Judgments

JSC BTA Bank v Ablyazov

Practice – Pre-trial or post-judgment relief – Freezing order – Court making freezing order against first defendant – Defendant taking out loan agreements, made by lending companies arguably controlled by defendant – Claimant seeking declaration that defendant's rights under loan agreements to be considered assets for purposes of order – Claimant seeking disclosure of drawings made pursuant to agreements – Judge holding rights under loan agreements not assets – Judge not dealing with disclosure application – Claimant appealing – Judge erring

[2013] EWCA Civ 928, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

CA, CIVIL DIVISION

RIMER, BEATSON, FLOYD LJJ

25 JULY 2013

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S Smith QC and T Akkouh for the Appellant

D Matthews QC and C Tan for the Respondent

Hogan Lovells International LLP; Addleshaw Goddard LLP

BEATSON LJ:

THE ISSUE

[1] The questions for decision in this appeal are narrow but important ones relating to the scope of the standard Commercial Court form of freezing order which prohibits a Defendant subject to such an injunction from disposing, dealing with or diminishing the value of his assets. The principal one is whether a contractual right to draw down under an unsecured loan facility qualifies, either generally or in particular circumstances, as an "asset" for the purpose of the order? The second question is whether, if the right to draw down is an "asset", the Defendant's exercise of the right by directing the lender to pay the sum drawn down to a third party constitutes "disposing of" or "dealing with" an asset? The answer of Christopher Clarke J to both questions was "no". JSC BTA Bank ("the Bank"), which obtained the freezing order, contends that the judge was wrong. There is also a question as to whether, even if the judge was not wrong, in the particular circumstances of this case it is just and convenient to order the disclosure of all drawings which have been made pursuant to such loan facilities.

THE CONTEXT

[2] These proceedings are part of what Christopher Clarke J, in an earlier judgment, described as "extraordinary litigation on a large scale": [2011] EWHC 2664 (Comm) at 2. It all started on 9 August 2009 when Blair J granted a freezing order in favour of the Bank against Mr Mukhtar **Ablyazov** ("Mr **Ablyazov**"), the Bank's former Chairman and part-owner, and other Defendants. The Bank contends that Mr **Ablyazov**, with his associates, has misappropriated vast sums of money from it. On 21 August 2009, in a decision subsequently upheld by this court, Teare J rejected an application to stay the disclosure requirements until after the return date. The freezing order was continued on the return day and subsequently amended. It remains in force. Since then, in August 2010, the court appointed receivers over Mr **Ablyazov**'s assets. As a result of the complexity of the dispute, for case management purposes the litigation has been separated into different segments.

[3] In February 2012, Teare J found Mr **Ablyazov** guilty of contempt of court. He also made "unless" orders, the non-compliance with which debarred Mr **Ablyazov** from defending the Bank's claims. Contrary to a clear and unequivocal confirmation to the court that he would attend the handing down of the judgment, Mr **Ablyazov** did not do so: see [2012] EWHC (Comm) at 3 – 5. In a letter dated 12 December 2012, Addleshaw Goddard, Mr **Ablyazov**'s solicitors, informed Teare J's clerk that Mr **Ablyazov** had left the jurisdiction. By then, in a decision handed down on 6 November 2012, Teare J's decisions had been affirmed by this court: [2012] EWCA Civ 1411.

[4] The Bank has now commenced eleven actions against Mr **Ablyazov**. Other aspects of the case have been before this court on a number of occasions between 2009 and 2011 and on three occasions in 2012. ([2012] EWCA Civ 639, 1411, and 1551, respectively refusing the Bank's application that Mr **Ablyazov** be required to surrender as a condition of pursuing his appeal against Teare J's decision that he was in contempt of court, affirming the contempt decision, and dismissing an appeal by Mr **Ablyazov** from Teare J's subsequent refusal to recuse himself as the trial judge.) In his judgment in the contempt appeal Maurice Kay LJ stated that "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**": [2012] EWCA Civ 1411 at 202. Rix LJ's judgment in that case contains a full and helpful summary of the background at 4 to 14. Since the decision of the Court of Appeal, judgments totalling over US$3.7 billion have been entered against Mr **Ablyazov**, and three other Defendants have been held to have knowingly assisted in the frauds principally perpetrated by him.

[5] As before the judge, the Bank was represented by Messrs Stephen Smith QC and Tim Akkouh, and Mr **Ablyazov** by Mr Duncan Matthews QC and Miss Charlotte Tan. I am grateful to counsel for their excellent submissions, including their written submissions in response to the court's request after the hearing as to the implications, if any, for this appeal of the decision of Lightman J in *Coutts & Co v Stock* [2000] 2 All ER 56, [2000] 1 BCLC 183, [2000] 1 WLR 906, a decision on s 127 of the Insolvency Act 1986. The context in which the two technical and conceptual questions set out at 1 fall for decision is one in which a court might be tempted to stretch legal analysis to capture what are seen as the merits or lack of merits of the case before

it. But it is important not to succumb to that temptation. With the submissions and my own self-warning firmly in mind, I turn to the terms of the freezing order, the material facts, and my analysis.

THE FREEZING ORDER

[6] The freezing order granted by Teare J is in the standard Commercial Court form used since 2002. For the purposes of this appeal, its material parts are:

> "4 Until judgment or further order . . . [Mr **Ablyazov**] must not, except with the prior written consent of the [Bank's] solicitors:
>
> (a) remove from England and Wales any of [his] assets which are in England and Wales . . . up to the value of £451,130,000 [check amount as the order says £451,130,000] . . .
>
> (b) in any way dispose of, deal with or diminish the value of [his] assets in England and Wales up to the value of . . . £451, 130,000 . . . .
>
> (c) in any way dispose of, deal with or diminish the value of any of [his] assets outside England and Wales unless the total unencumbered value . . . of all [his] assets in England and Wales . . . exceeds £451, 130, 000 . . . .
>
> 5 Paragraph 4 applies to all [Mr **Ablyazov**'s] assets whether or not they are in [his] own name and whether they are solely or jointly owned and whether or not [Mr **Ablyazov**] asserts a beneficial interest in them. For the purpose of this order [Mr **Ablyazov**'s] assets include any asset which [he has] power, directly or indirectly, to dispose of, or deal with as if it were [his] own. [Mr **Ablyazov**] is to be regarded as having such power if a third party holds or controls the assets in accordance with [his] direct or indirect instructions.
>
> . . .
>
> EXCEPTIONS TO THIS ORDER
>
> 9(a) Paragraph 4 of this order does not prohibit [Mr **Ablyazov**] from spending up to £10,000 a week . . . towards [his] individual ordinary living expenses . . . nor does it prohibit [him] from spending a reasonable amount on legal advice and representation. But before spending any money on legal advice and representation [Mr **Ablyazov**] must notify [the Bank's] legal representatives in writing where the money to be spent is to be taken from.
>
> (b) this order does not prohibit [Mr **Ablyazov**] from dealing with or disposing of any of [his] assets in the ordinary and proper course of any business conducted by [him] personally."

[7] Until the amendments to the standard freezing order it did not contain a definition of "assets" such as is contained in para 5 of the order in the present case.

THE FACTUAL BACKGROUND TO THESE PROCEEDINGS

[8] After the freezing order was made, Mr **Ablyazov** entered into four loan facility agreements. Each agreement provided for facilities totalling £10 million to be made available to him; a total of £40 million. Two of the loan facility agreements were between Mr **Ablyazov** and Wintop Services Ltd ("Wintop"). The other two, on materially identical terms (see 10 below for the terms that are relevant to this appeal), were between him and Fitcherly Holdings Ltd ("Fitcherly"). Wintop and Fitcherly are BVI incorporated companies.

[9] Mr **Ablyazov** maintains the loans were essentially personal loans to fund personal and legal expenses made by Mr Shalabayev and Mr Povny, the individuals he claims are behind the BVI companies, because of a relationship of friendship and mutual trust with him. His case is that the loans were not ordinary commercial transactions and, as the lenders would have no interest in a third party taking up the loans, for all practical purposes they were unassignable.

[10] The Bank has maintained in other proceedings that the agreements are shams and, in an earlier judgment, given on 26 October 2011, Christopher Clarke J stated that, on the evidence before him, "there is strong ground for believing that Wintop and Fitcherly are in fact Mr **Ablyazov**'s creatures or conduits" and are ultimately owned by him: [2011] EWHC 2664 (Comm) at 71, referred to at [2012] EWHC 1819 (Comm) at 3. For the purposes of these proceedings, however, the Bank proceeded on the basis that the loan facility agreements were enforceable, and that it is incorrect in asserting that Wintop and Fitcherly are in fact owned or controlled by Mr **Ablyazov**. The judge therefore assumed (at 4) that the agreements were not shams or made with companies ultimately owned by Mr **Ablyazov**.

[11] The loan facility agreements enabled Mr **Ablyazov** to direct that Wintop and Fitcherly make payments directly to third parties. He made such directions in respect of the entire £40 million. It was thus drawn down and paid directly to third parties. The payments were used to fund the legal expenses of Mr **Ablyazov** and others, and his living expenses. In the October 2011 decision Christopher Clarke J stated (at 11) that payments were made to over ten leading counsel, more than 20 juniors and 75 other lawyers from at least eight different firms, and that the amount paid ran into millions of pounds. Although the Bank is unable to identify all the recipients, over US$16 million was paid to Stephenson Harwood, Mr **Ablyazov**'s former solicitors, and (in round numbers) about US $500,000 was paid in relation to a property on the Bishop's Avenue, US $119,000 to corporate service providers associated with Mr **Ablyazov**, and US $390,000 to lawyers acting for other Defendants to the Bank's claims.

THE TERMS OF THE LOAN FACILITIES

[12] The first two agreements, respectively dated 1 September 2009 and 1 April 2010, were between Mr **Ablyazov** and Wintop. The third and fourth agreements, respectively dated 17 August and 1 December 2010, were between him and Fitcherly. The material provisions are set out in 12 – 14 of the judgment below. The judge stated:

> "12 Each of the Loan Agreements provided for a £10 million facility available from the Lender to Mr **Ablyazov** for two years from the date of the Loan Agreement [see cl 1.1] and contained the same highly favourable terms. Sums up to a maximum of £10 million per Loan Agreement were to be disbursed at the written request of Mr **Ablyazov** whether in one or several tranches (clause 1.2). Interest, at the rate of 5% per annum, was not to be payable until repayment of the principal sum (clause 1.3). The Lender was not entitled to demand repayment until four years after the commencement of the facility (clause 1.4). The agreement was expressed to create '*legal, valid and binding obligations of the Borrower*' (clause 1.8). No security was required to be given in support of the borrowings. The Agreements contained an English choice of law clause (clause 1.18).
>
> 13 They also contained a clause entitled '*Binding Effect for the Lender*' which stated that the agreement was '*enforceable against the Lender in accordance with its terms*' (clause 1.11). Clause 1.12 provided '*Use of Proceeds.* The proceeds of the Loan Facility shall be used at the

Borrower's sole discretion. The Borrower may direct the Lender to transfer the proceeds of the Loan Facility to any third party.'

14 The Loan Agreements also included the following two terms:

1.6 *Cancelation of the Loan Facility.* Notwithstanding section 1.1 hereof, any undrawn portion of the Loan Facility may be cancelled upon delivery to the Borrower of a written cancellation notice by the Lender.

. . .

1.16 *Assignment . . . .* The Borrower may not assign or transfer any of its rights under this Agreement without the prior written consent of the Lender."

THE JUDGMENT BELOW

[13] As I have stated, Christopher Clarke J held that the contractual rights to draw down under the loan facilities do not qualify as "assets" for the purpose of the standard form of freezing order and that their exercise by directing the lender to pay the sum drawn down to a third party does not constitute "disposing" or "dealing" with an asset. He dismissed the Bank's application seeking a declaration that if, as Mr **Ablyazov** contends but the Bank denies, the four loan facilities constituted valid contracts, his rights under them were assets for the purpose of the freezing order and that any drawings under them could only be made in accordance with the provisions of para 9 of the order, which is set out at 6 above. He also declined (see judgment, 85) to grant any consequential relief, and thus refused the Bank's application for disclosure of all drawings which had been made pursuant to the loan facilities. The Bank sought this disclosure in order to ascertain whether there were any assets which represent the traceable proceeds of such drawings, or whether other grounds exist to enable it to make applications against the recipients on the basis that they knowingly received property transferred contrary to the terms of the freezing order.

[14] The clearly structured judgment deals with three questions. The first concerns the meaning, in a freezing order, of the term "assets". The second concerns the meaning, in such an order, of the component parts of the phrase "dispose of, deal with and diminish the value of any of [Mr **Ablyazov**'s] assets". The third is whether the language of the standard form freezing order is ambiguous and, if so, how to resolve it. The judge did not deal with the Bank's alternative case on disclosure, that the BVI companies, Wintop and Fitcherly, were ultimately controlled by Mr **Ablyazov** so that payment by them to third parties was a payment of money controlled by Mr **Ablyazov** and therefore a breach of the order unless permitted by para 9. That alternative case relied on the judge's finding in his earlier judgment (see 10 above) that there was strong ground for believing that these two companies were ultimately controlled by Mr **Ablyazov**.

[15] As to the meaning of "assets", the judge stated (judgment, 43) Mr **Ablyazov** considered the Bank's submissions to be based on a syllogism which was invalid. He accepted its first two stages: (i) the rights under loan facilities such as these are *choses in action*, and (ii) some *choses in action* are "assets" for the purpose of a freezing order. But he rejected its third stage, that the right to draw down under the loan facilities must therefore be an asset within the order. He held that, in the context of a freezing order, not all *choses in action* are "assets". In reaching this conclusion, he had regard to the purpose of a freezing order and the particular terms of the four loan facility agreements entered into by Mr **Ablyazov**. The purpose of a freezing order is to prevent a Defendant against whom a Claimant might in the future secure a judgment from disposing of his assets otherwise than in the ordinary course of business so as to frustrate any attempt by the creditor to secure payment of its judgment by whatever process of execution might be open to it: see judgment, 72 – 75.

[16] The judge stated (judgment, 74) that the standard freezing order *prima facie* catches dispositions which are not dissipations so that it is possible it covers a right to borrow. He also stated (judgment, 77) that, “from a legalistic viewpoint”, there is no difficulty in regarding a right to borrow as a *chose in action*. But the freezing order, which did not use the term “*chose in action*”, should be construed “in the way in which it ought reasonably to be understood by a businessman to whom it was addressed in the light of the purpose which it was designed to serve”: see judgment, 72 and 76.

[17] In the light of the purpose of freezing orders as stated at 15 above, and the way a freezing order would be understood by a person subjected to one, the judge held that Mr **Ablyazov**'s right to borrow was not to be regarded as an “asset” for the purposes of the order. In reaching this conclusion he had regard to and followed two decisions of Neuberger J, as he then was, in *Cantor Index v Lister* [2002] CP Rep 25 and *Anglo Eastern Trust Ltd and another v Kermanshahchi* [2002] EWHC 1702 (Ch). He also had regard to the decision to the same effect by the Federal Court of Australia in *Deputy Commissioner of Taxation v Hickey* [1999] FCA 259 at 32 (*per* Carr J): judgment, 21 and 29.

[18] In the first two cases Neuberger J held, albeit in relation to the different wording in an earlier version of the standard form of freezing order, that drawing down on an unsecured loan facility by directing such a payment to a third party did not involve dealing with or diminishing the value of any of the injuncted Defendant's assets. They and the commentary in *Gee on Commercial Injunctions* (5th ed, 19-022) treat such a direction by an injuncted Defendant as causing his pre-existing indebtedness to be increased rather than diminishing his assets.

[19] Both before the judge and in this court the Bank relied on the change in the terms of the standard form of freezing order, and the fact that the version of the order considered in *Cantor Index v Lister*, the *Anglo Eastern Trust* case, and in *Hickey*'s case did not contain an extended description of the term “assets” such as that in para 5 of the order in the present case. Before this court, the Bank in particular relied on the fact that it did not appear that those cases considered the argument that, as the rights under a loan agreement are *choses in action*, they fall within the term “assets” in para 4 of the order, and “dealings” with them can only lawfully occur in accordance with the terms of the freezing order.

[20] The judge rejected the submission that these three cases should be distinguished for these reasons. He considered that the amendment made to the standard wording of freezing orders was directed to bring within the scope of a freezing order assets held by a third party in circumstances where the injuncted Defendant had power to control the asset but held something short of a legal or beneficial title to it. He considered that the new wording aimed to clarify “what *type of interest”* the injuncted Defendant must have in the property rather than *the nature of the assets* in which an interest may be had for the purposes of the freezing order: see judgment, 41 and 83.

[21] The judge recognised (judgment, 74) that the terms of a freezing order *could* relate to an asset which would not be seized in execution and that it was possible that the standard form covered the exercise of a right to borrow. But he also regarded it as important that Mr **Ablyazov**'s rights to draw down under the loan facility agreements were (see judgment, 82) incapable of assignment (cl 1.16) and that the lenders were able (cl 1.6) to withdraw the right to draw down. There was, as a result of these provisions, “no realistic prospect of the bank securing the right to borrow on these terms by execution”. Accordingly (see judgment, 83), Mr **Ablyazov** did not, under the loan facility agreements, have any asset of which he had legal or beneficial ownership or control,. For these reasons, the *choses in action* under the loan facility agreements did not qualify as assets for the purposes of the freezing order.

[22] For virtually the same reason, the judge also held (see judgment, 77) that the exercise by Mr **Ablyazov** of the right to draw down under the agreements was not to be regarded as a disposal of or dealing with the asset: judgment, 75. He considered that “disposing” and “dealing” suggests some sort of transfer or agree-

ment to transfer. He stated that was to be expected in an order designed to stop the movement of what might be taken in execution and contrasted that with the exercise of a right to borrow; that is to receive money in exchange for a debt.

[23] The judge also stated that, if the bank's submissions were correct, the standard freezing order would have some odd effects. Every termination of a contract, including many run-of-the-mill contracts, would at least potentially be a breach of such an order because it involved the disposal of a right by bringing it to an end even though the value of the right might be minimal: see judgment, 78. See also the judge's summary of Mr **Ablyazov**'s submissions at 43-44. Additionally, on the Bank's approach there would (judgment, 79) be “intractable questions of valuation eg as to the valuation of a right to borrow”. He made it clear that he did not mean that something is not an “asset” because it is difficult to value. He meant that the fact that a particular construction potentially involved a multiplicity of valuations of rights under run-of-the-mill contracts which would be “nigh on impossible to value” was a reason for adopting a stricter construction. The judge also stated that he found the evidence as to value of limited assistance. He was referring to the undisputed evidence of Mr **Ablyazov**'s expert that an undrawn credit facility is not an asset for the purpose of relevant accounting definitions, and to the evidence of the Bank's expert that the rights had real value to Mr **Ablyazov**, albeit value difficult to quantify and not necessarily transferable. He did, however, accept that evidence might support the submission that, on the true construction of the order, the rights were not the type of asset the freezing order was intended to catch. Later in his judgment (82) he concluded that Mr **Ablyazov**'s rights to borrow “were of no value”. He stated (judgment, 80) that the effects on run-of-the-mill contracts and the questions of valuation illustrated “the danger and the error of treating language designed to prevent the removal from a Claimant's grasp of that which he might secure in execution of any judgment as applicable to every *chose in action* including the right to incur a liability”.

[24] In the last section of his judgment, the judge stated that the language of the freezing order was at least ambiguous, and that such ambiguity in an instrument giving rise to a penal sanction should be construed in the way most favourable to the putative contemnor: (see judgment, 81). He also stated that, had he considered the construction adopted by Neuberger J in *Cantor Index v Lister* and *Anglo Eastern Trust Ltd v Kermanshahchi* (referred to at 17 above) was clearly wrong, he “would not have forborne to give effect to the right construction because the wrong one had stood unchallenged for so long”.

[25] The judge was acutely aware (see judgment, 84) that the effect of his interpretation allowed “someone in the position of Mr **Ablyazov** to effect a diminution of his assets outside the confines of the freezing order”. This might enable (see judgment, 16) an astute Defendant to borrow large sums without disposing of, dealing with or diminishing his assets but nevertheless reducing his net asset position and potentially reducing the amount available to the Claimant by the full extent of the loan. He accepted that this might mean that a Claimant would “find that the lender had obtained judgment on what may have been a short term loan in execution for the amount lent before the Claimant's claim was established” and in this way to “in effect make payments otherwise than in the ordinary course of business out of his assets without being touched by the freezing order” and “without any control by the Claimant or the court over the amount borrowed and the proportion of that spent on legal expenses . . . or on anything else”. He stated (judgment, 84) that, like Neuberger J, he did “not regard that as sufficient grounds for adopting a different construction of the order”.

THE ISSUES IN THIS APPEAL

[26] At the heart of the Bank's challenge to the judge's order is the submission on its behalf that “logic and consistency – not to mention certainty – dictate that all *choses in action* should be treated in the same way for the purposes of freezing orders; dealings with them should not occur except pursuant to one of the exceptions” to the prohibition: skeleton argument, para 3. The Bank contended that, if this is not so, an injuncted Defendant who is able to borrow large sums without granting security can evade the operation of the order by reducing his net asset position and can thus potentially reduce the amount available to the Claimant without the Claimant knowing that this is happening, let alone having any control over the process. The Bank

maintained this would give rise to anomalies which many would consider absurd and which would render freezing orders less effective and bring them into disrepute.

[27] Mr Smith identified two anomalies. The first concerned the difference between the position of a payment by a debit card for a purchase which is not permitted by the ordinary living expenses exception in the order. Where the Defendant's bank account is in credit, the transaction will be a breach of the order because the money standing to the credit of the account is a *chose in action* which will be reduced or extinguished as a result of the transaction. Where the Defendant's bank account is overdrawn pursuant to an overdraft facility which has not been exhausted, applying the decision of the judge, the transaction will not breach the order because it does not involve dealing with one of the Defendant's assets, it only involves an increase in his liabilities. The position would be different if the overdraft facility was secured because in that case the transaction would reduce the Defendant's interest in the asset charged.

[28] The second anomaly that is said to follow from the judge's decision is between drawing down on an unsecured loan facility by a payment to the Defendant or into his bank account, and his use of the facility to require direct payment to third parties. In the first case, the Defendant's use of the money to pay third parties will be prohibited except pursuant to the terms of the order. In the second case, the judge's decision means it will not because the Defendant has not made the drawn-down funds his assets for the purposes of the freezing order.

[29] On behalf of the Bank it was submitted that the judge's reasoning was overly elaborate and erred in five respects. The first was ascertaining the meaning of the words in the freezing order by looking at them from the perspective of the hypothetical businessman. (His reasons for this submission are summarised at 67-68 below.) The second is that the judge linked the scope of the term “assets” in the freezing order with the question whether the assets can be enforced against and have a market value. The third was the judge's conclusion that there were difficulties with valuation, since the difficulties identified were more apparent than real. The fourth and fifth were his conclusions that it was not clear that exercising a *chose in action* to borrow money constituted “dealing with” or “disposing of” that *chose in action*, and that the terms of the freezing order were ambiguous, which ambiguity should be resolved in Mr **Ablyazov**'s favour.

[30] On behalf of Mr **Ablyazov**, Mr Matthews submitted that the ordinary meaning of “dealing with” or “disposing of” assets does not include borrowing money. Although *choses in action* are in one sense “assets”, that does not mean that, in the context of a freezing order, “assets” include all *choses in action*. He argued that in the light of the fundamental purpose of a freezing order, a right to borrow which cannot be bought, sold or exercised by any third party and would never be available to assist enforcement for the benefit of the Bank is not an asset for the purposes of the order. He also argued that, since a commercial lender is, at its lowest, highly unlikely to lend money on an unsecured basis to a person subject to a freezing order, the dangers identified by the Bank are overstated. He submitted that any possible lacuna in the present form of the freezing order should be addressed by amending its terms, for example by prohibiting the injuncted Defendant from increasing his liabilities without the consent of the court. It should not, he contended, be done by distorting the meaning of the existing wording of the order.

[31] It is common ground that the judge did not deal with the Bank's alternative case on disclosure. The Bank contends that the judge erred in not ordering disclosure because there were grounds to believe, as the judge had previously found, that Wintop and Fitcherly, the BVI companies who were the lenders under the loan facility agreements, were the creatures of Mr **Ablyazov**, and also that it was just and convenient to make the order for other reasons in this case. In his October 2011 judgment ([2011] EWHC 2664 (Comm)), the judge stated (at 47) that a disclosure order in aid of freezing relief:

> “may be made if it is just and convenient to make it in order to ensure that the injunction is effective. There must, therefore, be grounds to believe that there is a real risk that the injunction may be being broken. Whether the order is in fact made is likely to depend on the strength of

those grounds and the considerations which militate in favour and against making such an order."

The Bank relied on the following matters:

"(1) The judge's finding that it had established 'strong grounds' to believe that Wintop and Fitcherly were Mr **Ablyazov**'s creatures, so that payments by these entities were disposals of monies within his control and therefore a breach of order unless sanctioned by paragraph 9.

(2) There were grounds to believe that the order has been broken because a number of the payments were made in support of legal fees and could not possibly be sanctioned by paragraph 9.

(3) The provision of the information may identify the existence of further undisclosed assets which the Bank could take steps to preserve, and the identification of recipients of funds would enable it to investigate whether such payees knowingly received monies paid in breach of the freezing order and enable it to consider whether steps should be taken to recover such monies."

[32] On behalf of Mr **Ablyazov**, it was submitted that a disclosure order would be futile because, in the light of the evidence given by Mr **Ablyazov** in his sixteenth witness statement, he will not be able to provide the disclosure sought. This is because he has stated that, although to the best of his knowledge the invoices from third parties were always paid, he does not have knowledge of the way Wintop or Fitcherly made the payments he requested. It was also submitted that, since it has not been proved that Wintop and Fitcherly are Mr **Ablyazov**'s creatures, this application is a fishing expedition and there is no evidence before the court that the funds paid pursuant to the loan agreements may have been used to purchase valuable assets or give grounds for identifying further assets. Although the Bank had maintained that Fitcherly's bank statements had enabled it to prove that Mr **Ablyazov**'s alleged tenancy over Carlton House was a sham and that a deposit was not paid until months after the commencement of the purported term, this information had not, in itself, led Teare J to conclude that the tenancy was a sham.

ANALYSIS

[33] I summarised the questions for decision at 1 above. The judge stated (judgment, 71) that he found them to be of some difficulty with much to be said on both sides. He considered that the answer may depend on whether the question is viewed from the viewpoint of a lawyer, an accountant, or a businessman. Even when viewed from the viewpoint of a lawyer the answer is not straightforward. This is because, as the submissions before this court showed, there are three legal principles in play as to the approach of the court to freezing orders and there is a certain tension between these principles. This part of my judgment is in four parts:

"(1) I first identify the three principles and the tension between them.

(2) I then consider whether, in the light of the way the authorities have resolved that tension, there is a reason of principle preventing the recognition of *choses in action* such as the drawdown rights in the loan facility agreements from qualifying as assets for the purposes of a freezing order regardless of the terms of the particular order. I conclude, for the reasons given at 40 – 60 below, that the answer is 'no'.

(3) I then consider the construction of the current standard Commercial Court form of freezing order. Do its terms in fact make *choses in action* such as those under these loan facilities 'assets' within the order? If they do, does drawing down amount to disposing of, dealing with, or diminishing the value of the assets? I conclude that the answer to both questions is 'no'. My reasons are set out at 64 – 91 below.

(4) Finally, I deal (at 93 – 95 below) with the Bank's alternative case on disclosure."

(1) The principles

[34] *(a) The enforcement principle*: The first and primary principle is that the purpose of a freezing order is to stop the injuncted Defendant dissipating or disposing of property which could be the subject of enforcement if the Claimant goes on to win the case it has brought, and not to give the Claimant security for his claim: *Z Ltd v A*-Z [1982] QB 558 at 571 and 585, [1982] 1 All ER 556, [1982] 2 WLR 288 (*per* Lord Denning MR and Kerr LJ); *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 at 76, [1989] 1 All ER 1002, [1989] 2 WLR 412 (*per* Lord Donaldson MR); *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695 at 1709G-H, [2000] NLJR 393 (*per* Mummery LJ) and 1714-1715 (*per* Nourse LJ); *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [2011] 4 All ER 1240 at 32, 49, 51 and 52, [2011] 2 All ER (Comm) 1063 (*per* Patten, Aikens and Longmore LJJ). Lord Mustill's speech in *Mercedes Benz AG v Leiduck* [1996] AC 284, [1995] 3 All ER 929, [1995] 3 WLR 718 is, despite the difference of context, also instructive. He stated (at 297) that the jurisdiction to make freezing orders, then known as *Mareva* injunctions (The first case was *Nippon-Yusen-Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, [1975] 2 Lloyd's Rep 137. The second, *Mareva Comp Nav SA v International Bulk Carriers Ltd* [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509, 9 LDAB 393, provided the name by which these injunctions were known until 1998, when the Civil Procedure Rules came into effect) "should be exercised with great circumspection", and (at 299) that "the *Mareva* injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future". The most recent statements by this court are in *Solodchenko'*s case. Patten LJ stated (at 32) that "the purpose of a freezing order is to prevent the dissipation by a Defendant of assets which would otherwise be available to satisfy a judgment in favour of the Claimant". Later in his judgment, when setting out a number of points for the guidance of judges dealing with applications for orders in the new Commercial Court form, he stated (at 49(1)) that nothing in the judgment was "intended to cast any doubt upon the established principles which underlie the grant of all freezing orders". His formulation at this stage was, if anything, narrower. It was that "the *only* purpose of such an injunction is to prevent the dissipation of assets which would otherwise be available to meet a judgment" (emphasis added).

[35] A similar approach is seen in the context of *Chabra*-type injunctions (see *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231) against third parties: see the analysis by Sir John Chadwick P in the Cayman Islands Court of Appeal in *Algosaibi v Saad Investments Co Ltd* (CICA 1 of 2010), which was approved and applied by Flaux J in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm) at 146, 154 and 157, [2012] 1 BCLC 651, [2012] Bus LR 1649, and by Gloster J in *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm) at 38 and 58, [2012] 2 All ER (Comm) 513, [2011] NLJR 29. Gloster J stated (at 38) that "the purpose of a freezing order is so that the court 'can ensure the effective enforcement of its orders'". See also *C Inc v L* [2001] EWHC 550 (Comm) at 75(6) and 77, [2012] 2 All ER (Comm) 513, [2011] NLJR 29 *per* Aikens J, but cf the broader approach in *HMRC v Egleton* [2006] EWHC 2313 (Ch), [2007] 1 All ER 606, [2007] Bus LR 44 *per* Briggs J.

[36] *(b) The principle of flexibility*: The second principle is that the jurisdiction to make a freezing order should be exercised in a flexible and adaptable manner so as to be able to deal with new situations and new ways used by sophisticated and wily operators to make themselves immune to the courts' orders or deliberately to thwart the effective enforcement of those orders: *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 at 76 and 77, [1989] 1 All ER 1002, [1989] 2 WLR 412 (*per* Lord Donaldson MR); *TSB Private Bank SA v Chabra* [1992] 2 All ER 245 at 241D, [1992] 1 WLR 231 (*per* Mummery J). In *Derby & Co Ltd v Weldon (Nos*

3 & 4) Lord Donaldson MR stated (at 76) that the court "should not permit the Defendant artificially to create . . . a situation" where "come the day of judgment", it is not possible for the Claimant "to obtain satisfaction of that judgment fully or at all". Neill LJ stated (at 95) that it should also be borne in mind "that modern technology and the ingenuity of its beneficiaries may enable assets to depart at a speed which can make any feline powers of effervescence [a reference to the Cheshire cat] appear to be sluggish by comparison". In *ICIC v Adham* [1998] BCC 134, Robert Walker J (as he then was) stated that "the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level."

[37] *(c) Strict construction*: The third principle follows from the "fundamental requirement of an injunction directed to an individual that it shall be certain": *Z Ltd v A-Z* [1982] QB 558 at 582, [1982] 1 All ER 556, [1982] 2 WLR 288 *per* Eveleigh LJ It is that, because of the penal consequences of breaching a freezing order and the need of the Defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed: *Haddonstone v Sharp* [1996] FSR 767 at 773 and 775 (*per* Rose and Stuart-Smith LJJ); *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695 at 1705C and 1713C-D, [2000] NLJR 393 (*per* Mummery and Nourse LJJ). In *Anglo Eastern Trust Ltd and another v Kermanshahchi* Neuberger J stated that "a freezing order, which has been referred to as a nuclear weapon, should . . . be construed strictly" because the court is "concerned with an order which has a potentially draconian effect on the commercial and economic freedom of an individual against whom no substantive judgment has yet been granted".

[38] *(d) The tension*: There is tension between the first two principles and the third because a strict construction of the order may leave it open to an unscrupulous and determined Defendant to potentially reduce the amount that will be available to the Claimant at the conclusion of the proceedings. Another way of characterising the tension is that giving primacy to the purpose of the order or to the need for flexibility when construing it may involve not giving it a strict construction.

[39] A third way of characterising the tension is that a strict, literal and legalistic construction of terms such as "asset" in a freezing order that does not take account of the purpose of such orders may have the result that conduct which will not reduce the amount available to the Claimant at the conclusion of the proceedings will nevertheless breach the order. It would do so even though it is outwith the enforcement principle which is the, or at least the primary, purpose of a freezing order. The thrust of Mr Matthews' submissions is that treating all *choses in action* as assets for the purpose of a freezing order has this effect. In other cases a strict and uniform construction, which gives primacy to the enforcement principle, may mean that conduct which will indirectly reduce the amount that will be available to the Claimant at the conclusion of the proceedings by increasing the claims against the Defendant's assets and thus affecting the Defendant's net asset position will not breach the order. It could thus be said to give insufficient weight to the need for flexibility inherent in the second principle. Mr Smith QC contended that this was the effect of the judge's order in this case.

(2) Is There Any Principled Objection To The Recognition Of The Rights Under The Loan Facility Agreements As Assets?

[40] A number of considerations suggest that there is no fundamental objection of principle to the recognition of the right to borrow money from the lender under the loan facility agreements by the lender's contractual undertaking to lend in accordance with their terms as assets. The borrower's/promisee's right against the lender/promisor is a *chose in action*. As a matter of law, the enforceable promise that is a promisee's *chose in action* is "an asset" for many purposes. Some *choses in action* held by a person who is subject to a freezing injunction, including the right to money in that person's bank account, are clearly "assets" within the meaning of the order: see *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, at 42, [1982] 3 All ER 237, [1982] 3 WLR 746 *per* Lawton LJ and *Templeton Insurance Ltd v Thomas and another* [2013] EWCA Civ 35 at 18-19 *per* Rix LJ. The *chose in action* that is the right to an agreed overdraft limit has been held to be property which can be the subject of theft where forged cheques are presented to the bank: *Kohn* (1979) 69

Cr App Rep 395, [1979] Crim LR 675. In the present case, in a broad sense, the four *choses in action* that are the rights under the four loan facility agreements "belong" or "belonged" to Mr **Ablyazov**. When he drew down on them, he altered the extent to which he could exercise the right to draw down in the future and thus affected the extent of the interest underlying the right that is the *chose.* When he exhausted a facility, he extinguished the right under it and in that sense extinguished the *chose*. Secondly, holding that the rights to draw down qualify as assets within the order would not give the Claimant security for his claim and thus be contrary to the purposes for which a freezing order may be obtained.

[41] Do the statements in *Cantor Index Ltd v Lister* and other cases to which I referred at 17-18 above inexorably lead to a different conclusion? What was said in those cases is that increasing indebtedness, whether by *ad hoc* borrowing (as in the *Anglo Eastern Trust* case) or, as on the facts of *Cantor Index* and *Hickey'*s cases, exercising a right to draw down on a credit card, is not dealing with or disposing of an asset for the purposes of a freezing order. It should, however, be noted that the focus of Neuberger J's reasoning in *Cantor* and the *Anglo Eastern Trust* cases was the question of construction rather than the question of principle which I am considering in this part of my judgment. It is also not clear that the submissions in those cases dealt with the *chose in action* point, and the decisions do not expressly address it.

[42] What of the decision of Lightman J in *Coutts and Co v Stock* [2000] 2 All ER 56, [2000] 1 BCLC 183, [2000] 1 WLR 906? Albeit in the context of s 127 of the Insolvency Act 1986, Lightman J reached a similar conclusion to that reached by Neuberger J He held (see 6 at 909) that the acts of a Bank in honouring cheques drawn on an insolvent company's overdrawn account were a loan by the Bank to the company, but not a disposition of the company's property. He stated (at 910B) that s 127 "does not invalidate a company's assumption of liabilities". He rejected Sir Roy Goode's view (now to be found in *Principles of Corporate Insolvency Law* 4th ed, 2011 at 618-619) that, while in general a withdrawal from an overdrawn bank account does not qualify as a "disposition of property", one of the exceptions is where the drawing is within the limit of an agreed overdraft because "the effect of the drawing is to reduce the amount of the facility remaining available and thus the quantum of the *chose in action* vested in the company". Lightman J's conclusion was based on the language of s 127, which is less expansive than that used in the standard form freezing injunction because it is limited to "dispositions of property" and does not include "dealing with" or "disposing of" the company's assets.

[43] In their post-hearing submissions on *Coutts v Stock,* Mr Matthews and Miss Tan stated that the different policy considerations in play in the context of s 127 (to which I refer at 83 below) mean that some of the analysis in that case should be treated with caution when considering a freezing order, but submitted the overall thrust of the decision accords with the position of Mr **Ablyazov** in these proceedings. They submitted that the result in that case and the three cases on freezing orders reflects a wider understanding which he described as the common-sense perception of ordinary people. Part of this submission relates to the construction of the current standard Commercial Court form of freezing order such as that made in these proceedings rather than the question of principle. Mr Matthews' submissions, however, extended to the proposition (Replacement Skeleton Argument, para 47) that "rights to borrow do not, in principle, constitute "assets" falling within the scope of the freezing order". He argued that the result of the importance of the enforcement principle is that the assets which can be caught by a freezing order *are limited* to property which has value to third parties and against which a judgment creditor could enforce any judgment which he might obtain.

[44] I have referred to the judge's recognition (judgment, 74, summarised at 16 and 21 above) that the terms of a freezing order could relate to an asset which would not be seized in execution and that it was possible that the standard form covered the exercise of a right to borrow. He also recognised (at 40) that the lenders' right under cl 1.6 of the facilities agreements to withdraw the right to draw down at any time and (at 40 and 79) that the fact that the borrower's right to draw down is difficult to quantify and not transferable to anyone else without the lender's consent did not necessarily mean that it could not be an asset for the purposes of the freezing order. In those parts of his judgment he appeared to reject the submissions on behalf of Mr **Ablyazov**, and to recognise that, in principle, a freezing order could include rights such as the *choses in action* under the agreements, but went on to find that, as a matter of construction, they did not fall within

the terms of the standard form order used in this case. However, at 73, and before he turned to consider the particular language used in the order, he stated that construed in the light of the purpose a freezing order was designed to serve and the way the order ought reasonably to be understood by a businessman to whom it is addressed, "the assets to which the freezing order refers are assets which would or could be of some value to the Bank and against which the Bank would be capable of securing execution". That may indicate that the objection went beyond a question of construction, and was either a matter of principle or indicated a default position which excluded such rights from the scope of the order absent clear words bringing them in.

[45] Why, despite the primacy of the enforcement principle, have I concluded that there is no objection of principle to the inclusion of rights such as those under the loan facilities within the scope of the freezing order? My starting point is the decision of this court in *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436, [2011] 4 All ER 1240, [2011] 1 WLR 888, to which I have referred at 34 above. That case was, as the judge stated (see 20 above), concerned with the nature of a Defendant's interest in what was undoubtedly a qualifying asset rather than the nature of the asset itself. The leading judgment was given by Patten, Longmore LJJ, in a concurring judgment, agreed with Patten LJ and in particular with his summary of the principles at 49. Aikens LJ agreed with both judgments. This court accepted that the 2002 amendments to the standard Commercial Court form of order considerably enlarged the scope of the injunction from the position under the former standard form. The former wording of the standard form was interpreted in *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] NLJR 393, [2000] 1 WLR 1695 at 1709 – 1711 and 1714 to include only assets beneficially owned by the Defendant.

[46] The *Solodchenko* case held that a freezing order can cover assets held by the Defendant as a trustee or a nominee. The court, however, showed caution in accepting that it was legitimate to do this. It based its acceptance on two pragmatic grounds. In the light of the nature and the purpose of a freezing order, the court's caution about the circumstances in which it is appropriate for an order to cover the assets of a third party rather than those of the Defendant is both understandable and instructive. It is instructive because of the guidance provided by the overall approach of the court and in those pragmatic grounds about the approach to be taken in a case such as the present one.

[47] The first of the pragmatic grounds which was regarded as justifying the inclusion of assets which a Defendant claims to hold as a trustee or nominee is that, on the facts, there may be a risk that the Defendant and not the third party is in fact the beneficial owner of those assets. In the *Solodchenko* case (see 9 of Patten LJ's judgment) there was uncertainty as to the beneficial ownership of the BVI companies. For a similarly pragmatic approach where there is strong evidence that the Defendant against whom a freezing order is sought has or is likely to have assets in a company which he wholly owns and controls, see Hildyard J in *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch) at 80-81, a decision handed down since the hearing in the present case.

[48] The second pragmatic ground concerns what can be described either as the Defendant's self-certification or the ostensible position where assets appear to be or are stated by the Defendant to be held on trust, as a nominee, or by a company. If such assets are excluded from the scope of the order, there is a risk that an unscrupulous Defendant, by self-certification or creating artificial trusts or companies which he wholly owns and controls, will be able to put assets which turn out to in fact be his beneficially, beyond the reach of the Claimant. In the *Solodchenko* case Patten LJ stated (at 39) that "a Defendant who has gone to the trouble of disguising his own assets as those held under a trust for a named third party will have done so with a view to resisting applications" which claim that the assets fall within the order. Longmore LJ (at 55) stated that "it is, by no means, uncommon for Defendants in cases such as the present, to wish to avoid the consequences of any court order and to be reticent in saying what assets they have and what their interest in them is". He also referred (at 56) to the unsuccessful submission of the Bank in *Hadkinson*'s case that excluding assets which appeared to be held on trust or as a nominee would enable an unscrupulous Defendant to undermine and nullify the object of the order. Such a Defendant would be able to do this by simply saying that he did not believe he was the beneficial owner of the fund or asset in question, withhold its existence from his disclosure affidavit, and then secretly deal with it.

[49] Patten LJ considered that the wide form of order is "likely in many cases to provide [the Claimant] with an opportunity of investigating the truth of the claim that the assets are held on trust before they are released from the injunction and its accompanying disclosure obligations." He also stated (at 49(2)) that a judge asked to grant an injunction in the new form should be "concerned to minimise the impact of the order on third party beneficiaries under genuine trusts", that expedition is required in resolving any issues of title, and that it will usually be appropriate to extend the cross-undertaking to cover the purported beneficiary. Longmore LJ (at 58) stated that he agreed "in particular" with the need for the cross-undertaking to cover loss caused by the injunction to any beneficiary who is truly a third party.

[50] The fact that the mischief which it was the purpose of the change in the wording of the standard form to meet was to deal with the position of assets apparently held as trustee or nominee for an innocent third party was one of the factors mentioned by the judge in reaching his conclusion in this case. He considered that the changes made for that purpose are not apt to catch a position where, as under these loan facilities, at all material times monies owned and controlled by the lenders, who alone had power to deal with them, were paid directly to third parties. But irrespective of any difference in the underlying mischief or purpose, and acknowledging Patten LJ's evident concern (see 43 and 46) about what was a radical enlargement of the scope of the injunction, at the level of general principle the *Solodchenko* case is significant in the present context. Its recognition that it is legitimate in some circumstances to include within a freezing order property which appears to be held by the Defendant as a trustee or nominee shows that the enforcement principle is not absolute. It cannot be absolute because if, by the time of judgment, it is established that the assets in question are in fact held by the Defendant as a nominee or trustee but there has been no application to exclude them from the order, the judgment creditor will not be able to enforce the judgment against those assets.

[51] Mr Smith's submissions as to the difficulties and anomalies that will result in circumstances such as those in these proceedings if only some *choses in action* qualify as assets for the purposes of a freezing order are, from a policy point of view, powerful. There will be some uncertainty in ascertaining which *choses in action* qualify and which do not. Here too, problems of self-certification by a Defendant, who by definition has been shown to pose a risk of dissipation, may arise. For instance, there may be a demonstrated risk that the unsecured loan facility has been entered into with a person or company in fact controlled by the Defendant. In the present case the judge indeed stated (see the references at 10 above) that there are strong grounds for supposing that Wintop and Fitcherly were ultimately owned by Mr **Ablyazov**.

[52] The consequence is that, while the position is not identical to that where the property is ostensibly held by the Defendant as trustee or nominee, it is, in material respects, very similar. Moreover, since it is indisputably the case that the *choses in action* that are the borrower's rights to draw down under the loan facilities agreements "belonged" to Mr **Ablyazov**, the case for recognising a further exception to the enforcement principle can for that reason, be seen as stronger than it was on the facts of the *Solodchenko* case where the ostensible beneficial owner of the asset was a third party apparently untainted by the Defendant's position. There is a stronger case for regarding all *choses in action* which undoubtedly belong to an injuncted Defendant as qualifying as assets within the freezing order even though, by the time of judgment, it may be the case that the Claimant-creditor will not be able to enforce against a particular *chose in action.* It is possible, in the light of the enforcement principle, that this should not be the general position. But the approach in the *Solodchenko* case is a strong pointer to it being the position until it can be established whether or not the loan facility is a genuine transaction between two independent contractors, or a sham, or something in between, and whether it in fact has any value to a third party.

[53] A similar approach may explain what in fact happened in *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, although it does not reflect the way Sir Thomas Bingham MR and Phillips LJ (at 636H and 640) stated the underlying principles. That case concerned the position of a quantity of high-denomination but unissued banknotes under a freezing injunction obtained by a judgment creditor against the Bank of Zambia. The Bank had paid the printers, De La Rue plc but the notes had not

been delivered to it and they had not yet become the Bank's property. The Bank conceded (see 635A-B) that the banknotes fell within the scope of the freezing order or would do so the moment they became its property, but applied for their release from the injunction. It did this on the ground that the export of the banknotes for issue in Zambia was of considerable importance to the Zambian economy which was suffering from hyper-inflation. It contended that it needed the banknotes to fulfil its role as the central banker in Zambia, and that unissued banknotes were of no value to the creditor or to anybody but itself. At the time of the proceedings, because property in the unissued notes had not passed to the Bank, it had only a right to them under its contract with De La Rue (a *chose in action*), but the judgments of Sir Thomas Bingham MR and Phillips LJ suggest they considered that nothing turned on that.

[54] It appears that, in the *Bank of Zambia* case, there may have been similar problems of self-certification and a risk of evasion of the order to those in *Solodchenko'*s case. On the facts, it was not absolutely clear at the outset that the banknotes were substantially or totally worthless to anyone but the Defendant Bank and had no realisable value. Although the Bank contended that, as only it could issue the banknotes, they were of negligible value to anyone else, it had been suggested that a third party, a Zambian state owned copper mining organisation, was a potential purchaser of the notes for value. Despite finding that the third party's interest in fact only related to issued bank notes, the trial judge held the unissued notes were assets and refused the Bank's application for their release from the order. This court allowed the Bank's appeal. The result of the case was thus that the court exercised a measure of control over the situation because the Defendant Bank was required to apply for the exclusion of the banknotes from the order.

[55] Sir Thomas Bingham MR stated (at 636H) that it was important to go back to first principles:

> “A [freezing] injunction is granted to prevent the dissipation of assets by a prospective judgment debtor, or a judgment debtor, with the object or effect of denying a Claimant or judgment creditor satisfaction of his claim or judgment debt. Here it is plain that the Defendant wants to transfer these banknotes to Zambia. In doing so, it would not, as it seems to me, dissipate any asset available to satisfy the judgment debt because the asset has, in the open market, no value. It is not an asset of value to the Plaintiff or other creditors of the Defendant if it were put up on the market and sold.”

Phillips LJ described the banknotes as “a worthless and potentially embarrassing quantity of scrap paper of some 19 tonnes in weight” but which were of “great practical significance to the Defendant”. He stated (at 640) that, in those circumstances, the freezing order “is being used in relation to these banknotes not for the purpose of preserving an asset that will be of value in the process of execution, but in an attempt to pressurise the Defendant into discharging part of its liability under the judgment”. That, he stated, was not a legitimate use of a freezing order.

[56] Aldous LJ, while agreeing that the injunction should be modified to exclude the banknotes, considered that they did not fall within the freezing order. His reason (at 638B – D) was that, because the banknotes had no market value, the Plaintiff's purpose of seeking to induce the Bank to pay to avoid damage and inconvenience, while “a commercial attitude”, was “not one for which a [freezing] injunction should properly be granted”. He stated that to remove the notes from the jurisdiction “cannot amount to dissipation of assets” and that the judge was wrong in taking the view that they were assets.

[57] At the hearing, the judgments in the *Bank of Zambia* case were subjected to close analysis. Mr Smith submitted that Sir Thomas Bingham MR and Phillips LJ supported the Bank's position that an item with no value on the open market can be an “asset” within the meaning of a standard form freezing order. He submitted that the explanation for the relaxation of the injunction to exclude the banknotes was primarily (see Sir Thomas Bingham MR at 637D) the “quite extraordinary circumstances” of hyper-inflation affecting Zambia's economy.

[58] Mr Matthews submitted that it was not necessary for the court to decide whether the banknotes were properly included within the order because of the Bank's concession, and that the view of Aldous LJ was, as a matter of principle and the weight of authority (including many of the cases to which I have referred at 17 and 34-35 above), to be preferred. He submitted that the issue before the court in that case was whether to release the unissued banknotes from the scope of the order, and not the question of whether they qualified as assets.

[59] I respectfully agree with the judge (see judgment, 49) that the decision of the majority of the court was that the unissued banknotes were assets covered by the order. Although the judgments in the *Bank of Zambia* case do not deal with the matter in this way, in the light of the approach of this court in the *Solodchenko* case, the decision can also be explained as follows. It was (see 55 above) not obvious at the outset that the unissued banknotes were worthless to anyone but the Defendant Bank, and were therefore not an asset over which execution might be levied. It was consequentially justifiable to regard the Bank's undoubted interest in the banknotes as falling within the scope of the freezing order so that the Bank had to seek the sanction of the court for their removal from the scope of the injunction. Once it was clear that they would be of no value to the judgment creditor it was not justifiable for them to remain subject to the injunction.

[60] I recognise the force of Kerr LJ's statement in *Z Ltd v A-Z* [1982] QB 558 at 588, [1982] 1 All ER 556, [1982] 2 WLR 288 that when drawing up a freezing injunction the court should regard reliance on applications by a Defendant or third party to vary or discharge a freezing order “as a means of ensuring it does not cause unnecessary hardship” only as “a secondary consideration”. He considered that primary consideration should be given to what, at the *ex parte* stage, appears to be the appropriate order. But in the light of the authorities to which I have referred, and for the reasons I have given, I do not consider that there is any difficulty of principle in finding that the *choses in action* representing the rights under the four loan facility agreements *initially* qualified as assets within the freezing order. Although it might turn out that the contracts are arms-length transactions, at the time the facility agreements were entered into the Bank needed an opportunity to investigate the truth of the claim that they were such transactions. The position is similar to that in the *Solodchenko* case where (see Patten LJ at 39) the Bank needed an opportunity of investigating the truth of the claim that the assets in that case were held on trust. The question is whether, in the very particular circumstances of these proceedings, that is not an option.

[61] The very particular circumstances of these proceedings are that, although in other proceedings the Bank has maintained that the loan facility agreements are shams and entered into by Mr **Ablyazov** with companies of which he is the ultimate beneficial owner, for the purposes of these proceedings (see 10 above) it has proceeded on the assumption that this is not so and the agreements are enforceable arms length transactions. The judge accordingly proceeded on the same assumption. Does that assumption mean that, as a matter of principle, it is not possible to state that in this case the principle of flexibility should apply to qualify the principle of enforceability?

[62] The argument would be that, as a result of that assumption, the pragmatic grounds for any qualification of the enforcement principle cannot apply. The rights under the facility agreements must be seen as of no value to anyone but the Defendant, because they are not (see cl 1.16 set out at 12 above) assignable and because the lender is empowered (see cl 1.6) to cancel the facilities at any time. It would follow that, as in the *Bank of Zambia* case, because a judgment creditor could not sell the *choses in action* for value, they are, adapting the words of Phillips LJ in the *Bank of Zambia* case (see 56 above), not assets that will be of value in the process of execution, and it is not legitimate for them to remain within the ambit of the order.

[63] Whatever the position is, if, after proper investigation, the matter is clarified and the court finds it to be as the Defendant claims it to be, that is not this case. This court has been asked to consider the question as at the date of the order. The Bank contends in other proceedings that the agreements were shams or made with companies ultimately owned by Mr **Ablyazov**. In his earlier judgment to which I have referred (see 10 above) Christopher Clarke J stated that there is good reason to suppose the ultimate beneficial owner of the lender companies is Mr **Ablyazov**. That matter has not been fully investigated or determined. Accordingly,

provided that, on its true construction, the terms of the freezing order in this case in fact make *choses in action* such as those under these loan facilities assets within the order, the pragmatic grounds apply. I therefore turn to the question of construction.

(3) The Construction Of The Order

[64] I start with two general propositions about the approach to the construction of a freezing order. The first is that the words of the order must be given their ordinary meaning, and the background, context, and purpose of the order are relevant in determining that ordinary meaning. In *San Souci Ltd v VRL Services Ltd* [2012] UKPC 6, Lord Sumption, delivering the judgment of the Judicial Committee of the Privy Council as to the meaning of an order of the Court of Appeal of Jamaica, stated (at 13) that "the construction of a judicial order, like that of any other legal instrument, . . . depends on what the language of the order would convey, in the circumstances in which the court made it . . .". He also stated (at 15) that "as with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion", the meaning of the order ". . . is open to question if one does not know the background". Albeit in the context of an order made as part of judicial supervision of arbitration proceedings, this shows that background and purpose are relevant tools of interpretation.

[65] It must be remembered that an order is not a contract and (save where the order is a consent order) the principles used in the construction of a contract cannot, as Hildyard J recently stated in *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch) at 75, be applied without modification. Because third parties have to be able to rely on the order and to take it at face value, lest they expose themselves to liability, the apparent meaning of words or phrases used should not be qualified by reference to facts which are not common knowledge. See, by way of analogy, the statement of Lord Reid in *Slough Estates Ltd v Slough BC* [1971] AC 958 at 962, [1970] 2 All ER 216, 68 LGR 669 in relation to the interpretation of a planning permission. It is, however, probably putting it too high to state, as Lord Collins did in *Re Sigma Finance Corporation* [2009] UKSC 2, [2010] 1 All ER 571, [2009] NLJR 1550, that there is not much assistance to be derived from Lord Hoffmann's much-cited formulation in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 BCLC 493, [1998] 1 WLR 896 at 912. Even in the case of commercial contractual documents, if the need for certainty is paramount, admissible background is, for that reason, restricted: *Mannai Investments Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, at 779, [1997] 3 All ER 352, [1997] 2 WLR 945, *per* Lord Hoffmann. Accordingly, recognising the differences between a non-consensual order of the court and a contract, and adapting Lord Hoffmann's words to reflect this, what must be ascertained is "the meaning which the document would convey to a reasonable person having all the background which would reasonably have been available" at the time the order was made. Part of that background is the purpose for which freezing orders are made.

[66] The second general proposition is the third of the principles I set out at 37 above. It is that freezing orders should be strictly construed. As with any order with a penal sanction for breach, such orders must set out clearly what the Defendant must do or not do. I have referred to the statements of this court to this effect in *Haddonstone v Sharp* and *Federal Bank of the Middle East Ltd v Hadkinson* and to that of Neuberger J in the *Anglo Eastern Trust* case at 37 above. Strict construction is also an aspect of the "great circumspection" with which Lord Mustill, in *Mercedes Benz AG v Leiduck* [1996] AC 284, at 297, [1995] 3 All ER 929, [1995] 3 WLR 718, stated that the jurisdiction should be exercised.

[67] There was no common ground as to the approach to be taken to the construction of a freezing order. Mr Smith submitted that because the order is a legal document which uses the language of penal notices, contempt of court, fortification and other technical terms, the starting point should be that its terms be given their ordinary *legal* meaning. That, he argued, would render the meaning of the order consistent with the intentions of the lawyers and judges responsible for formulating the standard form order and those of the judge who made it. He submitted that the judge erred in construing the freezing order through the eyes of the proposed Defendant who is to be injuncted by it.

[68] Mr Smith supported this submission in three ways. First, the Defendant might be expected to adopt a strained and narrowing construction of the terms of the order in the hope of freeing himself from restrictions which it is designed to impose. Secondly, the judge's approach would require a distinction to be made between orders addressed to businesspersons, and those addressed to others. Thirdly, such orders have to be interpreted by third parties such as the Land Registry, banks and company secretaries, and it is unacceptable to ascertain their meaning through the eyes of either the proposed Defendant or a hypothetical businessperson. It was for such reasons that he maintained (see the summary at 26 above and see 71 below) that “logic and consistency” and “certainty” dictated that all *choses in action* should be treated in the same way for the purposes of freezing orders. I accept Mr Matthews' submission that the Bank's critique of the judge's approach to construction is based on a somewhat ungenerous reading of the judgment. My reading of it is that the judge was seeking to ascertain the meaning and scope of the order by reference to the understanding of an ordinary and reasonable businessperson, who is usually the target recipient of such documents, and of the third parties who will be served with it, rather than the understanding of an individual with particular attributes. That is the approach I have adopted in considering the order in this case.

[69] Turning to the meaning of the term “assets”, during the hearing a number of possible meanings were canvassed. I have referred to the widest, for which the Bank contended, that all *choses in action* fall within the term. The narrowest meaning, for which Mr **Ablyazov** contended, was that the term only included something against which a judgment creditor could secure execution. The judge stated (see judgment, 73) that the term included anything “of value” to the Claimant or, it can be added, a judgment creditor. In substance this was a variant of the narrow meaning.

[70] Before turning to the Bank's primary case, I should state that I do not consider that the anomalies and odd effects referred to by the judge, and summarised at 23above, which were relied on by Mr Matthews, would in themselves be important factors if the wording of the order clearly made all *choses in action* qualify as assets. The judge considered that the fact that the Bank's construction would *prima facie* preclude the termination or the exercise of rights under a multiplicity of run-of-the-mill contracts was a reason for not adopting it. I accept Mr Smith's submission that in many cases the conduct would be *de minimis* or would fall within the permitted exceptions in para 9 of the order. Where it would not, as in the examples canvassed of high value contracts for bodyguard protection or expensive car club or golf club membership, it is open to the injuncted Defendant to apply to the court, as happened in the *Bank of Zambia* case. Where the right or the asset has no realisable value, it is likely that, as in the *Bank of Zambia* case, the court will release it from the order. Where it has a value, if the parties are unable to deal with the matter by consent, it is correct for the matter to be subjected to the control of the court.

[71] The Bank's primary case was that the *choses in action* qualify as assets within para 4 of the freezing order irrespective of the extended definition in para 5 because the ordinary legal meaning of “asset” includes *choses in action*, as seen in the decisions to which I have referred at 40 above. Mr Smith sought to defend the wide meaning for which he contended by identifying what he described as two anomalies that result from the judge's narrower approach (see the summary at 27 and 28 above) and because he maintained that the consequence of that approach is uncertainty. The first anomaly is said to result from distinguishing the use of a debit card for a purchase not permitted by the ordinary living expenses exception in a freezing order, which is a breach of the order, and the use of a credit card for such a purpose, which, on the judge's approach, is not. The second anomaly is said to result from distinguishing direct payments to third parties and payments to the Defendant or his bank account. Mr Smith maintained that distinction is anomalous because the direction of the payment is dictated by the Defendant who will, on the judge's approach, be able artificially to evade the reach of the order in the way Lord Donaldson MR (see 36 above) stated a Defendant should not be able to do. A right to draw down under a loan facility should, he maintained, be held to qualify as an asset whatever the terms of the facility because to hold otherwise would treat some *choses in action* differently from others. There would be uncertainty in distinguishing which *choses in action* qualify and which do not.

[72] I agree with the judge (judgment, 75) that a man who is entitled to borrow and does so “is not ordinarily to be described as disposing of or dealing with an asset”. As Sir Roy Goode has stated, albeit in the context

of s 127 of the Insolvency Act 1986, "[i]f there is one thing that is still clear in the increasingly complex financial scene . . . it is that a liability is not an asset and that an increase in a liability is not by itself a disposition of an asset": *Principles of Corporate Law,* 4th ed, (2011) at 13-133. I also agree with the judge that, while in construing a legal document such as the order the court needs to have regard to the legal meaning where technical legal terminology is used to describe particular concepts, here the terms used; "assets", "dispose of", "deal with", and "diminish the value of" are not specifically legal terminology.

[73] At this stage it is important to recall the need for freezing orders to be strictly construed and the statement of Robert Goff J in *Searose Ltd v Seatrain UK Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894 at 897, [1981] 1 Lloyd's Rep 556. He stated that "any asset in respect of which an order for a *Mareva* injunction is sought should be identified with as much precision as is reasonably practicable". The term "*choses in action*" was not used in the order and, as the judge stated, the terms "dispose of" and "deal with" suggest some form of transfer or agreement to transfer. The terms used do not naturally convey the exercise of a right to borrow, that is to either receive or cause a third party to receive money in exchange for the generation of a debt. I do not consider that it can be said that the wording has identified all *choses in action* as falling within the scope of the term "asset" with as much precision as was reasonably practicable.

[74] I am fortified in my conclusion because of the understanding over a decade which those who obtain freezing orders and those who are restrained by them and advise such persons have gained as a result of the decisions in *Cantor Index Ltd v Lister* and the *Anglo Eastern Trust* case (and see also the commentary referred to at 88 below). That understanding is that a person who increases his or her indebtedness without providing security is not caught by a standard form freezing order. Mr Smith submitted that, while the previous decisions of the court may be very relevant on an application to commit Mr **Ablyazov** to prison for contempt on the basis of his dealing with the *choses in action* in question, they are not relevant in the present context. Not only were the decisions made about a differently worded order, but the "*chose in action*" point was not taken. The first of these points has little force because the order in those cases referred to "assets" without any gloss, and the Bank's primary case relied on the meaning of that term in para 4 of the order where it is similarly unglossed.

[75] There is more force in the submission that the "*chose in action"* point was not taken in those cases. But Mr Smith's submission that there is no ambiguity in the order because of the ordinary legal meaning of "assets" includes all *choses in action* does not take account of the context in which the term is used and the purpose of freezing orders. I have concluded that, in determining the meaning of the term "assets" in a freezing order, account should be taken, as part of the background and context of such orders, of their purpose, in the way that anyone construing any document should take account of the background of it. Where the words used clearly and unequivocally lead to the conclusion that the term "asset" includes that which cannot be the subject of execution, effect must be given to the words. Where they do not, the purpose of such orders will be a significant factor in determining the meaning of the term "asset" in this context, and a pointer against including the particular right under consideration.

[76] I reject the submission on behalf of the Bank that the judge fell into error in his treatment of the difficulties of execution and questions of valuation. As I have stated (see 23 and 44 above), he did not regard those difficulties as bars in principle to the recognition of the *choses in action* as assets. He treated them as factors to be taken into account when applying the principle of strict construction in the light of the primary principle, in this context that is the enforcement principle. I consider that he was entitled to do so. The fact that, on the evidence of the Bank's expert, the value of a loan facility "could not be expressed in monetary terms even though the service provided is money itself" shows, moreover, that, in the case of valuation, the problem was not one of difficulty but of impossibility. It was that which appears to have led the judge to conclude (judgment, 82) that Mr **Ablyazov**'s rights to borrow "were of no value".

[77] I observe that Sir Roy Goode's view in his *Principles of Corporate Insolvency* 4th ed (summarised at 42 above) that a company's drawing within the limit of an agreed overdraft is a disposition within s 127 of the Insolvency Act 1986 because it reduces the *quantum* of the *chose in action* vested in the company, is not

stated against a background in which a strict construction is required. Sir Roy stated (at 612) that the term “disposition” in s 127 “must be given a wide meaning if the purpose of the section is to be served” and should include any dealing in intangible assets. But he also stated (at 613) that to qualify the reduction or extinction of the company's rights in an asset must be one which leads to a real and not merely a technical transfer of value to another party. That suggests that a right which cannot be expressed in monetary terms cannot qualify.

[78] The Bank's approach to the construction of the order, which involves the elimination of distinctions which are described as anomalous, can in one sense be characterised as a reversion to the old, primarily literal and conceptual, approach to construction. It relies for its force on the syllogism which Mr **Ablyazov** (see 15 above) correctly criticised and the judge appears to have rejected. In my judgment it also pays insufficient attention to the context and the primacy that has consistently been accorded (see 34-35 above) to what I have described as the enforcement principle throughout the development of the jurisprudence on freezing orders since 1975.

[79] The submission that it is anomalous to distinguish the use of a debit card for a purchase not permitted by the ordinary living expenses exception in a freezing order, which is a breach of the order, and the use of a credit card for such a purpose can, in one sense, be seen as appropriately conceptual, in treating all the rights/*choses in action* exercised by an injuncted Defendant in the same way, whatever the nature of the particular right/*chose in action*. But, it can also be regarded as insufficiently conceptual and overinclusive because it overlooks the important distinctions between the nature and contents of rights in general and in particular the nature and content of the rights under the loan facility agreements with which we are concerned.

[80] As to rights in general, for example, the rights of the holder of a credit card differ fundamentally from those of the holder of a debit card. Only the former has the right to borrow money by the use of the card. The lawyers and judges responsible for formulating the standard form order to whom Mr Smith referred (see 66 above), and the lawyers who advise the professionals and businesspeople from a variety of walks of life who may be served with freezing orders, would be aware of this distinction and its consequences. Mr Smith invited the court to ignore the distinction and to focus exclusively on the fact that the Defendant has a *chose in action.*

[81] In his post-hearing submissions, Mr Smith relied on the decision of this court in *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, [2001] 1 All ER (Comm) 357, in which it was stated that, for the purposes of s 127 of the Insolvency Act, no distinction should be made between the position where a payment by a company to a creditor was made from a bank account in credit and where it was made from an account in debit: see Mummery LJ at 21, 23, 32 and 33. Taken together with his main submissions, this is an invitation to disregard the enforcement principle when construing the words of the order in a way which seems inconsistent with the general approach to the construction of documents as described by Lord Hoffmann (see 65 above).

[82] The Bank focussed on the effort Mr **Ablyazov** took to set up the loan agreements and to use them, and regarded the crucial factor to be (see supplementary skeleton argument, para 10) that the rights were of significant value *to Mr **Ablyazov***. This shows a disregard of value to anyone else or of objective value, which are relevant if any account is taken of the enforcement principle. Alternatively, it is an invitation to relegate that principle to a subordinate role in comparison with the flexibility principle. I am not assisted by what was stated in *Hollicourt (Contracts) Ltd v Bank of Ireland* because the context is very different. In a s 127 case there is no strict construction, the term “disposition” is to be given a broad meaning, the enforcement principle is not in play, and the underlying policy differs. That policy concerns who should have to make good a hole in a company's assets available to creditors: the bank which has *bona fide* honoured cheques, third party payees, or a director who has guaranteed the overdraft.

[83] Similarly, in the context of the particular rights under these loan facility agreements, Mr Smith contended that the judge erred in attaching importance (see 21 above) to Mr **Ablyazov**'s practical inability to assign the right to draw down because of cl 1.16 and the lenders' rights under cl 1.6 to withdraw Mr **Ablyazov**'s right to draw down at any time. Again, that was an invitation to ignore the nature and content of the particular rights and to focus exclusively on the fact that the Defendant has a *chose in action.* The contention on behalf of the Bank was in substance that, since the rights are undoubtedly Mr **Ablyazov**'s, the ordinary legal meaning of the term "asset" should be ascertained without regard to the context in which it was used or the purpose of the order, and taking no account of the fact that, even on the evidence of the Bank's expert, the value of the rights under the loan facility "could not be expressed in monetary terms". This again was an invitation either to disregard the enforcement principle or to relegate it to a subordinate role, and to put the abstract conception of a right which is not quantifiable in monetary terms at the centre of the analysis. A promisee (the person entitled to draw down on the loan) whose right cannot be transferred to a third party is in a relationship of a strictly personal kind with the promisor (the lender). If the promisor also has the right to cancel the promise at any time, although the borrower's right remains a *chose in action*, it is a *chose in action* of a very different kind to those which have been held to be caught by freezing orders. It differs from the Bank's right in the *Bank of Zambia* case to the unissued banknotes because, apart from the freezing order, there was no restriction on the Bank's ability to transfer or assign the right to the banknotes, and De La Rue did not have the right to cancel the contract at will. The effect of Mr Smith's submissions, if accepted, would be that such distinctions are immaterial.

[84] Essentially, the Bank's case is that a bright line is required, which includes all *choses in action* within the ambit of the term "asset", primarily to remove difficulties of proof against a Defendant who the Claimant has shown poses a risk of dissipating assets. But, while it is open to a Claimant to do this by using clear and unequivocal language, the principle that these orders should be construed strictly means that the Claimant, who has control of the form of the order when he seeks it, but who has not used such language, cannot rely on the court giving the terms of the order a broad meaning. At the interlocutory stage, notwithstanding the demonstrated risk posed by the Defendant, fairness to the Defendant against which no judgment has yet been entered requires the Defendant to know where he, she or it stands, and only clear and unequivocal language strictly construed enables this. Similarly, it is important for a third party who deals with the injuncted Defendant to know whether or not a transaction is in breach of the freezing order: *Z Ltd v A-Z* [1982] QB 558 at 574, 575 and 582, [1982] 1 All ER 556, [1982] 2 WLR 288 *per* Lord Denning MR and Eveleigh LJ.

[85] The Bank's secondary case relies on the extended definition of "asset" in para 5 of the order, which I have set out at 6 above. I do not consider that, given the scenario in this case, the first and third sentences of para 5 are of assistance to the Bank. The first sentence extends the order to assets which are not in the injuncted Defendant's name, jointly owned assets, and assets in which the injuncted Defendant does not assert a beneficial interest. The *chose in action* under the loan facility agreements is or was Mr **Ablyazov**'s. The third sentence is also not of assistance because the rights to draw down are held by Mr **Ablyazov** and not by a third party. Moreover, on the assumptions the Bank was prepared to make for the purposes of these proceedings, there was no suggestion that a third party held or controlled the rights to draw down in accordance with Mr **Ablyazov**'s direct or indirect instructions.

[86] The Bank's case was properly focussed on the middle sentence of para 5 of the order. This provides that, for the purposes of the order, Mr **Ablyazov**'s assets "include any asset which [he has] power . . . to dispose of, or deal with as if it were [his] own". It was submitted that he has or had power under the facility agreements to dispose of or deal with the rights to draw down. I accept that the fact that this power is subject to the right of the lenders to cancel is, as the judge recognised, not in itself fatal.

[87] The question is whether the middle sentence of the extended definition of "assets" in para 5 of the order makes the position sufficiently clear. Although I have not found this question easy, I have concluded that it does not make the position sufficiently clear. First, the power to deal with the *chose in action* is subject to the lender's consent and to the lender not cancelling the facility. Those are not generally features of an ability to deal with or dispose of an asset "as if it were his own". While I accept these features are not in themselves

fatal to regarding the *choses in action* as qualifying, they are real impediments to the right-holder, here Mr **Ablyazov**, disposing of them or dealing with them as his own. There is also a certain "drawing oneself up by one's bootstraps" element in relying on the middle sentence of para 5 of the order, because it is only if the item qualifies as an "asset" that the power to dispose of it or deal with it as if it was the right-holder's own becomes relevant.

[88] Additionally, it is to be noted that the extended definition of "asset" in para 5 was primarily designed to catch assets which the Defendant claimed he held on trust, as a nominee, or in respect of which a third party was otherwise beneficially interested. The fact that the extended definition and the Commercial Court words were drafted for a different purpose is a factor indicating that para 5 was not concerned with the nature of the asset but with the nature of the Defendant's interest in it, and so is not of assistance to the Bank in this case. I would not, however, regard that indication in itself as very strong, let alone conclusive had the words been clear. But, for the reasons I have given, they are not. For those reasons, and in the light of the consistent understanding in the authorities, and as a result by the legal profession and in the literature, I have concluded that those words in para 5, drafted for a different purpose are insufficiently clear to effect the radical enlargement in the scope of the order for which the Bank contends. I have referred to the authorities earlier in this judgment. As to the literature, the 2013 edition of the White Book states that "a freezing injunction . . . restrains the Respondent from dealing with his assets, but it does not prevent him from borrowing money, thereby increasing his overall indebtedness": vol 2 para 15-55. See also vol 1, para 25.1.25.6 and *Gee on Commercial Injunctions,* 5th. ed, para 19.022.

[89] I have not found the construction of the order an easy matter to decide. My views fluctuated during the course of the hearing and during the preparation of this judgment. In *Federal Bank of the Middle East Ltd v Hadkinson*, Mummery LJ, who found himself in a similar position, stated (at 1709) that his main source of doubt was not so much the actual language of the order as the possible repercussions of the construction contended for on behalf of the injuncted Defendant on the effectiveness of freezing orders made in the form. He concluded (at 1711) that the "hallowed" or standard form of freezing order was not apt without the addition of words clearly extending its effect to cover a bank account held in the name of and under the control of the injuncted Defendant but which was assumed to belong beneficially to a third party.

[90] The position in this case is not the same as in *Hadkinson's* case where the question was whether the expression "his assets and/or funds" could be construed to include assets which were assumed not to be the Defendant's beneficially but those of a third party. As I have said (see 40 and 52 above), the Bank's case here is stronger because the rights under the loan facilities are not those of a third party but those of Mr **Ablyazov**, the injuncted Defendant. Notwithstanding that, in the light of the background understanding of the purpose of such orders, the authorities on the point, and the guidance on which practitioners have relied, I have also reached the conclusion that, if the order is to treat rights of this sort as "assets" despite their unamenability to enforcement and the inability to place a value on them, additional words are needed.

[91] Accordingly, for these reasons, I would dismiss the appeal on the main question, whether the contractual right to draw down under the loan facility agreements qualifies as an "asset" and whether the exercise of that loan facility constitutes "disposing of" or "dealing with" an asset.

(4) The Bank's Application For Disclosure

[92] It follows from my conclusions on the construction of the order that I would also reject the Bank's primary case on disclosure because that depends on finding that the *choses in action* were caught by the freezing order.

[93] As to the Bank's alternative case, as the judge stated in his October 2011 decision ([2011] EWHC 2664 (Comm) at 44, 46) it is not necessary in order for disclosure to be ordered for it to be proved that Wintop and Fitcherly are Mr **Ablyazov**'s creatures. He did so on the ground (see the passage set out at 31

above) that the jurisdiction is essentially protective. In that case the applications for disclosure in respect of Wintop and Fitcherly were deferred because at the hearing the Bank advanced for the first time the contention advanced in the present proceedings that, even if the borrowing was from a *bona fide* third party, the use of the money was a breach of the freezing order: see [2011] EWHC 2664 (Comm) at 31. However, the judge made an order for disclosure in respect of Green Life, another company which the Bank claimed was controlled by Mr **Ablyazov**.

[94] Although Mr **Ablyazov**'s evidence is that he does not have knowledge of the way Wintop and Fitcherly made the payments of invoices following his requests, and although the court is cautious before requiring disclosure where the information is in the hands of third parties, it would be possible for Mr **Ablyazov** to seek further information from the two companies or Messrs Shalabayev and Povny as to how the payments were made. A person who is preparing an affidavit in response to a disclosure order is under a duty not only to give a truthful answer, but also to take reasonable steps to investigate its truth. While Mr **Ablyazov**'s sixteenth witness statement (at para 9) records that he has no knowledge of the manner in which invoices were paid under the Wintop agreements, and did not ask Messrs Shalabayev and Povny how the invoices were paid or where the funds were paid from, he does not say that he believes that, if he asks, he will not be given any information.

[95] In those circumstances, in the light of the judge's findings in his October 2011 judgment, there appears to be a good case that a disclosure order would not simply be a fishing expedition, so that the order should be made. But, since the evidence that was before the judge was only superficially examined during the hearing before this court, and, in respect of Wintop and Fitcherly, the judge did not reach a conclusion on the “balance of prejudice” points extensively considered by him at the October 2011 hearing, I would remit the matter to the Commercial Court.

FLOYD LJ:

[96] I agree with Beatson and Rimer LJJ (both of whose judgments I have read in draft) that the appeal on the main issue must be dismissed and that the Bank's alternative case for disclosure should be remitted to the Commercial Court.

[97] Whether a particular *chose in action* is an “asset” depends on the purpose for which one is asking the question and the context in which the question arises. In the context of para 4 of the freezing order in the present case, and taking account of the purpose of such orders in general, the right to draw down on a loan agreement is not an asset. That conclusion is reinforced because such orders must be construed strictly, so as not to leave doubt as to what the Defendant can and cannot do. The closest that the Bank comes to bringing the transactions of which it complains under the terms of the freezing order in this case is in its reliance on the extended meaning of “assets” in the second sentence of para 5 of the order “For the purpose of this order [Mr **Ablyazov**'s] assets include any asset which [he has] power, directly or indirectly, to dispose of, or deal with as if it were [his] own.”

[98] Rimer LJ does not consider that para 5 is concerned with anything other than Mr **Ablyazov**'s assets. I would certainly agree that it is not clear that the paragraph extends to assets which are not legally or beneficially owned in some way by Mr **Ablyazov**. However, even if it were correct to say that this sentence in the order extends the scope of “Mr **Ablyazov**'s assets” to an asset which is not his own, this is not enough for the Bank. The money in the lender's hands, before it is transferred to a third party, is neither Mr **Ablyazov**'s

nor Mr **Ablyazov**'s “to deal with as if it were his own”. Quite apart from the lender's ability to cancel the facility, Mr **Ablyazov** incurs a corresponding debt to the lender as soon as the money is transferred. This feature of the way in which Mr **Ablyazov** can direct movement of those funds is, as it seems to me, quite inconsistent with an ability to deal with that money as it if it were his own. That is a sufficient reason to exclude the operation of that part of the extended definition of “assets”.

RIMER LJ:

[99] I have read in draft Beatson LJ's comprehensive and illuminating judgment. I agree with him that the appeal on the main issue should be dismissed. I express my own reasons shortly as follows.

[100] Whilst Mr **Ablyazov**'s right to draw under each of the four loan agreements is correctly characterised as a “chose in action”, it was not in my view an “asset” within the meaning of para 4 of the freezing order. It was not, for example, akin to a chose in action in the nature of a debt such as that represented by a credit balance in a bank account, which undoubtedly is an “asset”. It was simply a personal, cancellable, non-assignable loan facility upon which Mr **Ablyazov** was under no obligation to draw. A loan facility which has not been drawn down is neither an asset nor a liability. It is merely a contractual right to call for a payment of money in exchange for the incurring upon its receipt of a corresponding liability in debt to repay it. I consider that most people would be surprised to have an unused loan agreement described as one of their assets.

[101] Money actually advanced to Mr **Ablyazov** under any of the loan agreements, or to a third party to be held to his order, would of course be an “asset” of his to which para 4 of the freezing order would apply. In this case, however, that did not happen. What did happen is that he instructed the lenders to make disbursements under the loan agreements to third parties in payment of legal and living expenses. The money so disbursed was not, however, his money but that of the lenders: he was not thereby disposing of an asset of his, because the money paid was not his. He was simply giving an instruction to the lenders to make payments that caused him to incur a personal liability in debt to them in the amount of the sums disbursed.

[102] The effect of that instruction was to increase his liabilities and so reduce his net asset position. To that extent, the transaction was potentially injurious to the Bank's interests. That is because a freezing order does not give the Claimant security over the frozen assets and the increase in the Defendant's liabilities potentially reduced the dividend ultimately payable to creditors. The three authorities to which Beatson LJ has referred in 17 show, however, that the incurring by Mr **Ablyazov** of such new indebtedness was not a disposition of, dealing with or diminution in the value of his assets within the meaning of para 4(b) of the freezing order.

[103] Reliance was placed on para 5 of the order as extending the grasp of para 4 so as to catch the money paid by the lenders to third parties by an instruction under the loan facility. I disagree that para 5 has that effect. Paragraph 5 is about, and only about, dealings with “assets” of Mr **Ablyazov**. For the purposes of these proceedings and appeal, it has been assumed that the lenders are not companies in Mr **Ablyazov**'s control. Where the money so disbursed actually came from is unknown, but on the said assumption there is no basis upon which it can be regarded as having been his money. Upon ordinary principles, the money disbursed was the lenders' money, not Mr **Ablyazov**'s. Paragraph 5 is, for present purposes, irrelevant.

[104] As to whether the authorities referred to in 17 of Beatson LJ's judgment were correctly decided, I consider that they were. Freezing orders in the form of para 4 have never been regarded as enjoining the incurring of liabilities. They have always been directed, and understood as directed, at restraining dispositions of or dealings with or the diminution in the value of assets. “Diminution” in this context refers to the value of particular assets, not to the Defendant's overall net asset position. Paragraph 4(b) does not cast the net wider so as to restrain a diminution in Mr **Ablyazov**'s net asset position. Freezing orders should be strictly construed, and there is no warrant for interpreting the present order as having restrained the incurring by Mr **Ablyazov** of the liabilities to the lenders that he did incur.

[105] As regards the Bank's disclosure application, it follows that the Bank's primary case for disclosure fails. I agree with Beatson LJ, however, for the reasons he gives, that the Bank's alternative case should be remitted to the Commercial Court.

Judgment accordingly.