Judgments

JSC BTA Bank v Ablyazov and others

Costs – Order for costs – Claimant bank being ordered to pay costs of third party's compliance with Norwich Pharmacal disclosure order – Claimant applying to vary order to require third party to pay costs of compliance with disclosure order – Whether third party liable for costs of complying with disclosure order – Circumstances in which appropriate to depart from normal order for costs in relation to Norwich Pharmacal order

[2014] EWHC 2019 (Comm), 2009 Folio 1099, (Transcript)

QBD, COMMERCIAL COURT

FLAUX J

11 APRIL, 13, 24 JUNE 2014

24 JUNE 2014

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

S Smith QC and T Akkouh for the Claimant

J Machell QC for the Respondent

Hogan Lovells LLP; Boodle Hatfield LLP

FLAUX J:

INTRODUCTION

[1] The Claimant bank applies by Application Notice dated 30 January 2014 to vary the order made by Eder J on 28 October 2013 that, subject to further order of the court, the costs of compliance by the Respondent with a *Norwich Pharmacal* disclosure order be paid by the Claimant, to provide that the Respondent should pay those costs himself. At the end of the second day of the hearing of this matter, I indicated that the application would be allowed in substance and that I would give my reasons for that decision at a later date. This judgment sets out those reasons.

[2] The present application is the latest round in the litigation being pursued by JSC BTA Bank ("the bank") against its former chairman, Mr **Ablyazov**, in respect of vast sums which the bank contends he stole from it and invested in a maze of corporate structures designed to frustrate the bank's efforts to trace its monies and to enforce a series of judgments it has obtained in this court against Mr **Ablyazov** for in excess of US$3.7 billion, none of which has been paid. The bank initially obtained a Worldwide Freezing order against Mr **Ablyazov** in August 2009 and on 6 August 2010, a further order was made appointing receivers over his assets. Each of those orders has been extended from time to time to cover the myriad of additional companies and assets through which Mr **Ablyazov** operates.

[3] The Respondent to the present application is Mr Tyschenko, a Ukrainian businessman, whose Factor and Fortuna groups of companies have interests in banking, oil and gas, real estate and logistics companies. The bank's case is that Mr Tyschenko is an associate of Mr **Ablyazov** and has assisted him in seeking to put assets outside the reach of the bank.

[4] By the order of 28 October 2013, Mr Tyschenko was ordered to file and serve affidavits setting out:

> "to the best of his ability all Relevant Information [defined as including information as to the ownership and location of certain assets and businesses and all dealings or attempted dealings with them since 12 August 2009, instructions given or received by him in relation to them since that date and communications between his wife and/or himself and Mr **Ablyazov** in relation to them since that date] within his own knowledge (without being under any obligation to make inquiries) [in relation to certain identified assets and businesses and any other asset with a value exceeding US$5 million]. The order also obliged him to exhibit to the affidavits such documents evidencing the matters set out 'as he may reasonably be able to collate in the available time (without being under any obligation to undertake electronic searches)'."

[5] Mr Tyschenko did file and serve two affidavits, one relating to the identified assets on 22 November 2013 and another relating to other assets with a value over US$5 million on 9 December 2013. The bank contended that those affidavits were deficient and did not comply with the order and indicated that it wished to cross-examine Mr Tyschenko. In the event, he attended voluntarily for cross-examination on two occasions, on 13 December 2013 before Mr Robin Knowles QC (sitting as a deputy High Court judge) and on 28 March 2014 before Males J.

[6] The bank now seeks to invoke the provision in the order of Eder J that, subject to further order of the court, the bank should pay the reasonable costs of compliance with the *Norwich Pharmacal* order and set aside that order, essentially on two grounds: (i) that Mr Tyschenko has not engaged in good faith in the disclosure process pursuant to the order and, particularly in his cross-examination (to the detail of which I return below) that he gave dissembling and evasive evidence and/or (ii) that the information that he did give showed that he was closely mixed up with Mr **Ablyazov**'s wrongdoing, intermeddling with his assets and assisting him to move assets around in breach of the freezing order. Mr Stephen Smith QC for the bank recognised from the outset of his submissions that the so-called *Babanaft* proviso would protect Mr Tyschenko from committal for contempt if the assistance he provided to Mr **Ablyazov** was provided overseas, even if

(which Mr Tyschenko denies) he knowingly assisted Mr **Ablyazov** in breaching the freezing order. However Mr Smith QC submits that the bank does not need to go so far as establishing what would (but for the *Baba-naft* proviso) be contempt. The court has a discretion as to costs and if it is satisfied as to one or both of the grounds relied upon, it should conclude that the bank should not have to pay for the privilege of the disclosure process.

[7] Mr John Machell QC for Mr Tyschenko resists the application on a number of grounds. He emphasised at the outset that Mr Tyschenko is not a Defendant to the proceedings and whatever suspicions the bank may have about him and however sceptical the court may be about some of the matters in relation to which he has given evidence (as to which see below), nothing has been proved against him at any trial. His involvement so far as the present application is concerned has been only as a Respondent to a *Norwich Pharmacal* order.

[8] Mr Machell QC submitted that, however sceptical the court might be about some of Mr Tyschenko's evidence, apparent evasiveness might be explained by the complexity of the matters about which he was being asked and the fact that he was a busy businessman with many companies and he had not been required to make all reasonable enquiries about the various assets and businesses identified in the order before he gave his evidence, whether in his affidavits or in cross-examination, (Eder J having removed that requirement originally imposed in the order made *ex parte* when the matter was argued *inter partes* at the return date). He submitted that in those circumstances, it would be wrong in principle for the court to reach the conclusion at this interlocutory stage that Mr Tyschenko was knowingly implicated in Mr **Ablyazov**'s wrongdoing.

[9] Recognising that in certain respects the evidence Mr Tyschenko gave was unsatisfactory and contradictory, Mr Machell QC submitted that, nonetheless, there had been substantial compliance by Mr Tyschenko with the *Norwich Pharmacal* order and, in those circumstances, it would not be appropriate for the court to deprive Mr Tyschenko of his costs of providing evidence. Furthermore, since in the case of each of the two cross-examinations, they had taken place pursuant to Consent Orders of the court each of which continued the costs regime imposed by Eder J (namely that, subject to further order of the court, Mr Tyschenko should be entitled to the costs of the exercise), the court should only set aside these orders if the bank could demonstrate, in each case, that there had been a material change of circumstances after the date of the relevant order, which Mr Machell QC submitted the bank could not do.

DETAILED BACKGROUND TO THE APPLICATION

[10] Mr **Ablyazov** fled the jurisdiction in early 2012 in breach of court orders. He refused to comply with an order made by Teare J on 29 February 2012 that he return to the jurisdiction and surrender himself to the tipstaff. He has failed to cooperate with the receivers and is clearly intent on frustrating the bank from obtaining any monies from him.

[11] Since fleeing the jurisdiction, Mr **Ablyazov** has engaged in concerted efforts to prevent the bank from enforcing against his assets and to put those assets beyond the bank's reach. Part of his *modus operandi* in that regard appears to be to “park” his assets with third parties such as Mr Tyschenko. Disclosure orders have been made against various third parties, including Mr Salim Shalabayev, his brother in law, whose compliance with the order was so deficient that cross-examination of him was ordered, after which Cooke J held that he should pay the bank's costs of the cross-examination, a departure from the normal rule that the Applicant for a *Norwich Pharmacal* order should pay the reasonable costs of compliance by the third party with the order.

[12] Having been on the run since early 2012, Mr **Ablyazov** was arrested towards the end of July 2013 at a villa near Cannes by the French authorities. The bank's enquiry agents were led to that address by Ms Olena Tyschenko (to whom Mr Tyschenko was married until 24 July 2013) who is a Russian lawyer who, at least from December 2012 until July 2013, acted for Mr **Ablyazov** in a professional capacity, but who at some

stage became romantically involved with him. On 22 July 2013 she had attended a hearing in this court, acting on behalf of one of his companies included in the Receivership order. She left court and went to France to see Mr **Ablyazov** and the enquiry agents followed her, after which he was arrested. Mr **Ablyazov** remains in prison in France awaiting the outcome of an extradition request by the Ukrainian authorities.

[13] In early September 2013, this court granted a search order which was executed at the Tyschenko's former family home in Weybridge and at an office used by Mr Tyschenko in the City of London. By that stage, Ms Tyschenko had returned to Moscow, where she was arrested on suspicion of money laundering on behalf of Mr **Ablyazov**. She was held in prison there until her release just before Christmas last year.

[14] On 11 October 2013, the bank made a without notice application for a wide ranging disclosure order and ancillary orders against Mr Tyschenko. The basis of the application was dealings which it was contended Mr Tyschenko had had with Mr **Ablyazov**, including negotiations he admitted having had to acquire BTA Ukraine, one of Mr **Ablyazov**'s assets. The application was prompted by recent press reports that Mr Tyschenko had seized control of two of Mr **Ablyazov**'s valuable logistics companies in Russia, Logoparks Pyshma and Tolmachevo. That application was heard by Eder J who made the disclosure order with an ancillary "gagging" order and an order restraining Mr Tyschenko from leaving the jurisdiction and ordering him to deliver up his passports to the bank's solicitors.

[15] That order was extended with minor changes by Eder J on 18 October 2013 and was served on Mr Tyschenko when he arrived at Heathrow the following day. The order was explained to him in English and Russian, but he refused to deliver up his passports and took a taxi to his home in Weybridge. A bench warrant for his arrest was granted out of hours by Foskett J. That was served on him by the Surrey police accompanied by a partner from Hogan Lovells, the bank's solicitors. He delivered up one passport which he said was his only passport. However that passport did not contain the visa for his recent trip to the United States and, on being challenged, Mr Tyschenko admitted that he had another passport which he had recently given to his driver. That was retrieved and handed over.

[16] On 22 October 2013, the bank's solicitors discovered photocopies of the photograph pages of two other passports of Mr Tyschenko which on their face were still valid. They applied for a further bench warrant, which was granted by Eder J Mr Tyschenko was arrested and brought before the court later that day. A short adjournment was granted for the hearing of the bank's committal application which took place on 25 October 2013, the return date for the various orders which Eder J had made on 11 and 18 October 2013.

[17] The committal application duly took place on 25 October 2013 and Mr Tyschenko was cross-examined. In his judgment of 28 October 2013 Eder J found that the "passport" order should not have been made and discharged it, but he still found that Mr Tyschenko was in serious breach of the order and in contempt of court. He sentenced Mr Tyschenko to 14 days in prison, but suspended that sentence for 12 months. His reason for doing so at 113 of his judgment was:

> "because of the importance of this litigation, which is ongoing, and that it is important that Mr Tyschenko appreciates the importance of complying with orders of this court during a period when he may be involved in dealing with the disclosure order and other orders . . . ."

[18] As appears from his judgment, Eder J had been troubled at the *ex parte* hearing on 11 October 2013 at the width of the *Norwich Pharmacal* order he was being asked to make and, specifically, that it included an obligation on Mr Tyschenko to make all reasonable enquiries about the assets and businesses. In his judgment following the return date when Mr Tyschenko was represented by Mr Machell QC, Eder J decided at 57 that the original order was too wide and unreasonably oppressive and that a more restricted order should be made.

[19] I have already set out at 4 above the substance of the more restricted order that was made on 28 October 2013. The identified assets and businesses were:

(a) Logopark Pyshma;

(b) Logopark Tolmachevo;

(c) Iceberg Business Centre and other business centres in Kiev;

(d) the Vitino Port;

(e) BTA Ukraine: and

(f) Eximenergo Ltd, Ostel Holdings Ltd, Millennium Support Group Ltd and Vaida Trading Ltd.

[20] On the present application, Mr Machell QC placed particular reliance on the fact that the order expressly provided that Mr Tyschenko was under no obligation to make inquiries. He submitted that this meant that Mr Tyschenko was under no obligation to see whether he could personally establish details and that what might appear to be the vagueness of some of his evidence in cross-examination could be explained by the fact that he had not undertaken any personal investigation (since that qualification to the order meant he was not obliged to do so) and hence did not have details of assets and transactions at his fingertips.

[21] I agree with Mr Smith QC that the qualification was concerned with making enquiries of third parties and did not exonerate Mr Tyschenko from the obligation to set out his own knowledge concerning the various assets and businesses to the best of his ability and to produce such documents relating to those matters as he could reasonably collate in the time available (albeit without any obligation to conduct electronic searches). To that extent (and for other reasons set out below) the vague and evasive nature of much of his evidence in cross-examination cannot be excused on the basis that he was under no obligation to make enquiries of third parties.

[22] In relation to the costs of compliance with the *Norwich Pharmacal* order, the circumstances in which Eder J came to make the order in 7 that, subject to further order of the court, the bank should pay the costs of compliance by Mr Tyschenko, emerge from observations by the learned judge during the course of argument:

> "EDER J But what happens . . . in a case where a *Norwich Pharmacal* order is made and that it appears after compliance that because of the documents disclosed then, in compliance with the order, and further enquiry is then made, it is then discovered that the non-party against whom the original order was made is guilty of a tort or a crime or something like that? It seems odd that the Applicant should not then be able to come back to the court and say 'Now we have got the documents we know that this non-party is in fact involved in a crime or a tort or something of that kind and our losses include the costs that have been paid . . . I am making this order now . . . on the assumption that Mr Tyschenko is not involved in any fraud or tort or anything of that kind and that's why I am prepared to make it, but it seems to me that Mr Akkouh is right, that if the underlying premise, which is the basis upon which I'm making that order, ultimately proves incorrect, that somehow or other I should deal with that . . . . I'm keen that Mr Tyschenko gests his costs virtually automatically but I think Mr Akkouh is right . . . that although *Totalise* [a reference to a decision of the court of Appeal which I consider in more detail below] may not deal with it expressly, I do think that I cannot and should not close the door in this kind of case from the possibility of Mr Akkouh coming back and saying, for whatever reason, on new evidence, new material, that that is-that order should be varied."

[23] In purported compliance with the order, Mr Tyschenko filed and served an affidavit dealing with the six identified categories of assets on 22 November 2013. It is necessary to set out in summary some of what Mr Tyschenko says in that affidavit. I propose to focus on those matters which were the subject of subsequent cross-examination and which were ultimately relied upon by the bank on the present application. However, in doing so, I have not lost sight of the fact that there were a number of matters disclosed by Mr Tyschenko which may not have been known or fully known to the bank, which were not specifically challenged in cross-examination (whilst recognising as Mr Smith QC submitted that the bank only had limited time in cross-examination and had to prioritise the issues it wished to ask about) and which may have been of some assistance to the bank in its pursuit of the assets of Mr **Ablyazov**. That is something which is reflected in the order I propose to make.

[24] Equally, there are other matters on which he was cross-examined such as Valenora and Rocklane which although they formed part of the bank's complaint in its opening submissions, Mr Smith QC sensibly indicated in reply he was not pursuing at present because there was a conflict of evidence which could not be resolved at this stage. I do not propose to say any more about those matters.

[25] In the affidavit of 22 November 2013, Mr Tyschenko sets out the background to his dealings with Mr **Ablyazov**, describing how he was introduced to him by Mr Georgy Popov and met Mr **Ablyazov** in July 2010 to discuss a potential investment by Mr Tyschenko in two assets of Mr **Ablyazov**'s, large business centres in Kiev called the Iceberg and Prime Stroy (not disclosed to the bank or the receivers by Mr **Ablyazov** when the Receivership order was made on 6 August 2010). Mr Tyschenko says that later that year he recommended managers and discussed purchasing the business centres.

[26] He states that Eximenergo is his company and was a profitable trading company which imported oil and gas into Ukraine, but that a change of political agenda in 2010 or 2011 meant that it was unable to compete with favoured providers and ceased trading. He accepts that in January 2011 he obtained a US$5 million loan from Ostel (one of Mr **Ablyazov**'s treasury companies) apparently to repay a bank loan. He also accepts that, at that time, he agreed to hold US$10 million on behalf of Millennium (another of Mr **Ablyazov**'s treasury companies). This was not a loan but he was asked to hold it until Mr **Ablyazov** or Mr Trofimov (an associate of Mr **Ablyazov**) asked him to transfer it, as a favour for having received the US$5 million loan. He says that the US$15 million has now been repaid. He does not remember how, but thinks it was partly through payments to Vaida (another of Mr **Ablyazov**'s treasury companies). He has reached that conclusion having looked at the bank's evidence, knowing that payments were made from Eximenergo to Vaida and thinking those must be repayments of the Ostel and Millennium money since there was no trading history between Eximenergo and Vaida. In my judgment what he says about the use of Eximenergo in relation to the US$15 million amounts to an admission that he had acted as a front for Mr **Ablyazov** and assisted him in moving around his assets.

[27] In relation to BTA Ukraine he states that Mr **Ablyazov** had offered him the opportunity to purchase his interest in that bank in March 2011, but he was not interested. In April 2011 at a London restaurant he met Mr **Ablyazov** with Messrs Zharimbetov and Sheklanov, the latter being one of the other owners of the Vitino Port, a port on the White Sea in Russia, to discuss one of his companies taking over its management. There was a further meeting to discuss this subject in September 2011. He admits that he was present at a meeting at a London restaurant in September 2011 when Mr **Ablyazov**, Mr Sheklanov and Mr Pukhlikov (another of the owners of the port) discussed “how to avoid the receivers”. I agree with Mr Smith QC that, although Mr Tyschenko is careful in his evidence not to say in terms that he was aware throughout his dealings with Mr **Ablyazov** of the existence of the Worldwide Freezing order and, once it had been made, the Receivership order, it is inconceivable that as a sophisticated businessman, he was not aware from his dealings with Mr **Ablyazov** that Mr **Ablyazov** was seeking to move his assets around to frustrate the bank and the receivers. If he did not know it before, he must have known it after that meeting in September 2011 when “avoiding the receivers” was specifically discussed.

[28] According to Mr Tyschenko, in 2012 Mr **Ablyazov** offered to provide him with money to purchase shares in the Logopark companies which Mr Tyschenko would hold as nominee on behalf of Mr **Ablyazov**. He says that he was not interested in this proposal but only in buying the logoparks. He also says that in late 2011 or early 2012, Mr **Ablyazov** offered him the opportunity to invest US$30-40 million of his own money in Tolmachevo in return for an interest in the Logopark property. He sent his representative, Mr Kriger, to view the site, but ultimately decided that he was not interested. He says that as he understands it, Medion (another of Mr **Ablyazov**'s companies) is now the company which has the main interest in and/or control of the logoparks.

[29] He says he knows that, prior to the involvement of Medion, Fininvest LLC (a company for which the bank believes the correct name is FinanceInvest LLC) was a creditor of Tolmachevo in respect of a loan of US$100 million. Mr Tyschenko says that, in August or September 2013, he purchased FinanceInvest from Mr Okhotnikov (who worked for Mr **Ablyazov** in control of the logoparks until July 2012 when they had a disagreement). His understanding is that it was Mr Okhotnikov's company, although it is possible that it was held for Mr **Ablyazov**. Mr Tyschenko suggested that he purchased FinanceInvest because the loan to Tolmachevo could be enforced. Because his relationship with Mr **Ablyazov** had broken down (presumably because of the affair with his wife) he was keen to enter into any transaction which would hurt Mr **Ablyazov**. He says that he purchased the shares in FinanceInvest for US$10,000 to US$20,000 and that Mr Okhotnikov was content for him to pay so little because the value of the company was unclear, as FinanceInvest had purportedly transferred the loan to Medion. He says he found out that Medion rather than FinanceInvest had become the creditor of Tolmachevo in August 2013 when he found out there had been a Russian court decision to that effect. He is trying to get that decision reversed.

[30] His explanation in the affidavit of how he assumed control of the logoparks was as follows. He says that, after his ex-wife's arrest, he wanted to get her released from custody and thought it would assist the bank if he could get control of Mr **Ablyazov**'s assets, specifically the two logoparks. Two Moscow lawyers (whom he does not identify) arranged for the founders of Medion to transfer shares in that company to Librato Group Ltd, a company controlled by the Moscow lawyers. On 9 September 2013 Librato agreed to transfer the shares in Medion to his company, Balousia Holdings Ltd for US$1 million, which has not been paid. On 13 September 2013, Balousia applied to the Russian tax authorities to change the registered director of Medion to Quelzon Holdings Ltd, another of his companies, incorporated in Cyprus. Mr Kriger acted for Quelzon. The two Moscow lawyers also arranged for the shares in Tolmachevo to be transferred to Seven Brilliants Corporation, another company controlled by them. On 9 September 2013, Seven Brilliants agreed to transfer the shares in Tolmachevo to Sudbrook Holdings Ltd for US$1 million, which has also not been paid. On 25 September 2013, Sudbrook applied to the Russian tax authorities to change the registered director of Medion to Quelzon. Mr Tyschenko says that on 8 October 2013, the shares were then transferred to Factor Capital (one of his principal companies).

[31] He says that at the end of October 2013 he lost control of Medion and on 19 October 2013, he lost control of Tolmachevo. The director of the former was changed to Mrs Guschina and of the latter to Mr Lavrentiev, both acting for Mr **Ablyazov**. He does not explain how such loss of control occurred. He says that on 15 October 2013 Mr Kriger wrote to the bank stating that Mr Tyschenko was losing control of the two companies and Mr **Ablyazov** was taking it back, again he does not explain how or why. Notwithstanding the ostensible loss of control, he says that on 22 October 2013, the shares in Tolmachevo were transferred back to Sudbrook, which is puzzling since that is his company.

[32] Having considered Mr Tyschenko's affidavit, the bank's solicitors Hogan Lovells wrote to his solicitors, Boodle Hatfield, on 25 November 2013 expressing concern that he had provided scant information on the central issues raised in the application in respect of the assets and businesses identified at para 4(a) to (f) of the order. They made specific complaint about (i) the absence of any meaningful explanation as to how he obtained control of the two logoparks or how Mr **Ablyazov** was allegedly able to regain control shortly thereafter; (ii) the absence of any meaningful explanation as to how the US$15 million which Eximenergo received from Mr **Ablyazov** was applied, the clear implication being that the purpose of the transactions was to enable

Mr **Ablyazov** to avoid the injunctions. Hogan Lovells drew attention to the absence of any supporting documentation; (iii) the fact that although he says it is possible FinanceInvest was owned by Mr **Ablyazov**, he fails to provide basic information regarding his acquisition of the company, such as the precise purchase price paid. Hogan Lovells again drew attention to the absence of any supporting documentation. They invited Mr Tyschenko to consent to being cross-examined on his affidavit. Failing such consent, they said the bank would make an application to the court.

[33] Boodle Hatfield replied on 26 November 2013 refuting the criticisms made and insisting that Mr Tyschenko's desire to assist the bank was genuine. They said that, without prejudice to his position that he had complied with the order of Eder J, he would agree to be cross-examined on certain terms, including that the costs provisions in 7 of the order should apply to the cross-examination and that it was agreed that it was reasonable for him to be represented by a partner of their firm and leading counsel. In response on 27 November 2013, Hogan Lovells said they were content for 7 of the order of Eder J to apply to the cross-examination hearing and that for the avoidance of doubt that incorporated the liberty to apply which Eder J previously recognised as appropriate to reflect the decision of the court of Appeal in *Totalise*. A Consent Order was then signed by both firms of solicitors, 3 of which stated: “Paragraphs 7 and 8 of the Disclosure order shall apply to the cross-examination hearing” [8 of the order of Eder J related to the basis of assessment and payment of any costs and was thus dependent upon 7].

[34] Thereafter, on 9 December 2013, Mr Tyschenko filed and served his second affidavit dealing with 4(g) of the order of Eder J which relates to any other asset with a value exceeding US$5 million which he believes or suspects belongs to or formerly belonged to or is or was formerly controlled by Mr **Ablyazov** in respect of which Mr Tyschenko has received or given instructions since 25 October 2012. That affidavit included the disclosure of three documents relating to the loan from Ostel to Eximenergo of US$5 million, one being the loan agreement dated 20 January 2011 and another a loan agreement dated 10 March 2011, whereby Eximenergo agreed to lend US$5 million to Eastway Commercial LLC which Mr Tyschenko says is another **Ablyazov** company. He says Mr **Ablyazov** requested this as the means of repaying the loan from Ostel. The third document is a spreadsheet showing various payments by Eximenergo to Eastway totalling US$4,702,000. He repeats (as he had said in the earlier affidavit) that the balance of the loan was repaid by payment of Mr **Ablyazov**'s legal and directors fees.

[35] In relation to the US$10 million which Mr Tyschenko had said in his earlier affidavit Mr **Ablyazov** had asked him to hold on behalf of Millennium but which was not a loan, Mr Tyschenko produced with this later affidavit a document dated 9 February 2011 recording the receipt of the monies as a loan from Millennium. He says that when he said previously it was not a loan, he meant that no interest was payable although the US$10 million was repayable. That document in fact refers to interest, but he says it was not intended that interest would be payable and none was paid. He also produced another document also dated 9 February 2011 recording a loan agreement for US$10 million between Eximenergo and Vaida and a spreadsheet showing a payment to Vaida of US$2 million on 28 February 2011 and various other payments to Vaida totalling US$7,527,000. He says that Mr **Ablyazov** requested that the US$10 million from Millennium be repaid to Vaida. The balance between the US$10 million and the total of US$9,527,000 paid to Vaida was also repaid by payment of Mr **Ablyazov**'s legal and directors fees.

[36] On 13 December 2013, Mr Tyschenko was cross-examined by Mr Smith QC on behalf of the bank on his two affidavits before Mr Robin Knowles QC Mr Machell QC was present to represent Mr Tyschenko's interests. Mr Tyschenko reiterated that Medion was owned by Mr **Ablyazov**. In relation to FinanceInvest he said that his interest in it was because he read a court decision that Tolmachevo owed US$100 million to FinanceInvest. He said quite categorically that FinanceInvest was owned by Mr **Ablyazov** and was part of Mr **Ablyazov**'s holding company. He repeated that he bought it from Mr Okhotnikov for US$10,000 or US$20,000. It was not a big deal. It was bought primarily to hurt Mr **Ablyazov**.

[37] As regards the logoparks, he reiterated his evidence in his affidavit that he had obtained control when Balousia obtained the shares in Medion and Sudbrook obtained the shares in Tolmachevo. When asked who

the two lawyers were who obtained control on his behalf he said one of them was called Dmitri and purported not to know his surname, saying his security people communicated with him. I agree with Mr Smith QC that he was either unable or unwilling to provide any credible explanation as to how the two lawyers were able to procure the transfer of the logoparks from Mr **Ablyazov** to Mr Tyschenko without the former's consent.

[38] He agreed that he controlled the logoparks until the end of October 2013. He was asked whether during that period of control, he took money out of the logoparks. He responded that they were in the offices, paid the costs of the businesses and had control of the bank accounts which were not blocked, through the director, Quelzon, which was his company. He said that payments made from the bank accounts were in the ordinary course of the business, payroll, payments of loans and receivables.

[39] Mr Smith asked whether it would be right to assume that no payments were made to him or any of his companies. Mr Tyschenko said something was paid to FinanceInvest. He did not know how much. It needed to be checked. He said no money was paid to him personally but something was paid to Elpiem which is a service company with a large staff of employees, which he acquired in October or November 2013 (so a matter of weeks before he was giving evidence).

[40] Asked how Mr **Ablyazov**'s people regained control of the logoparks, he said they had a second register. He said that they were transferring the companies (evidently a reference to Medion and Tolmachevo) to Librato and Seven Brilliants because they did not pay the money and there was a conflict between “those lawyers and Mr **Ablyazov**'s management”. He said that they were going to court in Russia and he thought they would restore their rights to Medion and Tolmachevo. As soon as they managed to get them back, he would be prepared to hand them over if the court said they should be handed over to the receivers.

[41] In relation to Eximenergo, he was cross-examined about a bank statement for that company for the period from 1 January 2011 to 28 May 2012 which was apparently found at the Tyschenko's house in Weybridge during the execution of the search order. This shows regular movements of funds into the account from companies associated with Mr **Ablyazov** and then out of the account almost immediately, sometimes to other companies associated with Mr **Ablyazov**. For example, on 26 January 2011, the US$5 million was received from Ostel recorded as a loan. On the same day it was paid out in two tranches to Ukrhimprom (recorded as “return of prepayment”) and Nafto-Zalart (recorded as “shares in charter capital payment”). As I understand it, the bank is not in a position to say for sure that these were payments to **Ablyazov** companies.

[42] The US$10 million received from Millennium was received in two equal tranches recorded as “receipt of loan” on 11 and 18 February 2011. The first sum of US$5 million was paid out the same day to Ukrhimprom (also recorded as “return of prepayment”). The second sum of US$5 million received on 18 February 2011 was paid out in three tranches the same day, one to Vaida recorded as “loan payment”, one to Ukrhimprom (again recorded as “return of prepayment”) and the third to Swindom, which Mr Tyschenko says is one of his companies, recorded as “prepayment for oil products”. In addition, on 15 February 2011, a sum of US$1,354,415 was received from Swindom, also recorded as “prepayment for oil products”. US$1,350,000 was paid out the same day to Vaida recorded as “loan payment”.

[43] On 23 February 2011, US$2.375 million was received from Fraser International recorded as “prepayment for oil products” and the same sum was paid out the same day to Vaida recorded as “loan payment”. US$1.5 million was received from Promo Advanced on 3 March 2011 recorded as “prepayment for oil products” and the same sum was paid out the same day to Vaida recorded as “loan payment”. On 23 March 2011 US$1 million was received from Fraser International recorded as “prepayment for oil products” and the same sum was paid out the same day to Vaida recorded as “loan payment”. The payments to Vaida in February and March recorded in the bank statement as loan payments total just short of US$7 million. A further payment to Vaida of US$630,000 recorded as “loan payment” was made on 24 April 2011.

[44] A similar pattern emerges later in the year of payments coming into the account and promptly being paid out to Eastway, which Mr Tyschenko admitted in his later affidavit is a **Ablyazov** company. Thus, on 21 April 2011 two payments totalling US$1 million were received from Factor Petroleum (one of Mr Tyschenko's companies) recorded as “prepayment for oil products” and paid out the same day to Eastway recorded as “loan payment”. Thereafter on 17 May 2011, 16 June 2011 and 2 August 2011, payments from a company called Rogly SA recorded as “prepayment for gasoil” were received and paid out to Eastway on the same day in each case, recorded as “loan payment”.

[45] As I have said, Mr Tyschenko was cross-examined about this bank statement and some of the payments in and out. He said Rogly was not his company and he did not know whether it was making prepayment for gasoil. It was put to him that, as he had said in his 22 November affidavit, by this stage in 2011 Eximenergo had ceased trading in gasoil. He responded (somewhat contradicting what he had said in his affidavit) that it had not stopped trading in gas oil in 2010 or 2011 but substantially reduced its trading volumes. He said it definitely did not make any imports in 2012. He said importation of gasoil was sometimes handled by Swindom, one of his companies and Rogly needed to be checked, “to find the interrelationships between those affiliated companies”. He said that Eastway was indeed an **Ablyazov** company and that “it seems obvious” that there was a close connection between the receipt from Rogly and the transfers to Eastway.

[46] However, when Mr Smith QC put to him that if the bank were right in thinking that Rogly was an **Ablyazov** company, all that was happening here was Mr **Ablyazov** moving money from one of his companies to another of his companies through the Eximenergo account, Mr Tyschenko said: “Rogly's definitely not an **Ablyazov** company. I need to double-check with my financiers of course. I can tell you precisely that we never did any transfers to **Ablyazov**. I could never allow it”. That denial is contradicted by the evidence of the bank statement itself.

[47] These transactions passing into and out of the Eximenergo account on the same day have all the characteristics of being money-laundering, as I put to Mr Smith QC, a proposition with which he was inclined to agree, at least in his opening submissions. Mr Machell QC submitted that it would be unfair and inappropriate for the court to reach that conclusion on this interlocutory application. He submitted that the bank statement was a document with which Mr Tyschenko was confronted in cross-examination and it was not as if he had had advance disclosure of it and an opportunity to deal with it before he gave evidence. However, in my judgment, that point has very little force: the statement was found in Mr Tyschenko's house. If it really were the case that he had insufficient opportunity to consider it, he could have taken it away and either put in a further affidavit dealing with the transactions or dealt with it when he came to be cross-examined again more than three months later. He had ample time between the two sessions of cross-examination to deal with the bank statement.

[48] Furthermore, as Mr Smith QC submitted it is striking that, although Mr Tyschenko said in relation to a number of transactions or companies that it needed to be checked whether they involved Mr **Ablyazov** (specifically in this context the relationship with Rogly), he did not at any later stage provide any further information or documents about those matters which needed to be checked. This is something which he could and should have done since (as set out further below) he knew from Hogan Lovells' letter of 17 December 2013 sent immediately after the first cross-examination that the bank and its solicitors “remain very concerned by . . . his failure to date to provide any proper particulars in relation to the various payments apparently made on Mr **Ablyazov**'s behalf.”

[49] In his reply submissions, Mr Smith QC indicated that it was not a necessary part of the bank's case that this was money-laundering on behalf of Mr **Ablyazov**. Rather what the statements showed was all this money flowing towards **Ablyazov** companies and what the bank wanted to know was why Mr Tyschenko's company Eximenergo was making those payments and where they had gone. However, he had not provided that information.

[50] As already indicated, immediately after that first cross-examination, Hogan Lovells wrote to Boodle Hatfield on 17 December 2013. They stated that, in the light of the evidence he had given, Mr Tyschenko should take immediate steps to transfer all relevant assets under his control, including the shares in Medion, Tolmachevo and FinanceInvest. Failing confirmation that he would do so, the bank would proceed with an application to the court. The letter continued that he should provide clear answers to a number of questions which he had conspicuously failed to address in his affidavits or cross-examination:

> (i) full details of the acquisition of the shares in FinanceInvest, including the exact amount paid and copies of any document evidencing the transaction;
>
> (ii) full details of the audit of FinanceInvest and steps taken to set aside assignment of its rights to Medion, as referred to in the 22 November affidavit;
>
> (iii) the full names of the two Moscow lawyers;
>
> (iv) the full name of Elpiem and particulars of its role in connection with any of the assets referred to in the affidavits;
>
> (v) the exact amounts and dates of payments by Medion or Tolmachevo to companies owned or controlled by Mr Tyschenko including FinanceInvest and Medion and
>
> (vi) the basis for all such payments.

[51] The letter continued that the questions were limited to questions related to the logoparks but as already quoted above, they remained very concerned about other aspects of his evidence including his failure to provide proper particulars of payments apparently made on Mr **Ablyazov**'s behalf. The bank reserved the right to require further cross-examination.

[52] Just before Christmas 2013, Elena Tyschenko was released from prison in Moscow so she could return to be with her children. On the material before the court, it is perfectly clear that once that had occurred, the attitude of Mr Tyschenko changed. Whilst the stance of ostensible cooperation with and desire to assist the bank may have remained, the reality was somewhat different, as the subsequent events, including the second cross-examination, demonstrate.

[53] On 9 January 2014, Boodle Hatfield wrote to Hogan Lovells stating, *inter alia*, that Mr Tyschenko required as a term of his voluntarily agreeing to attend for a further day's cross-examination, that any Consent Order provide that the bank pay, on an indemnity basis, his costs of such attendance. Hogan Lovells responded on 10 January 2014 that there was no reason why the bank should have to pay the costs of the restored cross-examination on a different basis from that originally ordered by Eder J ie in accordance with 7 and 8 of his order.

[54] A Consent Order on this basis was agreed by Boodle Hatfield by return and made by Andrew Smith J on 21 January 2014. 3 of that order provided:

> "In accordance with paragraphs 7 and 8 of the Disclosure order, the Claimant shall pay, on the qualified indemnity basis, the Respondent's legal costs, a reasonable allowance for the time the Respondent spends and the Respondent's out of pocket expenses incurred relating to, preparing for and attending the further [cross-examination] up to the conclusion of the further [cross-examination]."

The further cross-examination was subsequently listed, by agreement between solicitors and counsel, for 27 February 2014.

[55] On 14 January 2014, Boodle Hatfield wrote suggesting further cross-examination on 31 January 2014 or a convenient date in February. At [5] of the letter, they stated:

> "Subject to agreeing suitable transfer documents, our client is willing to transfer such right and interest he (or his relevant companies) may have (if any) in the shares in . . . Medion and Logopark Tolmachevo . . . pursuant to an order providing for . . . Medion to be added to the receivership and directing the transfers to the receivers to be made . . . ."

[56] In the light of this ostensible willingness to cooperate, it is surprising, to say the least, that notwithstanding that on 7 February 2014, Medion was added to the receivership order against Mr **Ablyazov** and Mr Tyschenko was ordered to give the receivers such information and documentation and do such things as they may reasonably require to carry out their functions, he has still not transferred his interest in the shares of Medion or Tolmachevo to the receivers more than four months later, a matter of specific complaint in a letter from Freshfields, solicitors for the receivers, dated 11 June 2014.

[57] At 6 of their letter of 14 January 2014, Boodle Hatfield stated:

> "So far as FinanceInvest LLC is concerned, our client does not believe that it is a company beneficially owned by **Ablyazov** . . . . We have taken instructions from our client in relation to the evidence given by him during the cross-examination and he says that his evidence that it was owned by **Ablyazov** was mistaken . . . . On that basis, our client's position is that there is no basis for him to transfer the shares to the Receiver."

[58] This volte face, notwithstanding his categoric statement in cross-examination that FinanceInvest was an **Ablyazov** company, is rendered all the more surprising by the fact that only a matter of weeks later, on 4 February 2014, Mr Tyschenko wrote a letter to the bank in Kazakhstan inviting them to discontinue the expensive proceedings in London on the basis that he would cooperate with the bank in recovering Mr **Ablyazov**'s assets for an agreed remuneration. In that letter, he referred to having acquired FinanceInvest and removed the existing management who were working in the interests of Mr **Ablyazov**, scarcely consistent with it not being a company beneficially owned by Mr **Ablyazov** as his solicitors had asserted on instructions.

[59] On 23 January 2014, Teare J granted a freezing injunction against Mr Tyschenko prohibiting him from dealing with the shares and assets of Tolmachevo, Medion and FinanceInvest and requiring him to take all reasonable steps within his power to procure that those assets were not dealt with, disposed of or diminished in value. The basis for the granting of that injunction was the *Chabra* jurisdiction, under which the court can grant a freezing injunction against a third party where there is a sufficiently arguable case that the third party is holding assets on behalf of the Defendant the subject of the principal freezing order. On 7 February 2014, Medion was added to the receivership order on the terms referred to in 56 above.

[60] According to the Russian Companies Register, on 20 February 2014, the shares in FinanceInvest were diluted by a factor of ten. Before that date, FinanceInvest had 500,000 issued shares, 95.48% of which were held by Keron Holdings Ltd, a company under Mr Tyschenko's control, the balance held by a Mr Petrachenkov. After the allotment, FinanceInvest had 5 million issued shares, 90% held by Factor Capital Ltd, another company controlled by Mr Tyschenko, 9.55% held by Keron and 0.45% by Mr Petrachenkov. The bank's case is that this dilution of shares was procured by Mr Tyschenko or that he failed to take reasonable steps to prevent the dilution, in either case in breach of the freezing order made against him by Teare J on 23 January 2014. Mr Tyschenko contends that, because of delay by the Russian authorities the transaction was not recorded until February 2014, but the allotment had in fact been agreed in December 2013, prior to

Teare J's order. Mr Smith QC accepted that, whatever the Bank's suspicions, it was not possible to say on this application, that Mr Tyschenko had deliberately breached the freezing order against him.

[61] On 26 February 2014, Mr Tyschenko applied successfully to adjourn the further cross-examination due the following day, on the basis of his evidence that in view of the crisis in the Ukraine, he could not afford to spend a day away from the Ukraine and his presence in Kiev was vital. However, contrary to that evidence, he was not in the Ukraine at the time the application was made, but in Moscow. He evidently decided to spend the day he was due to be cross-examined flying to Kazakhstan, where he was seen on 28 February 2014 at the bank's offices, trying to arrange an appointment to see the chairman of the bank, apparently with a view to procuring compensation for his cooperation. That was of course the basis for his letter of 4 February 2014.

[62] At a hearing on 28 February 2014, the bank informed Teare J of the whereabouts of Mr Tyschenko and that he had misled the court and applied to add FinanceInvest to the receivership order. At that hearing, Mr Machell QC adopted the position that the court should not add FinanceInvest to the receivership as a matter of discretion. Teare J rejected that argument and added FinanceInvest to the receivership order. In doing so, he stated:

> ". . . I accepted [Mr Tyschenko's] evidence and in reliance upon it adjourned the cross-examination of Mr Tyschenko. It now appears that on Wednesday of this week, when that statement was being put before me on behalf of Mr Tyschenko, he was not in Kiev meeting with Fortuna's clients and creditors but was in Moscow, albeit on Fortuna business. It is plain that I was misled . . . . If I ask myself whether I can trust Mr Tyschenko to obey the freezing order, in circumstances when he has permitted me to be told something which is plainly untrue, I am afraid that the answer is plain: I cannot."

[63] The adjourned further cross-examination hearing was subsequently fixed for 28 March 2014. Prior to that hearing, on 24 March 2014, the bank made an *ex parte* application to me for a further *Chabra* freezing injunction against Mr Tyschenko in relation to Elpiem and a further entity, Stockroom. At least as regards Elpeim, the basis for that application was the evidence which Mr Tyschenko had given at the first cross-examination hearing on 13 December 2013. I granted that application and also added those two entities to the receivership order.

[64] On 28 March 2014, the further cross-examination eventually took place before Males J Mr Tyschenko was again represented by Mr Machell QC In his evidence at that hearing, Mr Tyschenko was asked again about the evidence he had given previously that Mr **Ablyazov** had regained control of the logoparks, specifically about the evidence that the shares had reverted to Sudbrook on non-payment of the purchase price, notwithstanding that Sudbrook was one of his companies. His response was that he was no longer dealing with this project and that the assets were being controlled by Mr **Ablyazov**, but that there were proceedings in Russia between Mr **Ablyazov** and the directors appointed by the Russian lawyers. He claimed not to know the names of those directors or the nature of Mr **Ablyazov**'s complaint in the Russian proceedings.

[65] He was asked about the time when he was in control of the logoparks. He said this was in October 2013 and that he had legal but not physical control, stating that he did not think they had any physical presence. This contradicted his evidence in his first cross-examination that they were in the offices. Mr Smith QC put to him what he had previously said about having control of the bank accounts and being able to authorise payments out of the bank accounts that related to the logoparks. He stated that he was not in control. The director, Mr Kriger was in control. He denied that he had appointed Mr Kriger. Mr Kriger acted for a Cypriot company the name of which he purported not to recall and of which he could not recall whether it was registered in his name. This evidence flatly contradicted his evidence at his first cross-examination that the Cypriot company for which Mr Kriger acted was Quelzon, one of Mr Tyschenko's own companies. Of course, he had also said in his affidavit that Mr Kriger had acted as his representative in relation to inspection of a logo-

park site. I agree with Mr Smith QC that this purported lack of recollection on the occasion of the second cross-examination as to the name of the Cypriot company was evasive. It is inconceivable that he did not recall the name of his own company. Equally his attempt to distance himself from Mr Kriger, his own representative and appointee, was evasive.

[66] Mr Smith QC then asked Mr Tyschenko whether he was involved in the management of Logopark Pyshma to which he said that he spoke to the managers at Elpeim, the management company, from time to time. He was asked again about Elpeim. He said it was not an **Ablyazov** company. Asked who owned it, he said he knew Mr Popov was there. In his 22 November 2013 affidavit he had described Mr Popov as a former employee of Mr **Ablyazov** whom he had known since 1997 and who introduced him to Mr **Ablyazov** in July 2010. Later in cross-examination, he said he did not own or control Elpeim, which was now controlled by Mr Popov.

[67] Mr Smith QC asked him about Elpeim again. I propose to quote extensively from his answers not just because they are flatly inconsistent with what he had said at the first cross-examination in December 2013 (when he said he had acquired Elpeim in October or November 2013 and that it was a service company with a large number of employees) but because they demonstrate the extent to which his evidence was dissembling and evasive:

> "Q I want to turn to the LPM company. You've described [it] as a service company and you said it was under the control of Mr Popov. Would you disagree with me if I suggested to you that the ultimate owner of the LPM company is Mr **Ablyazov**?
>
> A I would disagree.
>
> Q So who do you say is the ultimate owner of the LPM company?
>
> A I think it's Mr Popov and the company managers. Mr Popov has an ongoing conflict with Mr **Ablyazov**, just as Mr Okhotnikov used to have.
>
> . . .
>
> Q . . . I'm taking from your evidence that neither you nor any of your companies has any ownership interest in LPM?
>
> A It was our plan actually to buy LPM and Mr Popov came to see us and made that proposal to us. And I think I mentioned either in my evidence or in my affidavit to the effect that we were going to buy that company from the managers. But if you ask me whether I control or own the company, my answer is it's Mr Popov who owns the company, and he has a conflict with Mr **Ablyazov** very similar to the conflict I had with Mr **Ablyazov**. We have a good friendly relationship with Mr Popov, he is a partner.
>
> Q You said you were going to buy that company but do I understand from your evidence that the negotiations to buy didn't complete and you never did buy the company?
>
> A Well I wouldn't really call it a negotiation. I was in touch with Mr Popov all the time, on an ongoing basis, and just because he has a conflict similar to the conflict that I have does not make him a partner.
>
> Q So did you or did you not buy LPM?

A I really have no recollection. I have a hundred companies. How can I recall everything that happens in those companies?

. . .

Q When you were in control of Tolmachevo and Medion/Logopark Pyshma you told us on the last occasion that some payments were made to LPM?

A Mm hmm

Q How much was paid?

A I do not know.

Q Roughly?

A I do not know.

. . .

Q Does LPM have its own premises?

A I don't think so.

Q So where does Mr Popov run LPM from?

A Those assets were run by the managers, Mr Popov and I remember there was an Anatoly there . . .

Q In an office in Moscow?

A Yes.

Q Who else is at LPM apart from Popov? Are there any other staff?

A There must be. I think so. But I really do not know. I am in touch with Popov only. We received control in October. There was the director there. And it was our plan to make sure the company continued in existence.

Q You received control of Tolmachevo and Medion, you didn't receive control of LPM did you?

A No, LPM was an auxiliary company. I do not really remember any documentation related to that company, any records related to that company. I only had a relationship-ongoing relationship with Mr Popov.

. . .

Q . . . are you aware of any payments by the LPM company to any of the companies in the Fortuna or Factor Capital groups?

A We have been working with Mr Popov for several years, so it is quite possible that he may have made some payments.

[Mr Smith QC then put to him the cross-examination about Elpeim on 13 December 2013 when he said that he had acquired it recently and that it had a large staff]

Q There you were clear that the LPM company had been purchased in October or November 2013. This morning you said it hadn't been purchased. The question of purchase had arisen, but it hadn't been taken to a purchase.

A Well for us to be absolutely clear about what the true answer to that question is, we would need to turn up the shareholders' register, and then from that register we would see who the shareholder was at what time.

Q So are you saying you may have purchased the LPM company at some point in time?

A What I'm saying is we need to turn up the documents. Something similar happened to Fin-invest. When I was writing the affidavit I said that it was my company. I bought it from the managers. So I said that we had bought it. And then, when I looked at the transcript, I saw something different. So for us to be absolutely certain and not to mislead either the court or yourself, sir, we would need to look at the documents.

Q Well my understanding is that the shareholder of record in LPM is a company called Sreda SJSC . . . . Is that one of your companies?

A I don't think so. I don't think that Sreda played any role at all . . . I do not even recall exactly who worked there . . . it had nothing to do with these assets. It had nothing to do with [the log-oparks]. You see there is simply no way I can recall everything.

. . .

Q So what did it have something to do with? What was its business?

A How would I know? We have 40, maybe 50 companies. It may have been one of the auxiliary companies, or it may not have been one of the auxiliary companies.

Q So it may be one of your companies, is that what you're saying?

A I would need to double-check. I would need to see the documents. I would not like to hy-pothesise.

Q Who is Mikhail Tuz?

A Mikhail Tuz is my driver.

Q Is he the shareholder or controller of Sreda?

A I simply do not recall.

Q Is it possible?

A It is possible.

Q What about Yevgeniya Podorazhnaya?

A She used to work for Factor . . . . By the way she was a director of Sreda.

. . .

Q When was she a director of Sreda?

A I do not know. Am I expected to know all the directors?

Q Well you recalled that she was a director of Sreda. When did you learn that she was a director of Sreda?

A Well I just recollected that. As soon as I recollected that, I told you.

Q When she worked at Factor, was she your personal assistant?

A No I think-and I do not recall exactly-I think she was either a secretary or an administrator.

. . .

Q According to the information we have, she became the managing director of LPM on 26 November 2013. Is that possible?

A It is likely possible.

. . .

Q And she remained managing director . . . until 26 February 2014. Is that possible?

A Again it is likely so, but we would need to turn up the documents.

. . .

Q Why would she for three months have been the managing director of LPM when you said when she worked at Factor Capital she was a secretary or an administrator?

A Maybe we were planning on buying the company or something. You may recall that I wrote in my affidavit that we were planning on buying some companies . . . .

Q . . . what I'm suggesting to you is that . . . from the end of November until at least the end of February, you through your former secretary or administrator . . . had control over LPM.

A What I do know is that she used to work, together with Popov, for more than one month and then she travelled to Yekaterinburg in October, November, or perhaps even in September. That I know for a fact.

Q Are you suggesting that she left the employment of the Factor Group in October, November or perhaps even in September?

A Again I do not recall exactly when she left. I would need to have a look at the documents. What's the problem? She was working with Popov."

[68] At the cross-examination hearing on 28 March 2014, Males J ordered Mr Tyschenko to comply by 4 April 2014 with the requests being made by the receivers for information. Mr Tyschenko served a witness statement on 4 April 2014 in purported compliance with that order. I do not propose to go through all the requests or the extent to which the receivers remain dissatisfied with his responses, as is apparent from the letter from their solicitors, Freshfields, of 11 June 2014. I will simply highlight a few matters which bear on the critical issues which concern the bank on the *Norwich Pharmacal* application, in particular in relation to the logoparks. Mr Tyschenko provides no further information about how he obtained and then lost control than he had in his evidence in response to the *Norwich Pharmacal* order. He still claims not to know the full names of the Moscow lawyers who acted on his behalf save to say that they were called Dmitry and Igor. He says he will make enquiries to try and find out their full names. However, he does not appear to have made such enquiries, nor does he appear to have provided further information as to what steps his Russian lawyers are taking with regard to Tolmachevo in proceedings in Russia.

[69] In relation to Elpiem he says in the witness statement that he was unsure of the position in relation to it at the time of his cross-examination the previous week. He says he has checked the position and Sreda purchased the shares of Elpeim on 1 October 2013 and then sold them on to Stockroom on 3 March 2014. He produces the sale agreements. He says that Sreda is not his company but Mr Popov's. At the time of its incorporation he was involved with Mr Popov in relation to Sreda and "in a general sense have referred to it in the past as one of my companies but I was never a director or shareholder in Sreda (neither were any of my employees or companies) and I did not regard myself as a beneficial owner of it." That evidence appears to overlook that his driver Mr Tuz was shareholder of Sreda and that Ms Podorazhnaya who was the managing director of Sreda had until very recently worked for his company Factor Capital. Furthermore, I agree with Mr Smith QC that his evidence at the cross-examination on 13 December 2013 that Elpeim was a company he had bought in October or November 2013 was not general but quite specific. Overall it seems to me that what he says about Elpeim in the witness statement of 4 April 2014 compounds the dissembling and evasive nature of the evidence he gave in cross-examination the previous week.

APPLICABLE LEGAL PRINCIPLES

[70] It is common ground that the normal order for costs in relation to a *Norwich Pharmacal* order is that the Claimant has to pay the reasonable costs incurred by the third party Respondent in complying with the order, but that there may be circumstances in which it is appropriate to depart from that normal order and order the Respondent to bear his own costs or even to pay some or all of the Claimant's costs. The dispute between the parties is as to the circumstances in which it is appropriate to depart from the normal order.

[71] There is very little assistance in the authorities as to when the court might consider departing from the normal order. In seeking guidance, it seems to me that one has to start from first principles with the decision of the House of Lords in *Norwich Pharmacal v Customs & Excise* [1974] AC 133, [1973] 2 All ER 943, [1974] RPC 101 itself. Mr Smith QC drew my attention to a passage in the speech of Lord Reid at 175A-D:

> "My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the Appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140; 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.
>
> I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the Respondents must disclose the information now sought unless there is some consideration of public policy which prevents that."

[72] I agree with Mr Smith QC that what this passage demonstrates is that where the third party has become mixed up in the wrongdoing of the Defendant, however innocently, he is under a duty to assist the Claimant. The position is an *a fortiori* one where the third party has in any sense acted knowingly, so that he may have incurred a liability to the Claimant, even if the Claimant has no intention of suing him. It follows as I see it that Mr Machell QC's characterisation of Mr Tyschenko as being merely a witness under the *Norwich Pharmacal* order is not really accurate. On Lord Reid's analysis, Mr Tyschenko is under a duty to assist the bank by giving it full information in relation to the assets and businesses, even if he has not incurred any potential liability to the bank; all the more so if he has actively and knowingly assisted wrongdoing by Mr **Ablyazov**, even if the bank cannot or chooses not to join him as a Defendant.

[73] Furthermore, even though the order of Eder J does not require him to make inquiries, that must mean inquiries of third parties as Mr Smith QC submits and the order does require him to set out the Relevant Information to the best of his ability and to produce such hard copy documents as he is able to collate in the available time, obligations that underline that he is under a duty to cooperate with and assist the bank in providing information and documents. Accordingly, in my judgment Mr Machell QC's submission that the court should approach Mr Tyschenko's evidence on affidavit and in cross-examination on the basis that he is a busy businessman who did not have the time to prepare or consider documents before giving evidence that a witness would have at trial is misconceived. He was under a duty to provide information and hard copy documents to the best of his ability.

[74] So far as the costs of compliance are concerned, it is striking that Lord Reid puts the matter in terms that “it may be” that the Claimant ought to reimburse the expense incurred by the third party in complying with the order. Implicit in that formulation is that there may equally be cases where it will be just and appropriate not to order the Claimant to pay such costs, without circumscribing what those cases will be. The only other speech touching on costs is that of Lord Cross of Chelsea who puts it in more mandatory terms at 199G “The full costs of the Respondent of the application and any expense incurred in providing the information would have to be borne by the Applicant.”

[75] In *Totalise plc v The Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233, the Court of Appeal allowed an appeal against the decision of the judge at first instance to order the Second Defendant to *Norwich Pharmacal* proceedings (where the First Defendant was the alleged wrongdoer) to pay the Claimant's costs of the application. The Court of Appeal confirmed that in general the costs of the application should be recovered from the wrongdoer and the innocent third party should be paid his costs of the application and of compliance.

[76] That case was concerned principally with the costs of the *Norwich Pharmacal* application, where the third party has some legitimate reason for opposing the application, rather than with the costs of compliance with an order once made, but the judgment of the Court (Aldous, Sedley and Arden LJJ) at 29 – 31 provides some limited guidance on the issue I have to decide:

> “29 We believe that Mr Higham is right. Norwich Pharmacal applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by CPR r 48.3. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the *Norwich Pharmacal* case [1974] AC 133, 176, 199. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the Applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.
>
> 30 The court when considering its order as to costs after a successful *Norwich Pharmacal* application should consider all the circumstances. In a normal case the Applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. There may be cases where the circumstances require a different order, but we do not believe they include cases where:
>
> (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it;
>
> (b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or
>
> (c) the party could be subject to proceedings if disclosure was voluntary; or
>
> (d) the party would or might suffer damage by voluntarily giving the disclosure; or
>
> (e) the disclosure would or might infringe a legitimate interest of another.

> 31 That does not mean that a party who supports or is implicated in a crime or tort or seeks to obstruct justice being done should believe that the court will do other than require that party to bear its costs and, if appropriate, pay the other party's costs."

[77] Mr Machell QC placed considerable reliance on the reference to the costs of pre-action disclosure, now governed by CPR 46.1(2), which provides that the general rule is that the court will award the person against whom the order is sought his costs of the application and of compliance with any order made. Mr Machell QC submitted that this would be the position even where the person against whom the disclosure order was made was subsequently a Defendant and the Claimant obtained judgment against that Defendant. I do not consider that anything in the rule or the notes in the Civil Procedure justifies that conclusion. The rule is concerned with the position at the time that an application for pre-action disclosure is made and a person (who by definition is not a Defendant to the proceedings at that stage and may never be) complies with an order. Under the rule, at that stage, the general rule is that that person should recover his costs of compliance. However, if as in the present case, there were a liberty to apply built into the CPR 46.1(2) order and, as a consequence of the disclosure, that person became a Defendant and the Claimant recovered judgment against him, it seems to me that in an appropriate case the Claimant could exercise the liberty to apply to seek to recover the costs previously paid over and there is nothing in the rule which precludes that.

[78] It might be said that that analysis suggests by analogy that in 31 of their judgment in *Totalise* the Court of Appeal was considering only the position where the *Norwich Pharmacal* Respondent was subsequently convicted of a crime or judgment entered against him in respect of a tort, which was the position adopted by Mr Machell QC, who submitted that it would be unfair and inappropriate for the court to conclude that Mr Tyschenko had supported or was implicated in wrongdoing by Mr **Ablyazov** at this interlocutory stage or indeed at any stage short of a trial.

[79] I agree with Mr Smith QC that that paragraph of the judgment in *Totalise* is not intended to circumscribe the circumstances in which the court may decide to depart from the normal order for costs in a *Norwich Pharmacal* case to those where the crime or tort is established at a criminal or civil trial. The question is whether at the time when the court is considering the appropriate order as to costs (which may well be after compliance or purported compliance with a *Norwich Pharmacal* order as in the present case) on the material before the court, the court can be satisfied that the Respondent has supported or is implicated in the wrongdoing or has sought to obstruct justice.

[80] That that is the correct approach seems to me to be borne out by two matters. First, as the second paragraph in the speech of Lord Reid in *Norwich Pharmacal* itself which I quoted at 71 above contemplates, there may well be cases where at the time of the application or after purported compliance, the court can see for itself that the Respondent is sufficiently implicated to be under a liability to the Claimant, even though the Claimant has no intention of suing him. It would surely be most peculiar if the court could not, in such a situation, depart from the normal order in relation to costs of compliance or purported compliance, unless and until the liability had been established at trial, given that by definition, since the Claimant has no intention of suing the Respondent, there will be no trial.

[81] That also seems to me to be an answer to Mr Machell QC's point that, where the Claimant suspects that the *Norwich Pharmacal* Respondent is knowingly involved in the wrongdoing of the Defendant, he has a choice either to proceed only by way of a *Norwich Pharmacal* order or to join the Respondent as a Defendant and, if he chooses the former approach, he should still have to pay the costs of compliance. As I see it, implicit in Lord Reid's speech is that in such a case the Claimant does not have to make a choice of that kind. He can seek a *Norwich Pharmacal* order and invite the court to depart from the normal order as to costs which the court will do if it is just and appropriate to do so.

[82] This leads on to the second matter which supports the conclusion that it is not only where the Claimant establishes at a trial that the *Norwich Pharmacal* Respondent was implicated in the Defendant's wrongdoing, that it is appropriate to depart from the normal order in relation to costs. This is the “sliding scale” of discretion as to the appropriate order for costs where the court decides to depart from the normal order. As the court of Appeal in *Totalise* recognise at 31, the court may order the Respondent to pay his own costs or, where appropriate, the Claimant's costs and there are of course gradations in between, such as an order that the Respondent pay some of the Claimant's costs or recover only some of his own costs. If it were really the case that the court could only conclude that the *Norwich Pharmacal* Respondent was implicated in the wrongdoing after a trial of that issue, it is difficult to see what other order for costs would be appropriate if the liability of the Respondent was established at trial than that he should have to pay his own and the Claimant's costs of compliance with the *Norwich Pharmacal* order.

[83] Of course, as Mr Smith QC recognised in his reply submissions, there may be issues which arise from the information and documents obtained pursuant to the *Norwich Pharmacal* order which involve a conflict of evidence which the court could not resolve at the present interlocutory stage. It is for that reason that, on reflection, Mr Smith QC has not pursued reliance on the issues concerned with Rocklane and Mr Terenov or with the ownership of Valenora. However he submits, and I agree, that if on the material before it, the court is satisfied that the Respondent is knowingly implicated in wrongdoing, it can express its disapproval of that by either ordering the Respondent to pay his own costs or by ordering him to pay some or all of the Claimant's costs.

[84] I agree with Mr Smith QC that nothing in 7 and 8 of the order of Eder J precludes that approach. Nothing in what the learned judge said during the course of argument on 28 October 2013 suggests that he considered that his costs order could only be revisited if the bank established at a trial that Mr Tyschenko was knowingly implicated in Mr **Ablyazov**'s wrongdoing. Quite the contrary: in the passage which I quoted at 22 above, he clearly contemplated the bank being able to come back and revisit the order at any stage for whatever reason, on new evidence or material.

[85] So far as the other way in which Mr Smith QC puts his case is concerned, that Mr Tyschenko has not engaged in good faith in the disclosure process pursuant to the order, Mr Machell QC submitted that it would only be where the *Norwich Pharmacal* Respondent had frustrated the whole process by a failure to engage that it would be appropriate to deprive him of his costs on this ground or order him to pay the Claimant's costs. This was not such a case: whatever conclusion I reached about the unsatisfactory nature of some of his evidence in cross-examination (which to an extent Mr Machell recognised) I should conclude there had been substantial compliance by Mr Tyschenko with the order of Eder J He had provided evidence in his affidavits, some of which was not challenged in cross-examination, some of which may have been of assistance to the bank.

[86] In relation to this aspect of the case, Mr Smith QC submitted that the bank did not have to go so far as demonstrating that Mr Tyschenko's participation in the *Norwich Pharmacal* process had been a complete charade. He also cavilled at the concept of “substantial compliance” with the order, which he submitted would not give the sort of refined answer which the court needed to give in this situation. He gave the example of a Respondent of whom ten questions are asked who answers eight of them properly to the best of his ability but in relation to the last two questions, which are the critical questions, he dissembles and is evasive. He submitted that this was precisely the sort of situation in which the bank should not have to pay the costs of the whole exercise.

[87] On reflection, it seems to me that Mr Smith QC is right on this point. It is quite apparent from the 20th witness statement of Mr Michael Roberts of Hogan Lovells dated 11 October 2013 in support of the application for the *Norwich Pharmacal* order that the critical issue on which the bank was focusing on which it was seeking Mr Tyschenko's assistance was the ownership and control of the logoparks in relation to which press reports were saying that Mr Tyschenko had recently seized control. The other issues on which the bank was particularly focused were (i) Valenora and (ii) Eximenergo and the receipt of US$15 million from Mr

Ablyazov. I agree with Mr Smith that, to the extent that the bank establishes that Mr Tyschenko's evidence on those matters was dissembling and evasive, Mr Tyschenko can derive little assistance from being able to show that he provided information on other issues which were not critical.

[88] Mr Machell QC relied upon the principle confirmed in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 4 All ER 259, [2012] 1 WLR 2591 that the discretion granted to the court under CPR 3.1(7) to vary or revoke its own order where there has been a material change of circumstances since the order was made: see per Rix LJ at 39. On the basis of that principle, Mr Machell QC submitted that each of the orders of Eder J and the Consent Orders of 27 November 2013 and 21 January 2014 had to be considered in turn as at the date of the order. In relation to each of the Consent Orders, he submitted that it would only be if there had been a material change of circumstances since the previous order of the court that the bank was entitled to revisit that previous order.

[89] Thus, Mr Machell QC submitted that, by the first Consent Order, the bank was agreeing that it was appropriate for Mr Tyschenko to be paid the costs of cross-examination, so that the bank could not rely upon anything which had happened before the date of the Consent Order (such as any defect in 22 November 2013 affidavit) because it was not a material change of circumstances since the date of the Consent Order. Equally, in relation to the second Consent Order, by 21 January 2014 the first cross-examination had taken place, so that the bank could not complain about anything in that cross-examination as a material change of circumstances since the date of the second Consent Order.

[90] In my judgment, this process of dissection of the orders is a complete mischaracterisation of the nature and effect of the Consent Orders. Each of the orders is intended to preserve the reservation made in 7 of the order of Eder J that the bank should be entitled to ask the court at any later date to make a different order as to costs in respect of some or all of the *Norwich Pharmacal* process. There is no question of the bank having foregone by the first Consent Order its entitlement to rely upon deficiencies in the affidavit evidence or anything else that had happened since 28 October 2013, as a material change of circumstances or of the bank having foregone by the second Consent Order its entitlement to rely upon the deficiencies in the first cross-examination upon which it relies or, indeed, anything else that had happened since 28 October 2013, as a material change of circumstances. Even if that were not clear from the terms of the orders, it is made absolutely clear by the letters from Hogan Lovells of 27 November 2013 and 10 January 2014 referred to at 33 and 53 above.

[91] Accordingly in my judgment the bank is entitled on this application to rely upon the entire conduct of Mr Tyschenko since the order of Eder J in support of its case that there has been a material change of circumstances.

DISSEMBLING AND EVASIVE EVIDENCE

[92] Mr Smith QC submitted and I accept that there were a number of difficulties with the evidence of Mr Tyschenko in his affidavit of 22 November 2013, as to the circumstances in which he came to take control and then lose control of the logoparks (the evidence summarised at 28 to 31 above). First, in relation to the two Moscow lawyers who seem to have been instrumental in securing control on his behalf, in his affidavit he does not name them. Second, although he says he gained and then lost control of the logoparks he does not say how, so that this information is of no assistance to the bank or the receivers in seeking to gain control of the logopark assets. Third, he said that he put Quelzon in control, of which the representative was Mr Kriger, but he subsequently completely contradicted himself in cross-examination in March 2014 denying that he had appointed Mr Kriger and claiming not to recollect the name of Quelzon, his own Cypriot company. As I have already found at 65 above, that evidence was evasive.

[93] Fourth, in the affidavit he says nothing about any dealings with the assets of the businesses or transfers from the bank accounts whilst he was in control, even though he must have known that was the sort of

information the bank was after. In his first cross-examination he does mention dealings and transfers, albeit in vague and unhelpful terms and subsequently contradicted himself in his second cross-examination.

[94] In relation to Eximenergo, as I have already held at 26 above, what he says in his affidavit about the use of his company in relation to the US$15 million amounts to an admission that he had acted as a front for Mr **Ablyazov** and assisted him in moving around his assets.

[95] In the circumstances, it seems to me that the criticisms levelled by Hogan Lovells in the letter of 25 November 2013 about the quality of the written evidence, as referred to at 32 above were entirely justified. If agreement to be cross-examined had not been forthcoming from him, I consider the court would have found that he had not complied properly with the order of Eder J and that he should be cross-examined on his evidence.

[96] In relation to Mr Tyschenko's evidence in cross-examination on 13 December 2013 about the logoparks and related assets, I agree with Mr Smith QC that there are four principal difficulties with that evidence. First, in relation to FinanceInvest, which he acquired for US$10,000 to US$20,000 without ever identifying the precise price, notwithstanding that it had a chose in action worth US$100 million, he said quite categorically that it was owned by Mr **Ablyazov**. However, on 14 January 2014, that is to say after his ex-wife had been released from prison, he contradicted this through his solicitors, despite the fact that, a few weeks after that, on 4 February 2014, he wrote personally to the bank in terms which were only consistent with FinanceInvest being an **Ablyazov** company before he acquired it and with him still being in control of or at least able to get control of it. This is flatly inconsistent with what Boodle Hatfield wrote on instructions.

[97] Second, in that first cross-examination he disclosed for the first time that money was taken out of the logoparks whilst they were under his control but without providing any detail (see 37-38 above). I agree with Mr Smith that, given that the context of all this is that, on Mr Tyschenko's evidence, he has undertaken a raid on Mr **Ablyazov** and his companies with a view to seizing control of them and, at least on the basis of what he said originally, had put Mr Kriger in control of the logoparks and their bank accounts, it is incredible that he would not know in more detail what payments had been made from the logoparks to his own companies.

[98] This is one of those situations where Mr Machell's submission that Mr Tyschenko is a busy businessman with many interests who cannot be expected to know the detail of what was going on, simply will not wash. Quite apart from the point just made as to the incredibility of his assertion that he does not know what payments were made, the order of Eder J required him to set out to the best of his ability the Relevant Information and to disclose relevant documents. Even if the order did not oblige him to make enquiries of third parties, it seems to me that he could easily have found out what payments had been made from the logoparks bank accounts, to whom and when, during the period when he was in control, from the documents of his own companies, without the need to make enquiries of third parties. In my judgment, his failure to do so was a failure to comply with the order of Eder J.

[99] Third, as noted at 39 above, when Mr Tyschenko was asked about the payments, he said it needed to be checked. However, he has never provided any information subsequently in relation to that matter or, indeed, anything else which he said in cross-examination needed to be checked, notwithstanding that he had three and a half months between the two cross-examinations and has had two and a half months since the second cross-examination to provide information which should be available from companies within his control.

[100] Fourth, as Mr Smith QC put it, there was the striking emergence at the first cross-examination of Elpiem, a company never previously mentioned. At that stage, Mr Tyschenko stated, again in categoric terms, that he had acquired that company in October or November 2013, a matter of weeks before the evidence he was giving. However busy he is, it is inconceivable that only a few weeks after the transaction in question, he did not know whether or not he or his companies had acquired Elpeim, all the more so since at

the time that he was giving evidence in cross-examination, he must have been well aware that the interest of the bank was in any entities concerned with the logoparks or to which money from the logoparks had been transferred, which clearly, on his evidence up to that point, included Elpiem.

[101] Even if this interest had not been clear to Mr Tyschenko at the time of the first cross-examination, it must have been quite apparent when Hogan Lovells wrote on 17 December 2013, complaining about the matters he had failed to deal with in his cross-examination, which included details of the dates and amounts of the payments from the logoparks and the basis for such payments. Mr Tyschenko did not provide any of those details prior to the second cross-examination three and a half months later, notwithstanding that, at least in regard to companies which he had said he owned and/or controlled such as FinanceInvest or Elpeim, that information would have been within his own knowledge or obtainable from his own companies rather than third parties.

[102] Instead of providing that information, in the second cross-examination, he put forward evidence, quoted extensively at 67 above, which was inconsistent with and flatly contradicted the evidence he had given at the first cross-examination. In my judgment, that inconsistency cannot be explained away by suggesting, as Machell QC did in relation to a number of the unsatisfactory aspects of his client's evidence, that he was a busy man and had not had an appropriate opportunity to consider the materials. This is a point in relation to which Mr Tyschenko had more than three months to collate relevant documents and information and, in any event, it is striking that at the second cross-examination, he did not seek to justify the change in his evidence by saying he had previously had insufficient time to collate information and documents. In truth he does not put forward any real reason for the change in his evidence and, when confronted with the change, simply resorts to reference to the shareholders' register. If he had been giving transparent, helpful evidence in the first place, he would have produced entries from that register which, on the basis that he acquired Elpeim, he would have had.

[103] In my judgment, the evidence he gave at the second cross-examination, quoted extensively at 67 above, was flatly inconsistent with the evidence he had given at the first cross-examination. During that second cross-examination, he provided no explanation for that inconsistency, nor is any such explanation advanced in his witness statement of 4 April 2014. In the circumstances (and making every allowance for the fact that I did not personally see Mr Tyschenko being cross-examined) I consider that his evidence at the second cross-examination about Elpeim and related entities is indeed dissembling and evasive. It is not necessary to make any findings as to why he changed his evidence, although the obvious inference is that, once his ex-wife had been released from prison in Moscow, the imperative to help the bank was no longer there and he may have wished to focus more on helping Mr **Ablyazov** or, at least, not harming his interests. What matters is not the motive for the change of evidence but that it took place, about which there can be no doubt.

[104] So far as Eximenergo is concerned, at the first cross-examination the bank put to Mr Tyschenko the bank statement found at the house in Weybridge in execution of the search order. I have already dealt with that at 41 to 48 above. Although Mr Machell QC sought to suggest that it was unfair to draw adverse inferences as to what that bank statement shows, in circumstances where it was put to him for the first time in cross-examination on 13 December 2013, I am unimpressed by that point. Even if one assumes in Mr Tyschenko's favour that he was unaware of the bank statement when he was cross-examined, Mr Tyschenko has now had six months since that bank statement was produced to explain the entries in it and to check the matters he said needed to be checked, such as the relationship between Rogly and the various entities admitted to be **Ablyazov** companies, such as Eastway. He could also have explained why the payments were made to the various **Ablyazov** companies and where the money has gone. He has conspicuously failed to provide any such further information.

[105] To the extent that Mr Tyschenko sought to give evidence as set out at 46 above that no transactions had been entered where money had been transferred to Mr **Ablyazov**, that evidence is untrue. The bank statement demonstrates regular payments to and from **Ablyazov** companies and the attempt to deny it is

evasive. Mr Tyschenko has had ample opportunity since the hearing on 13 December 2013 to provide a legitimate explanation for the payments to and from **Ablyazov** companies, but he has conspicuously failed to do so. It is not necessary to make a finding in this judgment that what was going on was money laundering on behalf of Mr **Ablyazov**, although that is certainly what the bank statement appears to demonstrate. It is sufficient to say that the statement shows Eximenergo being used to transfer substantial funds to companies controlled by Mr **Ablyazov**.

[106] In the circumstances, it seems to me that the criticisms and concerns expressed by Hogan Lovells in the letter of 17 December 2013 (referred to in 48 and 50 above) about the first cross-examination were entirely justified. Mr Tyschenko had conspicuously failed to deal properly with the critical issues raised by the bank, specifically the logoparks and Eximenergo. Contrary to the submission which Mr Machell QC made about Mr Tyschenko not having had the same opportunity as a witness at trial to prepare because he was under no obligation to make enquiries beforehand, he was not entitled simply to turn up to be questioned without any preparation. The *Norwich Pharmacal* order required Mr Tyschenko to set out all Relevant Information within his own knowledge to the best of his ability and to produce the hard copy documents he was reasonably able to collate in the available time, which was six weeks by the time he was cross-examined the first time. Given that he had failed to deal properly and to the best of his ability with the dealings with the logoparks and involving Eximenergo in his affidavits, it was incumbent on him to prepare properly for the cross-examination and to produce relevant documents. In the circumstances, I agree with Mr Smith QC that given the inadequacy of the information Mr Tyschenko provided at the first cross-examination, if he had not agreed to attend for further cross-examination, the court would have ordered such further cross-examination.

[107] The second cross-examination was due to take place on 27 February 2014 but as set out at 61 above, Mr Tyschenko procured an adjournment of that hearing by misleading the court into thinking that his continued presence in the Ukraine was vital. In fact he flew to Kazakhstan, evidently with a view to persuading the bank's chairman to compensate him for his cooperation in handing over assets of Mr **Ablyazov**, the line he had adopted in his letter of 4 February 2014, rather than complying with the court order. Whilst this behaviour and the deliberate misleading of the court is in no sense determinative, it is indicative that Mr Tyschenko's attitude is that he is only prepared to engage with the court process if it suits him or he can perceive a personal advantage.

[108] The second cross-examination eventually took place on 28 March 2014 and was principally concerned with the logoparks. Mr Smith advanced a number of points as to why the information provided by Mr Tyschenko on that occasion was unsatisfactory, with all of which I agree. As already set out at 65 and 102 above, much of his evidence completely contradicted what he had said at the first cross-examination: he now denied having acquired Elpeim at all or having appointed Mr Kriger or knowing how many staff there were or having a physical presence in the logoparks when he was in control, all matters he had asserted positively in December. He even purported not to remember the name of his own Cypriot company, Quelzon, which he had referred to in December. He now claimed that Elpeim was owned by Mr Popov. His evidence in the second cross-examination that Sreda was not his company was completely incredible.

[109] Although he confirmed what he had said in his 22 November affidavit about the assets of Logopark Pyshma having been transferred to Medion, he purported to be unable to recall what assets had been transferred, although this was precisely the sort of matter he had said needed to be checked at the first cross-examination and he well knew that the bank's principal interest was in what had become of assets of Mr **Ablyazov** and his companies. He also purported not to remember what payments were made to Elpeim, even though that was something else he had been asked to check.

[110] In my judgment, his evidence at the second cross-examination was vague and evasive. I accept Mr Smith QC's submission that he had no intention of assisting the bank and the evidence he gave seemed designed to undermine the evidence he had given previously at the first cross-examination. This cannot be explained away on the basis he was under no obligation to make enquiries of third parties. The matters he had asserted at the first cross-examination were evidently within his own knowledge and the complete volte face

simply cannot be excused as lack of knowledge of the matters in question. Equally, as with the first cross-examination, it was incumbent on him to come prepared, having checked the matters he had said needed to be checked and addressed the questions raised by Hogan Lovells in the letter of 17 December 2013. If he had been acting in good faith, intending to assist the bank, that is what he would have done.

[111] Accordingly I have concluded that in relation to critical issues raised by the bank about dealings in the logoparks and involving Eximenergo, Mr Tyschenko has not complied properly with the *Norwich Pharmacal* order and has not engaged in good faith in the disclosure process. That is a material change of circumstances since the order of Eder J of 28 October 2013, which justifies the court in re-exercising the discretion as to who should bear the costs of the *Norwich Pharmacal* process.

*INVOLVEMENT OF MR TYSCHENKO IN MR **ABLYAZOV**'S WRONGDOING.*

[112] As recorded at 82 above, Mr Smith QC accepts that on matters where there is a conflict of evidence, such as the ownership of Valenora and the Rocklane matter involving Mr Terenov, however strong the bank's suspicions, it would not be appropriate for the court to seek to resolve those conflicts at an interlocutory stage and to conclude that those matters demonstrate that Mr Tyschenko is implicated in Mr **Ablyazov**'s wrongdoing. However, there are other matters where, on the material before the court I can be and am satisfied that they demonstrate that Mr Tyschenko is implicated in Mr **Ablyazov**'s wrongdoing. Specifically, the dealings which Mr Tyschenko admits with the US$15 million of Mr **Ablyazov**'s money in January/February 2011 and the related payments into and out of the Eximenergo bank account seem to me to demonstrate clearly that Mr Tyschenko was actively assisting Mr **Ablyazov** to move assets around at a time when Mr **Ablyazov** was subject to the Freezing injunction and Receivership order.

[113] I have already dealt with the detail of these transactions at 41 to 48 above. As I said there, there is very little in Mr Machell QC's point that it would be unfair to reach the conclusion on the basis of the bank statement and his evidence about it at the first cross-examination, that it demonstrated that Mr Tyschenko was actively assisting Mr **Ablyazov** in moving assets around in breach of the freezing injunction, because he had not had a proper opportunity to consider the statement before he was asked questions about it. The fact is that he has now had six months to consider the bank statement and to provide a legitimate explanation for the various transactions if there were one. He has conspicuously failed to provide such an explanation or to provide answers on the matters he said required checking. The position is left on the basis of an unconvincing denial (referred to at 46 above) that he did any transfers to Mr **Ablyazov** which is contradicted by the evidence of transfers to **Ablyazov** companies in the Eximenergo bank statement. The fact that Mr Tyschenko has not provided details or documents to support that denial after the “double-check with my financiers” which he said he needed to do, speaks for itself.

[114] I have made every allowance for the fact that Mr Tyschenko was giving evidence through an interpreter and for the fact that I am being asked by the bank to reach a conclusion of implication in wrongdoing when I did not see Mr Tyschenko give his evidence on either occasion. The answer to that point, however, is that the evidence of Mr Tyschenko having actively assisted Mr **Ablyazov** in moving his assets around, in breach of the freezing injunction and receivership order is really to be found in the Eximenergo bank statement. Mr Tyschenko has had every opportunity in the six months since he was first cross-examined to put forward a legitimate explanation for the transactions with **Ablyazov** companies. He has not done so.

[115] Furthermore, whatever the true position is as regards dealings with the logoparks and other assets such as FinanceInvest, about which Mr Tyschenko has given contradictory and evasive evidence, it is clear that Mr Tyschenko has dealt with assets which were beneficially owned by Mr **Ablyazov**. Indeed that is the whole basis for the *Chabra* freezing injunctions granted against him by Teare J on 23 January 2014 in relation to Tolmachevo, Medion and FinanceInvest and by me on 24 March 2014 in relation to Elpeim and Stockroom. It is striking that, despite the evidence he gave at the second cross-examination, no application has been made to discharge either of those injunctions.

[116] From this material I am satisfied that Mr Tyschenko was implicated in the wrongdoing of Mr **Ablyazov**. Contrary to Mr Machell QC's submissions, it is not necessary for the purpose of exercising the discretion as to costs for the bank to establish that it would succeed in a claim against Mr Tyschenko at trial, which is obviously not something I could decide now. Once the bank can show, as it does by reference to the material I have referred to, that he was actively assisting Mr **Ablyazov** in moving his assets around, he is no longer to be regarded simply as an innocent third party unwittingly caught up in someone else's wrongdoing. That is also a material change of circumstances from the position at the time that Eder J made the original order.

THE APPROPRIATE ORDER

[117] Taking account of both the failure to engage in good faith with the disclosure process under the *Norwich Pharmacal* order and the extent to which Mr Tyschenko actively assisted Mr **Ablyazov** to move his assets around and exercising the discretion in relation to costs anew as the material changes of circumstances entitle me to do, it seems to me the appropriate and just order is as follows. Given that some of the material in his affidavits will be of limited assistance to the bank, I consider Mr Tyschenko should be entitled to recover 25% of the costs of preparing those affidavits. So far as the two days of cross-examination are concerned, it seems to me that he should not be entitled to recover any of his costs or expenses, but on the contrary, that he should pay the bank's costs of the cross-examination exercise. To that extent the bank's application succeeds.

Judgment accordingly.