if demanded, the loan from Alterson to Stantis would be considered as repaid.

33. In sum, therefore, it appears that Alterson advanced $80 million to Stantis; Stantis advanced the money onwards to the three Ukrainian companies; the short form agreement said nothing about Alterson's rights to repayment other than that it was to occur on 30 March 2014 (after 7 years); the long form agreement however gave Alterson additional rights to demand earlier repayment or to require the assignment of Alterson's rights to the $80 million; the June 2009 agreement appears to be a form of "cut-through" agreement whereby Alterson could secure Stantis's obligation to repay its advance from Alterson by demanding the assignment of Stantis's loans to the Ukrainian companies.

34. I trust that I have these matters correctly stated, for this area of the case has not been clearly set out in the materials before the court, and the exigencies of time for the

hearing of the appeal, with so many issues to cover, have not allowed for careful exposition. Indeed, Mr Matthews opened the appeal without referring us to any of the critical documents.

35. In the event, two critical issues were debated before the judge under this heading. One was whether the Stantis loans were assets owned by Mr Ablyazov for the purposes of the freezing order. The other was whether they had been dealt with by Mr Ablyazov in contemptuous breach of the freezing order, or whether the 2010 assignments were merely the working out of the commercial rights of Alterson which preceded the freezing order.

36. As to the first issue, the judge was satisfied so that he was sure that the Stantis loans were assets of Mr Ablyazov. Indeed, I do not think that Mr Ablyazov denied that Stantis was his company, only that the loans within it were his assets. In any event, the judge concluded that Stantis (and Alterson) were both companies within the beneficial ownership of Mr Alblyazov, or were his "creature". In coming to this conclusion the judge stressed the following considerations.

(i) Stantis's sole director was Mr Batyrgarejev, who, as stated above, worked exclusively for Mr Ablyazov.

(ii) Mr Ablyazov's case that Stantis was an independent company which was in the business of providing project finance was rejected. Mr Ablyazov's own witness statement (his third, dated 16 April 2010) had included Stantis as one of the companies by which he held his interest in BTA Ukraine. He did not identify Stantis as an independent company whose business might be damaged by the receivership order.

(iii) Mr Batyrgarejev's statement dated 4 June 2010 had referred to Stantis as a "holding company" or "nominee company", not as an operating company, and this was confirmed by his solicitors, Stephenson Harwood, in their letter dated 12 July 2010 to the court.

(iv) In effect, Stantis was a mere conduit for channelling funds for Mr Ablyazov's projects. That was in effect how a Mr Anuar Aizhulov, a former director of Eastbridge who worked in various roles for Mr Ablyazov until 2009, whose name was on the short form agreement, the long form agreement and the 2009 agreement (although he denied that he had signed the latter two documents), and who had given oral evidence at trial, described Stantis. He said that it was a "special purpose vehicle used in transactions where Mr Ablyazov would organise funding for Ukrainian projects".

37. As for the second issue, the judge was also satisfied so that he was sure that the long form agreement, and the 2009 agreement, were forgeries. Mr Aizhulov gave evidence

that his signature on the short form agreement was his, but that what purported to be his signatures on the long form agreement and the 2009 agreement were not his, and that he did not sign those documents. The judge was sure that in this respect at any rate Mr Aizhulov was to be believed, and that any evidence to the contrary was not credible. In this respect the judge stressed the following considerations:

(i) The short form agreement, a short document barely over one page in length, was genuine. No one suggested otherwise, and Mr Aizulov recognised his signature on it. It had been found both in the bank's records and in the Big Yellow storage unit.

(ii) The short form agreement and the long form agreement were incompatible: they provided for different proper laws; only the long form agreement allowed for accelerated repayment or assignment; the long form agreement made no reference to the short form agreement, and the short form agreement contained no suggestion that it was merely a prelude to a longer agreement. Therefore the suggestion that the long form agreement was merely a working out of the short form agreement was unrealistic.

(iii) Unlike the short form agreement, the long form agreement had not been found in the bank's records or in the Big Yellow storage unit. It had been produced in what the judge described as odd and implausible circumstances, namely as a copy given to Syrym Shalabayev by Mr Kossayev. Similarly, the original of the June 2009 agreement had never been produced.

(iv) The assignment agreements produced in December 2010 made no reference to the 2009 agreement, which was consistent with and supported the conclusion that the 2009 agreement was a late forgery.

(v) The December 2010 assignments, backdated to July - October 2010, and the June 2009 agreement, were an attempt to legitimise the assignments of Stantis's loans at a time when the receivership order had been made and had survived an appeal to this court.

(vi) A structure chart attached to an email passing between Eastbridge employees in October 2008 indicated that the true UBO of Stantis was also the true UBO of Alterson. The very brevity of the short form agreement was consistent with the loan from Alterson to Stantis as being an "inter-group agreement". Mr Kossayev was put forward as the true UBO of Alterson, but this was rejected.

(vii) Although there was no evidence that Nitnelav belonged to Mr Ablyazov, the judge was persuaded that he must have benefited from the assignments to Nitnelav.

The witnesses at trial

38. The judge discussed the witnesses before him at length. The bank's oral witnesses were Mr Aizhulov and the bank's solicitor, Mr Christopher Hardman, a partner at Hogan Lovells.

39. *Mr Aizhulov.* The judge went into Mr Aizhulov's evidence and his role in great detail. He was prepared to give only limited evidence, restricted to his signatures on the Stantis loan documentation. He explained that he had not wanted to get involved in these proceedings, but had felt compelled to do so when Mr Ablyazov came to rely on documents which had been forged with his signature. It was submitted on the other side, however, that Mr Aizhulov's evidence should be set aside on the basis that he had cut a deal with the bank and the Kazakh and Ukrainian authorities, under the pressure of criminal proceedings and with the encouragement of financial inducements. The judge considered these submissions with great care but rejected them as based on nothing more than speculation. Mr Ablyazov himself had said that he did not consider Mr Aizhulov to be dishonest. The judge believed Mr Aizhulov on the essential evidence on which he had been called, and, as set out above, there was a wealth of supporting factors to assist the judge in that assessment. As the judge said, he had observed Mr Aizhulov give evidence for a day and considered that he had given his evidence with confidence and clarity. The judge also spoke of an "overarching matter to be borne in mind" (at [51]):

> "The only evidence Mr Aizhulov has given relates to his apparent signature on the Stantis documents. There is no indication that he has given or will give any other evidence. The matter is relevant because the Stantis documents are relied upon by Mr Ablyazov in defence to the allegation of contempt concerning dealing with Stantis' loans. That allegation was first made on 16 May 2011 when the contempt application was issued. The existence of the loans was only discovered by the Bank as a result of the Norwich Pharmacal orders made against Yahoo! In early 2011. Mr Ablyazov's reliance on the Stantis documents emerged by way of the evidence adduced by him in defence of that allegation much later in 2011. In those circumstances the suggestion that in or about December 2010 Mr Aizhulov made an arrangement with the Ukrainian authorities to give evidence against Mr Ablyazov is fanciful. The relevance of the Stantis documents was not revealed until later in 2011 and there is no other issue on which Mr Aizhulov has given evidence. Nor is there any reason apparent as to why the Ukrainian authorities would benefit from such evidence being given. The suggestion that a deal was done with the Bank in meeting with Mr Prosyankin in 2010 runs up against the same difficulty. The Bank could not have known about the relevance of the Stantis documents until later in 2011 when they were relied upon by way of defence to the Stantis allegation."

40. *Mr Hardman.* The defence made a strong attack on Mr Hardman's conduct of the litigation and in relation to the bank's disclosure. The attack was pursued in cross-examination. The judge accepted that Mr Hardman had pursued his responsibilities "with energy, rigour and indeed aggression", but he gave his evidence honestly and carefully, and the attack on him was rejected. A detailed account of the allegations

and of the judge's reasons for not accepting them was set out in Appendix 2 to the judgment. Moreover, the judge considered the criticisms addressed in closing submissions concerning the bank's disclosure in a separate part of his judgment, and in detail, at [36]-[39]. He there concluded that he did not accept the criticisms which had been made against Mr Hardman. He said (at [38](iii)(e)) that "I am wholly unpersuaded that Hogan Lovells and in particular Mr Hardman have failed to carry out a reasonable search of the documents. I have had to read and study the product of Mr Hardman's work on several occasions over the last two years. I do not consider that he has failed to interrogate the material which he has obtained with a lack of proper care or fairness to Mr Ablyazov."

41. The defence witnesses at trial provided evidence in some cases orally and in other cases only by written statement. The oral witnesses were Mr Ablyazov, Syrym and Salim Shalabayev, and Mr Roman Golovkin, a Russian lawyer who had acted for Mr Sadykov (who, it will be recalled was said to be the true UBO of Bubris).

42. *Mr Ablyazov.* He graduated in theoretical physics and went into business after the break-up of the Soviet Union and became very successful. He entered public life in Kazakhstan and became minister of energy, industry and trade. He became an opponent of the President. I have already referred to his imprisonment in 2002. In 2005 he returned to Kazakhstan after a period in Moscow and became the chairman of the bank. In February 2009 he was dismissed as chairman and came to London. The judge described him as a man of ability, with a clear grasp of the issues in the litigation, and said that he gave his evidence with clarity and firmness. Nevertheless, he concluded that he could place little weight on his denials and could accept only what was proved elsewhere by reliable contemporary evidence. In discussing his evidence, the judge pointed out in particular that Mr Ablyazov's credibility was undermined by his support for the false evidence of Syrym Shalabayev, by his failure in cross-examination as to his assets in the autumn of 2009 to mention the roles of Mr Udovenko and Syrym Shalabayev in administering his assets, and by the secrecy and falsification which surrounded that administration, of which the judge was able to cite examples. In the event, of course, in the light of his findings as a whole, the judge was satisfied that Mr Ablyazov had lied to him, both at this trial and on a former occasion, had been complicit in forgery, and had deliberately acted in contempt of court.

43. *Syrym Shalabayev.* Mr Shalabayev gave evidence by video link from an unknown location abroad where he was a fugitive from his sentence of 18 months imprisonment for contempt of court for refusing to obey the disclosure provisions of a freezing order. The judge nevertheless gave permission for his evidence to be taken in this way because Mr Ablyazov was relying on it (for instance as to the ownership of Carlton House and Oaklands Park) and it made him a crucial witness.

44. Mr Shalabayev graduated in law. When Mr Ablyazov was imprisoned in 2002 he took his brother-in-law's family to London and looked after the education of the children. I have already dealt with the judge's rejection of his important evidence as to the success of his career in the development and sale of the uranium business. The judge was sure it was Mr Ablyazov's business and that Mr Shalabayev had lied about this. Otherwise Mr Shalabayev started working for Mr Udovenko/Eastbridge in the administration of companies (I comment, hardly the work of a brilliant entrepreneur), of which at least some were Mr Ablyazov's companies. He admitted "helping out" in the administration of Mr Ablyazov's offshore interests. Like Mr Udovenko, he routinely allowed his name to be used as the nominal UBO of other persons' companies and to bring backdated documents into existence. "He is therefore a man who is willing to cause to be created documents which contain untruths and are designed to hide the truth. He did not appear to see anything wrong about this practice. It was, as he described it, his "business"." While the judge reminded himself that customs in Kazakhstan may be different, it entitled him to be wary of his evidence. The judge was also made wary by Mr Shalabayev's frequent unwillingness to answer questions about companies which he administered, some of which he even claimed to own. This suggested that he was not minded to assist the court. "I was left with the distinct impression that when questions were asked which were too difficult to answer he chose not to answer them." If he answered, he did so vaguely, as a defence against contradiction. Another matter of concern was that he said that he never saved or kept any documents (despite admitting to administering over 800 companies, in a role which Mr Matthews described as that of a "professional nominee"). For all these reasons, the judge regarded him as unreliable, unless his evidence was proved by contemporary documents.

45. *Salim Shalabayev.* Syrym's younger brother was shown to have lied about the whereabouts of Syrym in 2011. He had lied on oath when he said that he had not seen his brother Syrym in 2011, a lie which he had to admit when confronted with photographs of him together with Syrym in Latvia, even if the judge was prepared to accept that the lie was told in order not to reveal the location of Syrym, who had been sentenced to 18 months in prison for contempt of court and was a fugitive from justice. The judge therefore felt he had to exercise caution before accepting anything he said. In addition, he was prepared to sign untrue documents, such as declaring that he was the UBO of a company of which he was not the true UBO. He altered his evidence overnight. He "proved himself to be an unreliable witness".

46. *Mr Golovkin.* The judge accepted only that he was acting and speaking on Mr Sadykov's instructions, and that for all important purposes he had no personal knowledge about Bubris. The judge was unable to give any weight to his evidence.

47. The defence also relied on certain witnesses who gave their evidence only in the form of written statements. The judge raised why, if as was suggested they feared being exposed as supporters of Mr Ablyazov, there was anything which prevented them being cross-examined by video link. Their support by way of written statement was

known in any event. As in the case of Syrym Shalabayev, their location need not be revealed. Mr Batyrgarejev accepted that he made a practice of performing the role of nominal, apparent, UBO when he was not the true UBO. The judge said that in the circumstances he was unable to attach any significant weight to his evidence. Ms Kabanova, a former employee of Eastbridge and Euroguard, gave evidence about Bubris, the Schedule C companies and Stantis: but the judge was unable to give any significant weight to her evidence either, seeing that she was the author of an email which referred to "another creative project from the management" pursuant to which she transferred shares in Stantis to a nominee and backdated the trust deed. Mr Sadykov made a written statement, but, as the judge said "where certificates that X is the UBO are routinely designed to be untrue, it is difficult to give weight to a written statement by X that he is indeed the UBO" (at [81]). Mr Kovalenko made two written statements, but, as discussed above, they contradicted one another.

The appeal against the Bubris finding of contempt

48. The nature of the appeal against the findings of contempt consisted in a lengthy skeleton argument from Mr Matthews (leading Mr George Hayman and Mr James Sheehan) which effectively sought to reargue every issue of fact anew, and oral submissions which, in the light of a tight timetable, concentrated on a smaller number of points but which nevertheless did not invite the court to look at any of the documents which had a critical influence on the judge's conclusions. The appeal could be approached in this way in part because no permission to appeal is necessary in the case of a committal for contempt.

49. However, especially in a case such as this, where this court is at such a disadvantage in comparison with the trial judge, who not only heard the oral witnesses, but had so long to consider the material before him over the course of a 15 day trial and against the background of his huge and unrivalled experience in this litigation over many years, the appellant needs to be able to point to at least some substantial error of law or reasoning, or of factual misunderstanding, in order to open the gate to an appeal: and to do so, whether the test is the normal test on a civil appeal, which is that the judge is wrong, or the test on a criminal appeal of whether a conviction, here the finding of contempt, is unsafe.

50. It is not alleged that the judge adopted any error of law in the directions which he gave himself in his judgment. It is, however, submitted that the judge failed to apply the criminal standard of proof which he had set for himself. It is also said that there were a number of "pervasive flaws" of analysis. Mr Matthews addressed these pervasive flaws in his oral submissions. He also relied on some fresh evidence in the form of a second witness statement of Mr Ablyazov dated 19 June 2012, and a witness statement of Ms Naomi Simpson, a solicitor in the firm of Addleshaw Goddard LLP dated 26 June 2012.

51. The error of law alleged is that the judge failed to apply the correct criminal standard of proof because he sometimes adopted the language of a civil trial, saying that something was "improbable", or "likely", or words to that effect. It is true that the judge so expressed himself on occasions. However, the judge overwhelmingly used the language of the criminal standard (of being sure, or of rejecting the possibility that something may be as suggested), and he uniformly did so when reaching his conclusions on any essential plank of the bank's case. Examples of that are so numerous as to be unnecessary to exemplify. Moreover, it is not true that every single aspect of a criminal case has to be proved to the criminal standard, although of course the elements of the offence must be.

52. It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: *R v. Hillier* (2007) 233 ALR 63 (HCA), cited in *Archbold 2012* at para 10-3. Or, as Lord Simon of Glaisdale put it in *R v. Kilbourne* [1973] AC 729 at 758, "Circumstantial evidence…works by cumulatively, in geometrical progression, eliminating other possibilities". The matter is well put in *Shepherd v. The Queen* (1990) 170 CLR 573 (HCA) at 579/580 (but also passim):

> "…the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

53. I have no doubt that the judge, whose language so often reminded him of the appropriate criminal standard of proof, remained true to his self-direction. It is simply that, in a reasoned judgment which covers so much ground and so many factual issues, and where each dispute is covered by analysis, the judge is often forced into a position where, unlike the jury, he has to express a view as to individual pieces of evidence separately. However, ultimately he had to consider the charge against Mr Ablyazov cumulatively, and he was sure that the three alleged contempts were proved and that they were deliberate.

54. Mr Matthews' next complaint was that the judge had adopted a flawed analysis of the documentary evidence. He directed attention to the judge's remark in [34] of his judgment that in a context where a named beneficiary is routinely and deliberately not the true beneficiary, a paper trail which leads to UBOs other than Mr Ablyazov "is worthless as evidence that those persons are the owners of the assets in question". I would accept that the judge would have perhaps better expressed himself as saying that such evidence is "of very little value" (or words to that effect) rather than worthless. However, the evidence that nominal UBOs were as a matter of course used deliberately to hide the true beneficiaries was common ground. In truth, therefore, the documents were of no real worth. In any event, in every single case where it mattered, such as whether Bubris was owned by Mr Sadykov, or Astana was owned by Syrym Shalabayev, or Alterson was owned by Mr Kossayev, the judge was meticulous in examining all of the evidence before coming to his conclusion. Moreover, the expression "worthless" was perhaps a conclusionary expression which took into account all the evidence he had in mind as well as the following considerations which immediately followed at [34]-[35], which demonstrate the careful and proper approach of the judge to the documentary material before him:

> "…The creation of such documents must cause the Court to exercise caution before accepting as true, or as possibly true, statements made by such witnesses notwithstanding that the creation of such documents may be a necessary practice to prevent the President of Kazakhstan from unlawfully appropriating such assets.
>
> 35. In such circumstances the email traffic and other contemporaneous documents which the Bank has been able to obtain are likely to be of considerable assistance to the Court. The cornucopia of material obtained from disclosure, search and *Norwich Pharmacal* orders against Yahoo!, the Yellow Box strorage facility in north London and from the offices of corporate providers in Cyprus demonstrates the value of such orders…"

55. The next "pervasive flaw" alleged was that the judge's analysis of the defence witnesses was wrong. The bottom line submission was that the judge had failed in general to give proper weight to their evidence. Under this heading Mr Matthews made four points: (i) he repeated his complaint that the judge was unwilling to accept documentary evidence as reliable, even though wealthy owners may have legitimate reasons for wishing to conceal their ownership; (ii) the judge had improperly held against Salim Shalabayev his (acknowledged) lie about being ignorant about the whereabouts of his brother, when he, Salim, had good reason to be concerned for his brother's safety and that concern was divorced from the merits of the case; (iii) the judge wrongly discounted the evidence of those witnesses who did not give oral evidence, especially where it was unfair of the judge to think that an application in all their cases for them to be heard by video link would have been granted; and (iv) the judge's conclusion in the cases of Mr Ablyazov and the Shalabayev brothers that he could not accept their evidence without contemporary documentary corroboration was to reverse the burden of proof.

56. In my judgment, however, these points are without merit. I have already addressed point (i) above. As for point (ii), the judge was plainly entitled to hold Salim Shalabayev's lie against him, but the judge directed himself entirely correctly when he went on (at [55]) to say (just as if he had given a quasi *Lucas* direction to himself):

> "It is probably the case that he lied to protect the location of his brother's house in Latvia but the fact that he was prepared to lie so blatantly means that I must exercise very great caution before accepting anything else he says."

As for point (iii), the judge was never asked to make the video link facility available to the witnesses in question. It is not open therefore for Mr Matthews to submit that the judge would inevitably have declined any such application, if cogently made. In any event, the judge had good reason to discount this untested evidence. Mr Batyrgarejev, apart from being Mr Ablyazov's man, had allowed his name to be used on a large number of false documents; Ms Kabanova was responsible for creating an even larger number of false documents; and Mr Sadykov had only come on the scene for the purpose of assisting Mr Ablyazov's committal defence.

57. Only point (iv), which is placed last of these four points, would, if there was merit to it, raise a substantial matter of concern, for Mr Ablyazov and at least Syrym Shalabayev were important witnesses. However, the point lacks merit. It is plain throughout the judgment that the burden of proof rested plainly on the bank. However, as is typical of any trial, the evidence of any witness depends critically on his or her credibility and reliability. Just as typically, a judge comments that he is unable to credit the witness save to the extent that his evidence is reliably corroborated by the documents.

58. The next complaint was of a failure to appreciate the inherent improbabilities of the bank's case. It is submitted that the two key elements of this error were that there was no need for Mr Ablyazov to lie about his assets where he had already disclosed an estate worth billions of dollars; and that there was no need for such complex fabrications as the bank alleged when the same result could have been achieved far more simply (see for instance the Stantis allegation). As for the first, Mr Ablyazov disclosed 17 assets, which he originally said were worth $5 billion, and now says are worth $1 billion. The receivers' most recent valuation is of $220 - $379 million. Mr Ablyazov can fairly say that there has been a decline in value over the years, especially given his troubled position, but even so there remains a vast gap between the allegedly fraudulent loans and the disclosure. The documents which the bank has obtained from court orders against third parties have led to the addition of over 600 companies to the receivership order. A successful entrepreneur on Mr Ablyazov's scale would know that he could not present himself as without any assets at all. It is revealing however, that he has not even disclosed his own homes in England. There is, in my judgment, no inherent improbability in the bank's case here. As for the second element of this complaint, it goes no further than to put in question the merits of the allegations.

59. Mr Matthews' fifth pervasive flaw was a procedural point that the bank was unfairly allowed to raise allegations which were not to be found in the schedule of contempts. He cited RSC O 52, r 4.5 to the effect that "the court will have regard to the need for the respondent to have details of the alleged acts of contempt and the opportunity to respond to the committal application". The point was made at trial and rejected by the judge. There is to my mind no doubt that the contempt allegations tried by the judge were properly and fully pleaded. Mr Ablyazov knew exactly what case he had to meet. However, it is of the nature of the process that points are raised and responded to as a trial progresses. It is not to be expected that all such points will have been set out in pleadings (or ever needed to have been). Ultimately, it is a matter for the judge, if complaint is made, to hold the ring on the basis that the process should be fair. It would take a strong case to show that the judge was wrong in his assessment. No such case has to my mind been made out.

60. The next flaw was described as "Failure to analyse the evidence overall caused by an incremental approach to the allegations". The complaint appears to be that the judge rejected certain parts of the defence case by relying entirely or primarily on the rejection of another part: as where the defence case on Oaklands Park was rejected primarily for the reasons which had led to the rejection of the defence case on Carlton House. Instead, it is said that the judge should have adopted a holistic approach. However, where the allegations concerning both properties depended in large part upon Syrym Shalabayev's evidence about his success in the uranium business, the point is without substance. I agree nevertheless that ultimately, however much each allegation of contempt needed to be looked at on its own merits, the key question of Mr Ablyazov's honesty with respect to his assets is likely to link the allegations. Unfortunately, such an overall approach does not assist Mr Ablyazov, since the strength of the bank's case may be said to multiply (as Lord Simon said, geometrically) when everything is looked at together. In my judgment, the judge's allegation by allegation approach may, in a case of circumstantial evidence dependent on inference, be rightly said to have favoured Mr Ablyazov.

61. Another related complaint was that the judge did not take into account in favour of Mr Ablyazov the ramifications for his case as a whole of the judge accepting that certain parts of it might be true: as in the case of Elizabeth House. The point is without merit however. The individual allegations found proved were proved, in the judge's view, beyond reasonable doubt. The allegation, for instance, regarding Elizabeth House was not found proved to the required degree "notwithstanding the matters which strongly support the Bank's case". That is of very little, if any, assistance to Mr Ablyazov, especially where that property cost only £650,000.

62. Finally, it is said that the judge failed to address particular disclosure inadequacies regarding the documentation relied on by the bank. The judge could not be satisfied that the documentation was complete or that he had the whole picture. However, the

judge rejected the submissions that the bank's disclosure had been partial and selective or otherwise inadequate, and in any event the judge reminded himself that –

> "the Court must exercise care when relying upon and drawing conclusions from the disclosed material. That is because it is possible that the Bank may not have had access to all of Eastbridge's electronic documents and that some relevant documents may have escaped the electronic searches directed by Mr Hardman. These matters must be borne in mind when considering whether the Bank has been able to discharge the burden of proof to the criminal standard. I have sought to do that" (at [39]).

That was an impeccable self-direction.

63. I therefore reject all the fundamental criticisms aimed at the judge's judgment and analysis. In truth, these were a rather threadbare series of complaints.

64. I turn next to the criticisms raised (in writing) in respect of the judge's findings under the three separate allegations of contempt. However, I do not propose to deal with them in detail, for the reasons expressed below.

The Bubris allegation: appeal and discussion

65. There are 54 paragraphs of skeleton argument devoted to Bubris. Complaints are made that: (a) the bank's case that Mr Ablyazov owned Bubris was based entirely on inference and could not succeed beyond reasonable doubt, given the contrary evidence; (b) the judge was mistaken to conclude that Mr Batyrgarejev's appointment as UBO was not a mistake: it followed that his undoubted connection with Mr Ablyazov was of no consequence; (c) the judge was equally wrong to conclude that the replacement of Mr Batyrgarejev by Mr Kovalenko in February 2010 was to hide the connection with Mr Ablyazov rather than simply to correct the mistaken appointment of Mr Batyrgarejev; (d) the judge was also wrong to reject the evidence that Mr Sadykov was the true UBO of Bubris, as was confirmed by his appointment in September 2010; (e) in this connection the judge erred in saying that there was no reason for Mr Sadykov to reveal himself at that time; (f) there was the prospect of further evidence at final trial; and (g) the judge could not be sure that Bubris was worth more than £10,000 (below which the freezing order did not require disclosure).

66. These submissions track the whole of the evidence and arguments deployed at trial. It is an attempt simply to reargue the trial. The judge was meticulous in dealing with

every aspect of that evidence and argument in his judgment. I have considered these submissions, with the aid of the bank's skeleton and the judge's judgment, with care, but I cannot find in the submissions made on appeal any reason for doubting the judge's own careful evaluations and conclusions, which I find compelling. It is probably superfluous, and, given this court's far lesser exposure to the materials and evidence and argument than the judge enjoyed, even problematical, to attempt to put into my own words, succinctly, the reasons why I find the bank's case on the Bubris allegation fully proved, to the criminal standard. That is not even of course the test on appeal. There is simply no error shown in the judge's findings or reasoning. His conclusion is entirely safe.

67. Be that as it may, I would emphasise the following aspects of the argument as utterly damaging to Mr Ablyazov's appeal. (i) The declared UBOs of Bubris over the period from January 2008 down to September 2010 were Messrs Udovenko, Syrym Shalabayev, Batyrgarejev, Kovalenko and Sadykov. It is Mr Ablyazov's own case that the first four names were not the beneficial owners of Bubris, that all but Mr Batyrgarejev, whose appointment is said to have been a mere mistake, and Mr Sadykov, who is said to be the real owner, were nominal UBOs, deliberately chosen to conceal the real name of the true owner. In such a situation, a court must inevitably be extremely careful in considering the allegation that the true owner has to be finally identified in the person of the latest declared UBO. The natural inference is that the true owner has still not been named. It is frankly unrealistic to suppose that he has been. I use the expression unrealistic to connote the absence of a real possibility, such as would create a reasonable doubt about the true ownership of Bubris. (ii) In such circumstances, the evidence of Mr Sadykov himself would be critical. But Mr Sadykov has merely been willing to make a written statement, and to give instructions to a lawyer, Mr Golovkin, who has come to court to relay those instructions and otherwise, as the judge commented, rely on professional privilege to avoid the inevitable questions. If Mr Sadykov has been finally willing to have himself identified as the owner of Bubris (a company which Mr Ablyazov in any event says is worth less than £10,000, which would not mark out Mr Sadykov as a wealthy man), then, for the purposes of the argument that wealthy Kazakh citizens need to be astute to hide their identity to avoid persecution by the political powers of Kazakhstan (and there are of course many other reasons why wealthy men like to hide their wealth and its sources), the cover is blown. In such circumstances Mr Sadykov might have been expected to come to London to speak for himself, and explain why it was only in September 2010 that he was prepared to be identified. (iii) It follows that the positive case that Mr Sadykov was the true owner of Bubris (and I bear in mind that Mr Ablyazov does not in theory need to raise a positive case, and he in any event bears no burden of proof) does not get off the ground. As it is, the emergence of Mr Sadykov is clearly referable to the freezing order served on Bubris at the end of July 2010, together with evidence showing that Mr Kovalenko had denied being its true UBO. Moreover, Mr Sadykov had been an employee of the bank during Mr Ablyazov's tenure, with a history of acting in relation to Mr Ablyazov's assets.

68. (iv) As for the other names declared as UBOs of Bubris, Mr Udovenko has been associated with the administration of Mr Ablyazov's companies for many years and

has been the nominal UBO of some of them, even if he has also been involved on behalf of other owners; Syrym Shalabayev is Mr Ablyazov's brother-in-law and has likewise been deeply involved in the administration of Mr Ablyazov's companies, indeed taking the evidence as a whole it is clear that Syrym has been something of Mr Ablyazov's right hand man in that respect; Mr Batyrgarejev was only ever involved as Mr Ablyazov's representative, and acted for no one else; and Mr Kovalenko is admittedly a temporary cipher for someone else (it is said Mr Sadykov, but that suggestion carries no weight). In such circumstances, and especially when other matters are taken into account, such as the timing of the change from Mr Batyrgarejev to Mr Kovalenko, so intimately connected with what was happening in this litigation, the natural inference is that Mr Ablyazov is the true owner of Bubris.

69. (v) The closeness of the connection between Mr Ablyazov and Mr Batyrgarejev was such as to be capable of proving the bank's case all by itself, unless at least a reasonable doubt could be raised by the suggestion that his appointment as UBO was a mere mistake. That is the doubt that Mr Ablyazov sought to raise. However, it was an impossible task. Syrym Shalabayev himself said that there was no "logical explanation" for such an error. The documents which led to his appointment are numerous, and clear, and admit of no realistic possibility of it happening by mistake; and as late as November 2009, some six months after his appointment, he was referred to in terms of "as you know…the nominal beneficiary owner" of Bubris in an email sent by Ms Kolyasova, an Eastbridge employee, to Syrym Shalabayev himself. No doubt it was for this reason among perhaps others (such as that Mr Batyrgarejev was not replaced until February 2010) that in his oral evidence Mr Shalabayev said that the mistake was not spotted until February 2010, whereas in his written statement he had said that it had been spotted in April 2009 (and thus, oddly, at about the same time as his appointment was confirmed, namely 28 April 2009).

70. (vi) Mr Batyrgarejev was replaced by Mr Kovalenko only in February 2010. Mr Shalabayev's evidence that his replacement occurred then because it was only at that time that the error had been noticed was tainted (see above). Why therefore did it occur then? Because it had been on 18 February 2010 that the name of Bubris's UBO was sought from Mr Kythreotis, who on 22 February passed the request to Syrym Shalabayev, saying "the matter is now very serious". The appointment of Mr Kovalenko was (of necessity) backdated to April 2008. The suggestion made in Mr Matthews' skeleton that the change was merely a routine one, executed without sign of urgency, is, I am sorry to say, typical of submissions without merit made in a misconceived attempt to reargue the case from the bottom up.

71. As for the suggestion that Bubris was not worth more than £10,000, the judge said that he was sure that it was worth more, at any rate at the time of the freezing order in August 2009. The documents show numerous large transfers or transactions (in the millions of dollars) in August and September 2009.

72. As for the suggestion that the judge's conclusion was unsafe because there would be more evidence at trial, the judge, with his great experience of the case, was entitled to discount that possibility, so far as the ownership of Bubris was concerned. Gross LJ, giving the leading judgment of this court on Mr Ablyazov's appeal against the bank's choice of the Bubris allegation for the purpose of its application to commit, agreed with the judge's dismissal of an identical argument: see [2012] 2 All ER 575 at [47]. Since the hearing of this appeal, however, Mr Ablyazov's solicitors, Addleshaw Goddard, have written to the court to bring to its attention the judgment of Vos J dated 10 July 2012 dismissing the bank's application for the committal of Mr Ereshchenko in another action (the so-called AAA action) within this litigation: [2012] EWHC 1891 (Ch). Bubris is one of the defendants to that action, but the ownership of Bubris was not in issue in those committal proceedings (indeed para 107 of the judgment of Vos J records Mr Hardman's acceptance that he knew of no evidence that Mr Ereshchenko was concerned with the concealment of Mr Ablyazov's interest in Bubris). Rather, Mr Ereshchenko was charged with lying in his response to a disclosure order that he knew nothing about the AAA transactions and that he did not have access to any documents that might assist (at para 1 of the Vos J judgment). Thus the allegation went much closer to the merits of the AAA action than the much more closely focussed allegations of contempt which Mr Ablyazov has faced.

73. Moreover, Vos J referred, without any hint of criticism, to Teare J's para 122, in which he rejected the idea of there being further relevant discovery about the ownership of Bubris, and continued by *distinguishing* the position in the application and proceedings before him, thus:

> "134. Mr Ablyazov's case provides a good starting point for this discussion. In Mr Ablyazov's case, the type of contempt was the same as it is here, but Teare J thought he had all the available evidence on the point. That is not the same in this case. There is no doubt that there may be very much more evidence available concerning the AAA Transactions and Mr Ereshchenko's involvement in them. Indeed, the Bank has not yet been ordered to give disclosure and, according to Mr Hardman, has been careful to disclose only the documents it perceives that Mr Ereshchenko is entitled to receive at this stage. …
>
> "135. If the substantive case against Mr Ereshchenko is proved at trial, the court would undoubtedly be in a better position at that stage to determine whether what he said about his recollection and access to documents in December 2010 was clearly false…"

74. There is thus compelling circumstantial evidence that Mr Ablyazov was the true owner of Bubris. There is no documentary evidence to the contrary (the declaration of Mr Sadykov as the UBO stands by itself in no different category from the four previous UBO declarations). The judge was entitled and right to discount the evidence of Mr Ablyazov and his other witnesses, and indeed to find that such evidence was incredible and to be lies.

75. For these reasons, which essentially track those of the judge, I would dismiss this appeal in relation to the first finding of contempt.

The UK properties

76. Under this heading, the points made in Mr Ablyazov's skeleton argument are as follows.

77. As to the UK properties as a whole: it is submitted that the judge was wrong to conclude that Mr Ablyazov and not Syrym Shalabayev was the owner and seller of the uranium business; that he was wrong to place reliance on the failure (prior to new material coming forward between trial and judgment) of any purchaser of the UK properties to challenge the receivership order; and that he was wrong not to recognise the improbability of failing to disclose the ownership of UK properties despite other extensive disclosures.

78. As to Carlton House: it is submitted that the judge was wrong to view Sunstone as Mr Ablyazov's company; that he was wrong to find that Mr Ablyazov's lease of Carlton House was a sham; that he was wrong to infer complicity from the transfer in November 2009 of the shares in Mount Properties from Mega Property to Smartwhere; and that he was wrong to place reliance on the change made to the nominal UBO of Smartwhere (from Syrym Shalabayev to other individuals during October 2009 to June 2010).

79. As to Oaklands Park: it is submitted that the judge was wrong to find that Mr Ablyazov was the owner of the companies (Sunstone, Mega Property and Widley) which provided the purchase price; and that the judge was wrong to place reliance of a similar change in the name of the UBO of Lafe Technology (from Syrym Shalabayev to another).

80. As to Alberts Court: it is submitted that the judge was wrong to place reliance on Piper Smith Watton acting on behalf of Bensbourogh (the registered proprietor of Alberts Court) as well as on behalf of Mount Properties (the registered proprietor of Carlton House); that the judge was wrong to find that Salim Shalabayev's evidence of ownership of the Alberts Court flat was incredible; that the judge was wrong to conclude that Syrym Shalabayev must have arranged the purchase on behalf of Mr Ablyazov; and that the judge was wrong to place no reliance on the fact that Salim Shalabayev was the declared UBO of Bensbourogh.

81. The roll-call of these submissions again demonstrate that this appeal goes to practically every finding and comment of the judge, both those of importance in the structure of his analysis, and those of much lesser importance.

82. I would again conclude that the judge's reasons for his conclusions are compelling. I have again considered the written submissions carefully, but cannot find in them any reason for doubting the judge's analysis. No error of law is relied upon. There is again an attempt completely to reargue the trial, down to the smallest details. I would come to the same conclusions as the judge myself, and be sure of them, although that is not the test. I do not consider that the conclusions are in any way unsafe.

83. I do not think that I can better the way in which the judge has dealt with these matters, and which I have tried to summarise above. However, I will deal as briefly as I can with some at least of the points canvassed.

84. Mr Matthews' skeleton complained that the judge had placed too much weight on a letter written by Mr Ablyazov to the President of Kazakhstan dated 14 January 2004 in which he had described himself as head of the board of directors of Astana, and had taken insufficient account of Mr Ablyazov's explanation that it was written to assist Syrym; and had also failed to take into account that this letter had been disclosed late, and had left Mr Ablyazov little time for his response to it. Since the letter was his own letter, I do not understand that submission. I agree with the judge that the letter fatally undermines the case that the uranium business was Syrym's rather than Mr Ablyazov's. The submission fails to grapple effectively with the Denton Wilde Sapte letter dated 16 August 2005 which described Mr Ablyazov as the "beneficiary of the structure", that is the structure whereby Widley owned Astana and Astana owned the uranium business. In any event, I would comment that there is no evidence that Syrym was a successful businessman on a grand scale, as distinct from an administrator of his brother-in-law's companies, a man who attended to the bureaucracy of that administration, including the concealment of its ownership. That is not the hall-mark of the hugely successful entrepreneur, which Mr Ablyazov patently was. Moreover, it was not Syrym who lived in Carlton House and Oaklands Park, but Mr Ablyazov and his family.

85. The judge's reliance on the absence of a challenge to the receivership order by purchasers of Carlton House and Oaklands Park is clearly a most telling point. Just as telling, in my judgment, is the fact that, when the point was made at trial, an attempt was made between trial and judgment to put the alleged purchasers, the mysterious Mr Koefer and Ms Beaud, onto the stage: but not with proper evidence as to their purchase, or an application to the English court in challenge to the receivership order, which would be necessary to obtain a clear title on the register, but with an assertion made in a document exhibited in Cypriot court proceedings. Such coyness in relation

to properties of such value is cogent evidence that any dealings with them are not honest, arms' length, transactions.

86. I have already responded to the suggestion that the extent of Mr Ablyazov's asset disclosures makes the allegation that he has failed to disclose all his assets improbable (see at [59] above).

87. I turn to the additional points raised about Carlton House. As to Sunstone, Mr Ablyazov accepted in evidence that Sunstone held his interest in TechStroy Alyans for his benefit. It is true that Syrym Shalabayev said he was the beneficial owner of Sunstone: however in circumstances where Syrym was disbelieved in relation to the source of the proceeds paid by Sunstone for Carlton House (which Syrym said came from the proceeds of his uranium business but which the judge found came from the proceeds of Mr Ablyazov's uranium business), the compelling inference is that Sunstone was indeed Mr Ablyazov's company. As for the lease by Mr Ablyazov of Carlton House, I suppose that it is not impossible, although it is unlikely, that a beneficial owner should take a lease of a property from his own company: however, all the details of the lease in question which the judge relied on did indeed point to the conclusion that it was indeed a sham (see at [24] (vii) above). As for the transfer of the shares in Mount Properties to Smartwhere, the judge was fully entitled to view the transfer as an attempt to distance Mr Ablyazov from the Carlton House property. The transfer took place on 17 November 2009, respectively three weeks after and a few days before the first and second days of Mr Ablyazov's cross-examination. In any event, while this factor was pertinent (see [24] (vi) above), it was hardly a critical factor in the judge's reasoning. The same may be said for the complaint that the judge was wrong to take into account the successive transfers of the UBO of Smartwhere on 19 October and 11 November 2009 and 25 June 2010. It is surprising to find that such points have been raised.

88. I next turn to the additional points raised in relation to Oaklands Park: but these essentially go no further than those already addressed in relation to Carlton House. The evidence, direct and circumstantial, connecting each of Sunstone, Mega Properties and Widley with Mr Ablyazov was cumulatively compelling. Again, as with Carlton House, the change of the nominee UBO of its registered proprietor, Lafe Technology, was highly suggestive of an attempt to distance Mr Ablyazov from the property, but hardly decisive in the judge's reasoning. There is an element of scraping the barrel in raising this point.

89. As for Alberts Court: the points raised on behalf of Mr Ablyazov are a straightforward attempt to reargue the judge's assessment of the evidence of Salim and Syrym Shalabayev, witnesses who for the careful reasons given by the judge had no credibility with him. While the judge accepted that the case in respect of this property was not as strong as in the case of Carlton House and Oaklands Park (I would

comment, if only because the purchase prices were not as outstandingly large), the facts show that there was nothing to tie Salim Shalabayev with this property other than the say-so of the two brothers. However, he never lived there, although Mr Ablyazov's driver and his wife had lived there. If, therefore, the property was not Salim's, it must have been Mr Ablyazov's. Syrym, who had selected it, and negotiated for and paid for it, did not say that he bought it for himself.

The Schedule C companies.

90. The principal approach of the complaint made by the skeleton argument filed on behalf of Mr Ablyazov is that the matters relied on by the judge "did not provide sufficient evidence for a finding beyond reasonable doubt". This is simply not a basis upon which this court could overturn the careful findings of the trial judge. There was plainly evidence upon which the judge was entitled to find the bank's case proved to the requisite standard. I refer to the judge's reasons set out earlier in this judgment. Moreover, a combination of the complexity of the point together with an absence on appeal of either any serious error complained of or any attempt to take the submissions back to any underlying evidence, further undermines the overall complaint of error.

91. The skeleton argument complains that the speed with which the Schedule C payments were made, or information obtained about them, did not by itself prove anything, that the judge's conclusion that the Schedule C chart was not provided by C was unsustainable, that the absence of any documentation supportive of C's authorship was irrelevant, and that there was no sign of Mr Udovenko's or Syrym Shalabayev's involvement in providing this information. Moreover, it is submitted that the judge ought not to have rejected the evidence that FM was Syrym's and not Mr Ablyazov's company, nor the evidence that Bergtrans and Carsonway were Mr Kossayev's and not Mr Ablyazov's companies. A comparison of this list of challenges with the judge's findings and analysis set out earlier in this judgment demonstrates how much this appeal is simply an attempt to reargue each of the judge's assessments of the oral and written testimony and the documents (or absence of documents) at trial.

92. However, in my judgment, this goes nowhere. It is impossible for this court to gainsay the judge's rejection of the credibility (both overall and on this subject-matter) of Syrym Shalabayev and Mr Ablyazov. It does not help to say that the reluctance of Mr Kossayev himself to give evidence is explained by the existence of a warrant out for his arrest. The comment of Syrym Shalabayev himself in evidence that he knew nothing of the facts relating to Mr Kossayev's substitution as UBO of Bergtrans and Carsonway is devastating, especially seeing that Mr Shalabayev was himself a former UBO of these companies. The changes in the UBOs of these companies is highly reminiscent of the similar changes in the case of Bubris (also ending belatedly in a supposed "true" UBO, there Mr Sadykov). Further compelling points are that: there

was no documentation that C performed the treasury role for Mr Ablyazov's companies suggested by the defence, and no documentation to show how the Schedule C chart came forward; the inference is compelling that C was invented as the author of the chart at a time when Mr Ablyazov was seeking to conceal the roles of Mr Udovenko and Syrym Shalabayev as UBOs and administrators of his companies; when pressed, Mr Ablyazov had to admit that, when he wanted information about his companies, "first and foremost I turned to Mr Udovenko, because he helped to manage my companies. Later, Mr Shalabayev helped me" (H2/13/81); there was not the slightest documentary evidence to support the account which Mr Ablyazov gave of how the large-scale transactions between FM and Ablyazov companies were generated by Syrym's wealth.

Stantis

93. The points under this heading canvassed in the appeal skeleton are as follows: (i) that the judge could not properly have concluded that Mr Aizhulov was a credible witness in relation to the forging of his signature, or at least could not properly have been sure that he was not a mistaken witness; (ii) that in any event the conclusion that the long form agreement and the June 2009 agreement (and the notices given under them) had been forged was unwarranted; (iii) that the judge erred in concluding that the Stantis loans were assets of Mr Ablyazov; and (iv) that the forgery was improbably elaborate, especially without clear evidence that Mr Ablyazov had benefited through Nitnelav (the assignee), of which there was none. In respect of point (i) the submissions covered all the ground of trial to the effect that Mr Aizhulov had cut a deal to save his own skin and to improve his difficult financial situation. In respect of point (ii), again a whole raft of points was raised about the possible significance of aspects of the critical documents, and about the insignificance of the absence of negotiation documents. In respect of point (iii), it is submitted that the involvement of Mr Batyrgarejev is irrelevant, since he only became the director of Stantis in May 2010, and that, whatever Mr Ablyazov's involvement in the company, it was not shown that the loans to the Ukrainian companies were held to his instructions. In respect of point (iv), it is submitted that the judge's findings failed the tests of inherent probabilities and of the essentially unanswered question of *cui bono*?

94. I have again paid careful regard to the lengthy written submissions of which the above is only a brief synopsis, but, in my judgment, it is simply not possible to attempt to unpick the trial judge's conclusions in this way. Those conclusions are dependent upon his assessment of the witnesses whom he has heard, and on his great familiarity with the issues in this litigation. Again, it remains the position that, without a significant error of law or fact, it is not for this court to superimpose its views on that of the trial judge; nor, in the light of these submissions, am I in any way inclined to do so. For all the reasons explained by the judge, the impugned documents had the most serious question marks raised against them solely as documents. Critically, the short form agreement said that the loan from Alterson was not repayable until maturity, whereas the long form agreement made it repayable on notice at any time. On top of

that, comes the evidence of Mr Aizhulov. The judge had before him all the submissions remade to this court as to why Mr Aizhulov should not be believed, and the judge therefore knew that he had to be particularly careful if he was to place full credit in his evidence. He considered the status and value of his evidence, and the attacks that were made on his credibility, in a detailed and lengthy section of his judgment (at [40]-[51]); he was nevertheless convinced that he gave that evidence honestly. He also considered whether he might have been mistaken. Mr Ablyazov could always have sought expert handwriting evidence to challenge Mr Aizhulov's evidence as to the documents on which he challenged the authenticity of his signature; but no such evidence was called. All the detailed points raised again on appeal are considered in the judge's judgment. It is impossible to say that the judge was wrong in his conclusion; and the judge also had in mind the forensic points made such as that there were easier ways of covering the tracks of the dealing with these assets.

95. If the documents were forged, then there only remain comparatively technical points (I do not mean thereby to suggest that such points are not critical to a finding of contempt), such as whether the loans were Mr Ablyazov's to deal with. However, if the documents were forged, then it seems to me to be practically inconceivable that they were not forged for the purpose of meeting the allegation of dealing with such assets in contempt of court. Why else would they have been forged? As for Stantis, the evidence that it was Mr Ablyazov's company was strong, and Mr Batyrgarejev's presence as director (at any time) was an important part of that evidence. Moreover, it was Mr Batyrgarejev who executed the backdated December 2010 novation agreements, on instructions from Syrym Shalabayev. The inferences that all elements of these transactions, Alterson, Stantis, the Ukrainian companies, and Nitnelav, were joined in a single web of beneficial interest were immensely strong.

Conclusion on the committal judgment appeal

96. I would end this section of my judgment by saying this. It is noticeable from the facts of this case, both as found by the judge, but also in the nature of the structure of the arguments as they have developed, how time and time again, as some aspect of Mr Ablyazov's conduct has come under question, so the evidence deployed has become remarkable for the way in which it has taken tortuous turnings which have asked the court to suspend its belief in reality in favour of reduplicating unrealities. Thus in the case of Bubris, the court was asked to believe both that Mr Batyrgarejev, one of Mr Ablyazov's dedicated lieutenants, had been appointed UBO of Bubris by mistake, and that the true UBO had only emerged in September 2010, albeit backdated to May 2010, after two years in which a succession of nominal UBOs had been declared. The significance of September 2010 is that the freezing order against Bubris was served at the end of July 2010.

97. In the case of Carlton House and Oaklands Park, sumptuous homes which Mr Ablyazov and his family enjoyed, when they became the focus of attention in the committal proceedings, the court was asked to believe that not Mr Ablyazov but his brother-in-law Syrym Shalabayev was the owner, by virtue of his success in the uranium business, a success not only entirely undocumented but contradicted by documents, and unmentioned by Mr Ablyazov when he was setting out his original account of Syrym's business career. Moreover, when the point was made at trial that Syrym's alleged sales of these properties to third parties went unevidenced despite the receivership orders against the companies concerned and notes placed on the Land Registry, mysterious buyers subsequently to trial belatedly emerge making themselves known not in England, but in Cyprus, but otherwise strangely quiescent as to the disaster by which their highly valuable properties have become embroiled in English proceedings.

98. In the case of the Schedule C companies, the court is asked to believe in the existence of the mysterious and unidentified C, and that although some of the companies mentioned on the Schedule C chart, such as Drey and others, belong to Mr Ablyazov, nevertheless others do not. In particular, Bergtrans and Carsonway, just like Bubris, after a number of years in the hands of nominal UBOs connected with Mr Ablyazov, such as Mr Udovenko and Syrym Shalabayev, without any adequate explanation suddenly emerge in July 2010 (albeit as usual backdated) as companies who are given that most unusual of things, a true UBO, Mr Kossayev, a man who is allegedly so wealthy as previously to have preferred to go unknown, but who it seems needs to borrow £10,000 from the bank to buy a second-hand car.

99. In the case of Stantis, the court is asked to believe that loans which were assigned by it in December 2010, after the company concerned was brought into the receivership order, were the subject of an earlier agreement for their assignment made in June 2009 pursuant to a (long form) agreement of April 2007: even though the assignments make no mention of the earlier agreements, and the man who purportedly signed the agreements on behalf of Stantis gave evidence that he had not. Moreover, Stantis, whose sole director is Mr Batyrgarejev, Mr Ablyazov's lieutenant, and which is a company Mr Ablyazov had previously admitted was one through which he held an interest in another asset, is now said not to hold the Stantis loans for the account of Mr Ablyazov.

100. As this series of coincidences, misfortunes, errors, misunderstandings and inexplicable developments multiply, the court is entitled to stand back and ask whether there is in truth a defence or defences as alleged, even if no burden rests on Mr Ablyazov, and the burden remains on the bank, or whether there is at any rate the realistic possibility of such, or on the other hand whether the court is being deceived. The trial judge decided that it was being deceived by witnesses without credibility. It is not for this court to say that he was wrong without strong grounds for doing so, grounds which have simply not been formulated.

101. I would therefore conclude that the appeal on each element of the committal judgment should be dismissed.

The appeal against sentence

102. Mr Matthews submitted that the sentence of 22 months was too long, in circumstances where the maximum sentence which can be handed down on any one occasion is 2 years. The judge said that he had no doubt that the value of Bubris was likely to be substantial; the two main English properties had very substantial value; the value of the Schedule C companies was admittedly unknown, but the contempt involved in lying about them was substantial; and the Stantis contempt had occurred not long after and in breach of the freezing order and also very shortly after the receivership order had come into force and was also a substantial contempt.

103. The judge said he had regard to the guidance given by this court in sentencing Mr Kythreotis for contempt at [2011] EWCA Civ 1241 at [51]-[56]. Mr Kythreotis received a sentence of 21 months imprisonment, of which he could seek the remittal of up to 12 months in the event of prompt and full compliance with the breached orders. Jackson LJ, with the agreement of Lord Neuberger MR and Carnwath LJ, said this:

> "[55] From this review of authority I derive the following propositions concerning sentence for civil contempt, when such contempt consists of non-compliance with the disclosure provisions of a freezing order:
>
> (i) Freezing orders are made for good reason and in order to prevent the dissipation or spiriting away of assets. Any substantial breach of such an order is a serious matter, which merits condign punishment.
>
> (ii) Condign punishment for such contempt normally means a prison sentence. However, there may be circumstances in which a substantial fine is sufficient: for example, if the contempt has been purged and the relevant assets recovered.
>
> (iii) Where there is a continuing failure to disclose relevant information, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor."

104. Mr Matthews submits that the judge failed to have regard to previous authorities to which the judge had been referred. Mr Matthews referred to not only the *Kythreotis* case, but also *JSC BTA Bank v. Shalabayev* [2011] EWHC 2908 (Ch), where there was a sentence of 18 months; *JSC BTA Bank v. Stepanov* [2010] EWHC 794 (Ch), where a 2 year sentence was imposed; *Daltel v. Makki* [2006] 1 WLR 2704, where the sentence was 12 months; *IFC v. DNSL Offshore* [2005] EWHC 534, where the sentence was again 12 months; *Shalson v. Russo* (unreported, 9 July 2001), where a 2 year sentence was imposed; *Lexi Holdings plc v. Shaid Luqman* [2007] EWHC 1508 (Ch), [2007] EWHC 2355 (Ch), where the sentence was 2 years (after an initial indication of 18 months) because of post-judgment deception. Most of these authorities (and others) were considered in Jackson LJ's judgment in *Kythreotis*, so it is wrong to say that the judge did not have proper regard to them.

105. Mr Matthews submits that the facts of these earlier authorities where they resulted in similar sentences to that of the judge were different. For instance, he submits that in *Kythreotis* and *Shalabayev* there was a total failure to comply with the disclosure orders, in *Stepanov* there was wholesale non-compliance and a judgment for $200 million where the contempt had led to difficulties of enforcement, and in *Shalson* nearly 100 allegations of contempt were proved. Mr Matthews submits that the three allegations of contempt proved against Mr Ablyazov do not compare, and should have resulted in a lesser sentence. He also prays in aid the difficulties faced by Mr Ablyazov in preparing his defence of the merits of the litigation against him, which ought to have led to the suspension of the sentence pending trial; as well as the uncertainty of the amounts involved in the allegations proved in the case of Bubris, the Schedule C companies and the Stantis loans. He complains that a further hearing should have been directed to investigate the values concerned.

106. In my judgment, however, there is no justification for interference with the sentence imposed. Although there has not been a total failure of compliance with the orders imposed, Mr Ablyazov has an importance within this litigation which far exceeds other individuals such as Mr Kythreotis or Mr Syrym Shalabayev. Moreover, Mr Ablyazov's contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination, and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents.

107. The contempts have also been seriously aggravated by post-judgment events. Although the judge did not take these matters into account in his sentencing judgment, and only addressed them when he came to his unless judgment, the position is that Mr Ablyazov failed to attend the handing down of the committal judgment and has gone on the run to avoid his sentence. When reserving his committal judgment, Teare J asked for an undertaking that Mr Ablyazov would attend the judgment. His counsel, Mr Matthews "Confirmed that he will be present". The judge gave Mr Ablyazov the benefit of a forensic doubt as to whether a formal undertaking had been given of which Mr Ablyazov was in breach. Even so, this is undoubtedly an aggravating

feature of his contempts. Moreover, although ordered by the judge to surrender himself to the tipstaff and to make proper disclosure, Mr Ablyazov has done none of those things. He nevertheless pursues his litigation by instructing his lawyers from some safe, but unknown, haven. In the circumstances, the submission that his sentence ought to have been suspended pending trial is totally without merit.

108. It is suggested that Mr Ablyazov has complied very substantially with the original orders made against him, but I would not accept that. The position is that only three out of 32 alleged contempts have been tried; and that all the contempts tried have resulted in findings of guilt. Although a presumption of innocence may be said to prevail, and the burden of proof remains on the bank, the absence of trial of the other alleged contempts cannot in these circumstances stand as the equivalence of findings of compliance. On the contrary, this court has stated that Mr Ablyazov has ceased to co-operate with the receivers, and that there is evidence to suggest that he is seeking to deal with further assets: see [2012] EWCA Civ 629 at [29].

109. It seems to me that the sentence imposed by the judge, which allowed for the remittance of up to 10 months for prompt and full compliance, was fully justified by the facts and by the logic of the principles discussed by this court in *Kythreotis*. I would therefore dismiss the appeal against sentence.

The unless judgment

110. I recapitulate what I said in [2] above. Following Mr Ablyazov's absconding, the judge on 29 February 2012 gave a third judgment in which he gave his reasons for imposing an unless order, to the following effect. Mr Ablyazov will be debarred from defending the claims made against him, and his defences will be struck out, unless within the stated period he both surrenders to the tipstaff and makes proper disclosure of all his assets and dealings with them. The stated period for surrender was until 9 March 2012 and for disclosure was until 14 March 2012. However, the judge's order also provided that, in the event of an appeal, the sanctions for non-compliance would not take effect until seven days after the dismissal of the appeal. That was designed to preserve the position pending any appeal. His intention was that the unless orders "should not be…effective until seven days after the determination of any appeal" (at para 78).

111. These orders were opposed, but the judge was satisfied that he had both jurisdiction to make them, and ought in his discretion to make them. The essence of his reasoning is contained in the following passages from his unless judgment, [2012] EWHC 455 (Comm):

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

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

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

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

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

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

112. The judge considered that his findings of contempt provided ample justification for ordering Mr Ablyazov again to file an affidavit of his assets. The prospect of an appeal should not deter such an order. The order might in theory give the bank an opportunity for a further contempt application arising out of the same facts which were the subject of the earlier application: but any such application would face formidable difficulties, because Mr Ablyazov could not be sentenced twice for the same non-disclosures.

113. As for the unless orders, the judge referred to Mr Smith's submission that they were appropriate as a means of bringing pressure upon Mr Ablyazov to comply with the order for his committal and to disclose his assets so that the freezing order might be made more effective. In support of that submission the judge referred to *Derby v. Weldon (Nos 3 and 4)* [1990] 1 Ch 65 at 81D/E, *JSC BTA Bank v. Ablyazov (No 3)* [2010] 1 All ER 1093 (Comm) at [38] *per* Christopher Clarke J and *JSC BTA Bank v. Shalabayev* [2011] EWHC 2903 at [60]-[62] *per* Henderson J. The judge went on to refer to Mr Matthews' opposing submissions that no such orders should be made in the absence of a breach which would give rise to a substantial risk of injustice in the adjudication of a trial, such as to make a fair trial impossible. Mr Matthews cited *Hadkinson v. Hadkinson* [1952] P 285 at 289/290, 296, *Midland Bank v. Green (No 3)* [1979] Ch 496 at 506, *Logicrose Limited v. Southend United Football Club Limited* (Times Law Report for 5 March 1988), *Re Swaptronics Limited* (Times Law Report for 17 August 1998), *Arrow Nominees Incorporated v. Blackledge* [2001] ECC 591 at para 54, *Douglas v. Hello! (No 2)* [2003] EMLR 29, *Raja v. Van Hoogstraten* [2004] EWCA Civ 968, and *Polanski v. Condé Naste Publications Limited* [2005] 1 WLR 637. Similar authorities have been referred to again on this appeal.

114. The judge then reasoned his decision to make the unless orders as follows:

> "51. In the present case it is not suggested that Mr Ablyazov's failure to comply with the order for disclosure of assets will impede the court's ability to conduct a fair trial of the issues in the action. The unless order is sought in order to bring further pressure on him to comply with the disclosure order. That appears to me to be legitimate in principle and to be supported by the authorities relied upon by Mr Smith. Were it otherwise, the court would be powerless when faced with a defendant who refused to comply with an order for disclosure of his assets and when sentenced to be imprisoned for his contempt of court went into hiding in order to avoid the execution of that sanction.
>
> 52. The unless order would not be made because the court is indignant that the defendant has flouted the court's disclosure order, but because the unless order may cause the defendant to reconsider his position and comply, belatedly, with the disclosure order…
>
> 53. The authorities relied upon by Mr Matthews do not, in my judgment, suggest that it is illegitimate to make an unless order for such purposes. The principle which they establish is that a defence may be struck out if there is a substantial risk of injustice.
>
> 54. Whilst the cases essentially deal with a risk of injustice by reason of the difficulty of there being a fair trial of the issues in dispute, a risk of injustice can also arise by reason of the difficulty of enforcing a judgment caused by a defendant hiding his assets or dealing with his assets prior to trial…

> 59…Where there is a failure to give full disclosure of assets, the court must also carefully consider whether the failure has given rise to a substantial risk that overall the proceedings would be unfair or unsatisfactory…
>
> 62. The Bank's claims are very large indeed. They run to several billion dollars…
>
> 63. Mr Ablyazov's own estimate of the value of the 17 assets which he has disclosed was itself much less than the total value of the Bank's claim. There would therefore appear to be a risk, and a substantial risk, that the judgments the Bank seeks will not be fully enforced by execution on the 17 assets disclosed by Mr Ablyazov and, therefore, a substantial risk that justice cannot be done to the Bank without further disclosure…
>
> 66. It thus appears to me that, in the interests of overall fairness, the unless order should be granted in respect of the disclosure obligation…
>
> 76. So far as the surrender order is concerned, an unless order will be an incentive to comply with the order. Since compliance will enable the tipstaff to execute the warrant of arrest, it is appropriate that it be imposed. If the warrant is not executed, the proceedings will, in that respect, be unsatisfactory because the committal is designed to persuade Mr Ablyazov to comply with the freezing order and so ensure a fair trial in the full sense of that phrase…"

115. To the limited extent that an argument was raised before the judge in reliance on article 6 of the European Convention of Human Rights (ECHR), the judge said this:

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

116. Thus the judge granted the unless orders, not because the fairness of a trial had been or was likely to be prejudiced in relation to the determination of its issues in themselves, but so that orders of the court, which had been made in the interests of justice, could be supported against a recalcitrant litigant; so that that recalcitrant litigant, Mr Ablyazov, could be encouraged, by the threat that otherwise his litigation would be lost, to comply with the orders of the court and its pursuit thereby of the interests of justice; and so that the opposing party in the litigation, the bank, would not be unfairly prejudiced by the need to conduct litigation which Mr Ablyazov was both treating with contempt and at the same time seeking to make, ultimately, more or

less worthless. In such circumstances, without proper compliance with the orders of the court there was a substantial risk of injustice.

117. A particular issue arose before the judge as to whether the unless orders should apply to all eight of the actions commenced in the commercial court concerning the bank's claims against Mr Ablyazov. The judge ruled that they should, because of the way in which the freezing order in the first action was extended, by increasing the amount of it, to cover all the claims in the various actions involved (at paras 79-80).

118. The question on this appeal is whether such orders were within the jurisdiction of the court to make, and whether, even if such jurisdiction exists, they ought properly to have been made when due account is taken of Mr Ablyazov's rights pursuant to article 6, of the dictates of justice and fairness, and of precedent. The submissions made on behalf of Mr Ablyazov were, in this connection, covered both by Mr Matthews and by Mr Charles Béar QC, in written and oral form.

The submissions on behalf of Mr Ablyazov

119. A series of submissions have been addressed to this court. First, it is said that the judge lacked jurisdiction for his surrender order within either section 37 of the Senior Courts Act 1981 or the court's inherent jurisdiction. That was because the order was a final order, and there was no unconscionability, nor any legal or equitable right, to justify it. There was no precedent for it. Any analogous order was rooted in either rules of court or statute, such as sections 3(1) and 6 of the Bail Act 1976. Therefore the order was wrong in law.

120. Secondly, article 6 is invoked. It is submitted that article 6 jurisprudence frequently discusses the merely *implied* right of access, which is admittedly a qualified right interference with which may be justified on grounds of necessity and proportionality (*Golder v. United Kingdom* (1975) 1 EHRR 524). The interference with that implied right was one aspect of the argument concerning discretion. However, there is also the *express* right to an adjudication itself, a right to be heard, and that requirement, an aspect of the right to a fair trial, is absolute and not subject to qualification (*Dyer v. Watson* [2004] 1 AC 379 *per* Lord Hope at [73]). Therefore, the curtailment of that right inherent in the unless orders is absolutely wrong.

121. Thirdly, with respect to article 6's implied right of access, although interference with that can be justified, nevertheless such justification should follow the careful structure discussed for instance by Lord Steyn in *R (Daly) v. Secretary of State for the Home*

Department [2001] 2 AC 532 at [27]. There is no sign of that structured reasoning in the judge's judgment and for that reason alone the exercise of his discretion is flawed and has to be carried out anew by this court.

122. Fourthly, with regard to the question of justification, necessity, proportionality, fairness and discretion generally, the judge's exercise of his discretion is in any event flawed and outside the legitimate area in which disagreement is possible. In this connection, the following points are made: (i) the judge paid no regard to the absence of any Convention right exercisable by the bank, with which Mr Ablyazov's rights could be contrasted and balanced, and in any event carried out no proper balancing of the bank's and Mr Ablyazov's rights and interests; (ii) a situation of complete non-compliance (found in other cases) has to be contrasted with the situation in this case of incomplete non-compliance: the effect of Mr Ablyazov's only partial non-compliance upon the bank is uncertain; (iii) the judge failed to investigate the extent to which other mechanisms of information-gathering, such as the receivership itself, or self-help such as the bank has already adopted by seeking third party disclosure, could prove satisfactory so as to make the use of an unless order unnecessary and/or disproportionate; (iv) the judge was over-influenced by the idea that the court had to be seen to be doing something: this is the wrong starting-point, and to be compared with Mr Ablyazov's constitutional right to a hearing on the merits; (v) in any event, the court has an array of alternative sanctions, for instance in costs or through requiring payment into court, which the judge should have considered first; (vi) the judge was wrong to regard any loss of the right to a hearing on the merits as being due to Mr Ablyazov's own fault, should he not comply with the unless orders; (vii) punishment of Mr Ablyazov for his contempt is not, and was not regarded by the judge, as relevant to the issue of proportionality and fairness; (viii) precedent did not support the judge's orders.

The jurisprudence

123. In order to consider these submissions, it is necessary to consider relevant jurisprudence, which both parties relied on. Ultimately, I consider it most helpful if such jurisprudence, which considers both the jurisdiction to commit for contempt of court and the jurisdiction to make orders and impose sanctions in aid of a freezing order, as well as issues of fairness and proportionality (or human rights issues as they have been latterly designated) is considered chronologically, rather than by reference to individual points of what is, after all, a seamless analysis.

124. The earliest case cited was *Hadkinson v. Hadkinson* [1952] P 285 (CA), a family case which goes back before the era of the freezing order or the *Mareva* injunction as it used to be called (see *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, CA). In *Hadkinson*, the issue was whether a mother, who had disobeyed the orders of the court with regard to a child whom she had removed to

Australia, could be barred from being heard on appeal while she remained in contempt. It was held that she could be, if justice was impeded by her disobedience. The child was returned, the appeal was heard, and allowed. Denning LJ at 298 gave as examples of the impeding of justice "making it more difficult to ascertain the truth or to enforce the orders it may make".

125. *A J Bekhor & Co Ltd v. Bilton* [1981] 1 QB 923 (CA) brings us into the (early) era of the *Mareva* injunction. That was the authority which cemented the power to make disclosure orders in support of a *Mareva* injunction, pursuant to what is now section 37 of the 1981 Act. As Ackner LJ put it (at 940F/G):

> "To my mind there must be *inherent in that power*, the power to make all such ancillary orders as appear to the court to be just and convenient, to ensure that the exercise of the *Mareva* jurisdiction is effective to achieve its purpose."

Moreover, the same power existed in the inherent jurisdiction of the court (at 942G/H).

126. However, the court split on whether the power had been properly exercised in that case, where the judge had gone beyond the order of an affidavit of assets, and had ordered discovery of documents and interrogatories pursuant to the Rules of the Supreme Court. The majority (Stephenson and Ackner LJJ) held that the power had not been properly exercised: for the particular orders made seemed designed more to reveal the extent of breaches of the *Mareva* order committed in the past than to protect the function of that order for the future; moreover, the difficulties which had been experienced could have been addressed in other ways, such as by an application to cross-examine the defendant, or by removing the permission that had been granted to remove £1,250 per month out of the jurisdiction for living expenses (at 944G-955D, *per* Ackner LJ). Stephenson LJ put the matter somewhat differently (at 956C-D):

> "Parker J. described the plaintiffs' application and his order for discovery in aid or support of the *Mareva* injunction and so in a sense they were. But in so far as they relate to the defendant's assets at past dates as distinct from their present whereabouts their purpose seems to be not so much to help the court or the plaintiffs to locate and freeze particular assets now, as to open the way to incriminating and ultimately punishing the defendant for contempt of court in formerly disobeying the *Mareva* injunction and/or breaking his undertaking. This purpose emerges not only from the wide terms of the order but from the judge's comments at the end of his judgment. To that extent the order goes beyond the legitimate purpose of an order for discovery in aid of a *Mareva* injunction and Robert Goff J.'s order in *A v. C* and is not necessary for the proper and effective exercise of the *Mareva* injunction."

127. Mr Béar relied on this authority in support of his submissions. However, the dissent of Griffiths LJ reveals, particularly as time has gone on, how narrow the area of disagreement perhaps was; or alternatively, how the development of this jurisprudence would suggest that the decision reflects a somewhat sceptical, but now outdated, attitude to the newly discovered power of the *Mareva* injunction. Griffiths LJ said (at 950):

> "The judge was clearly dealing with a very evasive litigant…The judge was, in my opinion, fully justified in taking the view that the defendant's affidavits were so unsatisfactory that he was entitled to refuse to accept their contents at their face value and to order the defendant to make a full disclosure of his financial position…It is true that the judge might have used other measures to put pressure on the defendant to induce him to reveal the true state of his finances…
>
> I agree that the power to order discovery in support of a *Mareva* injunction should be sparingly exercised and if too readily resorted to could easily become a most oppressive procedure.
>
> I am sure that the judges in the commercial court have this well in mind. There should be no question of an order for discovery becoming a usual part of the *Mareva* relief…"

128. However, as will appear below, orders for the disclosure of assets at any rate by way of affidavit have become a standard feature of the freezing order. In due course, Parker J made an order for cross-examination of Mr Bilton, there was an application for leave to appeal, but leave was refused (at 956).

129. *House of Spring Gardens Ltd v. Waite (Mareva Practice)* [1985] FSR 176 (CA) confirmed the power to order a defendant to be cross-examined on, or even in advance of, his disclosure affidavit. Slade LJ said (at 180):

> "it is by no means inconceivable that cases, albeit perhaps rare cases, could arise where the court could properly take the view (1) that the defendant in an action appeared determined both to put and keep his assets beyond the reach of the plaintiff and to conceal the true nature and extent of these assets from the court; and (2) that, in the particular circumstances of the case, an immediate order for oral examination or cross-examination of the defendant was the only "just and convenient" way of ensuring that he would not deal with his assets, so as to deprive the plaintiffs in the future of the fruits of any judgment."

Cumming-Bruce LJ said (at 183):

> "The court has the power (and, I would add, the duty) to take such steps as are practicable upon an application of the plaintiff to procure that where an order has been made that the defendants identify their assets and disclose their whereabouts, such steps are taken as will enable the order to have effect as completely and successfully as the powers of the court can procure."

130. In *Bayer AG v. Winter* [1986] 1 WLR 497 (CA) the issue was whether the judge was right to refuse to order the defendants from leaving the country or to surrender their passports. This court reversed the judge on that issue. Fox LJ said (at 502C/D):

> "It is clear, however, that the law in relation to the grant of injunctive relief for the protection of a litigant's rights pending the hearing of an action has been transformed over the past 10 years by the *Anton Piller* and *Mareva* relief which has greatly extended the law on this topic as previously understood, so as to meet the needs of justice.
>
> Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink, if it is of the opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding that it may, in its terms, be of a novel character."

131. In *Logicrose Ltd v. Southend United Football Club Ltd* (1988) The Times, 5 March, Millett J dismissed an application for a claim to be dismissed on the grounds of inadequacies of discovery under RSC Order 24. It was alleged that a crucial document had been deliberately suppressed. Millett J described the application as unprecedented. He said, however, in a version of his judgment which appears to have been obtained from a court transcript and was subsequently cited in this court in *Arrow Nominees Inc v. Blackledge* [2000] 2 BCLC 167 at 183/4:

> "The object of Ord 24 r 16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the court...The deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe. But if the threat of such exclusion produces the missing document, then the object of Ord 24 r 16 is achieved. In my judgment an action ought to be dismissed or a defence struck out (as the case may be) only in the most exceptional circumstances once the missing document has been produced and then only if, despite its production, there remains a real risk that justice cannot be done. That might well be the case, for example, if it was no longer possible to remedy the consequences of the document's suppression despite its production, perhaps because a material witness who could have dealt with the

document had died in the meantime, or where, despite the production of the document, there was reason to believe that other documents had been destroyed or remained concealed. But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, unless there is a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice."

132. In *Maclaine Watson & Co Ltd v. International Tin Council (No 2)* [1989] 1 Ch 286 (CA) disclosure of assets had been ordered by the trial judge in support of a judgment creditor. The order was upheld in this court, whose judgment was given by Kerr LJ. He said (at 303F and 306E respectively):

"Secondly, there is the authority of this court in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923 and other cases that there is an inherent power under what is now section 37(1) to make any ancillary order, including an order for discovery, to ensure the effectiveness of any other order made by the court. This applies in the unusual circumstances of this case. Since the alternative means of appointing a receiver or of making an order under Order 48 are unavailable, the order for disclosure is necessary to render the plaintiffs' judgment against the I.T.C. effective."

"These cases are all instances of injunctions granted pursuant to section 37(1) of the Act of 1981for the purpose of rendering some other order effective. They provide ample justification for the order made by Millett J. in the present case in aid of the plaintiffs' unsatisfied judgment."

133. *Derby & Co Ltd v. Weldon (Nos 3 and 4)* [1990] 1 Ch 65 (CA) concerned the reach of a *Mareva* injunction and its proper ancillary orders abroad. Lord Donaldson of Lymington MR said:

"The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case…" (at 76E).

"What changes is not the power or the principles but the circumstances, both special and general, in which courts are asked to exercise this jurisdiction. This can and does call for changes in the practice of the courts. We live in a time of rapidly growing commercial and financial sophistication and it behoves the court to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case" (at 77C).

"… but in the context of a *Mareva* injunction, I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a consequence which it could contemplate lightly as it would become a fugitive from a final judgment given against it without its explanations being heard and which might well be enforced against it by other courts" (at 81E).

134. In *International Credit and Investment Co (Overseas) Ltd v. Adham* [1998] BCC 134, Robert Walker J maintained an order for a receiver of assets for the purpose of piercing a corporate veil in the context of a worldwide *Mareva* injunction. He said (at 136F):

"The other point is that it has become increasingly clear, as the English High Court regrettably has to deal more and more often with major international fraud, that the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level."

135. *Arrow Nominees Inc v. Blackledge* [2000] 2 BCLC 167 (CA) is for relevant purposes an important decision. There this court reversed the trial court's refusal to strike out a shareholders' petition alleging unfairly prejudicial conduct of a company's affairs. Chadwick LJ cited the observations of Millett J in *Logicrose* (see above) at para 33, and said –

"53. In those circumstances I take the view that it was wrong for the judge to allow the petition to proceed once he had reached the conclusion that there was a substantial risk that the allegations in relation to the disputed terms of the 1994 agreement were incapable of a fair trial…

54. It would be open to this court to allow the appeal against the judge's refusal to strike out the petition on that ground alone. But, for my part, I would allow the appeal on a second, and additional ground, I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to a contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take

> further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of a court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his part to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money…The trial was 'hijacked' by the need to investigate what documents were false and what documents had been destroyed…
>
> 56…A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have a fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

136. Ward LJ also cited the observations of Millett J from *Logicrose* (at para 67). He referred to the overriding objective under CPR Part 1 of the then new rules (at para 72). He assumed that the judge had had the overriding objective in mind, and had adopted the risk of a fair trial not being possible as a factor of crucial weight. However, he said that it was not the only material factor (at para 72) and continued, stressing the fact of admitted forgeries:

> "73. The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing…
>
> 74. This was, therefore, a flagrant and continuing affront to the court. Striking out is not a disproportionate remedy for such an abuse, even when the petitioners lose so much of the fruits of their labour."

Roch LJ said he agreed.

137. In *Regina (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, in a case concerned with judicial review of a decision which raised an issue under the Prison Act 1952, Lord Steyn addressed the question of the doctrine of proportionality which arose under the Human Rights Act 1998, observed that the doctrine was not necessarily on all fours with the doctrine of *Wednesbury* unreasonableness, and stated that –

> "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is

therefore important that cases involving Convention rights must be analysed in the correct way" (at 548B).

138. In *Stolzenberg v. CIBC Mellon Trust Co Ltd* [2004] EWCA Civ 827, article 6 of the ECHR was considered in the context of "unless" orders which debarred defendants from defending the claims against them unless they complied with freezing orders and their ancillary disclosure orders. The defendants sought relief pursuant to CPR 3.9(1) against the effect that such orders had taken in the form of judgments entered against them. The trial judge, Etherton J, had declined to set aside the judgments. In this court, the defendants' appeal was dismissed. Arden LJ gave the leading judgment, in which Ward LJ and Sir William Aldous concurred.

139. As to article 6, Arden LJ said this:

> "161. Article 6 of the Convention requires attention to be addressed to a matter which has always been implicit in cases of this kind, namely that the effect of the court's refusal to grant relief is that the losing party will be deprived of a trial of his defence on the merits. Clearly, as the judge recognized, that is an important factor. But three points must be borne in mind. First, it is open to a party to consent to judgment being given against him without a trial on the merits…Second, this is not an appeal against the judgments entered against the appellants. The appellants cannot say those orders were wrongly made. Third, the state can impose restrictions on the right of access to court provided that the restrictions serve a legitimate aim, are proportionate and do not destroy the very essence of the right. Here, the legitimate aim in imposing a sanction is to secure compliance with court orders, which in the instant case were made to ensure the effectiveness of freezing orders. The imposition of a sanction is proportionate if it is reasonably necessary for achieving that aim. The essence of the right of access to court is not destroyed because the litigant has the opportunity to seek relief against the sanctions. The refusal of that relief is Convention-compliant if the same tests are satisfied. The legitimate aim remains the same. Proportionality will be met if the overriding objective is met. The essence of the right will not be destroyed even if refused, since the appellants always had the chance to comply with the court orders and to help progress the case to trial."

140. This is to stretch the language of the Convention over concepts of fairness and thus inevitably of proportionality which have long been applied in our courts under the common law and our codes of procedure. In the latter respect, the CPR's overriding objective has given express prominence to such concepts.

141. *Polanski v. Condé Nast Publications Ltd* [2005] 1 WLR 637 (HL) raised the question whether a fugitive from justice could pursue litigation from abroad. Mr Polanski had

pleaded guilty to an offence of sexual assault in a California court but had fled to France, from where he could not be extradited. He subsequently brought libel proceedings in England. He feared that if he came to England, he could be extradited to the USA. He therefore applied for leave to give his evidence by video conference link, from France, as sanctioned by the CPR. It was accepted that there was no disadvantage or prejudice to either side in adopting that procedure. His application succeeded in the trial court, and in the House of Lords by a majority. The question was solely whether the administration of justice would be brought into disrepute by making the order sought: for as between the litigants there was nothing wrong with it. In such circumstances, the majority preferred the conclusion that the general rule was that a fugitive from justice should be accommodated in the way sought. Lord Nicholls of Birkenhead said –

> "[26] At first sight this may seem unattractive. It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that or so long as a fugitive remained "on the run" from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness has no place in our law. Mr Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement."

142. In circumstances, however, where the sole issue was one of public policy, and where the interests of the litigation itself were not involved, it is not clear how this authority applies to the present case. Although referred to in skeleton arguments, we were not directed to the authority during oral argument.

143. In *Regina (SB) v. Governors of Denbigh High School* [2007] 1 AC 100 the issue was whether there had been a breach of article 9 of the ECHR. If there had been an interference with the right under article 9(1), it would have to be justified under article 9(2). The court of appeal held that the decision-making (of a school authority) had not gone through a correct process of considering proportionality. The House of Lords said that that did not matter, provided the answer given was satisfactory. Lord Bingham of Cornhill said, at [29]:

> "But the focus at Strasbourg is not and has never been whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision…But the House has been referred to no case in which the Strasbourg court has found a violation of a Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in

the 1998 Act. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."

144. In *Masri v. Consolidated Contractors International (UK) Ltd* [2007] EWCA 702, Lloyd LJ had to consider whether to make an order for payment into court of $30 million, which the commercial court had required to be paid as an interim payment on account of costs, to stand as a condition of the right to appeal the merits of the decision below. An issue was raised before Lloyd LJ in terms of article 6, but he considered that it would not be inconsistent with article 6 to make the order for payment in. If payment in was not duly made, the appeal would be struck out.

145. In *Lexi Holdings plc v. Luqman* [2007] EWCA Civ 1501, Briggs J had refused to make an unless order debarring the defendant from defending the claim against him if he failed to comply with the disclosure aspects of a freezing order. This court, however, reversed the judge and imposed an unless order. Mummery LJ stated:

"28. The issue before Briggs J arising from the alleged deficiencies in the respondent's written evidence related to the effective policing of and ensuring compliance with the protective orders of the court. In these circumstances the court has to make a decision now about the respondent's evidence that he has no assets or only negligible assets. If the court takes the view that the respondent's written evidence about his assets and property is incredible, there is no need for cross-examination to establish that it is incredible. This course is pointless and simply postpones appropriate measures for dealing with a person who has submitted incredible evidence to the court. If, however, the court takes the view that the evidence is not incredible and it is contested, the proper course was not to postpone the issue of cross examination, but to order it in order to determine the position on alleged non-disclosure of assets.

29. In my judgment, Mr Marshall has demonstrated that the judge was wrong not to make an unless order in relation to the respondent's disclosure of assets. I agree with Lindsay J that, on the material before the court, his evidence is incredible and that it is now necessary to make an unless order, which, if not complied with, will result automatically in the respondent being debarred from defending the claim against him."

146. It seems to me that this, like *Stolzenberg* itself, is a direct, and binding, precedent for the legitimacy of such an unless debarring order where a defendant fails to provide the disclosure of assets required by a freezing order. Mr Béar raises the issue as to whether a partial failure of such disclosure equates to a total failure.

147. *Tarn Insurance Services Limited v. Kirby* [2009] EWCA Civ 19 was another case in which the defendant was ordered to make disclosure ancillary to a freezing order. Norris J found that his disclosure was inadequate and made an unless debarring order. Mr Kirby sought relief against the sanction of striking out, and was granted it. However, this court allowed the claimant's appeal. Sir John Chadwick referred with approval at [72] to the approach of Etherton J in *Stolzenberg* [2003] EWHC 13 (Ch) at [103], which had itself been upheld by this court in that case, viz

> "[103]…In the present case the "unless orders" were supplementary to, and in enforcement of freezing orders. Freezing orders are critical weapons in the court's armoury against fraud, securing the preservation of assets which might otherwise be wrongfully dissipated pending judgment, and, in appropriate cases, the preservation of evidence, including documentation, and the provision of information to trace the proceeds of fraud."

148. Sir John Chadwick continued:

> "[82]…In a case of deliberate and persistent non-compliance with orders to provide information and deliver documents made in order to safeguard proprietary claims, a proper administration of justice requires that, save in very exceptional circumstances, sanctions imposed should take effect. There were no exceptional circumstances in the present case."

Waller LJ and Thomas LJ agreed.

149. In *Blue Sky One Limited v. Mahan Air* [2010] EWHC 128 (Comm) the defendants were found to be in contempt of court in failing to observe an order to ground two aircraft at Schiphol Airport. Beatson J had to consider what the sanction for that contempt ought to be. The purpose of the grounding order was to safeguard the claimants' interests in the capital value of the aircraft pending trial. He said:

> "[37] I reject Mr Malek's submission that because the non-compliance with the grounding order will not impact on whether the court can ascertain the truth in the Phase 2 trial, that necessarily makes the barring of the defendants from participating in it disproportionate. I have concluded that, in the circumstances of this case, the breach of the order falls within the second limb of the analysis of Denning LJ in *Hadkinson's* case."

The judge put over his decision pending the provision of up-to-date information.

150. *JSC BTA Bank v. Ablyazov (No 3)* [2011] 1 All ER 1093 arose out of one of the cases (the so-called "Granton" case) within the current set of proceedings. Christopher Clarke J considered many of the authorities cited above in concluding that he was entitled to make an unless debarring order as a means of securing compliance with the court's orders for disclosure of information pursuant to a freezing order. In that case, however, an issue of jurisdiction had not yet been decided and thus an application to discharge the freezing order was yet to be heard. Even so, the judge concluded that it was open to him to make an unless order, and that the considerations in favour of doing so were overwhelming. Of course, the problem of establishing jurisdiction does not arise in the present case. Christopher Clarke J said:

> "[33] Lastly, if Mr Colton be right, fraudsters will flourish, since a challenge by the jurisdiction will automatically preclude the court from enforcing, by any realistic sanction, a disclosure order…
>
> [38] In my judgment if the court makes an order for disclosure for information or documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at liberty to enter judgment. Were it otherwise, in many cases the order will be without effect. The making of such an order is of course a discretionary exercise…There are many cases in which it is only an 'unless' order that will ensure compliance. Thus in *CIBC Mellon Trust Co v. Stolzenberg* [2004] All ER (D) 363 (Jun) at [49] and [177] the Court of Appeal agreed with the trial judge that on the facts he had no realistic alternative to making an 'unless' order in the face of the persistent defiance of two of the defendants in relation to the disclosure of their assets…
>
> [41] As to that I do not accept that the question is solely whether non-compliance will render further conduct of the proceedings unsatisfactory. As *Arrow Nominees Inc v. Blackledge* and the *Marcan Shipping (London)* case indicate, the court is entitled to take into account the effect of making, or not making, the order sought on the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective.
>
> [42] As to those considerations the object of the present case is to compensate the bank for the huge sums allegedly purloined from it by what is said to be a dishonest scheme by securing a judgment against the wrongdoers which can effectively be enforced so as to make a real recovery. In deciding what order to make the court, as I have said, must necessarily take into account on the one hand that absent an 'unless' order the bank may effectively be prevented from any recovery, or restricted in the recovery that it might otherwise make…"

151. *JSC BTA Bank v. Shalabayev* [2011] EWHC 2163 (Ch) is another case (the "AAA action") brought by the bank, involving Syrym Shalabayev, Mr Ablyazov's brother-in-law, and others. Mr Shalabayev had gone to ground, but committal proceedings were served on him by an alternative method. The contempt was proved. Clyde & Co, instructed by Mr Shalabayev, contacted the bank to seek an adjournment of the sentencing hearing. The bank thereupon issued an application for disclosure against

Clyde & Co, seeking disclosure of their client's contact details and assets. In the meantime Mr Shalabayev was sentenced in his absence to 18 months imprisonment. The disclosure application then came on before Henderson J. He reminded himself of *Polanski*, that Mr Shalabayev was not an outlaw, and that the application could not trespass on any advice which Clyde & Co were tendering to their client. He directed himself that even the disclosure of contact details could inhibit the freedom with which a client might turn to his lawyers for advice. Nevertheless, he distinguished between the application for contact details and for disclosure of assets, and granted the former while declining to grant the latter. As to the former, he said:

> "[39] Taking all these considerations into account, I consider that the balance comes down in favour of ordering disclosure by Clydes of all the contact details (past and present) which they hold for Mr Shalabayev. The primary purpose of the disclosure is to aid enforcement of the committal order made by Briggs J on 27 June. In the absence of that order I would probably not have been prepared to make the order sought. But in my view the committal order makes all the difference. All reasonable efforts must now be made to ensure that Mr Shalabayev is apprehended so that he can begin to serve his sentence. It is in the highest degree unsatisfactory that he can still be at large, as a fugitive from justice, when he has solicitors on the record acting for him, and intervening in legal proceedings as and when it suits his purposes. Such a procedure is liable to bring the administration of justice into disrepute, and to give the impression that British justice is an a la carte menu from which he can order at will without ever having to pay the bill…"

152. Later that year, in *JSC BTA Bank v. Shalabayev* [2011] EWHC 2903 (Ch) Henderson J considered the bank's application to debar Mr Shalabayev from defending the claim against him unless he paid outstanding costs orders and complied with disclosure orders made pursuant to a freezing order. Henderson J said:

> "[23]…The order is sought as a remedy of last resort, in a situation where, at the date of the application notice, there had still been no compliance whatsoever with the requirements of the freezing order. Furthermore, experience has shown that, on at least two previous occasions, Mr Shalabayev has been prepared to comply with an unless order. So it seems reasonable to infer that he might be anxious to avoid judgment being entered against him, and that the making of an unless order might prove fruitful."

153. Mr Shalabayev had apparently adopted the position that fears for his personal safety excused him from giving any disclosure. The judge rejected the logic of that (at [44]-[46]). The judge went on to refer to familiar jurisprudence, such as *Logicrose*, *Arrow Nominees*, *Stolzenberg*, and Christopher Clarke J in *JSC BTA Bank*, and continued:

"[61] Given the history of the proceedings to date, and his continued disregard for the authority of the court, as exemplified, above all, by the history of the committal proceedings, I think it would be a waste of time to make any order of a less draconian nature.

[62] If Mr Shalabayev wants to continue to participate in these proceedings, he must now take this last chance to do what he should have done 11 months ago, that is to say comply properly, and in detail, with the requirements of the freezing order. If he fails to do so, he will, in my judgment, have nobody to blame but himself, and he will have forfeited the right to defend the Bank's claim against him; although, even then, the possibility of making an application for relief against forfeiture would still be open to him.

[63] That final point illustrates that even an unless order is not necessarily the very end of the road, although it does represent the court's firm and considered statement that this should be the very last chance afforded to the defaulting party."

154. Finally, in *JSC BTA Bank v. Ablyazov* [2012] EWCA Civ 639, the issue of whether Mr Ablyazov could be barred from this appeal itself unless he first surrendered himself to custody was debated. Moore-Bick LJ, who heard the issue, was under no illusions as to what was to be laid against Mr Ablyazov's door. He said:

"[29] One important factor to bear in mind in the present case is that there are two parties to the litigation and that in seeking to determine how the interests of justice will best be served it is important not to lose sight of the Bank's very real interest in obtaining information which will enable it to identify the ultimate destination of the funds to which it lays claim. That is unlikely to be achieved without the co-operation, however, grudging, of Mr. Ablyazov. The committal order was intended in part to encourage him to give full and proper disclosure of his assets and to that extent the interests of justice would be better served by bringing him within the jurisdiction of the court. Moreover there are certainly strong grounds for believing that Mr. Ablyazov is in wilful and contumacious default of other orders of the court, despite the explanation he has given in his most recent statement for his refusal to surrender to custody or to make an affidavit giving disclosure of his assets. Much of what he says appears at first sight to be exaggerated and implausible and it is striking that the fears for his personal safety on which he now relies so heavily were voiced only after judgment was given in the committal proceedings. However, they cannot be entirely dismissed, as the judge himself has accepted. It can also be said that, as in the case of *Arab Monetary Fund v Hashim*, Mr. Ablyazov is doing his best to prevent the Bank from enjoying the fruits of any judgment it may in due course obtain against him and the other defendants and to that extent is abusing the process of the court. He has, for example, dealt with assets in breach of the freezing order and there is evidence to suggest that he is seeking to do so again. He has failed to co-operate with the receivers. There are very strong reasons for thinking that he has left the jurisdiction in breach of the court's order. All these

> factors point towards the conclusion that the court should make the order which the Bank seeks, even though a failure to comply would lead to the dismissal of Mr. Ablyazov's appeal and in turn the striking out of his defence to the substantive claim."

155. Nevertheless, Moore-Bick LJ was unwilling to prevent Mr Ablyazov from proceeding with his appeal in a matter which concerned his personal liberty. He concluded:

> "[31] In all the circumstances I have come to the conclusion that it would not be in the interests of justice to require Mr. Ablyazov to surrender himself to custody as a condition of proceeding with his appeal. However badly he may have behaved, Mr. Ablyazov is seeking to challenge an order which directly affects his personal liberty. As Potter L.J. observed in *Motorola v. Uzan (No. 2)*, the circumstances will be rare indeed where it will be right to shut a contemnor out from arguing an appeal against an order for committal. I accept that full and proper disclosure of the location of assets which the Bank is seeking to recover is necessary if there is to be a fair trial of the action, but I do not think that an order of the kind now being sought is the right way to protect the Bank's position. Mr. Ablyazov has not been committed simply for failing to give the disclosure required by the freezing order, but for specific acts and omissions amounting to contempts of court. If Mr. Ablyazov were to succeed in his attempt to have the committal order set aside, the requirement to surrender would disappear. Subjecting him to custody would not then be available as a way of compelling him to give the required disclosure. If his appeal fails, it may at that stage be appropriate to require him to surrender to custody as the price of being allowed to contest the claim, but that is for another day. I do not think that he should be required to surrender to custody as the price of being heard on this appeal."

Strasbourg jurisprudence

156. Mr Béar relied on a certain amount of Strasbourg jurisprudence to illustrate the way in which the qualified right of access, to be implied from article 6, was used in the authorities, but little to demonstrate his submission that an express right to a final hearing on the merits was an absolute, unqualified, right which went beyond the implied right of access and rendered the unless orders in this case unacceptable.

157. It is as well to remind oneself of the words of article 6, viz –

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

158. Mr Béar submitted that the unless orders amounted to the deprivation of the right to a hearing, or, as he glossed it, an adjudication on the merits.

159. *Golder v. United Kingdom* concerned a prisoner who was charged with participating in a disturbance and assaulting a prison officer. The officer concerned subsequently withdrew the allegation, and the charges were not proceeded with. The prisoner wished to consult a solicitor about bringing libel proceedings against the prison officer who had reported him. He was refused permission to do so. Thus, it was a basic right of access case concerning a potential claim which had never been brought. The ECtHR held that there was an implied right of access which had been infringed. As the court said, "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings" (at para 35). However, the court did not consider whether a decision on the merits of proceedings which had been commenced was required: "The Court has no need to ascertain in the present case whether and to what extent Article 6(1) requires a decision on the very substance of the dispute (English 'determination', French *décidera*')" (at para 36).

160. Mr Béar also referred us, among other authorities, to *Z v. United Kingdom* (2002) 34 EHRR 3, *Perez v. France* (2005) 40 EHRR 39, *Pietiläinen v. Finland* (application no 13566/06, 22 September 2009, *Cudak v. Lithuania* (2010) 51 EHRR 15, and *Seal v. United Kingdom* (2012) 54 EHRR 6.

161. In *Z*, the ECtHR said of the right of access that –

> "The right is not however absolute. It may be subject to legitimate restrictions, for example statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound minds."

162. In *Perez*, the claimant had complained that her hearing before the Cour de Cassation had not been fair, because not every point had been referred to in its judgment. Her complaint was rejected. In such a context the ECtHR observed, as it has done in other cases:

> "80…The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court. In other words, the effect of Art 6. is, among others, to place the "tribunal" under a duty to conduct a proper examination of the

submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant."

163. Mr Béar also referred us to Human Rights: Protection in the United Kingdom, 2008, by Beatson, Grosz, Hickman, Singh and Palmer and to Human Rights Law and Practice, 3rd ed, by Lester, Pannick and Herberg.

164. However, Mr Béar was unable to demonstrate by any citation that a full hearing on the merits was required in circumstances where a litigant has forfeited his right to a full trial by his conduct of the litigation. Every civil procedure code must reflect in its own way our own CPR which provides for circumstances in which a full trial may not, for various reasons, as well as the conduct of a litigant, be achieved. There are many circumstances in which a claim or defence may be struck out summarily; and the striking out or staying of litigation may also occur where a litigant has abused the process of the court, or has failed to comply with the requirements of the litigation, as for instance where security for costs is required but not complied with, or where a party delays to an extent which prejudices the course of justice, or simply falls foul of a statute of limitation, or is in various ways in contumacious denial of the requirements of civil justice. Of course any hearing must be a fair hearing (*Dyer*). But we have been shown no authority which requires a court to persevere to a full trial on the merits whatever the circumstances. In *Perez* the issue was concerned with the adequacy of the hearing on appeal to the Cour de Cassation which did take place, not with any doctrine which required a full adjudication on the merits come what may.

165. In these circumstances, it seems to me that this court must be guided by any relevant Strasbourg jurisprudence and by our own jurisprudence as to the fairness and proportionality of sanctions employed by the court in the course of litigation, such as unless and debarring orders and strikings out. No Strasbourg jurisprudence has been cited which comes anywhere as close to the circumstances of this case as our domestic jurisprudence which I have cited above. That demonstrates that it is clearly in order to deploy even the final sanction of striking out where necessary and proportionate to protect the interests of justice. That can be illustrated not only by cases decided before the Human Rights Act 1998 (such as *Arrow Nominees*), but also by cases decided more recently by reference to explicit citation of article 6, such as *Stolzenberg* and the many cases since which have referred back to it. There can in any event be no doubt that Mr Ablyazov has been accorded a plethora of hearings, and appeals, in which to argue his case, even though this has been in interlocutory hearings rather than in a final trial. Although Mr Ablyazov disputes the current appeals, and has disputed other appeals in the past, and no doubt dislikes the outcome of them, he has not been able to say that there is any element of judicial unfairness in the way that any of the numerous hearings with which he or his legal representatives have been concerned have been conducted.

166. In any event, it can be said that Mr Ablyazov has to the end been granted the opportunity for trial, if he complies with the court's orders, but has chosen to go his own way, and to forfeit the opportunities which have been given him. In this connection, I bear in mind what was said in *Arrow Nominees* at [54]: "A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial". Henderson J in *Shalabayev* and the judge below in his "unless" judgment made similar points. Moreover, there remains the possibility of relief against sanctions.

167. Subject therefore to the separate issue of jurisdiction, it is to the final question of fairness, necessity and proportionality that I will turn.

Jurisdiction

168. In the light of the jurisprudence cited above it seems to me to be impossible to submit that the court lacks jurisdiction, whether under section 37 or under its own inherent jurisdiction, to do what is just and convenient, and necessary, to protect its own orders and to give effect to the interests of justice. *Bekhor v. Bilton* specifically considered these matters, and the question has never been doubted since. There is no doubt that the bank has a legal or equitable right, namely the causes of action which it has deployed in its claim forms, to entitle it to seek freezing orders from the court; and there is no doubt that the court thereafter has the power to do what is just and necessary to give effect to such orders.

169. Although the matter has not previously been discussed in express terms of unconscionability, it also seems to me that Mr Ablyazov has been unconscionable in his refusal to abide by the orders of the court, either before or after the judgment under appeal. It seems hard to regard the conduct of a proven contemnor otherwise. In the light of this judgment, moreover, Mr Ablyazov seems to me to be a contemnor in denial. A principal object of the contempt of court jurisdiction is to bring a contemnor to face up to what he has done, to reflect on it, and, by a process of sanction and encouragement, to draw back from the brink. However, Mr Ablyazov, emboldened perhaps by the wealth at his disposal, which enables him to travel, hide, and still instruct lawyers on a prodigious scale, continues to obstruct justice with an attempt at impunity for the consequences of this litigation. I bear in mind that Mr Ablyazov says that he must hide for the sake of his safety. However, his fears have not prevented him or his family in the past from living in England, or from attending cross-examination here. Similar fears expressed by his brother-in-law, Mr Shalabayev, to explain his own conduct, did not impress Henderson J.

170. In the present case, particular attention has been given to the judge's order (coupled with an "unless" sanction) that Mr Ablyazov surrender himself to custody, ie to the tipstaff. It is suggested that such an order is, if only by reference to what is said to be its novelty and its concern with liberty, beyond the power of the court. It is said that it requires specific statutory authority, such as may be found in the Bail Acts. I will consider the judge's order as a matter of fairness and proportionality below. For the present, however, I would state that I do not regard it as beyond the powers of the court in such circumstances. The court plainly has power, under its contempt of court jurisdiction, to order the imprisonment of a litigant found to be in contempt. That is the power that encroaches on the liberty of the subject. That power is held as part of the armoury of the court to ensure that justice can be done in civil litigation. Although it has a quasi-criminal aspect, the application for committal is typically made by one litigant against the other, in order to preserve the litigation. It would fatally undermine the power to commit to prison for contempt of court if the court were powerless to enforce its order in circumstances where the adjudged contemnor simply goes into hiding and, as has almost certainly occurred in this case, leaves the jurisdiction. The order of committal is made for the sake of justice in the litigation and to encourage the contemnor to abide by the orders of the court (not, as has been suggested, for the purpose of bringing an end to the litigation). Litigation is not a game, but I may perhaps use the metaphor of "playing by the rules". If an adjudged contemnor is able, whatever the circumstances, to hold an order for committal at nought *and yet at the same time* demand that the litigation continue as though nothing had happened, because the court is powerless to say that the fugitive contemnor should face up to his responsibilities by surrendering to custody and should do so as a condition of being able to continue with the litigation, then the utility of the contempt of court procedure can be destroyed and a significant factor in the checks and balances which operate in the field of civil litigation is lost. On any realistic view of it, a judge who makes such an order is not going further down the road of encroaching on the liberty of the subject than the order of committal that he has already made: rather he is attempting to preserve a just balance in the litigation which is before him in circumstances where the contemnor has sought to destroy that balance in his own interest. The court is entitled to seek to preserve that balance.

171. Nor is such an order particularly novel. In *Shalabayev* (see at [153] above) Henderson J adopted the perhaps novel expedient of ordering a fugitive contemnor's own solicitors to provide contact details "to ensure that Mr Shalabayev be apprehended". Orders for the surrender of passports (even if once novel, see *Bayer v. Winter*), and even in the absence of any contempt, are not unfamiliar. In the criminal sphere, as the Vice President remarked during argument, the court orders a convicted person who is subject to an Attorney-General's Reference, which might lead to his sentence being increased, to attend the court. Moreover, the jurisprudence cited above is replete with confirmation of the power possessed by the court to make such orders as are necessary to make its own orders effective. At any stage of the developing jurisprudence, it might have been said (and often was) that novelty was a bar to some particular order. The *Mareva* injunction was attacked on that basis. Then it was said that it could not be made in respect of assets overseas. Then it was said that it could not be made effective by the inclusion of disclosure orders in support of it. In the present case, the question is whether the power to commit for contempt of court

includes a power to order the contemnor to surrender to the tipstaff and to make that a condition of something else. I can see no reason why not. The question whether such an order can be properly made in a particular case, is a further question which I consider below.

Fairness, necessity and proportionality

172. In this final section, I discuss and resolve the issues of fairness, necessity and proportionality concerning the judge's orders.

173. The question faced by the judge was how to deal with an adjudged contemnor who had failed to acknowledge his responsibilities by becoming a fugitive from the order for his committal. I have considered and upheld the order for his committal.

174. In my judgment, the judge was entitled to make the orders that he made.

175. It is well to remind oneself of the background to the current question. The bank's claim is that Mr Ablyazov has stolen some $5 billion of its assets, imperilling its very existence. The court has adjudged that that claim is a good arguable claim. Its freezing order is designed not only to preserve Mr Ablyazov's assets against the possibility that the bank will obtain a judgment against him, but also to preserve assets which the bank claims are assets which belong to it. Mr Ablyazov has made partial disclosure of assets, but the value of that disclosure is not very great in comparison with the value of the allegedly purloined billions. Mr Ablyazov says that the bank's claim is the latest attempt by the President of Kazakhstan to eliminate a political opponent; and that even his life may be in peril. That is an issue for any ultimate trial. In the meantime, Mr Ablyazov has been cross-examined, and has been found to have lied in his evidence to the court. He has been found to have failed to make proper disclosure in significant respects, and many other complaints of non-disclosure are outstanding, but not yet adjudicated. Similarly, he has been found to have dealt with assets on a significant scale, and many other similar allegations remain outstanding. He has been found to have attempted to support his attitude of contempt by the suborning of false evidence and the forging of documents. He has been committed to prison for 22 months for his contempt, a significant sentence, close to the available maximum of 2 years, and I would uphold that sentence. He has nevertheless been encouraged to purge his contempt by the judge's willingness to consider remitting 10 months from his sentence for prompt and full compliance with the orders of the court. He has nevertheless seriously aggravated his contempt by his post judgment conduct.

176. As long ago as August 2010 the judge appointed receivers over Mr Ablyazov's assets on the basis that he could not be trusted to comply with the court's orders: [2010] EWHC 1779 (Comm) at [99]. The court of appeal upheld that receivership order as being necessary, [2010] EWCA Civ 1141. Since that time the judge has added, in stages, some 659 companies to the receivership order, on the basis that there is good reason to believe that they are all in Mr Ablyazov's ultimate beneficial ownership. Mr Ablyazov has never disclosed these companies as his or as holding his assets, but he has not challenged the making of any of those orders. The addition of these companies to the receivership order was aided by orders of the court through which access to the documents of service companies administering these companies has been obtained, and the role of Mr Shalabayev has been revealed. Mr Ablyazov has nevertheless failed to co-operate with the receivers, as required.

177. The submissions made on behalf of Mr Ablyazov have been outlined at [122] above. I respond to them as follows, in the light of the jurisprudence considered above.

178. Mr Ablyazov has had hearings, fair hearings, and access to the court, to an extraordinary degree, even if he complains about the results.

179. The CPR rules are the means by which in civil litigation English law gives effect to the requirements of article 6 and the requirements of fairness and proportionality. There is built into those rules an overriding concern with the interests of justice. In particular cases there may of course be disagreement about the answers which those rules may allow for particular problems. See, for instance, *Stolzenberg*.

180. It is unnecessary for the court to go through any particular structural argument for the purposes of considering matters of fairness, necessity, or proportionality: *Governors of Denbigh High School*. It may be helpful to do so, or to be able, where there is dispute, to demonstrate that it has been gone through, but a decision will not for faulted because of the nature of the structure of the argument, if the outcome is compliant. In particular in matters of fairness in the process of civil litigation, the courts are very familiar with the need to operate with an overriding concern for the interests of justice. What Lord Steyn said in *Daly* (see [137] above) was really directed to the possibility that the process of reasoning by reference to the doctrine of proportionality might not on all occasions lead to the same conclusions as a process of reasoning by reference to the doctrine of *Wednesbury* reasonableness.

181. There is no question in this case of Mr Ablyazov being treated as an outlaw, ie as someone outside the law, because he has become a fugitive from justice. He has had an appeal against his committal as a matter of right, and he has not been prevented from taking forward any aspect of these appeals by reason of having made himself a

fugitive from justice or by reason of having persevered in his contempt. There is a plain distinction between the question of whether an unrepentant contemnor can appeal against the findings of contempt, and whether a contemnor (who has his appeal and, perhaps, the opportunity for relief against sanctions) can be made to face up to his responsibilities by means of unless orders.

182. Even Mr Matthews and Mr Béar accept that it may be necessary and proportionate, and fair, to debar a litigant whose conduct has created a substantial risk to justice or in order to prevent an unfair trial. That is supported by *Hadkinson*, *Logicrose*, *Arrow Nominees*, *Blue Sky* and *Ablyazov (No 3)*.

183. It is submitted that in the present case a substantial risk to justice or to a fair trial was neither found by the judge nor present. However, I disagree. The judge expressly relied on the principle that "a defence may be struck out if there is a substantial risk of injustice" (at [53]). He continued: "There would therefore appear to be a risk, and a substantial risk…that justice cannot be done to the Bank without further disclosure" (at [63]). He was in my judgment right to do so. It is true that he had earlier said that "it is not suggested that Mr Ablyazov's failure to comply with the order for disclosure of assets will impede the court's ability to conduct a fair trial of the issues in the action" (at [51]). However, he was distinguishing between the issues in the trial themselves, and the recovery of assets, should the bank obtain judgment. He regarded a trial in which a successful claimant could be cheated out of success by the defendant's dishonest failure to disclose allegedly stolen assets as being fundamentally unfair to the bank and inimical to the interests of justice. He was entitled to regard the matter in that way. Authority has established that that is so. Thus in *Hadkinson*, Denning LJ gave as an example of the impeding of justice which could justify a debarring order "making it more difficult to enforce the orders it may make" (see at [124] above). In *Stolzenberg*, the failure in question was, as in the present case, a failure to comply with freezing orders and their ancillary disclosure orders, and that was considered by this court to justify the making of a debarring order (see at [138-140] above). The same thing was done in *Lexi Holdings v. Luqman* and in *Tarn Insurance*, which are also cases in this court (see at [145] and [147] above), and in *Ablyazov (No 3)* and *Shalabayev*, which are decisions of Christopher Clarke J and Henderson J (see at (150) and (152) above). It was contemplated in *Derby v Weldon (Nos 3 and 4)* and *Blue Sky v Mahan* (see at [133] and [149] above), and by Moore-Bick LJ in this very case (at [155] above).

184. In several of those cases, the courts emphasised how vital the freezing order and its ancillary disclosure orders, as well as the proper sanctioning of breaches of those orders, are to the fair conduct of modern litigation. In *Tarn Insurance* Sir John Chadwick cited Etherton J in *Stolzenberg* for his comment that "Freezing orders are critical weapons in the court's armoury against fraud", and went on to say that "a proper administration of justice requires that, save in very exceptional circumstances, sanctions imposed should take effect". In *Ablyazov (No 3)* Christopher Clarke J said that "if Mr Colton is right, fraudsters will flourish, since a challenge by the

jurisdiction will automatically preclude the court from enforcing, by any realistic sanction, a disclosure order". And in this case, Moore-Bick LJ emphasised that "there are two parties to the litigation and that in seeking to determine how the interests of justice will best be served it is important not to lose sight of the Bank's very real interest…" (see at [154] above). Of course, as those judges well appreciated, fraud although alleged was yet to be proved, but the point being made was that fairness between the litigants demanded that a defendant not be permitted to disregard the interests of a claimant as well as the interests of the court as the arbiter of justice in insuring that orders made for the fair conduct of litigation be complied with or sanctioned.

185. It is not the case, therefore, that there is nothing on a claimant's side to balance against a defendant's interest in being permitted to carry on regardless to trial. The interest of a claimant in securing an effective and realistic outcome to his litigation, if he succeeds, may be as important in the balance of things as the interest of the defendant in preserving his right of access to trial despite his refusal to abide by the orders of the court.

186. Moreover, although the judge did not himself rely on these points, I have in mind (as an aside) that a trial involving a recalcitrant defendant who has shown himself willing to suborn false testimony and to rely on forged documents, but who remains unrepentant and unwilling to face up to the responsibilities of his litigation, is hardly likely to be a trial which remains unpolluted in itself from the conduct of that defendant.

187. It is suggested nevertheless that the debarring sanction in this case was unnecessary or disproportionate because Mr Ablyazov had made at least partial disclosure and/or because there were other means, which had already been shown to be not unsuccessful, such as third party disclosure or the receivership, by which a fair balance could be achieved. The assessment of that balance however was for the judge rather than for this court. The judge was well aware of such points, but they did not carry the day. It is impossible to say that he was wrong. The judge was essentially only asking Mr Ablyazov to do what he had always been ordered to do, and he was prepared to give him a last chance, but a real chance, of doing so. In the light of the litigation that had taken place, there was a substantial risk that Mr Ablyazov's non-disclosure and dealing with assets was pervasive and corrosive to justice.

188. The authorities demonstrate that it is vital for the court, in the interests of justice, to have effective powers, and effective sanctions. Without these, it would be possible for a defendant (or, in a different situation, a claimant) to flout the orders of the court, which are the court's considered means by which to keep the scales of justice for the parties even. If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of

this kind, with terrible consequences for the administration of justice. Those wrongly accused of fraud would be relieved of a certain amount of inconvenience, but fraudsters would rejoice and hitch a free ride to interminable litigation on the back of ill-gotten gains.

189. The same reasoning applies, in my judgment, to the order for surrender to custody and the unless order attached to it. It cannot be just or fair, or proportionate, to permit a contemnor to avoid the consequences of his contempt by the expedient of disappearing from sight (but not from the ability to communicate with his lawyers). As the judge said, it is a matter of choice for Mr Ablyazov. He may have his trial on the merits, if he complies with the court's orders. The court has denied him nothing except the ability to ignore the court's orders indefinitely. On the contrary, the order was made in an attempt to persuade Mr Ablyazov to comply with the freezing order "and so ensure a fair trial in the full sense of that phrase" (at [76]).

190. It is suggested that alternative sanctions such as a sanction in costs or a payment into court should have been considered. I am not sure if those were suggested to the judge. No proposals have been put to this court. In any event, Mr Ablyazov has ignored orders for payment of costs for some time. There is something very unattractive about this attempt by an unrepentant contemnor to bargain with the court (and the claimant), and to do so by the mere flying of a kite.

191. It is a fair point that the disclosure order may, at any rate in theory, lead to further dispute down the line. In the circumstances of this case, that consideration might have led a judge to consider that Mr Ablyazov had had his chances to make proper disclosure, and did not deserve a further chance. The judge, however, considered it preferable to give him one last chance. I cannot say that he was wrong to do so, even if it adds a further complexity to the litigation. In this respect, the judge made it clear that Mr Ablyazov could not be sentenced twice (he referred at any rate to "formidable problems" (at [40]) for failure to disclose the same material). It remains clear, however, what Mr Ablyazov must do. The court cannot cross future bridges all at once. In any event, there also remained the question of relief against sanctions. In that connection, it is not possible for a judge to foresee all possibilities: for instance, if Mr Ablyazov made full disclosure but did not surrender to custody, or vice versa.

192. It seems to me that the judge was right to say that his orders should encompass all eight of the actions commenced in the commercial court concerning the bank's claims against Mr Ablyazov. The freezing order encompassed them all, and therefore the same logic applied to them all.

193. It is unnecessary to say anything further about the judge's additional order, in the event of the unless orders taking effect, for the release of the bank's fortification. That must follow.

Conclusion

194. For all these reasons, I would dismiss all the appeals before the court.

Lord Justice Toulson :

195. I agree with Rix LJ's judgment in every respect except one. I agree that the appeal against the findings of contempt and sentence for contempt should be dismissed. I agree also that the appeal against the order debarring Mr Ablyasov from defending the claims, unless he makes proper disclosure of his assets and his dealings with them, should also be dismissed. On those matters there is nothing which I could possibly add to Rix LJ's comprehensive judgment.

196. My only point of difference concerns the further order debarring Mr Ablyazov from defending the claims unless he surrenders himself to the custody of the tipstaff. I see nothing wrong with the making of a surrender order in itself. In that regard I am not impressed by the argument that such an order is unprecedented. I am satisfied that it is within the inherent jurisdiction which the court has to enforce compliance with its own orders, and the argument that is unjust or unnecessary comes ill from a party who had assured the court through his counsel that he would be present when the judge gave judgment on the committal application but then absconded. Failure to comply with the order would be an additional contempt for which Mr Ablyazov would potentially be liable to receive a consecutive sentence. That would not be unjust in all the circumstances, and his exposure to that risk could provide an incentive to surrender to the court and to comply with the disclosure order.

197. My concern is limited to the part of the order debarring Mr Ablyazov from defending the claims if he fails to surrender. I recognise that my concern may be academic in the present case. Judging from past history, it appears unlikely that Mr Ablyazov will comply with the disclosure order. If he fails to do so, he will be debarred from defending the claims. But there is an alternative possibility, at least in theory, that he complies belatedly with his disclosure obligation (which it is the purpose of the latest disclosure order to encourage) but does not surrender himself to custody. In that event the inclusion of the "unless" provision in the surrender order (as well as in the disclosure order) would not be a matter of purely academic interest. It would have the effect of debarring Mr Ablyazov from defending the claims, notwithstanding that he had given disclosure and albeit that, as far as I can see, his fugitive status would not of itself cause material prejudice to the bank.

198. I would not expect the court to allow Mr Ablyazov to give evidence at the trial from some place of hiding, but it is another matter to debar him, through counsel, from

seeking to test the bank's claims and perhaps call other evidence. It would or might be different if his non-surrender somehow prejudiced the bank in its prosecution of the claims, but I do not see that his absconding would have that effect. To debar him from defending in those circumstances would be a form of additional punishment for his contempt, which seems to me to be wrong in principle and not in accordance with the authorities cited by Rix LJ.

199. The practical advantage to the bank of having an "unless" provision in the surrender order, as well as in the disclosure order, is that it might be easier to establish that he had failed to surrender than that any further disclosure which he might make was deficient, but I do not regard that as a good reason for its inclusion.

200. Since I am in full agreement with Rix LJ on all other matters, since the point which concerns me is likely to be academic in this instance, and since I am in a minority, I do not propose to develop the point at greater length, but there may be other cases in which an application for such an order is made and where it is far from academic. I would have allowed this appeal only to the extent of removing the "unless" provision from the surrender order.

Lord Justice Maurice Kay :

201. There is only one issue upon which my Lords disagree and, even there, Toulson LJ acknowledges that his concern may be academic in the circumstances of this case. For my part, I agree with Rix LJ on the issue of the debarring order attaching not only to the disclosure order but also to the surrender order. It seems to me that the approach of Toulson LJ assumes that belated compliance by Mr Ablyazov with the disclosure would leave the attachment of a debarring order to the surrender with no purpose to fulfil in relation to the orderly progress of these proceedings. In my judgment, such an assumption is misplaced. Mr Ablyazov's contemptuous disregard for court orders has not been limited to disclosure obligations. On the findings of Teare J, which we are upholding, he has also breached the freezing order, in particular by assigning the Stantis loans to Nitnelav Holdings Limited. The factual background to this is set out in paragraphs 32-38 of the judgment of Rix LJ. The natural inference now is that, even if Mr Ablyazov were to appear to comply with his disclosure obligations (and confidence about that would always be elusive), it does not follow that a court could have confidence that he would not commit further breaches of the freezing order so as to deny the Bank of a significant part of the fruits of any success it may achieve at trial. Like Rix LJ, I am satisfied that, when he made the order under appeal, Teare J was concerned not only with the integrity of the trial process in the narrow sense but also with the recovery of assets and the satisfaction of existing and any future orders for costs. I consider that, with these concerns in mind, he was entitled to attach debarring orders to both the disclosure order and the surrender order.

202. It is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr Ablyazov. Rix LJ has described in trenchant terms the factors which cause me to express myself in this way. There can be no complaint that Teare J decided that the court's powers

should be deployed so as to put the maximum pressure on Mr Ablyazov to comply with its orders so as to endeavour to prevent its fair procedures from being subverted.

203. For these reasons and the more extensive reasons given by Rix LJ, I too would dismiss all the appeals before the Court.