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Neutral Citation Number: [2014] EWHC 2788 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 08/08/2014

Before :

THE HON. MR JUSTICE POPPLEWELL

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Between :

JSC BTA BANK	**Claimant**
- and -	
MUKHTAR ABLYAZOV and others	**Defendants**
and	
(1) MUKHTAR ABLYAZOV	**Respondents**
(2) SYRYM SHALABAYEV	
(3) CLYDE & CO LLP	
(4) STEPHENSON HARWOOD LLP	
(5) ADDLESHAW GODDARD LLP	

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Stephen Smith QC, Tim Akkouh and Chris Lloyd (instructed by **Hogan Lovells International LLP**) for the Claimant
Charles Béar QC and Giles Robertson (instructed by **Addleshaw Goddard LLP**) for the First Defendant and First Respondent
Alain Choo Choy QC and Anna Boase (instructed by **Clyde & Co LLP**) for the Third Respondent
Jeffrey Gruder QC (instructed by **Stephenson Harwood LLP**) for the Fourth Respondent

Hearing dates: 28, 29, 30 July 2014

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Judgment

The Hon. Mr Justice Popplewell :

Introduction

1. The main application before the Court is that of the Claimant ("the Bank") seeking disclosure from the First and Second Respondents ("Mr Ablyazov" and "Mr Shalabayev") of documents relating to their assets which would attract legal professional privilege unless falling within the iniquity exception to such privilege, and which are currently held by the Third to Fifth Respondents ("Clyde & Co", "Stephenson Harwood" and "Addleshaw Goddard" respectively) as their solicitors or former solicitors.

2. The disclosure sought is of "all documents provided to or produced for or by Clyde & Co LLP, Stephenson Harwood LLP and/or Addleshaw Goddard LLP as remain within their sole or joint control which (in whole or in part) concern or contain information about (i) the current and/or former assets of Messrs Ablyazov and/or Shalabayev and/or (ii) any prospective or actual injunction [in respect of such assets] against Messrs Ablyazov and/or Shalabayev."

3. There are ancillary applications by the Bank for declaratory and preservation relief. There are cross applications by Mr Ablyazov concerning evidence in the Bank's applications.

The Proceedings

4. The proceedings by the Bank against Mr Ablyazov have occupied the Courts in England extensively over the last five years. For present purposes the following summary is sufficient.

5. The Bank is a bank in Kazakhstan, of which Mr Ablyazov was Chairman from May 2005 until early February 2009. On 2 February 2009 the State of Kazakhstan, through a sovereign wealth fund, effectively took control of the Bank when, according to the evidence of the Bank, there was significant concern as to the ability of the Bank to continue as a going concern. Mr Ablyazov was removed from his position and fled to London. The Bank has remained majority owned by the State of Kazakhstan throughout the relevant subsequent period although Mr Ablyazov alleges that a sale to private interests closely associated with the government has recently been agreed.

6. Shortly after nationalisation of the Bank, in early February 2009, Mr Ablyazov and Mr Shalabayev (together with others) instructed Clyde & Co.

7. On 13 August 2009 the Bank commenced these proceedings against Mr Ablyazov and others, claiming that he had misappropriated US$295 million pursuant to a fraudulent scheme. Other proceedings followed in this Court and the Chancery Division. It was alleged that Mr Ablyazov had treated the Bank as if it were his own private source of funds. In all 11 sets of proceedings have been commenced by the Bank against Mr Ablyazov and others for defrauding the Bank of in excess of US$6 billion. Mr Ablyazov denied these claims, alleging that they are an

attempt by the President of Kazakhstan, Nursultan Nazarbayev, to take control of his assets to support a politically motivated campaign designed to eliminate him as a political opponent of the regime. The Bank has obtained judgment against Mr Ablyazov for some US$4.6 billion in four of the actions and judgment for damages to be assessed (estimated at about US$120m) in another. The six further actions are in abeyance. In the Chancery Division claim which has been determined ("the AAA proceedings"), the judgment was given after rejecting Mr Ablyazov's defence on the merits. In the three actions in the Commercial Court judgment was given following Mr Ablyazov being debarred from defending the proceedings by reason of his contempt of court in lying about and concealing his assets pursuant to freezing and disclosure orders, for which he was sentenced by Teare J to 22 months imprisonment. Mr Ablyazov's conduct in concealing and lying about his assets, and dealing with them in breach of freezing orders, lies at the heart of the present application.

8. On 13 August 2009, Blair J granted a worldwide freezing order against Mr Ablyazov limited to assets with a value of £175 million, with the usual provision for disclosure of assets on affidavit. It was subsequently amended from time to time, which amongst other things involved ultimately removing any limit on the value of assets frozen, and was on 23 November 2012 replaced by a post judgment freezing order made by Teare J which was also subsequently amended from time to time. I shall refer to the order as amended from time to time and replaced post judgment simply as "the Freezing Order".

9. Clyde & Co came on the record for Mr Ablyazov who swore his second affidavit dated 27 August 2009 purporting to give the asset disclosure required by the Freezing Order. It listed indirect interests in 25 offshore companies having assets estimated as reaching several billion dollars and two bank accounts. It was not served immediately, but following unsuccessful challenges, it was served on 30 September 2009 under cover of a letter from Clyde & Co correcting what were euphemistically described as "minor inaccuracies", which included reducing the value of three of the companies from "approximately US$250m to US$1.2 billion" each down to US$38,000 in total, deleting two of the companies from the list on the grounds that Mr Ablyazov had no beneficial interest, and identifying five additional companies in which he allegedly held an indirect interest, each of which was said to have an approximate value of US$250m to US$1.2 billion.

10. On 16 October 2009 Teare J ordered Mr Ablyazov to attend for cross examination on his asset disclosure, describing it as "extraordinarily inadequate": see [2009] EWHC 2833 (QB), at [5]. Mr Ablyazov was cross examined over two days on 27 October 2009 and 18 November 2009 in the course of which he told lies about his assets in an attempt to keep them from the Bank's reach. One such lie concerned his previous interest in Eurasia Logistics which owned a valuable storage and distribution park in North Domodedovo near the airport in Moscow, whose value is currently estimated at something between US$300 million and US$700 million. He said he had transferred his 75% interest in Eurasia Logistics to "management" meaning "mostly" Mr Volkov, pursuant to a written agreement in July 2009. When the Bank sought a copy of the agreement, Clyde & Co refused to provide it stating in a letter of 17 November 2009 that the document evidencing the "gift to Mr Volkov" of the 75% interest in Eurasia Logistics would not be provided

because it was not an asset owned by Mr Ablyazov at the date of the Freezing Order. Clyde & Co were retained to advise on the transaction involving transferring the controlling interests, which involved Eurohypo as the lending institution. Documents subsequently obtained show that this occurred in November 2009; that the transaction was expected to close following an opinion letter written by Clyde & Co on 2 December 2009; that the transfer of interests was purportedly effected by a sale to a company called Keppel Land Ltd by Stepan Investments Ltd for $100 million, not a gift; and that the transfer documentation was falsely backdated to 31 July 2009 in order to support the lie told by Mr Ablyazov during cross examination oo his assets. It appears that Clyde & Co acted on behalf of Mr Ablyazov in relation to closing the transaction between March and July 2010, after they had come off the record in these proceedings. It is not suggested that Clyde & Co were aware of the fraudulent backdating, and there was room for uncertainty and confusion as to whether the transaction was itself a breach of the terms of the Freezing Order (which Clyde & Co advised it was not), given its then wording and limit of £175 million. Nevertheless the documents show that Mr Ablyazov's evidence when cross examined was a lie and that Clyde & Co's endorsement of it in their letter of 17 November 2009 was similarly untrue. The Bank places significance on this episode in the context of the present application as an example of documentation in the hands of Clyde & Co relating to Mr Ablyazov's assets which was not brought to the attention of the Bank or the Court at the time. The listing of the documentation scheduled to Clyde & Co's letter of 2 December 2009 suggests that the corporate structure was complex and the volume of documentation very substantial.

11. On 15 December 2009 Clyde & Co wrote on Mr Ablyazov's behalf making further disclosure of particulars relating to the previously disclosed assets. This was put forward as "voluntary" further disclosure, with the statement that no further questions would be answered.

12. On 19 February 2010 the Bank applied for the appointment of receivers over Mr Ablyazov's assets. In February and April 2010 Mr Ablyazov committed breaches of the Freezing Order by granting security in favour of a Russian bank, AMT Bank LLC, over certain loan repayment rights and land in Moscow. Meanwhile in March 2010, Stephenson Harwood replaced Clyde & Co as his solicitors on the record.

13. On 16 April 2010 Stephenson Harwood served Mr Ablyazov's third witness statement in opposition to the making of an order for the appointment of receivers. In it he asserted that he had no intention of doing anything other than abiding by the orders of the court. His counsel characterised this, on the receivership application, as "baring his soul". The witness statement explained that his modus operandi was to hold his assets through offshore companies with an ultimate beneficial owner ("UBO") who was difficult to trace through corporate documentation available to third parties and who would hold the beneficial interest as nominee for him under an oral agreement which would not be recorded in writing. In this way he hoped to put his assets out of reach of the Kazakhstan government, of which he was a political opponent. He identified particular nominees, including a Mr Batyrgerejev. He failed to disclose that, as has

subsequently emerged, one of his main nominees for such purposes was Mr Shalabayev, his brother in law, through whom he held beneficial interests in a very large number of companies whose existence and assets he wished to conceal from the Bank and the Court.

14. Teare J heard the Bank's application for the appointment of receivers over Mr Ablyazov's assets (together with other applications) between 25 May and 7 July 2010. Following the handing down of his judgment in draft, he received further submissions arising from passages in his draft concerning whether Mr Ablyazov had made known to Clyde & Co his interest in certain assets, including Eurasia Tower, described as the equivalent of Canary Wharf in Moscow, and BTA Kazan. There followed an exchange between Mr Flannery of Stephenson Harwood and Dr Connerty of Clyde & Co to which I shall return when considering the scope of Clyde & Co's retainer and the prospect of Clyde & Co holding documents which would be responsive to the order sought on this application.

15. On 16 July 2010 Teare J handed down judgment acceding to the receivership application, and following some delay in hearing argument about the form of the order occasioned by the judge's other professional commitments, Teare J made an order appointing receivers over Mr Ablyazov's disclosed assets on 6 August 2010 ("the Receivership Order").

16. There were further breaches of the Freezing Order by Mr Ablyazov in August 2010 by dealing with the Pakhra Fields land in Russia and in October 2010 by granting security in favour of AMT Bank LLC over shares in ZAO FT-MVB.

17. On 3 November 2010 Henderson J granted a worldwide freezing order against Mr Shalabayev in the AAA proceedings. Shortly thereafter Mr Shalabayev was personally served with it in Cyprus. He immediately went into hiding and failed to comply with his disclosure obligations thereunder. Clyde & Co subsequently acted for Mr Shalabayev in relation to the Bank's application to have him committed to prison for that failure to comply.

18. In December 2010 Mr Ablyazov committed further breaches of the Freezing Order and Receivership Order by dealing with loan rights with a face value of $80 million, and in late 2010/early 2011 he committed a further breach by granting a pledge/mortgage over two pieces of Russian real estate in favour of AMT Bank LLC.

19. In late 2010, the Bank obtained a number of search and disclosure orders which produced documentation demonstrating that Mr Ablyazov had a vast secret network of undisclosed companies and assets, principally administered by Mr Shalabayev. On 26 January 2011, a further 212 companies were added to the scope of the Receivership Order because there were good grounds for believing that they, and therefore any assets they held, were beneficially owned by Mr Ablyazov through his usual modus operandi of a nominee UBO.

20. In February 2011, Mr Ablyazov committed further breaches of the Freezing Order by granting security to the Central Bank of Russia over Sodruzhesto Fund Units and by granting pledges/mortgages over land in Russia in favour of AMT Bank LLC.

21. On 8 April 2011 a further 389 undisclosed companies were added to the Receivership Order because there were good grounds for believing that they and the assets they held were beneficially owned by Mr Ablyazov through his usual modus operandi of a nominee UBO.

22. On 17 May 2011 Briggs J found Mr Shalabayev to be in contempt of court for failure to comply with the disclosure obligations in the freezing order granted by Henderson J. On 27 June 2011 Briggs J sentenced Mr Shalabayev to 18 months imprisonment for the contempt which he described as "wholesale flouting of the court's order".

23. On 6 September 2011 Stephenson Harwood ceased to act for Mr Ablyazov and Addleshaw Goddard came on the record.

24. Between 30 November and 21 December 2012 the Bank's application to commit Mr Ablyazov for contempt of court was heard by Teare J. During the hearing Mr Ablyazov and Mr Shalabayev lied about Mr Ablyazov's assets. At the conclusion of the argument, Teare J reserved judgment relying on a clear and unequivocal undertaking given by Mr Ablyazov that he would attend the handing down of the judgment. On the handing down of the judgment on 16 February 2012 ([2012] EWHC 237 (Comm): "the Committal Judgment") Mr Ablyazov did not attend. He had fled the jurisdiction and gone into hiding. That was itself a breach of the Freezing Order. He nevertheless continued to instruct Addleshaw Goddard, who have actively and vigorously represented him in the litigation, instructing counsel to represent his interests in numerous court applications including that before me.

25. In the Committal Judgment Teare J made the following findings:

    (1) Mr Ablyazov failed to disclose Bubris Investments Limited ("Bubris") in breach of the disclosure obligations contained in the Freezing Order. Bubris was a company used by Mr Ablyazov to perpetrate the frauds complained of in the AAA proceedings: see [84]-[124].

    (2) Mr Ablyazov falsely denied on oath his interests in three English properties, valued at more than £30 million: see [125]-[173].

    (3) Mr Ablyazov falsely denied on oath his ownership of three of the companies to which funds had been transferred in the fraud on the Bank complained of in these proceedings (known as the "Schedule C Companies"): see [174]-[206].

    (4) Mr Ablyazov dealt in December 2010 with three sets of loan rights with a face value exceeding US$80 million in breach of the Freezing Order: see [207]-[235].

    (5) Messrs Ablyazov and Shalabayev gave false and deliberately misleading evidence as to Mr Shalabayev's ownership of a uranium project and a company called Widley Worldwide Inc for the purposes of suggesting that it was Mr Shalabayev and not Mr Ablyazov who owned the English properties and one of the Schedule C Companies: see [79] and [190]-[191].

(6) Mr Ablyazov misled the Court by procuring that trust deeds were backdated to hide Mr Shalabayev's involvement with his assets in 2009: see [79].

(7) Mr Ablyazov was the owner of: (i) Sunstone Ventures Limited, which Mr Ablyazov had untruthfully denied owning ([129]-[132]); (ii) Mega Property Limited, which Mr Ablyazov had untruthfully denied owning ([150], [152]); and (iii) Alterson Limited, which Mr Ablyazov had untruthfully said was in the ownership of a Mr Kossayev ([225]-[226]).

(8) Generally, Mr Ablyazov relied upon backdated and fabricated documentation and suborned the giving of false evidence on a wide-ranging basis: see [54], [79], [92], [95], [115], [116], [137], [146], [192], [204], [226], [227], [228], [229], [230], [233] and [236].

(9) Mr Shalabayev was a person who was "willing to cause to be created documents which contain untruths and are designed to hide the truth. He did not appear to see anything wrong about this practice. It was, as he described it, 'his business'": [64].

26. Mr Ablyazov was sentenced in absentia to three concurrent terms of imprisonment of 22 months at a hearing at which he was, despite his failure to appear in person, represented by leading counsel (who argued for a suspended sentence) instructed by Addleshaw Goddard.

27. On 29 February 2012 Teare J ordered that Mr Ablyazov's defences to the Bank's Commercial Court claims would be struck out unless he (a) gave full and proper disclosure of his assets and (b) surrendered himself to the Tipstaff. He failed to comply.

28. On 2 to 4 July 2012 Mr Ablyazov's appeal against Teare J's committal and unless order was heard. Addleshaw Goddard acted for Mr Ablyazov on the appeal and instructed leading and junior counsel. Judgment was handed down on 6 November 2012, dismissing the appeals ([2012] EWCA Civ 1411: "the Committal Appeal Judgment"). Rix LJ concluded:

> "[106] Mr Ablyazov's contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents.
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> [109] Mr Ablyazov, emboldened perhaps by the wealth at his disposal, which enables him to travel, hide and still instruct lawyers on a prodigious scale, continues to obstruct justice with an attempt at impunity for the consequences of this litigation"

29. Lord Justice Maurice Kay VP said at [202]:

> "It is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr Ablyazov."

30. Meanwhile on 21 September 2012 Teare J gave judgment on two applications seeking relief requiring Mr Ablyazov to take steps to intervene in Russian proceedings to reverse a number of his previous breaches of the Freezing Order ([2012] EWHC 2543 (Comm): "the First Reversal Judgment"). Teare J found that Mr Ablyazov had committed eight breaches of the Freezing Order by dealing with assets. Mr Ablyazov was ordered to use his best endeavours to intervene in Russian enforcement proceedings and inform the Russian court that the pledges were entered into in breach of the Freezing Order (see [61] and [79]). Mr Ablyazov was also ordered to adduce evidence in respect of certain pledges that appear to have been contemplated but where it was unclear whether they had, in fact, been carried into effect (see [72], [73], [75] and [80]). He failed to comply.

31. Teare J also found that Mr Ablyazov was the owner of the following assets which in breach of the Freezing Order he had failed to disclose (see First Reversal Judgment at [76]-[80]):

    (1) CJSC Logopark Pyshma and buildings and plots of land held by the same in Sverdlovsky, Russian Federation.

    (2) CJSC Logopark Kolpino and buildings and plots of land held by the same close to St Petersburg, Russian Federation.

32. On 23 November 2012 Teare J entered judgment against Mr Ablyazov in this and another Commercial Court action.

33. On 18 January 2013 Flaux J made an order on a further reversal application that Mr Ablyazov use his best endeavours to intervene in pledge enforcement proceedings in Russia to inform the Russian Court that the relevant pledges/mortgages were made in breach of the Freezing Order. Mr Ablyazov failed to comply.

34. On 19 March 2013 Teare J gave judgment against Mr Ablyazov in three of the Commercial Court actions.

35. On 5 July 2013 I ordered the Receivers to share non privileged information with the Bank ([2013] EWHC 1979 (Comm)). In declining to permit Mr Ablyazov to be heard on the application as a contemnor I observed:

> "[9]… [Mr Ablyazov] no longer maintains even a pretence, as he once did, of being willing to abide by the orders of the court …….

> [12]….Mr Ablyazov is a persistent and serial contemnor. There is every reason to think that he does not regard himself as bound by the orders of the court and that he will do all he can to avoid the Bank being able to execute its judgments against his assets, not only by direct disobedience to the court's orders, but also by taking any steps that may occur to him to thwart any future orders, or any steps that the Bank may take to enforce the judgment…….
>
> [25][Mr Ablyazov's] desire to make representations on this application is not that of a litigant who seeks to persuade the court to make an order only to the extent that it is fair to him, in order that he may comply with it to that extent. His opposition to the form of order is, I would conclude, advanced despite his intention of ignoring, and indeed seeking to thwart the purpose of, any order which may be made."

36. On 31 July 2013 292 further undisclosed companies were added to the Receivership Order. In addition to the instances mentioned above, there have been a number of further extensions to the Receivership Order adding undisclosed companies within its scope on the grounds that there is good reason to believe that they are beneficially owned by Mr Ablyazov, such that the number of companies now approaches 1,000.

37. The scale and complexity of this web of offshore companies is a hallmark of Mr Ablyazov's modus operandi and a testament to his determination to put and keep his assets beyond the reach of the Bank. His strategy has enjoyed substantial success so far. The Bank estimates the value of the assets disclosed by Mr Ablyazov which it has been able to secure at about US$100 million; and the value of those it has identified as beneficially owned by Mr Ablyazov, which he concealed, as being perhaps US$800 million, of which the major asset is the Eurasia Logistics Park in Moscow which will only be available for execution if and when there is resolved the dispute over the validity of the transfer which the Bank expects to involve hard fought court proceedings.

38. Mr Ablyazov has not been so successful in remaining in hiding. He was discovered in the south of France, and arrested on 31 July 2013 pursuant to an Interpol Red Notice issued at the request of the Government of Ukraine. Extradition requests were made by the Governments of Russia and Ukraine both of which were granted at first instance by a court in Aix en Provence. Mr Ablyazov appealed to the Cour de Cassation, which has quashed the extradition decision and remitted the issue to a court in Lyon for a retrial. Since 28 April 2014 he has been in prison near Lyon awaiting such retrial. Mr Ablyazov is also the subject of live criminal proceedings in Kazakhstan where a trial (in his absence and without being permitted representation) has found that for the purposes of Kazakh criminal procedure he ran an "organised criminal group".

39. Mr Shalabayev's present whereabouts are unknown to the Bank. He did not appear and was not represented before me on the present application.

The Tyschenko proceedings and evidence

40. The discovery of Mr Ablyazov's hideaway in the south of France was the result of the Bank's observations of the movements in England of a Ukrainian-qualified lawyer resident here called Olena Tyschenko, whom they suspected was assisting Mr Ablyazov. It was by following her that Mr Ablyazov's whereabouts were discovered. Proceedings against her and evidence obtained from her are of relevance to the current application.

41. On 14 August 2013 the Bank sought an Anton Piller order for the search of Ms Tyschenko's home in Surrey and an office in London ("the TSO"). The application was made ex parte in the usual way and the TSO contained a provision that its existence should not be revealed, intended primarily to maintain its secrecy from Mr Ablyazov. It was not immediately executed in the absence of Ms Tyschenko, but was executed on 4 September 2013 in her absence. The supervising solicitors were Bates Wells Braithwaite LLP ("BWB"). Meanwhile on about 31 August 2013 Ms Tyschenko was arrested in Moscow and held in a Russian prison on suspicion of criminal offences in connection with Mr Ablyazov's activities. She remained in prison there until 20 December 2013 when she was released without charge.

42. Whilst in prison she was represented by solicitors and counsel at the return date for the TSO before Flaux J on 13 September 2013. Flaux J ordered a process of review by BWB of the documents seized, designed to identify those which were relevant and to address legal professional privilege. Relevant but potentially privileged documents were to be withheld from the Bank, but were to be listed identifying the relevant document and the beneficiary of the potential privilege in sufficient detail to enable the Bank to challenge the privilege if so advised. Other relevant documents to which BWB considered no privilege potentially attached were to be provided to the Bank. By an order of 16 October 2013, Eder J revised the review process to define the potential privilege test to be applied by BWB as one of a good arguable case and without reference to any iniquity exception, which the Bank made clear it was not yet advancing in relation to Ms Tyschenko.

43. On 17 March 2014 Ms Tyschenko swore an affidavit and provided it to the Bank, with whom she was cooperating. In a letter of 17 July 2014 the Bank's solicitors have explained that in return for her assistance, the Bank had agreed to discontinue any civil proceedings currently on foot against her, and not to commence any new civil proceedings against her; not to encourage the commencement of new criminal proceedings in any country, or to encourage the continuation of any criminal proceedings already on foot; and to confirm to the relevant criminal authorities that Ms Tyschenko was cooperating with its recovery efforts.

44. This letter followed Mr Hardman's 68th witness statement dated 8 May 2014, served as reply evidence on the present application, by which he exhibited and relied on:

    (1) Ms Tyschenko's affidavit of 7 March 2014 as showing that Mr Ablyazov had continued in 2012 to seek to arrange his assets through new offshore companies so as to conceal them from the Bank and the Court in breach of the Freezing Order and Receivership Order; and

(2) Material supplied by BWB from the TSO search as evidence supporting further breaches on Mr Ablyazov's part in respect of:

(a) collusion in the Lithuanian divorce between his UBO nominee Mr Batyrgarejev and his wife whereby a substantial number of companies beneficially held for Mr Ablyazov were transferred to Mrs Batyrgarejev as part of the divorce settlement which Mrs Batyrgarejev applied for on 14 February 2012, the day that the Committal Judgment was circulated in draft to Addleshaw Goddard as Mr Ablyazov's solicitors; and

(b) the transfer of assets previously held by seven Russian companies to Belizean companies in breach of the Freezing and Receivership Orders.

45. It was only upon receipt of Mr Hardman's 68th witness statement that Mr Ablyazov and his advisers became aware of the TSO and subsequent proceedings related to it. They have been provided with the transcript of the ex parte hearing before Singh J but not the materials put before him on that application or before Flaux J on the return date, or the reports and statements produced by BWB as supervising solicitors under the TSO. I shall refer to these as the TSO Materials.

46. On behalf of Mr Ablyazov there are applications:

(1) to exclude the evidence emanating from the TSO and Ms Tyschenko relied upon by Mr Hardman in his 68th witness statement;

(2) for disclosure of the TSO Materials;

(3) to cross examine Mr Hardman in order to:

(a) explore the circumstances giving rise to Ms Tyschenko's affidavit for the purposes of supporting the argument for its exclusion from evidence on the Bank's applications on the grounds that there is a real risk that it was obtained in breach of Article 3 of ECHR; and

(b) explore the current information available to the Bank as to Mr Ablyazov's assets.

The Solicitors' retainers

Clyde & Co

47. Clyde & Co were instructed in early February 2009, shortly after the Bank commenced proceedings in Kazakhstan, by Mr Ablyazov, Mr Shalabayev and two other former officers of the Bank, Mr Solodchenko and Mr Zharimbetov (subsequently named as the Second and Third Defendants in these proceedings). They sought advice in relation to civil claims which might be brought against them in the UK and about the possibility of search and seizure orders being granted against them. Litigation privilege is therefore claimed in such communications from the moment of first instruction on their behalf on the grounds that their dominant purpose was contemplated litigation. Clyde & Co continued to represent all four in relation to these proceedings (including Mr Shalabayev, notwithstanding that he was not a named defendant) from their

commencement on 13 August 2009 until the firm came off the record on 1 March 2010.

48. Clyde & Co had a subsequent involvement in proceedings when in late April 2011 Mr Ablyazov contacted Clyde & Co in relation to a search and seizure order made by Henderson J in the AAA proceedings which had revealed some 60 boxes of documents in a Yellow Box storage facility, 14 of which were identified by the supervising solicitors as containing Clyde & Co files. In June and July 2011 Clyde & Co were instructed by Mr Ablyazov and Mr Shalabayev to make applications to obtain copies of the 14 boxes. Their instruction was to act for Mr Ablyazov only in respect of what became known as the "Boxes Issue", which included sifting the material seized for privilege. In due course Addleshaw Goddard were passed this material and took over the privilege sifting task.

49. Clyde & Co acted for Mr Shalabayev also in relation to all aspects of the AAA proceedings from June 2011 onwards until they came off the record in those proceedings on 24 November 2011, in the course of which they acted for Mr Shalabayev in relation to the Bank's application to have him committed to prison for failure to comply with the order requiring him to make asset disclosure.

50. Clyde & Co were also instructed in February 2009 to act on behalf of six companies, namely Drey Associates Limited ("Drey"), GEM Equity Management Limited ("GEM"), KT Asia Investments Group BV ("KT Asia"), Bolot Worldwide Limited ("Bolot"), and Widley Worldwide Inc ("Widley") and a Swiss company which is now dissolved and the identity of which is confidential. All the identified companies are ultimately beneficially owned by Mr Ablyazov and within the scope of the Receivership Order. When Mr Ablyazov formally terminated the retainer in March 2010 there was no formal termination of the retainer of these companies, but Clyde & Co did not actively advise them "or only very occasionally" thereafter. I infer that Clyde & Co were retained on behalf of those companies by and through Mr Ablyazov.

51. Drey was named as a defendant in these proceedings and Clyde & Co represented it for a brief period before it instructed other solicitors.

52. GEM sought advice in relation to ICSID arbitration proceedings against the Kazakh Government from about April 2009 to March 2010. KT Asia sought advice in relation to initiating ICSID arbitration proceedings against the Kazakh Government over the same period.

53. Clyde and Co were also retained to give Mr Ablyazov and Mr Shalabayev corporate advice in relation to the Eurasia Logistics/Eurohypo transactions to which I have referred above between September 2009 and January 2010. Mr Burdett of Clyde & Co says that the firm was also involved in advising Mr Ablyazov on the sale by Keppel to Stepan of 75% of the shares in Eurasia in the period March to July 2010. Those dates appear to be incomplete: the firm's involvement in the advice must have started earlier, given the terms of the letter of 2 December 2009 in which Clyde & Co give an opinion in respect of the proposed transaction which includes sale of the shares by Keppel to Stepan.

54. There is a dispute on the evidence as to whether and to what extent Clyde & Co provided any other corporate advice to Mr Ablyazov and Mr Shalabayev. Mr Burdett, the partner who has made a witness statement for the purposes of this application, summarises the "main instructions" in terms which, as clarified in subsequent correspondence, suggest there were no other corporate advice instructions. On the other hand, when Mr Flannery of Stephenson Harwood received Teare J's draft Receivership judgment stating that it was not denied that Mr Ablyazov had failed to inform Clyde & Co of the sale of his interests in BTA Kazan and Eurasia Tower, and that his failure to mention them was to avoid the Bank's solicitors learning of the sales, Mr Flannery spoke to Mr Ablyazov who said he had told Clyde & Co of these matters. In his First Witness Statement Mr Flannery describes a telephone conversation he then had with Dr Connerty, the relevant partner at Clyde & Co, on 14 July 2010. Dr Connerty is reported as saying that "although he had no specific recollection of discussions concerning the Eurasia Tower or BTA Kazan transactions, he did recall Mr Ablyazov approaching Clyde & Co on numerous occasions from August 2009 in order to discuss possible transactions and whether these could be carried out without breaching the freezing order". Mr Flannery then instigated a search of the files inherited from Clyde & Co for any attendance note mentioning Eurasia Tower or BTA Kazan. What emerged from that search was disclosed in heavily redacted form.

55. I conclude from this evidence that there is at least a good arguable case that Clyde & Co were consulted on a number of occasions in relation to actual or contemplated transactions in addition to Eurohypo/Eurasia Logistics. Mr Flannery's recording of what Dr Connerty said in a witness statement made the very next day is likely to be accurate in the light of its importance. By contrast Mr Burdett explains in his witness statement that he had no contemporaneous involvement prior to the present application and is reliant for his information on others, no single one of whom has an overall picture, and a review of documents which because of the way in which the files are maintained makes it difficult to be dogmatic without considerable further analysis, which has not been undertaken.

Stephenson Harwood

56. Stephenson Harwood were first instructed on behalf of Mr Ablyazov in December 2009 and first came on the record in any proceedings on 15 February 2010. In the interim period they advised Mr Ablyazov alongside Clyde & Co in relation to these proceedings and one of the other Commercial Court claims served on about 29 January 2010. They subsequently represented Mr Ablyazov in seven of the other actions brought by the Bank. They ceased to act for Mr Ablyazov in all the Bank's High Court proceedings in September 2011 although they remained engaged for a short time to assist with the handover of documents to Addleshaw Goddard who took over the conduct of all the proceedings on behalf of Mr Ablyazov. It was during this period that Mr Ablyazov's third witness statement was prepared and served in which it was contended he had "bared his soul" about his assets, in an attempt to resist the making of the Receivership Order.

57. In addition Stephenson Harwood acted for Mr Ablyazov in two arbitrations until 24 February 2012 and 23 March 2012 respectively.

58. Stephenson Harwood also acted for other defendants in three of the actions. In these proceedings and the AAA proceedings they acted for Mr Solodchenko, in these proceedings also for five of the corporate defendants, and in the third action for three corporate defendants. In each case they handed over to Addleshaw Goddard in September 2011. Additionally they acted for Mr Zharimbetov in these proceedings before handing over to Peters and Peters in September 2010. They have never acted for Mr Shalabayev.

59. Stephenson Harwood did not provide Mr Ablyazov with any advice or legal services in relation to corporate transactions.

Addleshaw Goddard

60. Mr Ablyazov first instructed Addleshaw Goddard on 6 September 2011 to represent him in the litigation with the Bank. Their conduct of the litigation on his behalf was in part in relation to his assets, as for example with variations and other applications in relation to the Receivership Order, and in part in relation to aspects of the litigation unconnected with his assets such as disclosure and witness statements in defence of the claims. One significant aspect concerned with his assets was the committal application, in which the concealment of his assets, lying about them, and transferring them in breach of the Freezing and Receivership Orders, formed the basis of the allegations of contempt. Mr Ablyazov has never sought from Addleshaw Goddard, and the firm has never given him, corporate legal advice, nor assistance or advice on the permissibility of dealing with any of his assets before such dealings took place or in anticipation thereof.

61. Addleshaw Goddard acquired material from Clyde & Co in relation to the Boxes Issue and took over the process of sifting that material for privilege.

62. Addleshaw Goddard also acted for other defendants in the litigation with the Bank to the extent inherited from Stephenson Harwood, as described above. They have never acted for Mr Shalabayev.

The Issues

63. The Bank's submissions may be summarised as follows:

    (1) Legal professional privilege, whether legal advice privilege or litigation privilege, does not exist where the advice or litigation is in furtherance of a fraud or crime or similar iniquity. I shall call this the "iniquity exception". Disclosure may be ordered where there is a strong prima facie case that the iniquity exception applies: ***Kuwait Airways Corpn v Iraqi Airways Co (No 6)*** [2005] 1 WLR 2734.

    (2) There is a strong prima facie case that the iniquity exception applies to all the documents held by the solicitors concerning the former or current assets of Mr Ablyazov and Mr Shalabayev. Mr Ablyazov and Mr Shalabayev pursued a strategy, conceived by the time they first instructed Clyde & Co in February 2009, or at the latest when the Freezing Order was made in August 2009, which involved (i) lying to and/or deliberately misleading the Court and the Bank about the extent and nature of the assets of which Mr Ablyazov was the

ultimate beneficial owner, and (ii) dealing with those assets in breach of court orders without informing the Court or the Bank or (after their appointment) the receivers, and (iii) lying to and/or deliberately misleading the Court and the Bank about those dealings, and (iv) otherwise seeking to prejudice the interests of the Bank by putting or seeking to put assets of which Mr Ablyazov was the ultimate beneficial owner beyond its reach. The Bank does not allege, for the purposes of the present application, that the solicitors knew of or were party to any iniquity. The Bank's case is that the solicitors were unwittingly retained and used by Mr Ablyazov and Mr Shalabayev to further their iniquitous strategy which was designed fraudulently to deceive the Bank and the Court by perjury, falsification of documents and wilful defiance of orders of the Court on a vast scale.

(3) Accordingly the Court should order the disclosure sought because the solicitors are likely to hold documents casting light on Mr Ablyazov's and Mr Shalabayev's beneficially owned assets which may assist the Bank in executing its judgments and enforcing the Court's orders against them.

64. The details of the implementation of the strategy upon which the Bank relies, and from which it asks the Court to infer that the solicitors were retained to further the strategy, were set out in a pleading which is annexed as a Schedule to this judgment. I have highlighted some, but not all, of the detail it contains in my summary of the proceedings above. It was not really in issue that the allegations of the widespread concealment of assets, perjury, falsification of documents, and wilful disobedience to court orders set out in the pleading were made good, at least to the interlocutory standard relied on by the Bank of a strong prima facie case.

65. The submissions on behalf of Mr Ablyazov, supported in some respects by submissions on behalf of Stephenson Harwood, may be summarised as follows:

(1) It is not sufficient to prevent privilege attaching that a solicitor is used in the conduct of litigation to advance a case on behalf of his client which the client knows to be untrue and therefore involves perjury, or an attempt to deceive the other party and the court, or to disobey court orders. That is the ordinary run of case in which privilege applies. Although Mr Ablyazov's conduct in this respect may be seen as persistent and involving large sums, there is no principled distinction between his conduct and the ordinary run of case.

(2) The Bank's case involves an impermissibly sweeping approach and fails to establish the necessary requirement that the communication in question must be "in furtherance" of the fraud. In doing so it is inconsistent with both the common law authorities, and the European jurisprudence on Articles 6 and 8 of ECHR. What is required is that the abuse of the privileged occasion itself operates to further the iniquitous purpose. There must be a real causal connection between the particular legal advice/assistance and the wrong being committed. That is not established in this case.

(3) Disclosure should not be granted because Mr Ablyazov invokes the privilege against self incrimination.

(4) Disclosure should not be granted as a matter of discretion, because it is a vast and pointless fishing expedition. The Bank has failed to make out a case that there is any prospect of responsive material of any value in addition to that which the Bank currently holds, alternatively any prospect which justifies the expensive, time consuming and intrusive nature of the search exercise. Moreover the exercise can only be undertaken if paid for by Mr Ablyazov who will not pay; the court will not act in vain. For similar reasons the invasion of Mr Ablyazov's ECHR rights is not necessary or proportionate.

(5) The interests of others must be protected where there is joint privilege or common interest privilege.

66. On behalf of Clyde & Co, Mr Choo Choy QC took a mostly neutral line on disclosure, but made submissions in relation to the practical aspects of an order and the protection of the interests of other parties, as well as the costs involved.

67. Mr Shalabayev was not represented and did not appear before me. The focus of the argument was therefore naturally on the position of Mr Ablyazov and his assets. This was especially so in circumstances where Addleshaw Goddard and Stephenson Harwood did not act for Mr Shalabayev, and Clyde & Co, who did, took a neutral stance on disclosure. Submissions by Mr Béar QC for Mr Ablyazov, instructed by Addleshaw Goddard, and by Mr Gruder QC for Stephenson Harwood, did not touch on Mr Shalabayev's position. For simplicity of exposition I shall refer primarily to the position of Mr Ablyazov and his assets. As will appear, I do not see any reason to draw a distinction between him and Mr Shalabayev, such that what applies to documents relating to Mr Ablyazov's assets in the hands of all three firms applies equally to documents relating to the assets of Mr Shalabayev.

The law

68. The principle invoked by the Bank, sometimes called the "fraud exception", finds its modern origin in ***R v Cox and Railton*** (1884) 14 QBD 153, and was summarised by Longmore LJ in ***Kuwait Airways (No 6)*** at [14] as being that if a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client (or his agent) and the solicitor do not attract legal professional privilege. The principle is not confined to criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice: ***Williams v Quebrada*** [1895] 2 Ch 751, 755; ***Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd*** [1972] Ch 554, 565; ***Barclays Bank v Eustice*** [1995] 1 WLR 1238, 1249; and ***BBGP v Babcock & Brown*** [2011] Ch 296 at [62]. In ***Ventouris v Mountain*** [1991] 1 WLR 607 Bingham LJ used the expression "iniquity", reflecting the language used in early formulations of the principle (see ***Garside v Outram*** (1857) 26 LJ (Ch) 113 per Sir William Page Wood VC and ***R v Cox and Railton*** per Stephen J at 171). I shall refer to it as the iniquity exception.

69. As is well known, there are two classes of legal professional privilege, legal advice privilege and litigation privilege. Although the iniquity principle has most often been invoked in relation to legal advice privilege, ***Kuwait Airways (No 6)***

decides that the iniquity exception is also capable of applying to litigation privilege. Where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing interests in disclosure of the communications: ***R v Derby Magistrates Court Ex p B*** [1996] AC 487; ***Three Rivers DC v Bank of England (No 6)*** [2005] 1 AC 610 at [25].

70. The submissions of Mr Béar take as their point of departure the underlying rationale for the existence of legal professional privilege. Lord Taylor of Gosforth CJ traced the history of the development of the doctrine from its origins in the 16th century in ***R v Derby Magistrates Court ex parte B*** [1996] 1 AC 487 at pp. 504 to 507. At p. 507C-E he concluded:

> "The principle which runs through all these cases and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

71. Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue and which therefore involves a deliberate strategy to mislead the other party and the court, and to commit perjury, as is clear from ***R v Snaresbrook Crown Court Ex p DPP*** [1988] QB 532 and ***R v Central Criminal Court Ex p Francis & Francis*** [1989] AC 346. Longmore LJ referred to these principles in ***Kuwait Airways (No 6)*** at [26] and [27]:

> "[26] In the *Snaresbrook case* [1988] QB 532 it was alleged that the defendant, who was charged with attempting to pervert the course of justice by making a false allegation of assault against the police, must have made a false statement in an application for legal aid made by him for the purpose of bringing his civil action for assault. Section 23 of the Legal Aid Act 1974 made it an offence for anyone seeking legal aid knowingly to make a false statement or representation when furnishing any information required from him. In response to a submission for the Director of Public Prosecutions that the communication with the area office of the Law Society for the purpose of obtaining legal aid was made in furtherance of such a crime, Glidewell LJ said, at pp 537-538:
>
> > "Obviously, not infrequently persons allege that accidents have happened in ways other than the ways in which they in fact happened, or that they were on the correct side of the road when driving while actually they were on the wrong side of the road, and matters of that sort. Again,

> litigants in civil litigation may not be believed when their cases come to trial, but that is not to say that the statements they had made to their solicitors pending the trial, much less the applications which they made if they applied for legal aid, are not subject to legal privilege. The principle to be derived from *R v Cox and Railton* applies in my view to circumstances which do not cover *the ordinary run of cases such as this is*." (Emphasis supplied.)

Glidewell LJ then went on to hold, at p 538, that for the purposes of section 10(2) of the Police and Criminal Evidence Act 1984 it was the holder who had to have the criminal purpose, and that the Law Society was the holder and that the Law Society had no intention of furthering a criminal purpose: "No intention could be further from its thoughts."

[27] This latter reasoning was overruled by the House of Lords in the *Francis case* [1989] AC 346 but Lord Goff of Chieveley went out of his way to approve the first part of Glidewell LJ's reasoning. He said, at p 397:

> "I have to recognise that . . . my conclusion in the present case undermines part of the reasoning of Glidewell LJ [in the *Snaresbrook case*]. But it does not necessarily undermine the conclusion of the Divisional Court in that case. This is because I am inclined to agree with Glidewell LJ that the common law principle of legal professional privilege cannot be excluded, by the exception established in *R v Cox and Railton* 14 QBD 153 in cases where a communication is made by a client to his legal adviser regarding the conduct of his case in criminal or civil proceedings, *merely because* such communication is untrue and would, if acted upon, lead to the commission of the crime of perjury in such proceedings." (Emphasis supplied.)"

72. The Bank relies heavily on the decision in ***Kuwait Airways (No 6)*** as analogous to the current application. That litigation had a tortuous procedural history involving a number of trials and appeals. The disclosure ordered was for the purposes of an imminent trial (the so called Perjury II trial) in which Kuwait Airways was seeking to set aside an earlier judgment on the grounds that findings on which it was based, namely that Iraqi Airways' conduct attracted state immunity from a particular date, had been procured by fraudulently perjured oral evidence and the manufacturing of forged documents and deliberate suppression of genuine documents. Such iniquitous conduct on the part of Iraqi Airways had already been proved in the so called Perjury I trial. David Steel J ordered disclosure of categories of documents (both in the hands of the solicitors, and held internally) relating to the preparations for the oral evidence of six witnesses, and the activity to conceal relevant documents, including those relating to the disclosure process. The Court of Appeal upheld the decision.

73. At [39] Longmore LJ said:

> "… no privilege can exist in communications between Iraqi Airways Co and their previous English solicitors (let alone Iraqi Airways Co's internal documentation) in relation to the tactics of and the evidence given in the main action or in the Perjury I action where the fraud was established."

74. At [40] and [41] he said:

> "40….The present case is far from the ordinary run of cases envisaged by Glidewell LJ and is much more than a mere case where, in the words of Lord Goff, a client gives wrong information to his solicitor which "if acted upon would lead to the commission of perjury". Here there was a widespread conspiracy to deceive the English court which was acted upon and has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale.
>
> 41 If the fraud exception cannot be relied on where there has been a final decision of the court that an earlier decision of the court has been procured by fraud, perjury and a conspiracy to pervert the course of justice, it would be difficult to think of any circumstances where it could he relied on once litigation was contemplated or begun. Once it is established (as I would hold) that the fraud exception can, in law, apply in such circumstances, it would be a travesty if it did not apply in the present case."

75. Mr Béar submits that what is relied on by the Bank against Mr Ablyazov in this case is no more than the ordinary run of case, in the sense used by Glidewell LJ, writ large. The number of perjuries or concealments can form no principled distinction, nor can the sums of money involved. Mr Smith QC submits on behalf of the Bank that wherever the line is to be drawn, Mr Ablyazov's conduct is at least as egregious and iniquitous as that of Iraqi Airways, indeed more so, with the result that it falls on the same side of the line.

76. Where is the line to be drawn between "the ordinary run of cases" in which privilege attaches to communications with a solicitor by a client with a view to advancing a knowingly false case, and the conduct in ***Kuwait Airways (No 6)***? The answer lies, in my view, in a focus on three aspects of legal professional privilege and the iniquity exception. The first is that legal professional privilege attaches to communications between solicitor and client which are confidential. The quality of confidence is a prerequisite to the privilege, because it is the protection of such confidence which forms the bedrock of the rationale for the privilege as essential to the administration of justice. Secondly, communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality. It is this which prevents legal professional privilege attaching to communications for such purpose. Thirdly, the reason that communications in furtherance of iniquity lack the necessary quality of confidentiality is that

communications can only attract the confidence if they are made in the ordinary course of professional engagement of a solicitor. It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service falling within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The "ordinary run of cases" involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case.

77. These three aspects are apparent from the authorities. As to the first, it is a constant theme that it is the necessary confidence between client and lawyer which justifies the privilege: see for example ***Holmes v Baddeley*** (1844) 1 Ph 476, 480-481, per Lord Lyndhurst LC; ***Southwark v Vauxhall Water Co v Quick*** (1873) 3 QBD 315, 317-8 per Cockburn CJ; ***Pearce v Foster*** (1885) 15 QBD 114, 119-120 per Sir Balliol Brett MR; ***Balabel v. Air India*** [1988] Ch. 317; ***R v Derby Magistrates Court*** per Lord Taylor in the passage quoted above. The same concept is contained in the formulation that the interests of justice require that the client should be able to "make a clean breast of it" to the lawyer: see eg ***Anderson v Bank of British Columbia*** (1876) 2 Ch D 644, 649 per Sir George Jessel MR; ***Hobbs v Hobbs and Cousins*** [1960] P 112, 116-7 per Stevenson J. As Mr Béar pointed out, it is the potential "chilling effect" of any uncertainty over whether such confidentiality will subsequently be broken which underpins the common law that privilege is inviolate and cannot be overridden by some competing public interest, even where the balance would require disclosure: see ***Derby Magistrates Court*** per Lord Taylor at p. 508A-C and Lord Nicholls at pp. 511E-512E.

78. The second and third aspect emerge from the cases establishing and developing the iniquity exception. In ***Follett v Jefferyes*** 1 Sim (N.S.) 1 Lord Cranworth V-C said:

> "It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself; for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence, and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor."

79. In ***R v Cox and Railton*** Stephen J, giving the judgment of the Court, identified the principle of legal professional privilege by reference to its expression by Lord Brougham in ***Greenhough v Gaskell*** (1833) 1 My & K 98. Stephen J said at p166:

> "In this case [Greenhough v Gaskill] the rule as to professional communications was laid down in the following words:-
>
> > "If, touching matters that come within the ordinary scope of professional employment, they" (legal advisers) "receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the

> transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."

80. He went on at p167:

> "The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment." A single illustration will make this plain. It is part of the business of a solicitor to draw wills. Suppose a person, personating some one else, instructs a solicitor to draw a will in the name of the supposed testator, executes it in the name of the supposed testator, gives the solicitor his fee, and takes away the will. It would be monstrous to say that the solicitor was employed in the "ordinary scope of professional employment." He in such a case is made an unconscious instrument in the commission of a crime."

81. Having cited the passage from the judgment of Lord Cranworth in ***Follett v Jefferyes*** he went on at p 168:

> "It is true that this is only a dictum, but it shows decisively how Lord Cranworth understood the rule on this subject, and this suggests another observation. In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence does not exist. The solicitor's advice is obtained by a fraud."

82. At page 169 he cited with approval the dictum of Sir William Page Wood V-C in ***Gartside v Outram*** that:

> "The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist".

83. These statements were made in relation to legal advice privilege. But the same theme emerges in cases involving litigation privilege, which illustrate the third aspect I have identified above, namely that it is the absence or abuse of the normal professional relationship which negates the confidence and therefore the privilege.

84. In ***O'Rourke v Darbishire*** [1920] AC 581 Lord Parmoor said at p. 621:

> "The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such a case must be differentiated from a case in which, after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor in his professional capacity, employing him in order to obtain the benefit of his confidential advice and assistance."

85. In ***Chandler v Church*** (1987) 137 NLJ 451 Hoffmann J said:

> ". . . The principle on which the plaintiffs seek disclosure is that laid down in the classic judgment of Stephen J in *R v. Cox and Railton* (1884) 14 QBD 153, namely that privilege does not attach to a communication between a client and his legal adviser "intended to facilitate or to guide the client in the commission of a crime or fraud". This principle applies not only when the legal adviser is party to the crime or fraud but also when he is ignorant of the purpose for which his advice or assistance is being asked. As Stephen J said, in neither case can the client have been consulting his adviser in a confidential professional capacity: "The client must either conspire with his solicitor or deceive him.""

86. In ***Dubai Bank v Galadari (No 6)*** The Times 22 April 1999, Morritt J said:

> "The rationale for the principle, and the decisions cited all pointed to the conclusion that communications in furtherance of a crime or fraud were not protected from disclosure if they were relevant to an issue in the action whether of not the plaintiff's claim was founded on that crime or fraud.
>
> Different considerations might apply to litigation privilege. It was plain from the authorities that litigation privilege was not displaced solely by virtue of the original fraud or crime: see *R v Cox and Railton* (at p 175); *O'Rourke v Darbishire* ([1920] AC 581, 622-3); *R v Snaresbrook Crown Court, ex parte DPP* ([1988] 1 QB 532, 537); and *Francis and Francis* (at p 397).
>
> But none of those cases dealt with the situation where a client, having committed a fraud, sought to further that fraud by stifling it yet further after proceedings were anticipated or commenced by putting forward to his solicitors bogus defences.
>
> The rationale behind the principle that by deceiving his solicitor the client deprived the communication of the necessary element of professional confidence was as applicable to communications after proceedings had been brought as to those which took place before."

87. In ***Dubai Aluminium Co Ltd v Al Alawi*** [1999] 1 WLR 1964, Rix J said at p. 1970A-C:

> "Ultimately, it seems to me that criminal or fraudulent conduct undertaken for the purposes of litigation falls on the same side of the line as advising on or setting up criminal or fraudulent transactions yet to be undertaken, as distinct from the entirely legitimate professional business of advising and assisting clients on their past conduct, however iniquitous. In this connection the extracts that I have cited above from *Reg. v Cox***,** 14 Q.B.D 153, 167, appear to me to lend support to my conclusion. I therefore think that the documents sought in the present case are in principle within the established exception."

88. In ***Trustee of the Estate of Omar (a Bankrupt) v Omar*** [2000] BCC 434 a wife and mistress had conspired, after the death of the husband, to remove money in bank accounts from his estate by taking the bearer shares in the company in whose name the accounts were held. Jacob J cited and applied the passages from ***Chandler v Church*** and ***Dubai Bank v Galadari (No 6)*** quoted above in ordering disclosure of documents used by the mistress's previous lawyers for the advancement of her defence at the trial because she had been using her lawyers, who were innocent of any dishonesty, to advance a fraudulent defence in the course of which she perjured herself.

89. In ***Owners of cargo lately laden on Board the ship "David Agmashenebeli" v Owners of the "David Agmashenebeli"*** [2001] CLC 942, Colman J ordered disclosure of correspondence surrounding a survey report which there was a

strong prima facie case had been procured for the purpose of creating false evidence to be used in litigation. He treated the conduct as within the scope of the iniquity principle as an attempt to concoct untrue evidence.

90. David Steel J said in ***Kuwait Airways (No 6)*** [2005] EWHC 367 (Comm) at [8]:

> "The application of this exception to cases where the privilege claimed is one of litigation privilege is likely to be rare. It will of course not be enough that a solicitor has simply been the conduit of untruthful evidence: see ***R v Central Criminal Court Ex p. Francis*** [1989] AC 346. But it cannot be part of the professional duty of a solicitor to assist in the presentation of a bogus defence particularly with the assistance of manufactured documents and the deliberate suppression of others."

91. The concept of abuse was captured by Cardozo J in the US Supreme Court decision of ***Clark v United States of America*** (1933) 289 US 1 at 15:

> "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."

92. In ***The Attorney General for the Northern Territory of Australia v Kearney*** [1985] HCA 60; (1985) 158 CLR 500, Gibbs CJ said at p. 514

> "The explanation given by Turner V.-C. [in ***Russell v Jackson*** (1851) 9 Ha 387, 392-3] for the principle on which the exception rests, namely that a communication in furtherance of an illegal purpose is not within the ordinary scope of professional employment, was in substance accepted as correct in *Reg. v. Cox and Railton* and is now generally accepted."

Wilson J said at p. 524:

> "The principle may be expressed by saying that, generally speaking, the public interest in the protection of alleged confidential professional communications will not be outweighed by the public interest in ensuring that all relevant evidence is admissible save when the professional relation is abused in a manner involving dishonesty that goes to the heart of the relationship. The presence of such dishonesty is enough to cause the privilege to "take flight", to use the words of Cardozo J. in *Clark v. United States*, because it precludes a true professional relationship from arising: see the remarks of Stephen J. in *Cox and Railton."*

93. I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in

which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the "ordinary run" of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege.

Article 6 and Article 8 ECHR

94. This analysis is not inconsistent with rights under the European Convention on Human Rights and the European jurisprudence in relation to lawyer client privilege. Lawyer client communications potentially engage the right to privacy in correspondence under Article 8. But here, as in domestic jurisprudence, the right attaches because the communication is one involving confidence: see ***Campbell v United Kingdom*** (1993) 15 EHRR 137 at [46]-[48] and ***Michaud v France*** (2013) (application no 12323/11) at [117]-[119]. Where there is an abuse of the relationship (the language used in ***Campbell*** at [48]), interference with Article 8 rights is justified where proportionate.

95. Mr Béar submitted that it would break new ground, going beyond the parameters of current Strasbourg jurisprudence, to allow the Bank's purely economic claim to justify an encroachment on litigation privilege. He went as far as to suggest that the effect of the decisions of the European Court of Justice in ***Ordre des Barreaux Francophones et Germanophones and others v Conseil des Ministres*** Case C-305/05 [2007] All ER (EC) 953 and of the European Court of Human Rights in ***Michaud v France*** was that it could never be a necessary or proportionate interference with a defendant's Article 8 rights to negate litigation privilege. Those cases do not establish any such principle: in neither was litigation privilege in issue. Moreover Mr Béar's submission mischaracterises the interests involved, which are not confined to the economic interests of the Bank. The Bank has important rights not to have its property stolen, and to recover its stolen property or be compensated by an equivalent amount, and these must not be lost sight of: see Rix LJ in ***JSC BTA Bank v Ablyazov (No 8)*** [2013] 1 WLR 1331 at [183]-[186]. But quite apart from the Bank's private rights, there are important public interests in play, namely the administration of justice and the rule of law. It is a fundamental and legitimate aim of a democratic society to see that its judicial process is respected rather than perverted, that its system of justice is rendered effective rather than undermined, and that the orders of its courts are obeyed rather

than thwarted, in civil cases as well as criminal. The rule of law is at the heart of the legitimate aims articulated in Article 8(2) of the ECHR being those of "national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". If a person sets out to abuse the lawyer client relationship in a concerted attempt to pervert the course of justice and thwart the legal process, it is necessary to permit sight of the communications by which he seeks to further that purpose, in pursuit of the legitimate aim of upholding the efficacy of the administration of justice and the rule of law.

96. Mr Béar further submitted that in any event, the speculative benefit from the order sought, and the very high level of intrusion, mean that the test of necessity is not passed. However for reasons I explain below under the heading "discretion", the order sought does carry a real prospect of yielding valuable material to assist in enforcement of the orders of the Court. The interference with Article 8 rights is necessary for this legitimate aim and is proportionate.

97. Privilege in communications with lawyers also potentially engages the right to a fair trial under Article 6, because the European Court of Human Rights has held that the concept of a fair trial consists of various elements which include the rights of the defence, equality of arms, the right of access to the courts, and the right of access to lawyers in civil and criminal proceedings, all of which may be infringed if lawyers are unable to carry out their task of advising, defending and representing their clients satisfactorily as a consequence of the invasion of privilege: see ***Ordre des Barreaux*** at [31]-[32]. But here it seems self evident that Article 6 rights cannot be invoked to protect communications in furtherance of a purpose which is the very opposite of securing a fair trial, namely the perversion of the course of justice by concealment, perjury and the defiance of court orders.

The law applied to the facts

Iniquity

98. The evidence establishes at least a very strong prima facie case that from the moment Mr Ablyazov engaged Clyde & Co he was bent on a strategy of concealment and deceit in relation to his assets which would involve perjury, forgery and contempt as and when such was required for that purpose. He sought advice from Clyde & Co at the outset in relation to civil claims which might be brought against him in the UK and about the possibility of search and seizure orders being granted against him. His subsequent conduct in carrying out the strategy of concealment, forgery and deceit in relation to the assets, and in breaching the Court's orders in dealing with assets in an attempt to conceal and preserve them, gives rise to a strong inference that the advice was sought from the start in order to assist in fashioning and pursuing such strategy. The strategy was pursued throughout the litigation which was, in February 2009, within his contemplation. By the time each of the other two firms was engaged on behalf of Mr Ablyazov the strategy was being pursued with vigour, and it has been relentlessly pursued throughout the period of the engagement of all three firms up to the present day.

99. In relation to such strategy the solicitors were not being employed in the ordinary course of professional engagement. On the contrary, they were being unwittingly used as an instrument to pursue a strategy which, had they known of it, they would have been unable to pursue on their client's behalf. It was an abuse of the normal relationship between solicitor and client to engage the solicitors in order to effect such a strategy, and there can be no confidence in communications between solicitor and client by which a client seeks to further such a strategy whilst trying to keep the solicitor in the dark about it. If the solicitors had connived at it, which is not suggested in this application, it would have involved a conspiracy to pervert the course of justice in which there can be no confidence. The quality of confidence is equally negated by the solicitors being used as the unwitting instrument of Mr Ablyazov in seeking to achieve the same purpose. There is at the least a very strong prima facie case that his strategy in relation to his assets is one which brings relevant communications within the iniquity exception.

100. Although the subsequent conduct of Mr Shalabayev was not as egregious as that of Mr Ablyazov, it was of the same nature and quality, and the same conclusions are justified in relation to his intentions and purposes from the moment he instructed Clyde & Co in early February 2009.

101. One of the points made on behalf of Mr Ablyazov and Stephenson Harwood was that the solicitors were unlikely to hold material casting light on assets which Mr Ablyazov had not disclosed because the solicitors would have been under a professional duty to ensure such assets were disclosed or to come off the record. I address the strength and relevance of the submission in the context of the exercise of discretion below, but the submission itself serves to reinforce the analysis that what was occurring was an abuse of the ordinary relationship of client and solicitor. The solicitors were being deceived to a very substantial extent about aspects of Mr Ablyazov's holdings in, and dealings with, assets, whilst being retained to conduct the litigation under the pretence that what they said on their client's behalf in relation to the assets was complete and true.

Furtherance

102. What are caught by the iniquity exception are relevant communications, not all communications. The submissions on behalf of Mr Ablyazov and Stephenson Harwood that not all the solicitors' activity can be treated in the same way are well founded. The iniquity does not touch, for example, the entirety of the work concerned with the defence of the claims on the merits. The negation of legal professional privilege is confined to communications which can be said to be in furtherance of the iniquitous strategy.

103. These can properly, in my view, include all those within the scope of sub paragraph (i) of the order sought, which limits them essentially to communications concerning or containing information about current and former assets. Anything which was supplied to the solicitors, or passed between solicitor and client, which might cast light on Mr Ablyazov's assets, and his dealings with his assets, can properly be said to arise in furtherance of the abusive engagement of the solicitors to be an instrument of an iniquitous strategy in relation to all the assets.

104. Mr Béar submitted that there is a "disconnect" between the relief sought and the basis for it, in that the relief is not in respect of the false allegations about assets which were deployed through the solicitors in the litigation, but in respect of documents relating to facts which were not deployed, but rather kept secret. Mr Gruder made a similar submission, that when Mr Ablyazov sought to conceal and breach the Court's orders, he did so secretly from Stephenson Harwood; the firm was not involved in furthering that iniquity. This is to draw a false dichotomy between what was to be disclosed by the solicitors and what was not to be disclosed. The iniquity which the solicitors were engaged to further involved concealment and evasion by putting forward a false and partial picture of Mr Ablyazov's assets. That was no less so by reason of any attempt on the part of Mr Ablyazov to keep them in the dark about that which it was intended should be iniquitously withheld. It is a separate question whether the solicitors may hold additional valuable information about current or former assets. But assuming they do so, all communications containing such information were made as a result of the iniquitous strategy of abusing their role as solicitors to put forward a misleadingly false and incomplete picture as to the totality of the assets, supported by concealment, perjury, forgery and contempt.

105. For similar reasons I see no force in the submission by Mr Béar that what Addleshaw Goddard did on behalf of Mr Ablyazov in relation to assets cannot be regarded as uniformly iniquitous because they were at times putting forward true evidence in relation to assets, and updating disclosure and clarifying matters in a way which involved no deception. A similar theme was developed by Mr Gruder on behalf of Stephenson Harwood, to the effect that everything which the firm did was intended to promote compliance rather than secure breach. That does not prevent such communications being part of, and in furtherance of, the iniquitous strategy in relation to his assets as a whole. Telling the truth in part is the furtherance of iniquity if the bigger picture is that such truth is a deliberately incomplete picture put forward as part of a strategy designed to deceive and evade, supported by perjury, forgery and contempt.

106. Sub paragraph (ii) of the order may be drawn too widely. As Mr Béar points out, most of the litigation has in one way or another "concerned" the Freezing Order and Receivership Order. I will hear further argument on the width of (ii) or some redrafted modification of it and the extent to which it properly adds to the scope of sub paragraph (i).

107. One question which was only briefly debated before me was how communications with a dual purpose should be treated. For example communications in relation to the Ablyazov contempt application must be presumed to have been made in part for the purposes of furtherance of the asset preservation and concealment strategy, and in part for the ordinary purpose of defending such an application both on liability and sentence, including the prevention of Mr Ablyazov being imprisoned. The answer lies in the dominant purpose test for the attraction of legal professional privilege (***Waugh v British Railways Board*** [1980] AC 521). It is not, however, as Mr Choo Choy submitted, necessary for the Bank to demonstrate, even to the standard of a prima facie case, that the dominant purpose was the furtherance of the iniquitous asset strategy. Where there are two purposes of equal force, one iniquitous and one a legitimate purpose which would attract legal

professional privilege, no privilege will attach. If a communication has the dual purpose of furtherance of iniquity and the proper conduct of litigation, it will only attract the privilege if the dominant purpose is conduct of litigation independently of any iniquity. If, in the absence of iniquity, privilege does not attach where there are dual purposes because the relevant legal purpose is not the dominant purpose, I do not see how it can do so where the other purpose is iniquity. The relevant question in relation to communications in this case is not, therefore, whether the dominant purpose was the furtherance of the iniquity. It is whether the dominant purpose was the conduct of litigation in accordance with the ordinary professional engagement of a solicitor irrespective of the iniquitous asset concealment and preservation strategy. Where there is a strong prima facie case that this was not so, disclosure may be ordered.

108. In his skeleton argument Mr Béar gave three examples of the solicitors' conduct of the litigation in this case where the dominant purpose was other than iniquity notwithstanding that it involved matters concerning Mr Ablyazov's assets and/or asset injunctions. These were the committal application, the clarification application and the funding application. These were not specifically addressed by the Bank, and I was not taken to the evidence necessary to form a concluded view on the issue of dominant purpose in the limited time available for the hearing. These are aspects which may have to be revisited in the course of working out the order. They are not a bar to the order being made in principle.

109. My conclusion that there is a strong prima facie case of iniquity in relation to the asset strategy is not an end to the question whether disclosure should be ordered. There is a discretion to be exercised, both because the iniquity exception is only determined to an interlocutory standard of proof, albeit a high one, and because the jurisdiction being exercised is the discretionary jurisdiction under section 37 Senior Courts Act 1981. Similar considerations inform the question whether any interference with ECHR rights is proportionate. Before dealing with the arguments on discretion I must address Mr Ablyazov's reliance on the privilege against self-incrimination.

The privilege against self-incrimination

110. The privilege against self-incrimination exists at common law. It is recognised by section 14 of the Civil Evidence Act 1968 which, by statute, confines its application in civil proceedings so as to operate only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law. The section also extends its application to the risk of incrimination of the person's spouse or civil partner. Section 14 refers to the privilege in the following terms:

> "... the right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing, if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty."

111. Section 14 recognises the existence of the privilege, but it does not create the privilege and it is not a statutory definition, although it was described by Lord

Diplock in In re Westinghouse [1978] AC 547, 636 as declaratory. The privilege applies where there are reasonable grounds to believe or apprehend that providing the documents or information in the circumstances in which the privilege is engaged would expose the person to a real risk of prosecution. That is the formulation, essentially, of the Court of Appeal in Sociedade Nacional v Lundqvist [1991] 2 QB 310. Other similar but not identical formulations are to be found in the authorities which are summarised in Matthews and Malek on Disclosure, 4th edition, 2012, at page 410, which says:

> "Whilst it is not for the court to try to assess the probability of the risk of proceedings being taken, the court must be satisfied that 'there is reasonable ground to apprehend danger' to the party claiming privilege, or that the risk is 'reasonably likely' or that 'there must be grounds to apprehend danger to the witness and those grounds be reasonable rather than fanciful', or that there is a 'real and appreciable' risk of prosecution if the documents are produced for inspection. A 'mere possibility' of grounds for charge being disclosed is insufficient."

112. The privilege is equally engaged if the danger facing the person is of proceedings for committal for contempt of court in civil proceedings as it is in relation to proceedings brought in a criminal court.

113. The privilege, properly so called, attaches only where there is a danger in relation to proceedings in part of the United Kingdom. But it is well recognised that where such a danger arises in relation to proceedings abroad, the Court has a discretion to refuse disclosure which may take account of, and protect, the same interests of the disclosing party as give rise to the privilege in domestic proceedings: Brannigan v Davison [1997] AC 238. On the current application, I proceed on the basis that the risk of incrimination in foreign proceedings should be a bar to disclosure to the same extent as would apply in respect of proceedings within the UK (cf R v Khan [2007] EWCA Crim 2331 at [26]).

114. Mr Ablyazov claims the privilege against self incrimination in relation to the entirety of the disclosure sought by reference to four sets of proceedings, namely:

    (1) Further contempt proceedings in the English actions.

    (2) Criminal proceedings by the Russian authorities who have sought his extradition from France pursuant to a criminal investigation.

    (3) Criminal proceedings by the Ukrainian authorities who have sought his extradition from France pursuant to a criminal investigation.

    (4) Criminal proceedings by the Kazakhstan authorities which are already on foot, and which Mr Ablyazov fears may be pursued against him in person following a rendition by Ukraine or Russia in the event of his extradition to either of those countries from France.

115. Mr Smith advances a number of points in answer to the claim to privilege. The first is that the privilege does not attach to the compulsory production of

documents which have an existence independently of the relevant order compelling their production; it is limited to statements or other material which is brought into existence in consequence of the compulsion of the Court. I considered the jurisprudence on this issue at paragraphs [52] to [87] of an extempore judgment I gave in relation to an earlier application in this litigation relating to Gaziz Zharimbetov: [2012] EWHC 2784 (Comm). I concluded:

> "72. In my view, it has been established by the authorities that the privilege against self-incrimination does not extend to provide a person with protection against the risk of incriminating himself by the provision of a document or documents which come into existence independently of any order, statute or other instrument of law which compelled their production. It does not normally cover documents other than those which come into existence by an exercise of will pursuant to a testimonial obligation imposed upon the party. I derive that formulation in particular from the passages I have identified at paragraphs 68 and 69 of **Saunders v United Kingdom** [1998] 1 BCLC 362, (1996) 23 EHRR 313, paragraphs 28, 31, 36, 38, 46, 63 and 64 of **C Plc v P** [2008] Ch 1 paragraph 18 of **R v S (F)** [2009] 1 WLR 1489, and paragraph 53 of **R v Kearns** [2002] 1 WLR 2815, cited with approval by the Court of Appeal in **R v S**."

116. Mr Béar submitted, with his characteristic skill and tact, that this was an erroneous conclusion to draw from the authorities. Having had the benefit of his submissions and an opportunity for further reflection, I remain of the view that although the authorities do not all speak with one voice, their effect is as I endeavoured to summarise.

117. Mr Béar submitted in the alternative that if this was the law, the documents sought would fall within the privilege because they would have been the result of the compulsory disclosure orders made against Mr Ablyazov by the Court. I cannot accept this submission. Insofar as communications relate to assets which Mr Ablyazov chose to disclose, disclosure of the communications cannot engage the privilege against self incrimination, which was not invoked in relation to the disclosure of those assets. Insofar as communications relate to assets which it was part of the iniquitous strategy to conceal, lie about and transfer in breach of the orders, the communications cannot have been the result of the compulsive orders of the Court. What matters is whether the creation of the document which contains or evidences the communication in question was compelled by a relevant order of the Court. It is not sufficient if such an order merely provided the occasion or motive for its creation: see my judgment in the Zharimbetov application at [81]-[86]. If the solicitors hold documents which may cast light on assets which Mr Ablyazov has not disclosed, or may provide further undisclosed information into assets which have been disclosed, they were not brought into existence in response to the compulsive effect of the Court's disclosure orders, but rather as part of a strategy designed to avoid compliance with such orders.

118. That is sufficient to dispose of the claim to privilege against self-incrimination. I can therefore deal briefly with three further alternative answers advanced by the

Bank. The first was that the privilege cannot be claimed where the witness is already at risk of prosecution if the risk is not materially increased by the disclosure ordered: Sociedade Nacional v Lundqvist [1991] 2 QB 310, 324 per Staughton LJ. Thus, where "the rule of law does not operate … and [the person claiming the privilege would], if returned, face arbitrary arrest, a prearranged trial, severe punishment and confiscation of their assets … then their possible disclosure of incriminating material is beside the point: the … state does not need further evidence": JSC BTA Bank v Ablyazov [2010] 1 All ER (Comm) 1029, [40] per Sedley LJ. The Bank argued that the disclosure could not involve a material increase in the risk of foreign prosecution, or of further contempt proceedings, given that it was Mr Ablyazov's case that the Russian and Ukraine extradition proceedings were brought at the behest of Kazakhstan and that Kazakhstan was already pursuing criminal proceedings against him; and that the evidence of Mr Ablyazov's post 2012 contempt is so overwhelming that it is inconceivable that any further disclosure would materially increase the risk of further committal proceedings. I was not persuaded by this submission. There are Russian and Ukrainian criminal investigations which might result in prosecution there rather than Kazakhstan. Moreover I do not regard it as fanciful that documents disclosed pursuant to this application would materially increase the risk of further contempt proceedings. The post 2012 evidence (assuming for these purposes that it would be admitted in evidence despite Mr Ablyazov's challenges to a good deal of it) is not such as will inevitably trigger further contempt proceedings, and even were it to do so, it does not follow that the extent of any further contempt revealed by the disclosure sought on this application would not materially add to the scope or gravity of the allegations in such contempt proceedings.

119. The Bank's second alternative submission was that Mr Ablyazov's position could be sufficiently protected by undertakings, which were offered on its behalf, not to use the material for any further committal proceedings in this country and not to provide it to the prosecuting authorities of any other country, in each case without the further permission of the Court. Had I concluded that Mr Ablyazov had a privilege against self incrimination which required protection, I would have accepted such undertakings as providing adequate protection but subject to the further requirement that disclosure should only be made to the Bank's legal advisers, save with subsequent permission of the Court.

120. The Bank's third alternative submission was that the privilege was negated by s. 13(1) of the Fraud Act which removes it where the offence concerned is for "any form of fraudulent conduct or purpose" (see s.13(4)). Mr Béar argued that civil contempt was not "an offence" and that in any event to come within the definition, fraud must be a necessary ingredient of the offence, which it was not in civil contempt. I do not need to express a conclusion on this point.

Discretion

121. There is no doubt that providing the disclosure sought would be a very complex and therefore lengthy and expensive exercise for each of the three firms of solicitors. The practical reality is that what would be required is a search through very large quantities of often unorganised material held by three firms as the result of 5 years of litigation which has been conducted on all sides by means of the

forensic equivalent of trench warfare. The paperwork produced is correspondingly large. Clyde & Co hold 73,337 electronic documents and 182 boxes of paper files; for Stephenson Harwood the figure is potentially over 1 million electronic documents and 580 boxes (with an estimate of 1,000 pages per box); Addleshaw Goddard hold over 500,000 emails, over 40GB of other electronic data, and at least 2,649 paper files. None of the solicitors' files are organised in a way that permits easy retrieval of all documents relating to assets and asset injunctions. At Addleshaw Goddard the documents are split across "matter numbers" and individual mailboxes; at Clyde & Co material is also held by 'matter number'; and Stephenson Harwood hold large quantities of material, some spread across individual computers. All the solicitors (bar Mr Hardman for the Bank) state their view that keyword searches are impractical, both because of the complex issues of ownership and multiple privilege in the documents, and for the more essential reason that if the Bank wants to find undisclosed assets then ex hypothesi it cannot know what keywords to search for. In this respect, the solicitors, who as the Bank admits do not know of any undisclosed assets, are in no better practical position than the Bank. Search words are therefore likely to be practical only insofar as the Bank hopes to recover further information about disclosed or known assets as an aid to execution. The Bank has not provided any suggested search list. Although it is impossible to predict the cost with any accuracy in advance of undertaking the exercise, the combined estimates of the solicitors at this stage suggest that £2.5 million may not be unrealistic. On any view it will be a complex and substantial exercise lasting many months.

122. It is submitted on behalf of Mr Ablyazov and Stephenson Harwood that the prospect of there being any material of any significant probative value thrown up by this exercise is negligible, and in any event insufficient to justify the order being made. It is emphasised that the strategy alleged by the Bank was to use the solicitors unwittingly, and that that therefore must have involved concealing from the solicitors assets which it was intended should not be disclosed to the Bank or the Court.

123. Nevertheless there is in my view a real prospect of material being disclosed in response to the order which makes the complex and expensive exercise involved proportionate. A number of points lead to that conclusion.

124. First, what the Bank seeks is not only material which relates to assets of which it has no knowledge, but additionally information in relation to known assets which may assist in enforcement. The huge numbers of offshore companies involved, and the regular dealing with assets in breach of the Freezing and Receivership Orders, make this an exercise in which snippets of information need to be amassed as part of a jigsaw which the Bank has been endeavouring to piece together. It is realistic to suppose that Mr Ablyazov or Mr Shalabayev would have included in a communication with their solicitors greater information in relation to a disclosed asset than the Bank currently holds, which would assist the Bank in enforcement, either because it casts light on company structures and underlying assets which Mr Ablyazov retains, or because it assists in tracing assets into new structures. In either case the information may well assist the Bank in enforcement as part of its investigative exercise.

125. Secondly, given the vast web of companies used by Mr Ablyazov, it is not fanciful to suppose that despite the strategy being to use the solicitors to conceal assets, there will be references in communications with them to assets which were not disclosed. The Eurohypo documentation held by Clyde & Co provides an example of exactly such an occurrence. It is no answer to say that if the solicitors had been aware of undisclosed assets they would have been under a professional duty to ensure their disclosure. In relation to any company or asset which Mr Ablyazov mentioned but claimed was unrelated to assets beneficially owned by him, it was not the duty of the solicitors to undertake an investigative exercise of the kind which the Bank is currently having to undertake. The history of disclosure in this litigation, and of the Bank's subsequent investigations, with the assistance of the receivers, demonstrates that if an asset was mentioned to the solicitors, and Mr Ablyazov asked about it, the answer may well have satisfied the solicitors on what they then knew that they were not bound to disclose it as beneficially owned by Mr Ablyazov, in circumstances where in the light of what the Bank now knows the information may point toward his beneficial ownership and may be of assistance in enforcement of the Bank's judgments.

126. Thirdly, for reasons I have explained, there is a good arguable case that Dr Connerty's attributed statement reflects the truth and therefore that Mr Ablyazov approached Clyde & Co on a number of occasions from August 2009 in order to discuss possible transactions and whether these could be carried out without breaching the Freezing Order. A reasonable inference to draw from the place in which the disclosed part of the attendance note sits amongst the redactions is that the redacted parts may well include reference to other assets.

127. Fourthly, the 14 Clyde & Co boxes of documents found in the Yellow Box Storage included a number of charts and diagrams which may cast new light on Mr Ablyazov's assets despite privilege having been claimed in them.

128. Fifthly, Addleshaw Goddard acted for Mr Ablyazov in relation to the two Reversal applications by which Mr Ablyazov claimed that he had not been dealing with assets in breach of the Freezing and Receivership Orders but which Teare J held had been a breach. Teare J and Flaux J ordered disclosure in relation to those transactions but there has been no compliance. Addleshaw Goddard may well hold documents which would respond to such disclosure order.

129. Sixthly, Addleshaw Goddard are currently being funded to conduct the litigation by a company (Green Life International SA) which Christopher Clarke J has held there is good reason to believe may be beneficially owned by Mr Ablyazov. That must have involved some investigation by Addleshaw Goddard of the company and the source of the funding under the regulatory requirements, and in order to satisfy themselves that there was no breach of the Freezing Order. The results may well be of assistance to the Bank.

130. Seventhly, the scale and expense of the exercise must be judged against the scale of the litigation and the sums at stake. The Bank has unenforced judgments for over US$4 billion. Mr Ablyazov has fought tooth and nail to conceal his assets, by foul means rather than fair. If, as the Respondents contend, the exercise involves looking for a needle in a haystack, it is nevertheless a potentially very valuable needle. Given the sums of money which the Bank allege Mr Ablyazov

stole from it in the first place, and the value of some of the assets already identified, a single company or single asset may be worth tens or hundreds of millions of dollars.

131. I have not overlooked the Respondents' submissions that the Bank's failure to particularise its current state of knowledge about Mr Ablyazov's assets undermines the ability of the Court to reach a conclusion in its favour on the value or proportionality of the exercise, especially since the Bank has recently received a very large number of documents pursuant to the TSO and Ms Tyschenko's cooperation, which it is argued may be presumed to contain much more valuable and up to date information about Mr Ablyazov's assets than any stale information residing in the solicitors' files. This exaggerates the scope of the Tyschenko material, because her involvement was not in relation to all Mr Ablyazov's assets. But it does not in any event invalidate the conclusions I have reached. It is reasonable for the Bank to decline to tell Mr Ablyazov everything it currently knows about his assets in the light of Mr Ablyazov's iniquitous strategy to defeat the Bank's ability to reach his assets. The Bank's declinature to do so does not prevent the Court from undertaking an evaluation of the potential benefit of making such an order, which is in part aimed at what Mr Rumsfeld would have called "unknown unknowns".

132. It is recognised by the Bank that the cost should not be borne by the solicitors. The Bank is currently unwilling to fund the exercise itself. Accordingly any order the Court makes will depend for its implementation on funding by Mr Ablyazov. It has been made clear on his behalf that he has no intention of funding it, and he continues to maintain that he has no undisclosed assets with which he has the ability to do so. This led to a submission that no order should be made because the Court will not act in vain. I reject this as a ground for declining to make an order required by the interests of justice. The Court makes orders on the basis that they are to be obeyed, and it would require exceptional circumstances for a respondent to be able to resist an order by saying that because he will not obey the order, it should not be made in the first place. But in any event, Mr Ablyazov's current stance of refusing to fund the exercise required by an order does not render it futile. It is not impossible to conceive of circumstances in which Mr Ablyazov might in the future be forced to change his mind, or of circumstances in which the Bank's asset enforcement might lead the Bank itself to fund the exercise.

133. Accordingly the Bank's disclosure application succeeds.

Joint and common interest privilege

134. It is accepted on behalf of the Bank that there may be documents held by the solicitors in which there exists joint privilege between Mr Ablyazov (or Mr Shalabayev) and natural persons independent of Mr Ablyazov, such as Mr Solodchenko and Mr Zharimbetov; and that such privilege must be protected because it is unaffected by Mr Ablyazov's iniquity. The same applies where there is common interest privilege arising out of communications with other parties to the litigation. This is a matter for the practical implementation of any order rather than a ground for not making it.

135. The argument before me touched upon the position of companies which were beneficially owned by Mr Ablyazov. Mr Choo Choy argued that the mere fact of common beneficial ownership did not destroy the separate corporate personality of such companies so as to allow piercing of the corporate veil. That submission is well founded. The relevant question is whether the companies were guilty of the iniquity which would prevent their legal professional privilege attaching to communications in which they had a joint interest with Mr Ablyazov. My conclusion is that there is a strong prima facie case that they were, because it appears that there was no one other than Mr Ablyazov who was ultimately responsible for instructing the solicitors on their behalf and it is to be inferred that in doing so his intention was that which informed his iniquitous strategy, so that his state of mind is to be attributed to the companies. This conclusion is reinforced by the circumstances described in paragraph 3(vii) of Dr Connerty's 7th witness statement that all of the corporate clients had come to the firm through Mr Ablyazov and that it was to his representatives that all the 60 boxes were redelivered by Clyde & Co in July 2010.

Declaratory Relief

136. In addition, the Bank seeks a declaration that there is no legal professional privilege in the material which is the subject matter of the disclosure application. It is submitted that this would be of value in relation to third parties who were not party to the present application, in particular to BWB in their review of privilege attaching to the material seized under the TSO, and to the Receivers. It seemed to me wrong in principle for the Court to grant a final declaration of rights in unqualified terms when it was being invited to address the iniquity exception by reference to the interlocutory standard of a strong prima facie case, albeit that that is sufficient to require disclosure now. Accordingly a declaration would have to be framed in terms of a strong prima facie case having been established. I doubt whether such a declaration would serve a useful purpose. That proof to such an interlocutory standard is sufficient to require disclosure will be apparent from this judgment and the order for disclosure against the solicitors. I would therefore decline to grant a declaration as presently advised.

Preservation Order

137. There was considerable argument addressed to me on whether the Preservation Order should have been applied for ex parte, whether there was non disclosure, and whether it was appropriate relief to have sought in any event against reputable solicitors. Whilst defending the Bank's actions, Mr Smith accepted that if and when a disclosure order was made by the Court, it would not be necessary to have any preservation order against the solicitors and he did not pursue his application in that event. Accordingly I make no such order.

The evidence applications

138. I have reached the conclusions set out above irrespective of the evidence contained in Ms Tyschenko's affidavit or its exhibit, and of the material obtained from the TSO, whose admissibility is in dispute. The admissibility issues do not therefore affect the outcome of the Bank's application.

139. In relation to the admissibility issues:

(1) I express no conclusion on the argument that Ms Tyschenko's affidavit and exhibit should be excluded from evidence on the grounds that there is a real risk that it was obtained in breach of Article 3 of ECHR. It has played no part in my conclusions on the Bank's applications.

(2) I reject the application to exclude the evidence obtained as a result of the TSO. Mr Béar's argument, in summary, was that the way in which the TSO was granted and implemented, without the knowledge or involvement of Mr Ablyazov and without Ms Tyschenko being present when it was executed, was inadequate to protect his privilege in documents seized, and was therefore such a clear violation of common law standards and his Article 6 and Article 8 rights that it would be unfair to allow reliance on evidence acquired by the Bank in response to the TSO. There is force in the submission that BWB were not as well placed as Addleshaw Goddard to form a judgment on privilege questions. Nevertheless there were obviously good reasons for seeking to keep the order secret from Mr Ablyazov if it was to serve its purpose of assisting in tracing further assets and assisting the Bank in enforcing the Court's judgments, given Mr Ablyazov's strategy of taking every step he could to thwart that purpose. With the possible exception of one document (dealt with in Mr Leedham's 8th witness statement), upon which I have not placed any reliance, there is no reason to believe that any of the documentation relied upon by the Bank in this application has been the subject of an erroneous assessment of privilege by BWB. Mr Béar sought to suggest that the Bank had knowingly received responsive material from BWB which could only properly have been provided if an iniquity exception had been applied, which the Bank had made clear it was not seeking to apply to the TSO responsive material at this stage. The criticism is unfounded. It was for BWB to identify whether privilege potentially attached, and the role played by Ms Tyschenko is not such as to render it obvious that she was acting in a legal capacity or that legal professional privilege attaches to communications which were disclosed by BWB upon which the Bank relies. The Bank was entitled to deploy in evidence the material received from the TSO in accordance with the privilege regime put in place by the orders of Flaux J and Eder J, which was a reasonable and proportionate way of protecting Mr Ablyazov's Article 6 and Article 8 rights consistently with the protection of those of the Bank and the necessary public interest in maintaining the rule of law.

140. The material obtained as a result of the TSO serves to reinforce the conclusions set out earlier in this judgment, although I reach those conclusions irrespective of it.

141. I heard argument on the first morning of the hearing on the application by Mr Béar, pursuant to CPR rule 32.7, for Mr Hardman to be cross examined on his 68th witness statement on two issues. The first was as to the circumstances in which Ms Tyschenko had come to cooperate with the Bank and make the affidavit upon which Mr Hardman relied, with a view to supporting the submission that it had been procured in breach of Article 3 of the ECHR and/or that little weight should be attached to it. The second was as to the information currently held by the Bank as to Mr Ablyazov's assets so as to support the submission that disclosure was not necessary or proportionate or in the interests of justice.

142. I rejected the application on the grounds that such cross examination was neither necessary nor appropriate in order for me to determine the present applications. Cross examination will only exceptionally be appropriate upon an interlocutory application such as the present, and the Court is often faced with having to determine such applications on the basis of contested witness evidence, or where the witness evidence is less full or complete than might be the case if investigated by oral testimony elucidated by cross examination. I have reached the conclusions which have been dispositive of the present applications without reference to Ms Tyschenko's affidavit, and on the basis that the Bank's reasonable refusal to particularise its current state of knowledge does not prevent the Court from undertaking an evaluation of the potential benefit of making such an order or assessing its proportionality.

143. Mr Ablyazov's application for the Tyschenko Materials was also advanced at the beginning of the hearing for the purposes of the present application. Disclosure was said to be necessary in order to enable the Court to assess whether the TSO was a proportionate interference with Mr Ablyazov's rights, for the purposes of deciding upon the admissibility of material responsive to the TSO. Again my conclusion was that disclosure was not necessary or appropriate in order to enable me to determine the Bank's disclosure application. The admissibility of the material which the Bank obtained as a result of the TSO could properly be considered without the unusual course of ordering disclosure on an interlocutory application; and in any event my conclusions have been reached irrespective of the admissibility of that evidence.

144. The evidence of Professor Bowring, which I read de bene esse, was admissible in support of Mr Béar's argument in reliance on Article 3 ECHR concerning Ms Tyschenko's affidavit, but ultimately irrelevant in the light of the fact that I did not find it necessary to determine that issue in order to dispose of the Bank's applications.

Conclusion

145. The Bank's application succeeds to the extent set out above. I will hear argument on the terms of the Order.

SCHEDULE: THE BANK'S PLEADING

*This document is served by JSC BTA Bank (the "**Bank**") pursuant to the Order made herein dated 30.1.14*

(i) The allegations of fraud (iniquity) upon which the Bank relies

1. Messrs Mukhtar Ablyazov and Syrym Shalabayev pursued a strategy of (i) lying to and/or deliberately misleading the Court and the Bank about the extent and nature of the assets of which Mr Ablyazov was the ultimate beneficial owner, and (ii) dealing with those assets in breach of court order without informing the Court or the Bank or (after their appointment) the receivers, and (iii) lying to and/or deliberately misleading the Court and the Bank about those dealings, and (iv) otherwise seeking to prejudice the interests of the Bank by putting or

seeking to put assets of which Mr Ablyazov was the ultimate beneficial owner beyond its reach (the "**Strategy**").

2. The Strategy, which was developed (at the latest) in or about February 2009 (when Mr Ablyazov fled to this jurisdiction from Kazakhstan), began to be implemented thereafter and was (at the latest) being implemented immediately following the Bank's commencement of proceedings against Mr Ablyazov in England on 13 August 2009. The overall purpose of the Strategy was to enable Mr Ablyazov to avoid and/or delay and/or frustrate the enforcement of any judgment to which the Bank might be entitled against him.

3. The Bank relies upon the matters set out in the Schedule hereto to evidence the said Strategy.

(ii) How the fraud (iniquity) was furthered by the use of or consultation with each of the solicitors

4. Clyde & Co LLP ("**Clyde & Co**") were first retained by Messrs Ablyazov and Shalabayev in about February 2009. Shortly after the Bank commenced its first set of proceedings in August 2009 (Claim number 2009 Folio 1099, the "**Drey Proceedings**"), Clyde & Co served a notice of acting on behalf of Mr Ablyazov. Clyde & Co remained on the record for him in the Drey Proceedings until 1 March 2010. Clyde & Co continued to act for Messrs Ablyazov and Shalabayev from time to time, in particular in connection with proceedings instituted by the Bank in the Chancery Division under claim number HC10C02462 until Master Teverson made an order that Clyde & Co had ceased to act for them on 24 November 2011 (the "**AAA Proceedings**").

5. Stephenson Harwood LLP ("**Stephenson Harwood**") were first retained by Mr Ablyazov in about late February 2010 and served a notice of acting on his behalf in the Drey Proceedings on 1 March 2010. Stephenson Harwood also acted for Mr Ablyazov in the other proceedings commenced by the Bank against him. Stephenson Harwood continued to act for Mr Ablyazov until Addleshaw Goddard LLP ("**Addleshaw Goddard**") served a notice of change of solicitor on 6 September 2011. Addleshaw Goddard thereafter acted for Mr Ablyazov in the Drey Proceedings and the other proceedings instituted against him by the Bank.

6. The iniquity as alleged in paragraph 1 was furthered by the use of the solicitors because it was through the solicitors that Mukhtar Ablyazov and Syrym Shalabayev:

   (a) corresponded with the Bank and third parties, which correspondence was premised upon and/or made reference to their untruthful and/or deliberately misleading instructions and/or evidence;

   (b) provided false, backdated or concocted documents to the Bank and/or the Court;

   (c) prepared and submitted evidence to the Court, which evidence (where it was given by Messrs Ablyazov and/or Shalabayev) was untruthful and/or deliberately misleading and/or (where it was given by others) had been suborned by Messrs Ablyazov and/or Shalabayev and was untruthful and/or deliberately misleading and/or (in either case) relied on the documents referred to in (b);

   (d) instructed counsel to make written and oral submissions to the Court, which submissions relied on correspondence sent on their instructions and/or false documentation and/or untruthful and/or deliberately misleading evidence (as described in (a) – (c) above); and

   (e) were provided with legal services in relation to corporate transactions which were intended by Messrs Ablyazov and/or Shalabayev to put assets of which Mr Ablyazov was the ultimate beneficial owner beyond the reach of the Bank.

7. Details of the use made by Messrs Ablyazov and Shalabayev of each firm of solicitors are contained in the Schedule hereto.

8. The Bank is presently unable to give particulars of the furtherance of the fraud by the consultation with the solicitors because it does not know when such consultations took place or what transpired at them. Without prejudice thereto, the Bank avers that Mukhtar Ablyazov and/or Syrym Shalabayev consulted with the solicitors from time to time:

    a. seeking advice which they intended to use for the purposes of putting or seeking to put assets beyond the Bank's reach; and/or

    b. about whether particular dealings in assets were permitted or not permitted by the Court's orders. It is to be inferred from the matters set out in the Schedule hereto that on those occasions they lied and/or gave deliberately misleading instructions to the solicitors about their connections with those assets.

9. For the avoidance of doubt, the Bank does not on this application by the references to the actions of any of the solicitors or counsel in the Schedule, allege that any solicitor or counsel was complicit in the wrongdoing of Messrs Ablyazov and/or Shalabayev or were aware that by their actions they were facilitating such wrongdoing.

(iii) The injunctions referred to in paragraph 1(a)(ii) of the draft order sought in the Disclosure Application and the nature of the Claimant's case with regard to prospective injunctions

Injunctions

10. The injunctions referred to in paragraph 1(a)(ii) of the Bank's proposed draft order are:

    a. The freezing order (and the injunctions contained therein, including in relation to the disclosure of information and documents concerning assets) first made by Mr Justice Blair on 13 August 2009, as amended or restated from time to time and as continued post-judgment by Mr Justice Teare on 23 November 2012 (the "**Freezing Order**").

    b. The receivership order (and the injunctions contained therein, including in relation to the disclosure of information and documents concerning assets) first made by Mr Justice Teare on 6 August 2010, as amended or restated from time to time thereafter (the "**Receivership Order**").

    c. The search order made by Mr Justice Henderson in the AAA Proceedings on 3 February 2011.

    d. The injunctions granted against Mr Ablyazov by Mr Justice Teare on 29 February 2012.

    e. The reversal orders (and the injunctions contained therein) made by Mr Justice Teare on 21 September 2012 and Mr Justice Flaux on 18 January 2013.

Prospective injunctions

11. As set out above, the Strategy was developed by (at the latest) about February 2009. At about that time, Messrs Ablyazov and Shalabayev consulted Clyde & Co as to freezing, receivership, search and/or disclosure orders which might be made against them, their assets and/or documents relating to their assets. Such advice was sought and (it is to be inferred from the matters set out in the Schedule hereto) acted upon for the purpose of avoiding and/or delaying and/or frustrating the enforcement of any judgment which the Bank might obtain against Mr Ablyazov.

SCHEDULE

30 September 2009

1. Mr Ablyazov purported to give asset disclosure pursuant to the Freezing Order. That disclosure was contained in an affidavit made by Mr Ablyazov which was filed and (it is to be inferred) drafted by or with the assistance of Clyde & Co. Mr Ablyazov deposed that he had spent *"many days sitting down"* with Clyde & Co in order to provide information and documents as to the location, nature and value of all of his worldwide assets: see Hardman, §67.[1] When Clyde & Co served the affidavit on 30 September 2009, they said that it had been prepared to the best of Mr Ablyazov's ability after making all reasonable enquiries.

2. The disclosure affidavit contained untruths and/or was deliberately misleading in that it (a) failed to disclose a large number of Mr Ablyazov's assets and (b) failed to provide information and documents as to the location, nature and value of the assets which it did disclose. For the purposes of this application, the Bank relies on the following matters:

    a. The disclosure was described by Teare J, on 16 October 2009, as *"extraordinarily inadequate"*: see [2009] EWHC 2833 (QB), at [5].

    b. By his judgment dated 16 July 2010 ([2010] EWHC 1779 (Comm), the "**Receivership Judgment**"), Teare J held that Mr Ablyazov should have disclosed (as a minimum) the identity of the trustee at the top of his asset-holding structures and the nature of the asset at the bottom of each structure, and that there were *"substantial grounds to believe"* that these matters were not set out because *"Mr Ablyazov wished to make enforcement of the Freezing Order difficult"*: [76]-[85].

    c. The affidavit did not disclose the numerous assets which have now been found to the criminal or civil standard to belong to Mr Ablyazov: see below.

    d. The affidavit did not disclose the c. 1000 companies which have now been added to the receivership (on the basis that the Bank has persuaded the Court that there is good reason to believe that they belong to Mr Ablyazov): see Hardman, §§46-49, [2013] 1 WLR 1331 (the "**Committal Appeal Judgment**"), [58], [85], [176], and below.

October - November 2009

3. In early October 2009, the Bank applied for Mr Ablyazov to be cross-examined as to his asset disclosure. Clyde & Co acted for Mr Ablyazov on that application and instructed counsel who submitted that Mr Ablyazov had complied with the disclosure obligations contained in the Freezing Order and that there was no requirement for him to take any further steps: see [2009] EWHC 2833 (QB), [4].
4. Mr Ablyazov was ordered to attend to be cross-examined. Clyde & Co acted for Mr Ablyazov at the hearing of the cross-examination, attended court and instructed leading and junior counsel on his behalf. For the purposes of this application, the Bank relies on the following false and/or deliberately misleading evidence given by Mr Ablyazov when cross-examined on oath:

    a. Mr Ablyazov denied that he owned any real estate anywhere in the world. He instead said that he was the tenant of the mansion on the Bishop's Avenue known as Carlton House. It was later established to the criminal standard that he was the ultimate owner of three properties located in or around London: Carlton House (worth c. £15 million), Oaklands Park (worth c. £20 million) and Alberts Court (worth c. £1 million); that the tenancy agreement he said he had entered into in respect of Carlton House was a sham; and that this perjured evidence was given with the intention of interfering with the administration of justice: see [2012] EWHC 237 (Comm) (the "**Committal Judgment**"), at [125] to [173], and Hardman, §34.

[1] References to Hardman are to the sixty-third witness statement of Christopher George Hardman dated 12 December 2013.

b. Mr Ablyazov denied that he retained any interest in the Eurasia Logistics group of companies, and instead asserted that he had given away his interest in these companies in July 2009.[2] Teare J later found, on the balance of probabilities, that Mr Ablyazov was the ultimate owner of two large logistics parks within the Eurasia Logistics group: see [2012] EWHC 2543 (Comm) (the "**Reversal Judgment**"), at [76] to [80], the Orders made on the handing down of the same (the "**Reversal Orders**"), Hardman §35ff, and below. In order to reach this conclusion, Teare J must have been satisfied that Mr Ablyazov was the ultimate owner of Eurasia Logistics Limited, a company incorporated in Jersey, and its subsidiaries.[3]

c. Mr Ablyazov denied that he had any interest in 29 of the 33 Schedule C Companies.[4] It was later established to the criminal standard that he was the owner of three of the companies of which he denied ownership and that his perjured evidence was again given with the intention of interfering with the administration of justice: see Committal Judgment, [174] to [206], and Hardman, §34. Further, (i) 29 of the Schedule C Companies have been added to the receivership on the basis that there is good reason to believe that they are Mr Ablyazov's assets and (ii) 10 of the Schedule C Companies were found in the Granton proceedings to belong to Mr Ablyazov ([2013] EWHC 510 (Comm), [87]).

d. Mr Ablyazov gave false evidence to the Court as to how a document which referred to the Schedule C Companies was produced: see Committal Judgment, [179], [183].

e. Mr Ablyazov denied any interest in Wintop Services Limited ("**Wintop**"), which he said was owned by a *"friend"*.[5] Mr Ablyazov later said that Wintop was in fact Mr Shalabayev's company at this time.[6] Both assertions were untrue and/or deliberately misleading. Wintop was always owned and/or controlled by Mr Ablyazov: see (i) Christopher Clarke J's judgment of 26 October 2011 (described below), (ii) the addition of Wintop to the receivership order, and (iii) Mr Shalabayev's false evidence as to his means (Committal Judgment, [58]-[77], and the Committal Appeal Judgment, at [44]).

f. Mr Ablyazov failed to reveal that Messrs Alexander Udovenko and Syrym Shalabayev played a critical role in relation to his asset-holding structures: see Committal Judgment, [79] and [179]-[184], and Hardman, §37ff. Instead, Mr Ablyazov falsely asserted that Individual C was involved in the administration of his assets: ibid.

g. Despite being asked questions about Eastbridge Capital Limited, Mr Ablyazov failed to disclose[7] the central role carried out by this company in relation to the administration of his assets: see Committal Judgment, [18], [64], [65], [90], [152] and

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[2] Subsequently, Clyde & Co (acting on Mr Ablyazov's instructions) stated, by letter dated 17 November 2009, *"The document evidencing the gift to Mr Volkov of a 75% interest in Eurasia Logistics will not be provided. This asset was not owned by our client at the date the Order was made and therefore falls outside the scope of it."*

[3] 12 of those subsidiaries have been added to the receivership. They are: Aruma Holdings Limited, Bondiza Consulting Limited, CJSC Joint Venture Eurasia M4, CJSC Logopark Biek Tau, CJSC Logopark Mezhdureche, CJSC Logopark Tolmachevo, Dregon Land Limited, Gatova Holdings Ltd, Keppel Land Limited, Melchia Trading Limited, Naturalna Holdings Limited and Timmins Investing Ltd.

[4] The companies which received the traceable proceeds of the monies misappropriated by the frauds complained of in the Drey Proceedings, so-called because disclosure relating to them was required to be made pursuant to Schedule C of the Freezing Order.

[5] Transcript of examination held on 27.10.09, pages 22-23. Subsequently, Clyde & Co (acting on Mr Ablyazov's instructions) stated, by letter dated 17 November 2009, *"The written agreement with Wintop … is an agreement with a third party who has not been made subject to the terms of the Order. The document will therefore not be provided."*

[6] [2011] EWHC 2664 (Comm), [26]. This assertion was subsequently repeated, for instance in Mr Ablyazov's evidence to the Court of Appeal by witness statement dated 17 April 2012 (prepared by Addleshaw Goddard), at [49].

[7] Transcript of examination held on 18.11.09, page 5.

Trial Judgment, [11], [13], [22], [85], [86] and [180]. By the Committal Judgment, Teare J found that Mr Ablyazov was the owner of Eastbridge Capital Limited's parent company, Mega Property Limited: see [152].

h. Mr Ablyazov stated that he dictated the terms of trust deeds signed by Rinat Batyrgareyev during a telephone call and that these terms reflected a previous *"oral agreement"*.[8] This was untrue: Mr Shalabayev gave instructions on and after 19 October 2009 for the creation of the new trust deeds for the purpose of hiding his (Mr Shalabayev's) prior involvement with Mr Ablyazov's (disclosed) assets: see CGH109, pages 228-239.[9] Some of those documents were backdated: see CGH109, pages 237, 239.

i. Mr Ablyazov failed to disclose the sale of his interests in BTA Kazan and his agreement to sell his interest in Eurasia Tower, such that his evidence in relation to these assets was deliberately misleading: see the Receivership Judgment, [113] and [115].

5. It was not for some time that evidence began to emerge which demonstrated that Mr Ablyazov had lied to the Court. In the meantime, the Bank and the Court were obliged to proceed on the assumption that Mr Ablyazov's evidence was truthful.

15 December 2009

6. Clyde & Co wrote to the Bank's solicitors and stated that Mr Ablyazov *"will not answer any further questions"*. Clyde & Co's letter attached an Annex which was said to contain *"further information in relation to our client's assets"*. The said Annex (prepared by Clyde & Co on Mr Ablyazov's instructions):

a. Did not disclose the numerous assets which have now been found to the criminal or civil standard to belong to Mr Ablyazov: see below.

b. Did not disclose the c. 1000 companies which have now been added to the receivership (on the basis that the Bank has persuaded the Court that there is good reason to believe that they belong to Mr Ablyazov): see Hardman, §§46-49, the Committal Appeal Judgment, [58], [85], [176], and below.

c. Referred in the present tense to Mr Ablyazov's ownership of interests in BTA Kazan and Eurasia Tower (via Blackdesert Holdings Ltd, Colligate Investments Limited and ZAO Techinvest) without making reference to Mr Ablyazov's recent sale of the same.

d. Stated that Mr Batyrgareyev had been the nominee acting in relation to Stantis Limited since 7 August 2009, which has subsequently been held to have been a *"falsification of the position"*: see Committal Judgment, [79(ii)].

7. On the same day, Mr Ablyazov secretly breached the Freezing Order by dealing with 75% of the share capital in Eurasia Logistics Limited when he procured the execution of a purported sale agreement in respect of those shares which was backdated to 31 July 2009: see Hardman, §§71-85. Clyde & Co provided advice to third parties in relation to this transaction on Mr Ablyazov's behalf. The transfer of ownership provided for by the purported agreement was registered in the middle of 2010: ibid. In reality, the purported sale agreement and transfer of ownership were devices designed to hide Mr Ablyazov's continued ultimate ownership of this shareholding (by transferring it from one of his nominee companies, Keppel Land Limited, to another, Stepan Investments Limited): ibid. The Bank did not discover this serious breach of the Freezing Order until much later.[10]

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[8] Ibid, pages 9-10.

[9] In a small number of cases, the intention was to replace someone other than Mr Shalabayev with Mr Batyrgareyev: see CGH109, pages 233, 234, 239.

[10] Mr Ablyazov failed to disclose this dealing when he produced evidence in opposition to the receivership application in April 2010 (when Stephenson Harwood were acting for him) or when he was ordered to

February 2010

8. Mr Ablyazov secretly committed a breach of the Freezing Order by granting security in favour of AMT Bank LLC over certain loan repayment rights: see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[11]

April 2010

9. Mr Ablyazov secretly breached the Freezing Order by granting security in favour of AMT Bank LLC over land plots at Bratyev Fonchenko, Moscow: see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[12]

16 April 2010

10. Mr Ablyazov signed his third witness statement. That evidence was untrue and/or deliberately misleading as set out below. It was served by Stephenson Harwood (who, it is to be inferred, drafted or assisted in its production). It was later heavily relied upon by counsel instructed by Stephenson Harwood in resistance to the Bank's application, and in support of the submission that Mr Ablyazov had *"bared his soul"* in relation to his assets: see Receivership Judgment, eg [39], [75], [86].

11. For the purposes of this application, the Bank relies upon the following untrue and/or deliberately misleading aspects of Mr Ablyazov's third witness statement dated 16 April 2010:

    a. He continued to deny having any interest in the vast majority of the Schedule C Companies (which at the time Teare J said would be a *"remarkable and brazen lie"*, such that he did not disbelieve Mr Ablyazov): see Receivership Judgment, [99]. It took the Bank a further 18 months to prove that Mr Ablyazov's lie did indeed justify this description: see Committal Judgment, [174]-[206].

    b. He did not disclose the numerous assets which have now been found to the criminal or civil standard to belong to him: see below.

    c. He did not disclose the c. 1000 companies which have now been added to the receivership (on the basis that the Bank has persuaded the Court that there is good reason to believe that they belong to Mr Ablyazov): see Hardman, §§46-49 and Committal Appeal Judgment, [58], [85], [176].

    d. He did not mention the central role played in his asset administration by Messrs Udovenko and Syrym Shalabayev: see Committal Judgment, [79].

    e. He said that trust deeds with Mr Batyrgareyev were created *"… to show transparency and as an act of good faith in this litigation. They formalised an existing relationship. I do not believe that the execution of those deeds is consistent with a desire to evade the court's judgment or to put obstacles in the way of the Claimant"*: see paragraph 255 of Mr Ablyazov's third witness statement and the Receivership Judgment, [119]. This was untrue:

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provide further asset disclosure in August 2010 (when Stephenson Harwood were acting for him) or in February 2012 (when Addleshaw Goddard were acting for him). In consequence his evidence on these occasions was untruthful and/or deliberately misleading.

[11] The previous footnote is repeated. Addleshaw Goddard acted for him in relation to the reversal application.

[12] The previous footnote is repeated.

i. the trust deeds were created to hide Mr Shalabayev's role in relation to Mr Ablyazov's disclosed assets (and so were created in bad faith and evidenced a new relationship);
ii. the trust deeds were not created in the manner described by Mr Ablyazov when cross-examined (see above); and
iii. at least some of the trust deeds were backdated: see CGH109, pages 237, 239.

f. He made the following assertions which, for the reasons set out herein, were untrue: (i) he had *"no intention of doing anything other than abiding by the orders of the Court"*, (ii) he would *"never knowingly breach an Order of the English Court"*, (iii) he *"tried to answer the questions put to me at my two cross-examination sessions as openly as I could …"*, (iv) he had *"tried again in* [his third witness statement] *to be entirely open with the court and the Claimant"*, and (v) the suggestion that it was far from improbable that he would manufacture a situation to avoid judgment was *"outrageous and offensive … (I apologise to the court if this is stated in strong terms but this reflects my feelings …)"*: see paragraphs 211, 213 and 256 of his third witness statement.

12. Further, Mr Ablyazov's fourth witness statement dated 17 May 2010 contained untrue and/or deliberately misleading evidence in that it stated that Mr Ablyazov had obtained the Schedule C chart from Individual C: see Committal Judgment, [179]-[184]. That statement was served by Stephenson Harwood (who, it is to be inferred, drafted it or assisted in its production).

August 2010

13. Mr Ablyazov secretly breached the Freezing Order by dealing with a land plot in Russia with an approximate area of 764,000 square metres (defined in the Reversal Order as the Large Pakhra Fields Land Plot): see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[13]

14. Mr Ablyazov purported to comply with the asset disclosure obligation imposed by paragraph 13 of the Receivership Order, which required him to provide full details of the ways (if any) in which the asset disclosure contained in his third witness statement was inaccurate. By his tenth witness statement dated 16 August 2010, Mr Ablyazov:

a. Falsely asserted that *"For the avoidance of doubt, I confirm that I do not own any assets worth more than £10,000 other than the assets listed under paragraph 259* [of his third witness statement]".

b. Failed to refer to the breaches of the Freezing Order identified above.

15. The said witness statement was served by Stephenson Harwood who (it is to be inferred) drafted or assisted in drafting the same.

October 2010

16. Mr Ablyazov secretly breached the Freezing Order by granting security in favour of AMT Bank LLC over shares in ZAO FT-MVB: see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[14]

[13] Mr Ablyazov failed to refer to the said breach when he purported to comply with the Court's disclosure orders of 6 August 2010 (when Stephenson Harwood were acting for him) or 29 February 2012 (when Addleshaw Goddard were acting for him). Further, Addleshaw Goddard acted for him in relation to the reversal application.

[14] Mr Ablyazov failed to refer to the said breach when he purported to comply with the Court's disclosure order of 29 February 2012 (when Addleshaw Goddard were acting for him). Further, Addleshaw Goddard acted for him in relation to the reversal application.

5 November 2010

17. Syrym Shalabayev was served with a worldwide freezing order made against him in the AAA Proceedings. He immediately went into hiding and failed to comply with his disclosure obligations thereunder: see unreported judgment of Briggs J dated 17 May 2011. Clyde & Co subsequently acted for Mr Shalabayev in relation to the Bank's application to have him committed to prison for that failure to comply.

9 November 2010

18. The Receivers, partners in KPMG, took office. Thereafter, Mr Ablyazov did his best to frustrate the receivership. For the purposes of this application, the Bank relies on the following matters:

    a. The breaches of the Freezing Order committed after the appointment of receivers described herein (which also constituted breaches of the Receivership Order).

    b. Paragraph 233 of the Committal Judgment and paragraphs 108 and 176 of the Committal Appeal Judgment.

    c. Moore-Bick LJ's finding that Mr Ablyazov had *"… failed to co-operate with the Receivers"*: [2012] EWCA Civ 639, [29].

December 2010

19. Mr Ablyazov (a) secretly breached the Freezing Order by dealing with rights under loan agreements with a face value exceeding US$80 million and (b) procured the backdating of relevant documents in order to make it appear that the dealings took place before the appointment of the Receivers: see Committal Judgment, [207]-[235]. The Bank did not discover this transaction until much later and subsequently brought an application to have Mr Ablyazov committed to prison in respect of it.[15]

Late 2010 / early 2011

20. The Bank obtained a number of search and disclosure orders which produced documentation demonstrating that Mr Ablyazov had a vast secret network of undisclosed companies and assets, principally administered by Syrym Shalabayev. Mr Ablyazov (using Messrs Syrym and Salim Shalabayev) had sought, in particular, to conceal the documentation held by Eastbridge Capital Limited from the Court and the Bank: see Hardman, §§91-96, and [2011] EWHC 843 (Ch), [6], [15], [31], [33], [36], [37] and [50].

21. Mr Ablyazov secretly breached the Freezing Order by granting a pledge/mortgage in favour of AMT Bank LLC over:

    a. the right to lease a land plot situate at Paveletskaya Square, Moscow: see the Reversal Judgment and Orders; and

    b. the right to lease land plots located at Kutuzovsky Prospect, Moscow: see the Reversal Judgment and Orders.

22. The Bank (a) did not discover these transactions until much later and (b) made an application in February 2012 to have them reversed.[16]

January 2011

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[15] Mr Ablyazov resisted that application in the manner described below, in respect of which Addleshaw Goddard acted on his behalf.

[16] Mr Ablyazov failed to refer to the said breach when he purported to comply with the Court's disclosure order of 29 February 2012 (when Addleshaw Goddard were acting for him). Further, Addleshaw Goddard acted for him in relation to the reversal application.

23. The Court added 212 companies to the Receivership Order on the basis that there was good reason to believe that they are owned by Mr Ablyazov. For the purposes of this application, the Bank relies upon the matters set out herein and the following:

    a. An email sent by Mr Alexander Udovenko on 9 October 2008, which gave a Cypriot corporate services provider, Paul Kythreotis, instructions to change the ostensible beneficial ownership of 102 companies from Mr Udovenko to Mr Shalabayev: see Committal Judgment, [90], [183], [184].

    b. An email sent by Mr Shalabayev on 26 July 2010, which gave Paul Kythreotis instructions in relation to 103 companies. The email included a large number of instructions to *"change the contact person"* or *"change the UBO"* of particular companies, and to backdate documents to *"the date of incorporation"* of a particular company or to the *"date of transfer"* of a company to the *"current agent"*. See Committal Judgment, [194], [199], [200].

24. Stephenson Harwood acted for Mr Ablyazov at the return date held on 4 February 2011. Mr Ablyazov's counsel informed the Court that *"obviously we do anticipate having instructions to challenge the order that has been made"* and that (according to his instructions) the approach adopted was *"fundamentally flawed"*. No such challenge was ever made and the assertion (on instructions) that the approach adopted was fundamentally flawed was untrue and/or deliberately misleading.

February 2011

25. Mr Ablyazov secretly breached the Freezing Order by granting security in favour of AMT Bank LLC over other valuable land plots: see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[17]

26. Mr Ablyazov secretly breached the Freezing Order by granting security in favour of the Central Bank of Russia over units in a Closed Annuity Unit Investment Fund: see the Reversal Judgment and Orders. The Bank (a) did not discover this transaction until much later and (b) made an application in February 2012 to have it reversed.[18]

8 April 2011

27. The Court added 389 companies to the Receivership Order on the basis that there was good reason to believe that they are owned by Mr Ablyazov. Mr Ablyazov did not challenge that order.

May-June 2011

28. Briggs J found Syrym Shalabayev guilty of three counts of contempt of court and sentenced him to 18 months' imprisonment. He found there to have been a *"wholesale flouting of the court's order"* which continued notwithstanding the *"pressing need for the information which the court has already ordered that Mr Shalabayev provide"*: see unreported judgment of Briggs J dated 17 May 2011 and [2011] EWHC B19 (Ch). Mr Shalabayev was represented by Clyde & Co.[19]

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[17] Mr Ablyazov failed to refer to the said breach when he purported to comply with the Court's disclosure order of 29 February 2012 (when Addleshaw Goddard were acting for him). Further, Addleshaw Goddard acted for him in relation to the reversal application.

[18] Ibid.

[19] Later, Henderson J ordered Clyde & Co to disclose Mr Shalabayev's contact details. The Judge concluded: *"It is in the highest degree unsatisfactory that [Mr Shalabayev] can still be at large, as a fugitive from justice, while he has solicitors on the record acting for him, and intervening in legal proceedings as and when it suits his purposes. Such a procedure is liable to bring the administration of justice into*

6 September 2011

29. Mr Ablyazov dis-instructed Stephenson Harwood, instructed Addleshaw Goddard, and sought (unsuccessfully) to rely upon (inter alia) his change of solicitors to adjourn the forthcoming committal trial: see [2011] EWHC 2545 (Comm). In refusing the adjournment, Teare J referred to a *"disturbing and worrying"* breach of the Freezing Order: ibid., at [8].

26 October 2011

30. Christopher Clarke J heard a disclosure application made on behalf of the Bank, and concluded as follows (in relation to two companies of which Mr Ablyazov untruthfully denied ownership, Wintop and Fitcherly Holdings Limited ("**Fitcherly**")): *"… The evidence to which I have referred affords, in my judgment, strong ground for believing that Wintop and Fitcherly are in fact Mr Ablyazov's creatures or conduits."* ([2011] EWHC 2664 (Comm), at [71]). Mr Ablyazov was represented by and gave evidence through Addleshaw Goddard.[20] Up to £40m was channeled through these companies for Mr Ablyazov's benefit, much of it in payment of his and other parties' legal fees.

Nov-Dec 2011

31. The Bank's committal application was tried. Addleshaw Goddard acted for Mr Ablyazov in relation to the application generally (instructing two leading and two junior counsel), and in particular prepared and filed a number of affidavits on his behalf and on behalf of his witnesses. Each allegation made by the Bank was strenuously contested. As set out below, the evidence relied upon by Mr Ablyazov was untruthful and/or deliberately misleading and supported by forged and/or false documentation.

16 February 2012

32. Teare J handed down his committal judgment, finding Mr Ablyazov guilty of the three counts of contempt alleged by the Bank. For the purposes of this application, the Bank relies upon the following principal findings contained in the Committal Judgment:

    a. Mr Ablyazov failed to disclose Bubris Investments Limited ("**Bubris**") in breach of the disclosure obligations contained in the Freezing Order. Bubris was a company used by Mr Ablyazov to perpetrate the frauds complained of in the AAA Proceedings (in relation to which summary judgment has now been entered against Mr Ablyazov: see [84]-[124] and [2013] EWHC 3691 (Ch) (the "**AAA Judgment**")). Teare J's conclusion that Bubris was one of Mr Ablyazov's assets placed reliance upon:

        i. The removal of Mr Batyrgareyev as the ostensible ultimate beneficial owner of Bubris (pursuant to instructions given by Mr Shalabayev) shortly after the Bank obtained a Norwich Pharmacal disclosure order in relation to this company on 12 February 2010, a change backdated to 8 April 2008: [107]-[109].

        ii. Mr Batyrgareyev was purportedly replaced by an individual called Mr Kovalenko. When the Bank traced Mr Kovalenko, he denied any knowledge of Bubris. The Bank relied upon this evidence when it applied for and was granted a freezing order in the AAA Proceedings on 26 July 2010. When served, this caused Mr Shalabayev to give instructions to change the ostensible beneficial owner of Bubris yet again, this time to a Mr Sadykov and this time backdated to May 2010: [110]-[117].

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disrepute, and to give the impression that British justice is an a la carte menu from which he can order at choice without ever having to pay the bill": see [2011] EWHC 2163 (Ch), [39].

[20] See the second witness statement of Ian Hargreaves dated 15 September 2011, and in particular paragraphs 12-14 thereof.

iii. Mr Kythreotis initially maintained that Mr Sadykov's appointment had not been backdated but then "confess[ed]" that it had been: see [2011] EWCA Civ 1241, [61]-[62] and Committal Judgment, [112]. This and other false evidence contained in Mr Kythreotis' affidavit of 28 September 2010 was suborned by Mr Ablyazov agreeing to pay Mr Kythreotis an indemnity of £4.5 million: see the email referred to at [2011] EWCA Civ 1241, [62].

b. Mr Ablyazov falsely denied on oath his interests in three pieces of English real estate, valued at in excess of £30 million: see [125]-[173]

c. Mr Ablyazov falsely denied on oath his ownership of three Schedule C Companies: see [174]-[206].

d. Mr Ablyazov dealt in December 2010 with three sets of loan rights with a face value exceeding US$80 million in breach of the Freezing Order: see [207]-[235].

33. For the purposes of this application, the Bank also relies upon the following additional findings contained in the Committal Judgment:

a. Messrs Ablyazov and Syrym Shalabayev gave false and/or deliberately misleading evidence as to Mr Syrym Shalabayev's ownership of a uranium project and a company called Widley Worldwide Inc for the purposes of suggesting that it was Mr Shalabayev and not Mr Ablyazov who owned the English real estate and one of the Schedule C Companies: see [79] and [190]-[191].

b. Mr Ablyazov misled the Court by procuring that trust deeds were backdated to hide Mr Shalabayev's involvement with his assets in 2009: see [79].

c. Generally, Mr Ablyazov relied upon backdated and fabricated documentation and suborned the giving of false evidence on a wide-ranging basis: see [54], [79], [92], [95], [115], [116], [137], [146], [192], [204], [226], [227], [228], [229], [230], [233] and [236].

d. Mr Ablyazov was the owner of: (i) Sunstone Ventures Limited, which Mr Ablyazov had untruthfully denied owning ([129]-[132]); (ii) Mega Property Limited, which Mr Ablyazov had untruthfully denied owning ([150], [152]); and (iii) Alterson Limited, which Mr Ablyazov had untruthfully said was in the ownership of a Mr Kossayev ([225]-[226]).

e. Syrym Shalabayev was a person who *"is willing to cause to be created documents which contain untruths and are designed to hide the truth. He did not appear to see anything wrong about this practice. It was, as he described it, 'his business'"*: [64].

c. 16 February 2012

34. Mr Ablyazov failed to attend the handing down of the Committal Judgment and went into hiding abroad. For the purposes of this application, the Bank relies upon the following matters:

a. Mr Ablyazov's flight was contrary to the provisions of the Freezing Order which required him to remain within the jurisdiction.

b. Mr Ablyazov's flight evidenced a breach of the provisions of the Freezing Order which required Mr Ablyazov to deliver up all of his passports.

c. Mr Ablyazov's failure to attend was contrary to a *"clear and unequivocal confirmation to the court in answer to a specific question from the court that he would attend the judgment"* ([2012] EWHC 455 (Comm), at [6]).

35. Mr Ablyazov was sentenced *in absentia* to three concurrent 22 month terms at a hearing at which he was, despite his failure to appear in person, represented by leading counsel (who

argued for a suspended sentence) instructed by Addleshaw Goddard. Thereafter, Mr Ablyazov (by counsel instructed by Addleshaw Goddard) suggested that the Bank was engaging in *"unsupported speculation"* as to Mr Ablyazov's whereabouts, premised *"on an unfounded assumption that Mr Ablyazov has fled the jurisdiction using a passport document that he should not have, for which there is no evidence whatsoever"*.[21] Addleshaw Goddard informed the Court that Mr Ablyazov had left the jurisdiction by letter sent to the Clerk to Mr Justice Teare on 12 December 2012.

February 2012

36. Mr Ablyazov committed multiple breaches of the Freezing Order by orchestrating the transfer of interests in a number of assets (in particular AMT Bank, BTA Armenia, land on the outskirts of Moscow and a mineral mine in Kyrgyzstan) from companies within the receivership to newly incorporated Belizean companies outside the receivership: see Hardman, §55ff.

37. Mr Ablyazov orchestrated the collusive divorce of Mr Batyrgareyev (his principal disclosed nominee) and his wife: see Hardman, §§57ff. As a result, Mr Batyrgareyev was required by the Lithuanian courts to transfer 53 of Mr Ablyazov's companies (all frozen and within the receivership) to Mrs Batyrgareyev within five business days. This was a further breach of the Freezing Order.

38. Mr Ablyazov subsequently, by evidence given through Addleshaw Goddard, denied any knowledge of these allegations: see paragraphs 20-21 of the witness statement of Naomi Simpson dated 29 March 2012.

29 February 2012

39. Teare J made unless order against Mr Ablyazov, which required him to (a) serve an affidavit giving full and proper disclosure of his assets (to include any dealings with those assets) and (b) surrender himself to the Tipstaff, failing which his defences to eight claims will be struck out: see Hardman, §19 (the "**Unless Order**"). In March 2012, Mr Ablyazov failed to comply, in that:

    a. he produced a witness statement (so as not to reveal his location) and not an affidavit (it is to be inferred that the said statement was drafted by Addleshaw Goddard);

    b. his witness statement failed to disclose ownership of any assets other than those identified in his third witness statement; and

    c. his witness statement failed to disclose the breaches of the Freezing Order described above.[22]

40. Teare J granted a declaration of non-compliance on 9 November 2012.

2-4 July 2012

41. Mr Ablyazov's appeal against Teare J's committal and unless order was heard. Addleshaw Goddard acted for Mr Ablyazov on the appeal and instructed leading and junior counsel. Judgment was handed down in November 2012, dismissing the appeals. Rix LJ concluded:

    a. *"… It is noticeable from the facts of this case, both as found by the judge, but also in the nature of the structure of the arguments as they have developed, how time and time again, as some aspect of Mr Ablyazov's conduct has come under question, so the evidence deployed has become remarkable for the way in which it has taken tortuous turnings which have asked the court to suspend its belief in reality in favour of reduplicating unrealities. …"* (Committal Appeal Judgment, [96])

[21] Skeleton argument dated 23 February 2012, paragraph 8.
[22] The said evidence was served by Addleshaw Goddard who (it is to be inferred) drafted or assisted in the preparation of the same.

b. *"The trial judge decided that* [the Court] *was being deceived by witnesses without credibility. It is not for this court to say that he was wrong without strong grounds for doing so, grounds which have simply not been formulated."* (ibid., [100])

c. *"Mr Ablyazov's contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents"* (ibid., [106])

d. *"Mr Ablyazov, emboldened perhaps by the wealth at his disposal, which enables him to travel, hide and still instruct lawyers on a prodigious scale, continues to obstruct justice with an attempt at impunity for the consequences of this litigation"* (ibid., [169]).

42. The Vice President was equally trenchant: *"It is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness towards court orders than Mr Ablyazov."* (ibid, at [202]).

September 2012

43. Teare J gave judgment on two 'reversal' applications made by the Bank. Teare J found that Mr Ablyazov had committed eight breaches of the Freezing Order by dealing with assets (described above).

44. Teare J observed: *"Mr Ablyazov has not acknowledged that he has acted in breach of the court's order or apologised for doing so. He made the clarification application but when the Court of Appeal gave the requested clarification he appears to have ignored it. He made some of the pledges after he had been told by the Court of Appeal that he could not rely upon the 'ordinary course of business' liberty. So far as I can see Mr Ablyazov simply went ahead with those pledges, notwithstanding the Court of Appeal's decision."* (see Reversal Judgment, [67]). Mr Ablyazov's evidence in opposition to the application was served (and, it is to be inferred, drafted) by Addleshaw Goddard.

45. Teare J ordered Mr Ablyazov to use his best endeavours to intervene in Russian enforcement proceedings and inform the Russian court that the pledges (described above) were entered into in breach of the Freezing Order (see Reversal Judgment, [61] and [79]). Mr Ablyazov was also ordered to adduce evidence in respect of certain pledges that appear to have been contemplated but where it was unclear whether they had, in fact, been carried into effect (see Reversal Judgment, [72], [73], [75] and [80]). He failed to comply, thereby committing further contempts of court. Initially, pending appeal (but despite no stay of his obligations having been granted), Addleshaw Goddard explained that Mr Ablyazov would not comply with the court's order as to do so would render his appeal nugatory: see the letter from Addleshaw Goddard dated 17 October 2012.

46. Teare J also found that Mr Ablyazov was the owner of the following assets (which in breach of the Freezing Order he had failed to disclose: see Reversal Judgment, [76]-[80]):

a. CJSC Logopark Pyshma and buildings and plots of land held by the same in Sverdlovsky, Russian Federation.

b. CJSC Logopark Kolpino and buildings and plots of land held by the same close to St Petersburg, Russian Federation.

18 January 2013

47. Flaux J ordered Mr Ablyazov to (i) use his best endeavours to intervene in pledge enforcement proceedings in Russia relating to the project at Paveletskaya Square and (ii) serve an affidavit on the Bank setting out the steps he has taken. Mr Ablyazov failed to comply, thereby committing further contempts of court. Mr Ablyazov was represented at the hearing by counsel instructed by Addleshaw Goddard.

5 July 2013

48. Popplewell J delivered judgment on the Bank's application to vary the Receivership Order: [2013] EWHC 1979 (Comm). He concluded:

    a. "… [Mr Ablyazov] *no longer maintains even a pretense, as he once did, of being willing to abide by the orders of the court"* (at [9]);

    b. *"Mr Ablyazov is a persistent and serial contemnor. There is every reason to think that he does not regard himself as bound by the orders of the court and that he will do all he can to avoid the Bank being able to execute its judgments against his assets, not only by direct disobedience to the court's orders, but also by taking any steps that may occur to him to thwart any future orders, or any steps that the Bank may take to enforce the judgment"* (at [12]); and

    c. *"[Mr Ablyazov's] desire to make representations on this application is not that of a litigant who seeks to persuade the court to make an order only to the extent that it is fair to him, in order that he may comply with it to that extent. His opposition to the form of order is, I would conclude, advanced despite his intention of ignoring, and indeed seeking to thwart the purpose of, any order which may be made."* (at [25]).

49. Mr Ablyazov was represented at the hearing by counsel instructed by Addleshaw Goddard.

31 July 2013

50. The Court added 292 companies to the Receivership Order on the basis that there was good reason to believe that they are owned by Mr Ablyazov. Mr Ablyazov has not challenged that order.

26 November 2013

51. Henderson J granted summary judgment against Mr Ablyazov in proceedings instituted by the Bank in the Chancery Division: see the AAA Judgment. Henderson J found that Mr Ablyazov was the owner of five BVI companies (one of which was Bubris): see AAA Judgment, [51]-[57]. Mr Ablyazov failed to disclose his interest in these companies (since added to the Receivership) and denied in his defence to the AAA Proceedings that he had any interest in them: see AAA Judgment, [16]. Addleshaw Goddard initially filed evidence in opposition to the application, and instructed counsel to attend a prior hearing of the application in July 2012. They were subsequently instructed not to attend the final hearing.