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Case No: 2009 Folio 1099

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2009

Before :

MR. JUSTICE TEARE

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Between :

JSC BTA BANK	**Claimant**
- and -	
(1) MUKHTAR ABLYAZOV	
(2) ROMAN SOLODCHENKO	
(3) ZHAKSYLYK ZHARIMBETOV	
(4) DREY ASSOCIATES LIMITED	
(5) ANTHONY EDWARD THOMAS STROUD	
(6) JOHN DOMINIC WILSON	
(7) SARAH JULIET WILSON	**Defendants**

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Stephen Smith QC and Robert S. Levy (instructed by **Lovells LLP**) for the **Claimant**
Brian Doctor QC and Adam Tolley (instructed by **Clyde & Co LLP**) for the **First to Third Defendants**
Daniel Tatton-Brown (instructed by **Magrath LLP) for the Fourth to Seventh Defendants**

Hearing dates: 3, 4, 5 and 6 November 2009

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Judgment

Mr. Justice Teare:

1. There is before the Court an application by the Claimants ("the Bank") to continue a Freezing Order which was granted by Blair J. on 13 August 2009. The continuation is opposed by all the Defendants who have issued their own applications to have the Freezing Order discharged.

2. It has not been disputed by the Defendants that the Bank has established a good arguable case against them. That claim has been summarised in the Bank's Skeleton Argument as follows:

> "In essence the Bank brings claims against the Defendants in respect of their involvement in what the Bank says is a huge

> misappropriation of funds belonging to it during the course of 2008, which totalled in excess of US$295m. D1 was the chairman of the Bank at the time, D2 was a fellow main board director and chairman of the Bank's management board, and D3 was a director of the management board. D4 – an English company – was secretly established and controlled by or for Ds 1-3 (or one or more of them) and received the $295m. Ds 5-7, English resident individuals, were or had been nominee directors of D4 and other companies which secretly held valuable assets of Ds 1-3 (or one or more of them)."

3. The First to Third Defendants who, until earlier this year, were involved in the management of the Bank have pleaded their Defence to the claim. They admit that the Fourth Defendant received the sums in question but say that such sums were part of the consideration paid by the Bank for the purchase of shares in three other banks. The agreements pursuant to which the payments were made were valid agreements and so they, the First to Third Defendants, did not act in bad faith or in other than the best interests of the Bank. To the allegation that the First Defendant did not disclose to the board of the Bank his interest in the Bank, in the banks being purchased and in the Fourth Defendant, and so acted in breach of the law of Kazakhstan, the First Defendant says that his interests in those corporate bodies were well known to the board of the Bank.

4. The Fourth to Seventh Defendants have yet to plead their defences. The Fourth Defendant is an English registered company which received the $295m. The Fifth to Seventh Defendants were directors of the Fourth Defendant until October 2007 in the case of the Sixth and Seventh Defendants and until June 2009 in the case of the Fifth Defendant.

5. The First to Third Defendants say that the Freezing Order should not be continued because:

   i) there is and was no sufficient risk of dissipation;

   ii) there was material non-disclosure;

   iii) it is not just and convenient to grant a Freezing Order.

6. The foundation of the First to Third Defendants' opposition to the Freezing Order is the allegation, supported by expert evidence, that Kazakhstan is a country where the rule of law is not observed. It is said that in assessing whether or not a risk of dissipation has been established this important feature of life in Kazakhstan must be borne in mind. Thus inferences which might properly be drawn from certain matters in England cannot fairly be drawn from the same matters when they occur in Kazakhstan. For the same reason it was said to have been incumbent upon the Bank, when applying to Blair J. for a Freezing Order without notice to the Defendants, to disclose to the Court this feature of life in Kazakhstan.

7. The allegations made by the First to Third Defendants as to conditions in Kazakhstan are extremely serious. They are supported by the expert evidence of Professor Bowring who claims to be "one of the most experienced experts concerning

Kazakhstan". His expertise lies in the "law and legal systems in Kazakhstan." Some of his opinions strike those familiar with life in England as extreme. Thus he states that "anyone who poses a real or perceived threat to the regime can expect retribution which will include torture and quite likely death." Of particular relevance to this case are the following expressions of opinion:

i) There is a history of "politically motivated charges".

ii) State owned organisations have no independence from the state. Information given to a government owned bank would be accessible by the police and prosecuting authorities. "Even if the documents were given to apparently innocent and independent persons in Kazakhstan, the lack of any proper civil law safeguards in Kazakhstan, dependent as they are on judicial independence would mean that the authorities could obtain that information by one or other means."

8. These allegations, in so far as they concern the relationship between the Bank and the prosecuting authorities, are denied by the Bank. Thus Mr. Dunayev, the Chairman of the Board of Directors of the Bank, whilst acknowledging that there is close cooperation between the prosecuting authorities and the Bank, has emphasised that access to documents is only given to the prosecuting authorities where there is a legal entitlement. He states that he has given very clear instructions that undertakings given by the Bank to this Court are to be respected. Mr. Varenko, the First Deputy Chairman of the management Board of the Bank and the person who made the affirmation in support of the application for the Freezing Order, has stated that he does not receive instructions from the Government and that the Government is not controlling this action.

9. The Court is not able on this application to make findings as to the serious allegations made by the First to Third Defendants as to the political and legal conditions in Kazakhstan. That can only be done at trial if and in so far as they are relevant to a determination of the Bank's claim. To the extent that the disputes are material to the outcome of this application it will be necessary for me to have to bear in mind that both the Bank and the First to Third Defendants have adduced evidence in support of their respective cases on those disputes.

The Freezing Order against the First to Third Defendants

(i) Risk of dissipation

10. The Bank relied upon several matters in support of its submission that there is a risk that, unless restrained, the First to Third Defendants might dissipate their assets. I shall mention what I regard as the most cogent.

11. The first, and obvious, matter relied upon was that the Bank's good arguable case that the First to Third Defendants had wrongfully misappropriated $295m. belonging to the Bank by having that sum paid to the Fourth Defendant, an English company in which one or more of the Defendants were interested, which interest was concealed from the Bank, itself indicated a risk of dissipation.

12. Counsel for the First to Third Defendants urged me to exercise considerable caution in giving weight to that matter. He urged me to keep well in mind that conditions in Kazakhstan were very different than in England. The expert evidence to which he referred me indicated that the rule of law was not respected in Kazakhstan as it is in England. However, I found nothing in that expert evidence which would suggest that it would be inappropriate to infer a risk of dissipation from the nature of the Bank's good arguable claim. Indeed, it seems to me that if there is a good arguable case that the First to Third Defendants engaged in the wrongful misappropriation of $295m. such conduct must, as a matter of common sense, be a cogent indicator of a risk that those same persons might seek to dissipate their assets to prevent or hinder enforcement of any judgment which the Bank may obtain.

13. Reliance was also placed upon the information provided by the First to Third Defendants in response to the Freezing Order. This was provided by affirmation and also, in the case of the First Defendant, by his answers in a cross-examination which had been ordered to take place in circumstances where the information provided by affirmation was inadequate. Reference was made to this material in private, with the public excluded from the court, in view of the restrictions placed upon disclosure of the material by the Court of Appeal and because the cross-examination itself took place in private. I shall therefore not refer to the material in detail but state in broad terms the matters which that material indicated.

14. The information provided by the First Defendant as to the whereabouts of the monies paid to the Fourth Defendant is to the effect that they were paid out within a short period of time to other companies and then paid out by those other companies to yet other companies, to a large extent ending up in accounts at the Bank. No explanation has been provided for these payments. It was suggested by counsel for the Bank that they were consistent with money laundering. The ease and speed with which these payments were made supports the suggestion that there is a risk of dissipation because they illustrated the ease and speed with which the Fourth Defendant, of which the First Defendant admits to be in control, can disperse assets.

15. The information provided by the First Defendant as to his own assets was remarkable in that he declared indirect interests in several companies in jurisdictions such as the Dominican Republic, Cyprus, the BVI, Seychelles, the Marshall Islands and Panama, (in addition to those in Kazakhstan, the Russian Federation, Ukraine and Belarus) but without any particulars as to the nature of his indirect interests. This had every appearance of being evasive. When cross-examined about such matters he indicated that in addition to holding shares in companies which owned valuable assets other companies or persons held assets for him. This latter form of indirect or beneficial ownership of assets also indicated the ease with which such assets could be hidden and dissipated.

16. With regard to such matters it is however necessary to bear in mind one particular alleged feature of life in Kazakhstan, namely, the use of nominees to hide assets from the Government which might otherwise seize them without lawful justification. I shall assume that this is a feature of life in Kazakhstan since it is consistent with the picture painted by Professor Bowring of life in Kazakhstan, although counsel for the Bank observed with force that Professor Bowring did not say in terms that this was a feature of life in Kazakhstan. On that assumption it may be said that the Court should not infer from the First Defendant's use of nominees that the First Defendant is at risk of

dissipating his assets. However, when the use of such nominees is coupled with the good arguable case that the First Defendant has wrongfully misappropriated $295m. belonging to the Bank, it adds to the risk of dissipation because it provides a ready means by which assets can be dissipated.

17. The Second and Third Defendants, when providing information as to their assets, failed to provide an address in England other than their solicitors' address. This was said by their solicitors to be because of fears as their personal safety. However, the information provided as to their assets was, by order of the Court of Appeal, to go no further than counsel and solicitors. In those circumstances the suggested risk to the personal safety of the Second and Third Defendants is fanciful. Their failure to provide a residential address is therefore suggestive of evasive conduct and adds to the risk of dissipation.

18. It was submitted on behalf of the First to Third Defendants that the fact that the Bank knew of the alleged misappropriation in March 2009 and yet did not seek a freezing order until August 2009 suggests that the Bank cannot have thought that there was in reality a risk of dissipation. This is a point worthy of consideration because delay in seeking a Freezing Order can indicate that there is no real risk of dissipation. However, having considered the evidence given by Mr. Hardman, the solicitor acting for the Bank, and by Mr. Varenko, I do not consider that it can fairly be said that there was delay. There was considerable work to be done in preparing the application for the Freezing Order in this major and complex dispute.

19. I have no hesitation in concluding the Bank has established a real risk of dissipation sufficient to justify the grant of a Freezing Order against the First to Third Defendants.

(ii) Non-disclosure

20. Counsel for the Defendants alleged that inadequate disclosure had been made by the Bank under 5 headings.

(a) The context of the dispute

21. The allegation is that although Mr. Varenko, who swore the affirmation in support of the application for a Freezing Order, briefly referred to the possibility of a wider political dispute between the First Defendant and the President of Kazakhstan, his account was "seriously incomplete and inadequate".

22. The history of the relationship between the First Defendant and the Kazakhstan prosecuting authorities is unusual by reference to what one might expect in England of a chairman of a major bank. In 2002 he was prosecuted and found guilty of abusing his public office. (He had previously been Minister for Energy, Industry and Trade and had since formed a reform movement called Democratic Choice of Kazakhstan.) He was sentenced to 6 years in prison but released after serving some months (he says 14 months). The First Defendant states that he was released as a result of domestic and international pressure upon the Government. By May 2005 he was Chairman of the Board of Directors of the Bank.

23. In February 2009 the Government of Kazakhstan acquired 75.1% of the shares in the Bank. Mr. Varenko states that this was because financial assistance was required because of the global financial crisis in October 2008. The First Defendant disagrees with this account. He considers that the government's action was unlawful and motivated by the President's wish to take over the Bank.

24. In the light of this history it was said, in counsel's skeleton argument, that the allegations of misappropriation of funds, following the nationalisation of the Bank, did not arise in a purely commercial context. I assume that it will be said at trial that the allegations of misappropriation of funds are false and politically motivated.

25. This history or background was referred to by Mr. Varenko in his affirmation. In particular he said:

> "38. [The First Defendant] has been quoted as saying that the allegations that are being made about his wrong-doing are without foundation and are politically motivated. He has also been critical of the Government's action in taking a 75% stake in the Bank though Samruk-Kazyna, accusing the Government of Kazakhstan of "corporate raiding", an "abuse of power" and "an illegal takeover by the State which conflicts the interests of both the bank's shareholders and management."

Mr. Varenko then gave a short account of the First Defendant's business career from 1998 to 2005, including his arrest and release.

26. It seems to me that this was an adequate account of the history or background to the Bank's claim. I accept that it is not a full account of the history and in particular that it was not said that at the time of the charges in 2002 the First Defendant was a leading member of the opposition to the President. However, the account given was sufficient to inform the court that not only was the relationship between the First Defendant and the Kazakhstan authorities troubled and marked by hostility and disputes but also that it was difficult to know where the truth lay in that relationship. Thus, although the authorities had convicted and sentenced the First Defendant in 2002 to 6 years' imprisonment he was released early and by 2005 was the chairman of a major Kazakhstan bank. There being such an unusual background to the Bank's claim it was necessary for the Bank, whose major shareholder is now the government, to set out with detail and clarity the evidential basis of its claim against the Defendants in order to establish a good arguable case. This was done.

27. I therefore consider that the Bank disclosed sufficient history or background to place its claim in context and gave a fair presentation of its case.

(b) The alleged criminality of the First Defendant

28. It was said that Mr. Varenko sought to present the First Defendant as though he were "an established criminal". The basis of this was the reference to the First Defendant having been convicted of abusing his public office and misappropriating public funds.

29. It is accepted that it was, or may have been, a mistake to say the First Defendant had been convicted of misappropriating public funds. However, I am unable to accept that

Mr. Varenko sought to portray the First Defendant as an established criminal. That is not said in terms and in any event the disclosure of his early release suggests that that there was something odd about the conviction. When I read this passage I did not regard Mr. Varenko as saying that the First Defendant was an "established criminal". Counsel for the Bank told me that this was not part of his case on the application before Blair J.

30. I therefore do not accept that an unfair presentation was made in this respect.

(c) The role of the Kazakhstan prosecuting authorities

31. There is no doubt that the prosecuting authorities in Kazakhstan are investigating the First to Third Defendants. This was referred to by Mr. Varenko in his first affirmation. Thus he said that soon after the Government became the majority shareholder the Kazakh Prosecutor General's Office was investigating the First Defendant in relation to allegations of embezzlement, fraud and money laundering. He said that these investigations were ongoing. That is not surprising if there is evidence that substantial sums have been misappropriated from the Bank.

32. It is the case of the First to Third Defendants that information passed to the Bank will find its way to the prosecuting authorities and that therefore it was incumbent upon the Bank, when applying for the Freezing Order, to disclose to the court that such risk existed and that the prosecuting authorities might use such information to seize assets of the Defendants. Concerns of this nature had led the Court of Appeal, following an offer by the Bank, to impose a restriction on the disclosure of information to the Bank's counsel and solicitors and not to the Bank. The Defendants' case is, as I have already noted, supported by Professor Bowring. It is also supported by the circumstance that the prosecuting authorities are carrying out their investigations from offices in the Bank. Indeed the Second Defendant said that the prosecuting authorities have had "unhindered access to everything" within the Bank and "free reign and the free run" of the Bank's premises.

33. As I have already noted the Bank does not accept this characterisation of the prosecuting authorities' presence within the Bank's premises. Mr. Varenko has stated that he has not been asked (much less forced) to hand over information or documentation to the prosecuting authorities.

34. If the suggested risk exists (and Professor Bowring states that it does) it is not a matter which goes to the merits of the Bank's claim or to the risk of dissipation. But it is relevant to the terms on which the court orders the Defendants to provide information as to their assets.

35. The standard form of Freezing Order requires the claimant to undertake to the Court not to use any information obtained as a result of the Freezing Order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction, other than the claim which is the subject of the Freezing Order. This undertaking was given by the Bank.

36. It seems to me that in circumstances where that undertaking is given and where, as here, Mr. Varenko does not recognise the risk asserted by the Defendants and spoken to by Professor Bowring, it would be a counsel of perfection to require Mr. Varenko

to make enquiries as to whether, notwithstanding the giving of the undertaking, there was nevertheless a risk that information obtained in pursuance of the Freezing Order might find its way to the prosecuting authorities who might use it to seize assets of the Defendants.

37. I accept, as counsel reminded me, that a Freezing Order is a most potent weapon in the hands of the claimant and that the highest standards are expected of the claimant when seeking such an order without notice. But it will only be in a small minority of cases where it will be appropriate to limit the persons to whom information provided by a respondent to a Freezing Order is given. Unless there is some clear indication known to the applicant that information provided by the respondent might be misused in breach of the undertaking I do not consider that his duty requires him to investigate whether a risk of misuse exists.

38. In the present case Mr. Varenko knew of the presence of the prosecuting authorities in the Bank's premises. However, he has said that he was aware of the importance of complying with undertakings given to the Court and had not at any time been put under any pressure by the Government or the prosecuting authorities. I do not, in these circumstances, consider that the presence of the prosecuting authorities in the Bank was a clear indication that information obtained from the Defendants might be passed to those authorities in breach of the undertaking given to the Court.

39. For these reasons I do not accept that the Bank ought to have disclosed to the Court "any reason for caution or concern as to the information that might be elicited."

(d) The reliability of the Bank's undertakings

40. Mr. Varenko was, it appears, at one time the director of a company, Fellowes International Holdings Limited, which was subject to an anti-suit injunction granted by this Court. In proceedings before the High Court of the Isle of Man and the Staff of Government Division (the Court of Appeal in the Isle of Man) it was held that Fellowes had acted in breach of that order. Mr. Varenko did not disclose this fact to the court when seeking the Freezing Order from Blair J. This is said to be a material non-disclosure because it was material to the reliance the Court could place on undertakings given on behalf of the Bank through Mr. Varenko.

41. The breach of the anti-suit injunction appears to have been committed in 2005. Mr. Varenko accepts that he was a director of Fellows "over four years" ago. He has not identified when he ceased to be a director. Since Fellowes is a BVI company it is not possible to research public documents to identify when he was a director. It is possible that he was a director when the breach was committed.

42. However, he has said that he had not been served with the proceedings in the Isle of Man and had not participated in them. He has further stated that "I had no part to play in any steps being taken by Fellowes which have led to the breach of any court orders, whether in England or elsewhere."

43. There will obviously be circumstances where a claimant seeking a Freezing Order is obliged to disclose to the court that he cannot be relied upon to obey orders of the court or respect undertakings given to the court. Thus if the claimant has himself broken an undertaking given to the court that information would be material to the

question whether the court would accept his undertaking. That is a simple case. The present case is very different. There is no suggestion that the Bank has breached an order of this Court. The suggestion is that a company of which Mr. Varenko was a director committed the breach. If Mr. Varenko had been the sole director of that company or a director responsible for causing the company to breach the order of the court, it is arguable that that circumstance was one which it was material for Mr. Varenko to disclose when seeking a Freezing Order on behalf of the Bank.

44. There is no evidence that the Bank had any connection with Fellowes. That is a factor which suggests the breach by Fellowes was not material. But Mr. Varenko is First Deputy Chairman of the Management Board of the Bank and his responsibilities include the recovery of assets of the Bank. He appears to have been the person who instructed the Bank's solicitors. If he had been a director of Fellowes at the material time and, knowing of the anti-suit injunction, authorised the conduct which amounted to a breach of it, I consider that such matters would be material which he was obliged to disclose when the Bank offered undertakings to the Court.

45. However, there is no evidence that he authorised its breach. On the contrary he has given evidence that he "did not have a part to play" in the steps which led to Fellowes breaching a court order. In those circumstances, even though he may have been a director of Fellows at the material time, I do not consider the duty of full disclosure extended to disclosing the fact of Fellowes' breach and, assuming that he had been a director of Fellows at the material time, disclosing that fact.

46. I am troubled that Mr. Varenko has neither said whether or not he was a director at the material time nor whether or not he knew of the breach at the material time. It is possible that he was and that he did. There is force in the submission that if he was not a director at the material time he could have said so, or, if he was, that he could have said so but stated that he was unaware of the breach. He merely said that he had "no part to play" in the breach.

47. Notwithstanding my concern, and although the matter is perhaps close to the line, I have concluded that unless Mr. Varenko authorised the breach it was not a material fact which was required to be disclosed when seeking the Freezing Order.

(e) Other proceedings by the Bank against the First to Third Defendants

48. In counsel's skeleton argument it was said that the Bank failed to mention other proceedings brought on behalf of the Bank against the First to Third Defendants or the recoveries made in those proceedings.

49. This is a complaint based in part on documents exhibited by Mr. Varenko to his affirmation and in part on documents exhibited to the witness statement of the First Defendant. They state that the prosecuting authorities have in the course of their investigation seized certain assets. Reference was also made to such seizures in respect of clams made on behalf of the Bank. Counsel did not allege that the Bank had itself made such claims. Rather, it was said that such claims had been made by the prosecuting authorities on behalf of the Bank in the context of criminal proceedings. A sum of KZT 30 billion, said to be the equivalent of $180 million had been recovered in respect of three such claims.

50. There is no evidence that such claims included the claim being advanced in this action. What is said, however, is that the Bank ought to have made enquiries of the prosecuting authorities because if a seizure had been made in respect of the claim in this action that would have been relevant to the amount covered by the Freezing Order. It does not appear that any such enquiries have been made. Whilst Mr. Varenko disclosed the charges being brought by the prosecuting authorities and referred to the authorities' investigation reports it does not appear that the attention of Blair J. was directed to the seizures.

51. In circumstances where there is no evidence that the Bank, by reason of the seizures in Kazakhstan, has security in respect of the very claim made in these proceedings, I am unable to find that there has been a material non-disclosure.

52. However, this is a matter which ought to have been investigated further by the Bank. I have therefore considered whether the failure to do so justifies a refusal to continue the injunction. I do not consider that it does. The seizures had not been executed by the Bank and there was no attempt to hide the evidence of such seizures by the prosecuting authorities. The failure to investigate further does not appear to have been because of a deliberate attempt to keep relevant material from the Court. To refuse to continue the Freezing Order on the ground of this failure would, I think, be an unduly penal and unjust application of the principles relating to non-disclosure in circumstances where it is apparent that great care had been expended in ensuring that the application had been thoroughly and properly prepared. A reduction of the amount covered by the Freezing Order might be the proportionate response should it hereafter appear that the seizures had been in respect of the claim in this action.

(iii) Just and convenient

53. The final point taken on behalf of the First to Third Defendants is that it is not just and convenient to grant a Freezing Order since "this litigation is quite clearly part of a much wider dispute between the President of Kazakhstan and the First Defendant." It was said to be inappropriate for the regime in Kazakhstan "to use a state-owned entity to ask the courts of this country to assist it" in its "campaign to wrest ownership and control of the Bank from the First Defendant."

54. Reliance was placed on the refusal of Blackburne J. in *Tajik Aluminium Plant v Ermatov and others* [2005] EWHC 2241 (Ch) to continue a freezing order. The principal reason for that refusal was that an entity not party to the proceedings before the court but interested in them was in fact directing the litigation (see paragraphs 191-192 of the judgment).

55. I do not consider that the present case is analogous to that case. In the present case the Bank has advanced a claim against the First to Third Defendants. It is not disputed that the Bank has a good arguable case. The Bank may now be owned or controlled by the government of Kazakhstan but the real parties to the dispute are before the court.

56. Further, the argument advanced by the First to Third Defendants assumes that they are correct in saying that the takeover of the Bank in February 2009 was the culmination of the President's campaign to wrest control of the Bank from the First Defendant. This is in dispute. The Bank says the takeover of the Bank was because of the world-

wide financial crisis in 2008. On this topic extensive evidence has been given by Mr. Dunayev, the current chairman of the Bank. That dispute, if it is relevant to the determination of the claim in this action, can only be resolved at trial.

Conclusion as to the continuance of the Freezing Order as against the First to Third Defendants

57. The Bank has a good arguable case against the First to Third Defendants. That has not been disputed. There is also, in my judgment, a real risk that the Defendants will dissipate their assets to avoid execution of any judgment which the Bank obtains in this action. I do not consider that the Bank's reference to the context of the dispute was materially inadequate or that the Bank wrongly presented the First Defendant as an "established criminal". The interest of the prosecuting authorities in the Defendants was properly disclosed. The Bank undertook to the Court not to use any information obtained as a result of the Freezing Order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction, other than the claim which is the subject of the Freezing Order. The Bank did not investigate whether there was a risk that information provided to the Bank by the Defendants might reach the prosecuting authorities and be used by them to seize their assets but I do not consider that it was obliged to do so. The Bank did not disclose that a company of which Mr. Varenko had been a director had breached an injunction granted by this Court but I do not consider that such fact was material. Whilst the Bank did not investigate whether seizures made by the prosecuting authorities provided the Bank with security in respect of the claim in this action as it should have done, I do not consider that that failure justifies a refusal to continue the Freezing Order. The investigation should however be made and if it appears that the Bank already has some security in respect of its claim the terms of the Freezing Order might require consideration. The context of the dispute does not render the grant of a Freezing Order inappropriate, unjust or inconvenient. On the contrary the existence of a good arguable case and a risk of dissipation makes it appropriate, just and convenient to continue the order. In the event that it later appears that the order should not have been made the Bank has undertaken to indemnify the Defendants in respect of damage caused by the order. That undertaking has been fortified by the deposit of £5m. It has not been suggested that that was inadequate. I have therefore concluded that the Freezing Order should be continued against the First to Third Defendants.

The Freezing Order against the Fourth to Seventh Defendants

58. There is a good arguable case that the Fourth to Seventh Defendants have participated in a scheme designed to conceal the fact that one of more of the First or Third Defendants are the beneficial owners of assets held by the Fourth Defendant. The risk of dissipation is supported by the circumstance that the Fourth Defendant has not disclosed such assets in England and has argued that disclosure of its assets might incriminate it in money laundering offences.

59. Counsel adopted the submissions made on behalf of the First to Third Defendants. He did not identify any additional reason as to why the freezing order should not be continued against the Fourth Defendant. Since I have rejected the submissions of the First to Third Defendants the order should be continued against the Fourth Defendant.

60. With regard to the Fifth to Seventh Defendants three additional submissions were made.

    i) There was no risk of dissipation.

    ii) The Freezing Order was not proportionate.

    iii) There was no need for a Freezing Order in circumstances where the assets of the First Defendant provided adequate security for the Bank's claim.

61. The first submission was based on the assets disclosed by the Fifth to Seventh Defendants, namely, their homes and modest savings. It was said that it was fanciful to suggest that there was a risk that they might be dissipated. In response it was observed that the Claimants had adduced evidence that the Fifth Defendant was the legal owner of substantial holdings in the Bank and in BTA Moscow and that the Sixth and Seventh Defendants were the legal owners of shareholdings in Omsk-Bank, BTA-Kazan and BTA Moscow. These holdings had not been disclosed.

62. Counsel for the Fifth-Seventh Defendants submitted there was no evidence that such shares were presently held by the Defendants. That is strictly true but the Defendants have not proffered any information about such shares notwithstanding the evidence that they at least recently held them. In those circumstances I am not able to regard the risk of dissipation as being fanciful.

63. The second submission is based upon the discrepancy between the size of the Bank's claim and the modest assets declared by the Fifth to Seventh Defendants. There is some force in this point in that it is most unlikely that the Bank would pursue its claim against the Fifth to Seventh Defendants if they could not pursue the First to Fourth Defendants. However, unless and until some explanation is given concerning the bank shareholdings to which I have referred it is not clear that the Freezing Order is disproportionate.

64. The third submission fails because the Bank does not accept that the true value of the assets disclosed by the First Defendant is sufficient to cover its claim. The values declared are substantial but the basis of such values is not accepted. For example, certain of the values are said to assume that the shareholders of the Bank have a good claim against the Government of Kazakhstan for the alleged wrongful take over of the Bank. The Bank does not accept that there is such a claim.

65. For these reasons I have decided to continue the Freezing Order against the Fourth to Seventh Defendants. As and when information is provided by the Fifth to Seventh Defendants concerning their present or past shareholdings the terms of the Freezing Order should be kept under review to avoid the order having an unduly oppressive effect on them.

Disclosure of information

66. The Court of Appeal restricted the disclosure of information provided by the First to Third Defendants with regard to their assets to counsel and solicitors acting for the Bank. The Bank has requested that that restriction should be set aside. The First to Third Defendants say that the restriction should remain in place so that if and when

the Bank wishes a certain piece of information to have a wider circulation an application will be necessary showing why such wider circulation is necessary.

67. In the light of the passage in Professor Bowring's report that information handed to the Bank "would inevitably find their way into the hands of the authorities" it is not possible for me to regard the risk as fanciful notwithstanding the assurances given by Mr. Varenko and Mr. Dunayev. Further, although counsel for the Bank understandably said that continuation of the restriction will cause extra expense and inconvenience, he did not identify any particular piece of information which required a wider circulation. I consider that the restriction should remain in place. If and when the Bank's counsel and solicitors identify information which they wish to disclose to others it will be necessary for an application to be made explaining why wider circulation is necessary. At the same time consideration will have to be given to other precautions such as those identified in paragraph 54 of the Skeleton Argument of counsel for the First to Third Defendants.

Passports

68. The Freezing Order required the First to Third Defendants to ensure that their passports are held by Clyde and Co. until further order. The justification for this order is that it is necessary to ensure that the Defendants provided the required information as to assets and did not leave the country before doing so. It is a restriction on their liberty and therefore should be no longer than is strictly necessary for that purpose; see *Bayer v Winter* [1986] 1 WLR 497 at p.503. The cross-examination of the First Defendant as to his assets is not yet complete. It seems to me that the application to permit the return of his passport is premature pending the completion of his cross-examination. The matter is not so clear in respect of the Second and Third Defendants but I am persuaded that since the cross-examination of the First Defendant may have a bearing on assets held by the Second and Third Defendants an application for the release of their passports is also premature. No suggestion was made that any of the Defendants has an immediate need for his passport.

Conclusion

69. The Freezing Order is continued.