Judgments

JSC BTA Bank v Ablyazov and another

[2016] EWHC 3071 (Comm)

Queen's Bench Division, Commercial Court

Laurence Rabinowitz QC sitting as a Deputy High Court Judge

9 December 2016

Judgment

Philip Jones QC and Tim Akkouh (instructed by **Hogan Lovells International LLP**) for the **Claimant**

Peter Knox QC and James Sheehan (instructed by **Kingsley Napley LLP**) for the **Second Defendant**

Hearing dates: 9-11 November 2016

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JUDGMENT

Laurence Rabinowitz QC (sitting as a Deputy High Court Judge):

Introduction

1. The matter before me is the latest of a number of claims to have come before the English courts in recent years arising out of the dispute between the First Defendant, Mr Mukhtar **Ablyazov** (Mr **Ablyazov**) and the Claimant, a Kazakhstan bank known as JSC BTA Bank (BTA), as a consequence of what BTA has alleged was a massive fraud perpetrated against it by Mr **Ablyazov**. The present case, however, is different from those that have come before in that, although Mr **Ablyazov** is again a defendant to BTA's claim, the real target of this action is not Mr **Ablyazov** but rather the Second Defendant, his son Madiyar.

2. More particularly, the dispute concerns a payment of £1.1 million made on 26 February 2009 (the Transfer) from an account held jointly by Mr **Ablyazov** and Madiyar (the Swiss Account) with EFG Private Bank SA in Geneva (EFG Geneva) to an account in Madiyar's name

(the Account) at EFG Private Bank Limited in London (EFG London). Madiyar was 17 at the time of the Transfer, living and attending school in London. He held a Tier 4 student visa.

3. It is common ground that no consideration was given by Madiyar in return for the Transfer.

4. It is not in dispute that shortly after the Transfer, about £1 million of the £1.1 million received was invested in certain gilts in Madiyar's name. This was done to enable Madiyar to obtain a Tier 1 investor visa in place of his student visa. When, in March 2014 those investments matured, the proceeds were remitted back to the Account.

5. At the end of 2015, the Account held approximately £1,025,000. As explained further below, the Account's proceeds have since been paid into Court. For convenience, I have from time to time referred below to the amount paid into the Account as well as the amount subsequently held in the Account and paid into Court, as the 'Fund'.

6. The claim now before me, issued by BTA on 11 December 2015, is part of the on-going effort on BTA's part to identify and recover whatever it can of the enormous sums of which it says it has been defrauded. More particularly, BTA contends (1) that in circumstances where no consideration was given by Madiyar, the Fund should be treated as having been received and held on trust by Madiyar for Mr **Ablyazov** (the Trust Claim); alternatively (2) that the Transfer was a transaction defrauding creditors which should be set aside pursuant to section 423 of the Insolvency Act 1986 (the Section 423 Claim).

7. There is also before me a cross-application by Madiyar for a declaration that he owns the Fund outright. If BTA's Trust Claim and Section 423 Claim both fail, then Madiyar would be entitled to the declaration he seeks.

Background: the dispute between BTA and Mr Ablyazov

8. It is necessary at the outset to say something about the wider dispute between BTA and Mr **Ablyazov** in the context of which the present claims arise. I set out below only an outline of the complex litigation to which this has given rise. I would note that the (incomplete) list of English court decisions that follows provides both an indication of the number of decisions this dispute has spawned as well as identifying where further detail of the dispute and the decisions that have resulted might be found: [2009] EWHC 2840 (Comm); [2010] EWHC 1779 (Comm); [2011] EWHC 843 (Ch); [2011] EWHC 2664 (Comm); [2011] EWCA Civ 1386; [2012] EWHC 237 (Comm); [2012] EWCA Civ 1411; [2013] EWHC 510 (Comm); [2013] EWHC 3691 (Ch); [2014] EWHC 2788 (Comm); and [2016] EWHC 230 (Comm).

9. Mr **Ablyazov** was the Chairman of the Board of Directors of BTA between May 2005 and February 2009. Over the course of 2008 and early 2009, the Kazakh financial regulator (the AFN) conducted a number of detailed investigations into BTA's financial health. In a working report made in April 2008, the AFN observed that (1) BTA's credit files were deficient and not in accordance with its own lending manual, (2) there was evidence of Mr **Ablyazov** being in a position of conflict of interest, (3) there was evidence of loans being made for the purposes of buying Mr **Ablyazov**'s own property, and (4) there was a need for BTA to improve its procedures to comply with internal policies and legal requirements, in particular in relation to the monitoring of affiliations.

10. In June 2008, the AFN produced a report which referred to BTA's lending to overseas entities and raised certain questions about the borrowers including whether the borrowers might be persons having "*special relationships*" with BTA and indeed whether "*those borrowers … are used as 'buffer' companies and act as nominal borrowers, whereas the Bank's funds are actually disposed by other companies which do not have any contractual relations with the Bank.*"

11. Following the production by the AFN of a number of further reports in 2008 which expressed on-going concern about lending practices within BTA, in January 2009 the AFN produced a further report that, among other things, noted that almost 20% of BTA's loan portfolio was non-performing. The consequence of this was that an additional provision of US$3.58 billion would need to be put in place.

12. On 30 January 2009, BTA informed the AFN that it could not meet its liabilities. On 2 February 2009, the Kazakh sovereign wealth fund acquired a majority stake in BTA in return for a cash injection of 212 billion Kazakh Tenge, approximately US$1.4 billion at the then exchange rates. Shortly thereafter, Mr **Ablyazov** was removed as Chairman of BTA's Board.

13. In the last days of January 2009, Mr **Ablyazov** fled Kazakhstan for London. BTA formed the view that its former management, and in particular Mr **Ablyazov**, had perpetrated a huge and systematic fraud against it, primarily by purporting to lend or otherwise transfer billions of dollars to offshore companies with no assets and which appeared to be in the control of Mr **Ablyazov** or his associates.

14. This was the backdrop when, in around February 2009, Mr **Ablyazov** and certain of his associates sought advice from Clyde & Co, solicitors in London, including about potential claims in this jurisdiction and the possibility of freezing orders and search and seizure orders being made against them. By this time, BTA had already instituted proceedings in Kazakhstan. The detail surrounding the nature of the advice and circumstances in which it was sought by Mr **Ablyazov** from Clyde & Co is dealt with by Popplewell J in the decision reported at [2014] EWHC 2788 (Comm).

15. In August 2009, BTA commenced proceedings against Mr **Ablyazov** in the Commercial Court and at about the same time obtained a worldwide freezing injunction against him (the Freezing Order). Mr **Ablyazov** was also ordered to provide disclosure of his worldwide assets and to answer a schedule of specific questions designed to assist BTA in tracing certain assets. Mr **Ablyazov** appears from the outset to have been concerned to do whatever he could to delay or avoid complying with these Court orders.

16. On 27 October and 18 November 2009, Mr **Ablyazov** was cross-examined on his asset disclosure. It has subsequently been held by this Court that much of the evidence given by Mr **Ablyazov** in the course of that cross examination was false and given with an intention of interfering with the administration of justice: see Teare J's decision reported at [2012] EWHC 237 (Comm).

17. Mr **Ablyazov** continued to purport to give further asset disclosure until 15 December 2009. However, a letter from Clyde & Co on that date made clear that it was Mr **Ablyazov**'s intention not to answer any further questions about his assets. This prompted BTA to seek the appointment of receivers over Mr **Ablyazov**'s assets. Receivers were duly appointed over Mr **Ablyazov**'s assets in support of the Freezing Order: see the decision of Teare J reported at [2010] EWHC 1779 (Comm).

18. On 16 May 2011, BTA applied for Mr **Ablyazov**'s committal for contempt of court alleging 35 separate heads of contempt, including failing to disclose assets, lying in cross-examination and dealing with assets in breach of the Freezing Order. In December 2011, a trial of three sample heads of contempt, so restricted for case management purposes, took place over 3 weeks. On 16 February 2012, Teare J found Mr **Ablyazov** guilty of contempt as alleged: [2012] EWHC 237 (Comm). Mr **Ablyazov** was sentenced to three concurrent terms of 22 months' imprisonment.

19. In the event, Mr **Ablyazov** fled the jurisdiction on sight of the Court's draft judgment. He did so notwithstanding an injunction and the imposition on him of other requirements intended to prevent this, and despite also a specific assurance given to Teare J at the conclusion of closing submissions. Teare J was therefore left to sentence Mr **Ablyazov** in absentia. Mr **Ablyazov** was subsequently ordered to provide proper asset disclosure and surrender himself to the Tipstaff so that he could commence his sentence for contempt: [2012] EWHC 455 (Comm). That order was made on 'unless' terms, providing for Mr **Ablyazov**'s defences to BTA's Commercial Court claims to be struck out in default of compliance. In the event, Mr **Ablyazov** failed to comply and his defences were struck out. When the matter came before the Court of Appeal, the Vice President of the Court of Appeal observed of Mr **Ablyazov** that it "*is difficult to imagine a party to commercial litigation who has acted with more cynicism, opportunism and deviousness than Mr **Ablyazov**"*: [2012] EWCA Civ 1411, para 202. Rix LJ made similar observations about Mr **Ablyazov** and his witnesses.

20. Mr **Ablyazov** remained on the run for 17 months before being apprehended by the French authorities in a villa close to Nice in late July 2013.

21. On 23 November 2012, judgment in default was entered on two of BTA's claims against Mr **Ablyazov** in the Commercial Court in sums of £1,021,591,758.13 and US$401,508,769 plus interest. On 19 April 2013, further substantial judgments were entered against Mr **Ablyazov** in two further sets of proceedings in the Commercial Court ([2013] EWHC 510 (Comm)). On 26 November 2013, summary judgment was entered against him in proceedings in the Chancery Division ([2013] EWHC 3691 (Ch)).

22. The total value of the judgments entered against Mr **Ablyazov** is now approximately US$4.9 billion, including interest. No part of this sum has been paid voluntarily, although BTA and the receivers have been able to recover a relatively small proportion by enforcement against certain assets belonging to Mr **Ablyazov**.

23. Before leaving the topic of these earlier decisions, I should refer to an issue that arose before me as to the extent to which the previous decisions in relation to the dispute between BTA and Mr **Ablyazov** had any probative value in the present claim. The stance taken to these earlier decisions by Mr Knox QC, leading counsel for Madiyar, was to not admit the "*correctness of the factual or legal conclusions*" contained in those judgments. Although the point was not developed further before me, I understand this submission to have been based on the decision of the Court of Appeal in ***Hollington v Hewthorn*** [1943] KB 587 which is authority for the proposition that findings made in earlier court decisions are inadmissible on the basis that they represent no more than the opinion of the judge in the earlier case.

24. However, as BTA in response to this noted the application of the principle in ***Hollington*** has in recent years become substantially diluted. In particular:

(1) Whilst a court cannot rely upon a bare finding of a prior court for example that a party has been negligent, it can rely upon the substance of the evidence which is referred to in the judgment of the prior court, including for example the contents of a document, the evidence given by a witness and the like: ***Rogers v Hoyle*** [2015] QB 265, [40], [48]-[49], [55] (Christopher Clarke LJ).

(2) Whilst the bare finding of a prior court is opinion evidence which a subsequent court cannot rely upon because the later court must make its own findings of fact, a reference in a judgment to the substance of evidence is itself evidence which the judge in a later case can take into account *"in like manner as he would any other factual evidence, giving to it such weight as he thinks fit"*: ***Rogers*** (supra).

(3) Moreover, if the judge in a later case concludes that the matters of primary fact recorded in an earlier judgment justify the conclusions reached in that judgment, he is entitled to reach the same conclusion: ***Otkritie International v Gersamia*** [2015] EWHC 821 (Comm), [23] (Eder J).

25. Unsurprisingly, I have not found it necessary to form conclusions on all of the factual matters considered and determined by English courts in these earlier cases. One point that has been determined that might however be relevant to the issues now before me, relates to the fact that Mr **Ablyazov**, by 2008, had been knowingly involved in the dishonest embezzlement of very substantial sums of money from BTA. No evidence has been put before me that would lead me to reach any decision different to those reached by the English courts in the earlier decisions referred to in paragraph 8 above, whether on this issue or indeed on any other issue. This being so, I should make clear that my conclusion on that point is in line with that arrived at in the earlier decisions in which this was considered and determined.

26. Having identified the wider context of the dispute between BTA and Mr **Ablyazov**, I turn below to deal with the facts relevant to the issues that have arisen between BTA and Madiyar in the context of the present claim. Before doing so, however, it is convenient first to say something about the witnesses who gave evidence before me and to identify more fully the issues arising in respect of each of BTA's Trust Claim and the Section 423 Claim.

The witnesses

27. BTA's sole fact witness was Mr Richard Lewis, the partner with conduct of this claim on behalf of BTA. Madiyar did not seek to cross examine Mr Lewis. So far as concerns the evidence adduced by Madiyar, in addition to giving evidence himself, Madiyar also adduced a witness statement from Mr **Ablyazov**, which was admitted as a hearsay statement. A witness statement was also put in from Mr Andrew Tingley, a partner in the immigration team at Kingsley Napley, Madiyar's solicitors. BTA chose not to cross examine Mr Tingley. Madiyar also put in a witness statement from Mr William Bartlett, an **Ablyazov** family employee. Shortly before the hearing, BTA was informed that Mr Bartlett was not willing to attend to give his evidence.

28. In addition to its factual evidence, BTA also adduced expert evidence from the well-known graphologist Dr Audrey Giles. No expert evidence was filed by Madiyar. Dr Giles was nevertheless cross examined as to some of her conclusions.

29. Insofar as it is appropriate for me to comment on the evidence given by these witnesses, I do so below in the context of dealing with the facts relevant to the issues to be determined.

The issues

30. As noted above, BTA advances two claims, namely the Trust Claim and the Section 423 Claim.

31. So far as concerns the Trust Claim, the issue that arises is whether the Fund should be treated as held on trust by Madiyar for Mr **Ablyazov** or as being beneficially owned by Madiyar. Determination of this issue turns on whether, at the time the Fund was transferred, it was intended by Mr **Ablyazov** as a gift for Madiyar or whether, as BTA contends, Mr **Ablyazov** intended to transfer only the legal, not the beneficial, title in the Fund to Madiyar. As noted above, the Fund is currently held in Court but the parties agree that the issue should proceed by reference to the position as it stood prior to the payment in.

32. So far as concerns the Section 423 Claim, this is only relevant in the event that BTA's Trust Claim fails on the basis that the Transfer was sufficient to transfer full ownership to

Madiyar. In that event, BTA contends that the Transfer should nonetheless be set aside under section 423 of the Insolvency Act 1986 as a transaction defrauding creditors. As more fully explained below, determination of this issue raises two main questions, namely (1) was it a substantial purpose of Mr **Ablyazov** in causing the Transfer to be made to put assets beyond the reach of or otherwise prejudice the position of BTA; and (2) is BTA's claim in this regard in any event statute barred.

33. I address each of these claims below, after setting out the relevant facts.

The facts

34. Madiyar was born in 1992. He arrived in London in 2002 where he attended school until completing his A-levels in 2010, after which he hoped to remain in the UK in order to attend university. During this time he lived with his aunt and uncle, Aigul Shalabayeva and Syrym Shalabayev.

35. It is Madiyar's evidence that in late 2007 or early 2008 he had discussions with his parents about their intention to make a gift to him of £1 million. According to Madiyar, there were a number of conversations about this subject. He suggests that he was told that the gift of £1 million would be used to help him to obtain an investor visa in the UK. Mr **Ablyazov**, in his witness statement, also refers to such conversations having occurred at this time.

36. BTA disputed whether any such conversations in fact took place and Madiyar was cross-examined about this. I return to this issue below. It is in any event clear from the contemporaneous documentary material in evidence that, as early as January 2008, Mr **Ablyazov**, through his associates, had begun to take steps to procure an investor visa for Madiyar. I should explain that possession of an investor visa allows the holder to remain in the UK with only very limited restrictions and without satisfying any significant requirements beyond the ownership of assets of the value of £1 million, the majority of which is required to be held in UK investments.

37. In January 2008, Gherson & Co (Gherson), a firm of immigration solicitors, were engaged by or on behalf of Mr **Ablyazov** to assist in obtaining an investor visa for Madiyar. Gherson had previously been involved in dealing with Madiyar's immigration status; in October 2007, they had been engaged to assist Madiyar in his application for an extension of his student visa. The nature of the instruction had changed. In particular, by letter dated 24 January 2008, Gherson were instructed to assist Madiyar with an application for an investor visa.

38. It is clear from the contemporaneous materials in evidence that the period immediately following Gherson's engagement was marked by frequent exchanges between Gherson and Mr Bartlett dealing with the documents and evidence required and the steps that would need to be taken to make the investor visa application.

39. Thus, for example, on 27 February 2008, Mr Bartlett wrote to Gherson reporting on the efforts made to open a private bank account at HSBC; on 19 April 2008, Mr Bartlett wrote to Gherson providing details of the financial status and employment position of Mr **Ablyazov** and his wife; on 21 April 2008, Gherson wrote to Mr Bartlett inquiring about certain issues relating to Mr **Ablyazov**'s tax position, and on 29 April 2008, Gherson wrote to Mr Bartlett attaching a long list of the documents Gherson would require for the application. Among the documents requested by Gherson was a full, certified, copy of the marriage certificate of Mr **Ablyazov** and his wife as well as full, certified, copies of their current passports and Mr **Ablyazov**'s original bank statements and/or investment portfolio valuations covering a period of no less than the last three months. Also requested were letters of reference from past and present employers and from Mr **Ablyazov**'s bankers, accountants and lawyers confirming the source of his funds and that any sums due in tax on those funds had been paid.

40. A further document identified at this time was a deed of gift document, this being a UK Border Agency requirement where the funds to be used by an applicant for a visa application had not been in the applicant's account for a period of three months prior to the application. I return to this below.

41. The correspondence between Gherson and Mr Bartlett in relation to the investor visa application continued, albeit sporadically, throughout 2008.

42. On 10 June 2008, in the course of making the arrangements necessary to progress Madiyar's application for an investor visa, applications to open bank accounts were made both to EFG Geneva and EFG London. The account at EFG Geneva, the Swiss Account, was to be in the names of both Mr **Ablyazov** and Madiyar. The account at EFG London, the Account, was to be in Madiyar's name alone. Mr Bartlett, who says in his witness statement he was introduced to EFG London by Mr Roger Gherson, a partner at Gherson, appears to have been responsible for organising the opening of these accounts.

43. I pause at this point to note that, supported by the evidence of Dr Giles, BTA disputes that Mr **Ablyazov** ever actually signed the account opening documents for the Swiss Account. Dr Giles was a most impressive witness with substantial expertise in this area and I have no hesitation in accepting her evidence about this and indeed about all the other matters covered by her evidence. I note, however, that BTA did not suggest that because of this the Swiss Account should not be treated as Mr **Ablyazov**'s account: to the contrary, BTA's case was that the Swiss Account should be treated as solely that of Mr **Ablyazov**.

44. On 25 July 2008, Ms Liz Kaye, the person at EFG London with responsibility for dealing with this, completed an approval form in respect of the opening of the Account. In addition to providing details of Madiyar's age and his intention to apply for an investor visa, Ms Kaye identified the anticipated nature of activity to be undertaken from the Account as involving the deposit of £1 million and the purchase of UK government bonds or gilts. Ms Kaye noted that the "*money is gifted by [Madiyar's] father Mukhtar **Ablyazov** who is the chairman of the Board of Directors of BTA Bank*". It is not apparent who told Ms Kaye that the money was a gift to Madiyar from Mr **Ablyazov**.

45. By 23 September 2008, Mr **Ablyazov** had not yet transferred to Madiyar the money necessary to enable him to acquire the investor visa application investments. This is apparent from an email exchange on that date between Mr Bartlett and Gherson in the course of which, responding to an email from Gherson which had asked for details of the amount on deposit for Madiyar, Mr Bartlett noted that Mr **Ablyazov** had not yet made the deposit because he did not wish to do so until everything needed for the application was in place. Mr Bartlett's email did however note that the Account had been opened and asked whether he should "*advise Mr **Ablyazov** to make the transfers now?"* If there was a response from Gherson, it is not in evidence.

46. Six days later, on 29 September 2008, Gherson sent Mr Bartlett drafts of letters that would be required to be sent in relation to the investor visa application. One was a letter to be sent by Madiyar to EFG London which noted that Madiyar was required in relation to the application to send the UK Border Agency written confirmation that he had "*in excess of £1 million gifted to me by my father Mr Mukhtar **Ablyazov***" and that "*he [Mr **Ablyazov**] has relinquished control of those monies as confirmed by the enclosed deed of gift to the UK Border Agency*". As set out below, a document containing the same or similar information was in due course actually sent to the UK Border Agency. Another of the draft letters produced by Gherson at this time was one they themselves were to send to the UK Border Agency accompanied by a deed of gift to be signed by Mr **Ablyazov** expressly confirming that the £1 million it was contemplated would be transferred to Madiyar was intended as an irrevocable gift.

47. Throughout this period, Gherson continued to produce drafts of the documents that would be required for the application.

48. At some point in October 2008, following discussion between Mr Bartlett and a Ms Bradbury at Gherson, a decision appears to have been made that Madiyar's investor visa application would be submitted after the 2008-2009 Christmas holiday. Accordingly, in November 2008, Gherson were instructed to and did apply to renew Madiyar's existing student visa on a temporary basis.

49. At the end of December 2008, Ms Bradbury again made contact with Mr Bartlett. Mr Bartlett responded to Ms Bradbury on 10 January 2009, noting that Madiyar was still abroad and that although Mr Bartlett expected the application to be made immediately on his return, it was possible Madiyar would make another trip in February half term and if this happened the application would be delayed until 23 February 2009. This was because Madiyar's passport would need to be sent to the UK Border Agency in connection with the application when made.

50. On 20 February 2009, £1.3 million was received into the Swiss Account. BTA's case is that the money originated from a BVI company known as Sunstone Ventures Ltd (Sunstone), a company BTA contends was in the ownership and/or control of Mr **Ablyazov**, found in earlier proceedings to have been an entity used by Mr **Ablyazov** to hide assets. The payment from Sunstone was routed into the Swiss Account via an account held in the name of Mr Shalabayev, Mr **Ablyazov**'s brother in law.

51. Although the instruction for the Transfer originally contemplated only £1 million being transferred from the Swiss Account to the Account, on 24 February 2009, at the suggestion of EFG London, this was amended to add a further £100,000. This further sum was needed to cover the costs of the investment to be made for the purposes of the investor visa application. It is clear to me that this was the only reason why the Transfer was for £1.1 million rather than just £1 million.

52. In all events, on 24 February 2009, an instruction to make the Transfer purportedly signed by Mr **Ablyazov** was given, requesting that £1.1 million be transferred from the Swiss Account into the Account opened for Madiyar. On 26 February 2009, the Transfer was made.

53. At this stage I pause again to note that, once more supported by the evidence of Dr Giles, BTA disputes whether Mr **Ablyazov** actually signed the Transfer instruction. Dr Giles' opinion was that the signature on this instruction was likely that of the same individual who signed the account opening documents for the Swiss Account referred to above. Again I accept that evidence. Again I note that BTA did not suggest that because of this the Transfer should be treated as unauthorised by Mr **Ablyazov**: to the contrary, BTA's case was that the Transfer was effected or caused to be effected by Mr **Ablyazov**.

54. At this time, in late February 2009, a number of documents were produced in connection with the investor visa application. This included a letter from EFG Geneva to the UK Border Agency dated 25 February 2009 confirming that Mr **Ablyazov** was its customer and providing details of the instructions given to make the Transfer, as well as one from EFG London to the UK Border Agency dated 26 February 2009 confirming receipt of £1 million into the Account.

55. Another document sent to the UK Border Agency at this time was a memorandum of gift dated 2 March 2009 (the Memorandum of Gift). The Memorandum of Gift bore what purported to be the signatures of both Madiyar and Mr **Ablyazov**. It expressly stated that "*[Madiyar] has been gifted £1 million sterling. [Madiyar] is the recipient of the gift*." It also expressly identified Mr **Ablyazov** as the "*donor of the gift*", noting further that, "*The legal ownership of this money is transferred to [Madiyar]. This is an irrevocable gift*."

56. BTA, again relying on Dr Giles, disputes that the document was actually signed by Mr **Ablyazov**. It also makes the point that Mr **Ablyazov** does not speak or understand English and so, without translation, would not have understood what this said. Dr Giles' opinion was that the signatory of this document was likely the same individual as signed the account-opening document for the Swiss Account and the Transfer instruction of 24 February. Again I have no hesitation in accepting the evidence of Dr Giles in this regard. I return to the significance of this conclusion below.

57. In addition to the foregoing, a further letter dated 2 March 2009 was sent by Madiyar to the UK Border Agency. This confirmed that he had instructed Gherson in connection with an application for leave to remain in the UK as an investor, and that he had money of his own amounting to "*no less than £1 million gifted to me by my father [Mr **Ablyazov**]*."

58. It is necessary at this point to note, as foreshadowed above, that at about the same time as steps were being taken in early 2009 to progress the visa application, Mr **Ablyazov** had become sufficiently concerned about events in Kazakhstan, that, at the very end of January 2009, he had left Kazakhstan for London and, in early February 2009, had approached Clyde & Co. for advice in relation to what has been described by Popplewell J ([2014] EWHC 2788 at [98]) as "*a strategy of concealment and deceit in relation to his assets*", a strategy that was according to Popplewell J within his, Mr **Ablyazov**'s, contemplation at and from that time.

59. It is in this context that BTA contends that Mr **Ablyazov**, having become aware that BTA would very likely soon begin to institute proceedings against him for the many frauds he had committed, was determined to take whatever steps he could to make it difficult for BTA to make recoveries against him. BTA's contention is that the application for the investor visa, involving as it did the Transfer of £1.1 million to Madiyar, was simply an aspect of that strategy.

60. In all events, the £1.1 million having been paid into the Account and the necessary documentation having been obtained, on 17 March 2009, Madiyar's investor visa application was submitted to the UK Border Agency. On 5 May 2009, the application was granted and Madiyar acquired Tier 1 investor status with leave to remain in the UK until May 2012. Thereafter, and in accordance with the requirements for the investor visa, on 3 June 2009, Madiyar instructed EFG London to acquire £1 million of UK Gilts. These were duly acquired the following day at a total cost of £1,064,395.92. Instructions to EFG London to acquire and hold investments of this sort were renewed from time to time, for example in March 2011, April 2012 and September 2012.

61. On 13 August 2009, proceedings in this jurisdiction were instituted against Mr **Ablyazov**. On the same day, the Freezing Order was made by Blair J. There followed a flurry of legal activity, generally described at paragraphs 15 to 22 above.

62. Although, prior to the making of the Freezing Order, Madiyar did not appear to make any withdrawals from the Account other than to make the investment in UK Gilts, in the period thereafter, Madiyar did make a number of withdrawals, including to pay for a BMW motor car, to pay for his university fees and to meet his everyday living expenses.

63. In early 2012, Madiyar applied for and was successful in extending his leave to remain in the UK until 10 October 2014. In September 2012, 10 years after his arrival in the UK, Madiyar became eligible to apply for indefinite leave to remain and, having made the application, on 16 September 2013, this was granted. This meant that Madiyar's right to remain in the UK no longer depended on his status as an investor so that the need for him to have £1 million invested in UK Gilts fell away.

64. On 21 January 2014, Madiyar contacted EFG London to arrange to discuss investment strategies for the Fund once the UK Gilts reached maturity in March 2014. On 29 January 2014, Madiyar attended a meeting with EFG London. According to a note made of that meeting, Madiyar informed EFG London that, having obtained indefinite leave, he wished to change the investment strategy in order to achieve better performance. EFG London then provided Madiyar with a brief overview of different investment strategies and it was agreed that there would be a follow up meeting a few weeks later to discuss the different options.

65. Little progress was thereafter made with taking forward these discussions. This led, in February and early March 2014, to email exchanges between Madiyar and EFG London in the course of which it became clear that, because of the Freezing Order, EFG London did not wish to act on any investment proposal from Madiyar in relation to the Fund. Indeed, EFG London was keen that the Account should be closed.

66. Following this, on 3 March 2014, Madiyar emailed EFG London to say that he had been in touch with his lawyers and that they would start "*taking care of everything, so that we can close the account*".

67. On 10 April 2014, Madiyar emailed EFG London apologising for taking longer than expected to get back in touch. His email referred to two documents sent as attachments. The first was a letter from Addleshaw Goddard, Mr **Ablyazov**'s then solicitors, to Madiyar dated 10 April 2014. This noted that the Freezing Order had been put in place on 13 August 2009 and that "*any dealings with his assets prior to that date, was not subject to the [F]reezing [O]rder*". The second was an invoice from a Swiss lawyer, Mr de Bavier, asking for payment of £1 million with VAT of 8% as a "*retainer for legal services*".

68. It is necessary at this stage to explain what was happening with Mr **Ablyazov** at this time. As noted above, in February 2012, Mr **Ablyazov** had fled the jurisdiction and, in July 2013, he had been arrested and incarcerated in France. He was then the subject of a series of extradition requests made by certain CIS states. The first extradition hearing, to consider whether Mr **Ablyazov** should be remanded in custody pending the resolution of the extradition process, took place in Aix-en-Provence on 1 August 2013. The court concluded that he should. It appears that there were further extradition hearings on 5 and 12 December 2013 and 9 January 2014 after which the French court approved Mr **Ablyazov**'s extradition to Russia. On 9 April 2014, that decision was quashed by the French Cassation Court.

69. The relevance of this, according to BTA, relates to the fact, as it contends, that Mr de Bavier had been advising Mr **Ablyazov** in relation to his extradition and that this explains Mr de Bavier's invoice. The invoice also demonstrates, suggests BTA, that the Fund was never intended as an outright gift for Madiyar. On the contrary, says BTA, the fact, as it contends, that Madiyar was proposing to send £1 million from the Fund to Mr de Bavier to pay Mr **Ablyazov**'s legal bills is evidence that Mr **Ablyazov** always regarded the money as his own.

70. It was further suggested by BTA that the timing of the invoice from Mr de Bavier, on 10 April 2014, was linked to the fact that, on 9 April 2014, the previous day, Mr **Ablyazov** had successfully resisted extradition so that new proceedings would have to commence in Lyon.

71. This is all disputed by Madiyar. He denies that Mr de Bavier was ever engaged by or for Mr **Ablyazov** whether for the extradition hearings or otherwise. He also denies that he ever agreed to pay Mr de Bavier for legal services in relation to his father's predicament. Rather, says Madiyar, acting on the recommendation of his sister, Madina, who lives in Switzerland, he had arranged for Mr de Bavier to assist him, Madiyar, to set up a bank account in Switzerland into which he could transfer the balance of the Fund. I deal with this factual dispute further below.

72. In all events, following Madiyar's 10 April 2014 email to EFG London attaching Mr de Bavier's invoice, on 7 May 2014, Eversheds, solicitors acting for EFG London, wrote to Addleshaw Goddard expressing concern about whether a transfer of money out of the Account might involve a contravention of the Freezing Order. No response to this letter was forthcoming until 16 April 2015, when Kingsley Napley wrote to Eversheds taking issue with any suggestion that the Fund in the Account belonged to Mr **Ablyazov**. On 28 April 2015, Hogan Lovells, BTA's solicitors, wrote to Dechert, who had by this time taken over as solicitors acting for EFG London, indicating their view that there was a "*serious likelihood*" that the Fund was subject to the Freezing Order.

73. Following further correspondence between solicitors, on 5 June 2015, Dechert wrote both to Kingsley Napley and Hogan Lovells proposing that EFG London would pay the Fund either into Court or into a bank account in their joint names or, alternatively, it would issue an application to determine the ownership of the Fund.

74. This led, on 7 September 2015, to Madiyar issuing his own application for a declaration about the ownership of the Fund. Thereafter, as noted above, on 11 December 2015, BTA issued its claim form and on 18 December 2015 directions were given by Popplewell J leading to the hearing before me, including that EFG London would cease to be a party to the proceedings provided it paid the Fund into Court pending the outcome of the dispute as to its ownership. On 21 January 2016, the Fund was paid into Court and EFG London ceased to be a party to these proceedings.

75. I turn next to address the two claims advanced by BTA, namely the Trust Claim and the Section 423 Claim. I deal first with the Trust Claim.

BTA's Trust Claim

76. It is well established law that a gratuitous transfer of property which contains no express or inferred provisions determining the beneficial ownership of the property, will give rise to a resulting trust in favour of the transferor unless the transferor intended to make a gift. If the transferor intended to make a gift, no resulting trust arises.

77. It is also well established law that in a case such as the present where the gratuitous transfer is from father to son, the transfer is presumed to be a gift. This presumption is rebuttable by extraneous evidence that shows the transferor did not intend a gift. If the evidence establishes that the transferor did not intend to make a gift then effect will be given to that intention, so that there is a resulting trust in favour of the transferor. On the other hand, if the evidence establishes that the transferor did intend to make a gift, the transfer will take effect as a gift. See generally in this regard ***Lewin on Trusts***, 19th ed. (2015), especially paras 9-001 to 9-011. Thus, the presumption is no more than a default rule that will have effect only in cases where there is no sufficient evidence to displace the presumption. See ***Snell's Equity*** 33rd ed. (2015), especially para 25-011.

78. As foreshadowed above, Mr **Ablyazov** says in his witness statement that the Fund was intended as a gift to Madiyar. He says, more particularly, that he gave Madiyar £1 million so that he could obtain an investor visa and that once Madiyar obtained British citizenship and it was no longer necessary for him to keep the money tied up, he could do with the money as he wished. He says further that he was aware that Madiyar would soon have to pay university fees, bank charges, rent for an apartment and that he would also need money for a car as well as money to pay for his own legal fees for immigration law advice. Because of this, he says, he decided also to give Madiyar a further £100,000 for these tuition and living expenses. Mr **Ablyazov** says further that when he discussed the matter with Madiyar before making the payment, he made clear that the money was for Madiyar's future and was for him to do as he

wished. There was, he says, never any question that Madiyar would have to repay to him any of the £1.1 million.

79. Madiyar, in his witness statement, gives similar evidence, referring to what he says were conversations with his parents continuing over a reasonably long period of time. He says that although he is not able to remember the exact detail of these discussions, he does recall being told that the gift would be for £1 million and that it would be used to help him obtain an investor visa. He also says that there were discussions about an additional £100,000 although these came later, in or around early 2009. This additional £100,000 was to be paid to him to assist him with university fees, although he was not due to go to university for more than a year, and also to enable him to acquire a car. He says also that the money was to be paid to him in one lump sum together with the £1 million for the investor visa as it was, he says, easier for his father to pay the money this way rather than in instalments and he had the funds to pay this in one lump sum.

80. There is in my view a serious difficulty with the evidence given by both Madiyar and Mr **Ablyazov** about these discussions. In particular, as already noted above, it is plain that the reason the amount transferred in February 2009 was £1.1 million rather than £1 million was because EFG London asked that this be done to cover the dealing costs involved in acquiring the investments. It had nothing whatever to do with providing Madiyar with university fees or other living expenses, and I therefore cannot accept the evidence from either Madiyar or Mr **Ablyazov** in relation to those discussions, which I regard as unreliable.

81. In light of my conclusion about this, the approach I have taken in seeking to determine the intention with which the Transfer was made is to treat the evidence given by Mr **Ablyazov** and Madiyar on this issue with great caution save where it is corroborated by contemporaneous documentary evidence or where what they say seemed to me in the circumstances to be in any event probable.

82. But what does the contemporaneous documentation indicate about Mr **Ablyazov**'s intention in making the Transfer? In my view, the materials to which I have already referred above establish, at least on the face of those materials, that, from as early as January 2008, Mr **Ablyazov** and those assisting him intended that an application should be made to obtain an investor visa for Madiyar in full knowledge that this would require that at least £1 million be gifted to Madiyar. The materials further indicate, again at least on the face of it, that this is why the Transfer was made into the Account.

83. I have already referred above to a number of contemporaneous documents that record or refer to Mr **Ablyazov**'s intention to gift the Fund to Madiyar for this purpose. They include the following:

(1) The account approval forms completed in July 2008 which note that the £1 million to be deposited into the Account was for the purpose of Madiyar acquiring an investor visa and was to be "*gifted by his father Mukhtar **Ablyazov***";

(2) The draft letter dated 23 September 2008 prepared by Gherson for Madiyar to send to EFG London which refers to his having "*demonstrated that I have in excess of £1 million gifted to me by my father Mr Mukhtar **Ablyazov***" and that "*he [Mr **Ablyazov**] has relinquished control of those monies as confirmed by the enclosed deed of gift to the UK Border Agency*";

(3) The draft (undated) letter produced by Gherson on or around 29 September 2008 which it was intended would be sent by them to the UK Border Agency confirming what it was envisaged would be "*the attached deed of gift signed by Mr Mukhtar **Ablyazov** giving permission for [Madiyar] to have the beneficial ownership of £1 million sterling*" and noting that the "*gift is irrevocable*";

(4) The Memorandum of Gift of 2 March 2009 sent to the UK Border Agency which expressly recorded that Madiyar "*has been gifted £1 million sterling*" and is "*the legal recipient of the gift*", and further that the "*legal ownership of this money is transferred to [Madiyar]*" and is "*an irrevocable gift*".

84. These documents, at least on the face of it, constitute strong evidence that Mr **Ablyazov** did indeed intend that the Fund be a gift to Madiyar rather than being held by him for the benefit of Mr **Ablyazov**. This is especially true of the Memorandum of Gift.

85. It will however be recalled that BTA, supported by Dr Giles, contends that the signature on the Memorandum of Gift is not that of Mr **Ablyazov**. I have already noted that I accept Dr Giles' evidence about this and, to the extent that Mr **Ablyazov** in his evidence suggests the contrary, I reject his evidence. Be that as it may, if the reality of the position is that the document was signed, if not by Mr **Ablyazov** then in his name by someone authorised by Mr **Ablyazov** to do so, then, as it seems to me, the fact that Mr **Ablyazov** did not personally sign the document may not much assist BTA's case. That is because the Memorandum of Gift, if made with Mr **Ablyazov**'s authority and consent, given what it said expressly about the Fund being intended as an irrevocable gift to Madiyar, would, notwithstanding the forged signature, still constitute strong evidence that Mr **Ablyazov**'s intention was indeed as stated in the document, viz that the Fund be gifted to Madiyar.

86. BTA in closing suggested that it was not open to Madiyar to advance a case that the Memorandum of Gift, if not signed by Mr **Ablyazov**, was signed by someone with general authority so to do. I cannot see why that should be so. In circumstances where I have accepted BTA's case that the signature on the document was a forgery, I do not think it would be right simply to treat the document as having no relevance whatever. It remains necessary, in my view, to seek to understand the circumstances in which the Memorandum of Gift came to be made and what if any light this may shed on Mr **Ablyazov**'s intention in making the Transfer.

87. In considering whether it was likely that the Memorandum of Gift was made with Mr **Ablyazov**'s authority, it is important to recall that the person signing that document is likely to have been the same person who also signed the Swiss Account opening documents in June 2008 and the Transfer in February 2009, again using Mr **Ablyazov**'s signature. I have already noted that BTA accepts, in relation to those documents, that the person did so with the authority of Mr **Ablyazov**. BTA has not identified any reason why the position should be different in relation to the Memorandum of Gift.

88. It is also relevant in this regard to observe that, in its skeleton argument, BTA noted that it was probable that the administrative arrangements necessary for Madiyar to obtain his investor visa would have been carried out by "*those who in effect worked for [Mr **Ablyazov**]*", probably Mr Shalabayev and Mr Bartlett. I agree. This being so, it seems to me inherently likely that Mr Shalabayev and Mr Bartlett, in taking the steps necessary to enable Madiyar to acquire an investor visa, would have acted with Mr **Ablyazov**'s general authority. It is difficult to imagine any reason why they would have done otherwise. But that is true not only in relation to the generality of the arrangements that had to be made in advancing Madiyar's application for an investor visa; it is likely also to be true in relation to the need, in this context, to advance the Fund to Madiyar to enable him to make the necessary investments in his own name, and indeed in relation to making any document that stated expressly that the Transfer of the Fund was by way of irrevocable gift. This being so, it is my view that whilst the signature on the Memorandum of Gift was not that of Mr **Ablyazov**, the document was nonetheless made and signed with his authority.

89. It follows, in my view, that the Memorandum of Gift does support the conclusion that the Transfer was intended to be an irrevocable gift to Madiyar. This of course assumes that the

document can and should be taken at face value, i.e., that it is not a sham, made simply in order to deceive the UK Border Agency into believing that the Fund was given to Madiyar as a gift when this was not in fact the case. BTA, of course, says that this is exactly the position. It points to the following matters as supporting its contention in this regard.

(1) BTA notes that a gratuitous transfer of £1 million to a son who has just turned 17 years of age calls for close scrutiny; could it really have been intended by Mr **Ablyazov** that Madiyar should be free the day after the transfer to use the money as he wanted? In the present case, says BTA, it is clear that Mr **Ablyazov** intended the Fund only to be used to purchase such securities as would be necessary to enable Madiyar to acquire an investor visa. This, says BTA, is fatal in the present case.

(2) Moreover, says BTA, it is material that the Transfer was made at a time when Mr **Ablyazov** contemplated that his assets would be frozen. The idea that Mr **Ablyazov** would have intended to put the Fund out of his own reach so that he could not call for a retransfer as and when required is, says BTA, not plausible. It was, says BTA, part of Mr **Ablyazov**'s strategy to hide his assets.

(3) Further, says BTA, it is relevant that the benefit Madiyar would obtain from the grant of the investor visa was, says BTA, in truth, at most marginal: Madiyar could not, by acquiring an investor visa, obtain indefinite leave to remain any earlier than he would have done under his student visa status; and he had already had his student visa extended until 2010 and was intending to attend university in England, which he did do, which would have enabled still further extensions of that visa.

(4) BTA also points to the instruction given to EFG London by Madiyar in April 2014 to transfer £1 million to Mr de Bavier, which, as foreshadowed above, it describes in its skeleton argument as an attempt by Madiyar to "*use his father's money to pay his father's legal fees in accordance with his father's instructions*".

(5) BTA also points to the fact that Madiyar did not actually use any part of the Fund to meet his own expenses until after the Freezing Order was made in August 2009, which shows, says BTA, that Madiyar did not actually regard the money as his to use.

(6) Finally, BTA says that it is material that Madiyar and Mr **Ablyazov** gave false evidence about the conversations that predated the Transfer and, in particular, about the reason for the additional £100,000. BTA also says that I should draw an adverse inference from the fact that Madiyar did not call as witnesses his mother or aunt and uncle, Aigul Shalabayeva and Syrym Shalabayev, all of whom it is said could have given relevant evidence.

90. There is certainly force in these points. However, whilst it is true, as BTA says, that the gratuitous transfer of £1 million to a son who has just turned 17 years of age calls for close scrutiny, that simply identifies the task for the Court, rather than compelling a particular answer. Moreover, whilst BTA poses the question as being whether it could really have been intended by Mr **Ablyazov** that Madiyar should be free the day after the Transfer to use the money as he wanted, that, as it seems to me, does not properly capture the reality of the position here where, given the arrangements being made in relation to the investor visa, almost the entirety of the money would be utilised in the acquisition of investments for that purpose.

91. Put differently, the real question, as it seems to me, is whether it is improbable that Mr **Ablyazov**, a very wealthy man with enormous amounts of money (even if much of it may have been obtained dishonestly), would have been willing to gift £1.1 million to his son in order that he might obtain an investor visa in the UK, even if this meant that the gift would be irrecoverable by him, Mr **Ablyazov**. Whilst it is obviously necessary to look at the other matters relevant to the present case, I should say at once that this would not, in my view, be either improbable

or unlikely. One can quite see why for someone of enormous means, a gift of this sort would make a great deal of sense.

92. Nor do I regard the fact that the Fund was intended by Mr **Ablyazov** to be used to acquire investments as fatal to the conclusion that it was to be gifted to Madiyar. I can see no reason, either as a matter of logic or law, why a father (or anyone else) could not gift a sum of money to a child (or anyone else) on the basis that the money should be applied to a particular purpose. The fact that the money is provided for a particular purpose does not, to my mind, undermine the possibility that it is provided as a gift.

93. So far as concerns the suggestion that any advantage to Madiyar of having an investor visa rather than a student visa was only marginal, at one point I had thought that BTA intended to advance this argument as part of a case that the application for the investor visa was itself no more than a sham, that is to say that it was made simply to provide a pretext for a transfer of £1.1 million into Madiyar's name. However, BTA in closing made clear its acceptance that Mr **Ablyazov** may well have wanted to obtain an investor visa for Madiyar. I would note that this certainly appears to reflect the contemporaneous materials described above, including the instructions to Gherson of January 2008.

94. But, if BTA accepts that Mr **Ablyazov** may genuinely have wanted to obtain an investor visa for Madiyar, then it is not clear to me why the extent to which it was better for Madiyar to have an investor rather than student visa should matter, at least in the context of the Trust Claim. In any event, in so far as this does matter, it seems to me that the advantages of an investor visa compared to a student visa were more than marginal; the investor visa allowed Madiyar to remain in the UK without any of the restrictions imposed on those with only a student visa such as the need for a student sponsor and the need to find a job on graduation with an employer willing to sponsor a general visa. These might be seen as particularly advantageous for the immediate family of a controversial or politically exposed person, a description that would cover Mr **Ablyazov**, whether or not, as appears likely to be the position, he was also guilty of embezzlement on an industrial scale.

95. What of the fact that the Transfer was made in late February 2009, at a time after Mr **Ablyazov** had fled Kazakhstan and when he would have had well in contemplation that he was likely to face claims alleging fraud and seeking the return of assets? As noted above, by the time of the Transfer Mr **Ablyazov**, according to Popplewell J, already had in contemplation "*a strategy of concealment and deceit in relation to his assets*". Insofar as it is necessary for me to do so, I accept what Popplewell J concluded in this regard as to the state of Mr **Ablyazov**'s mind at that time.

96. In response to this, the following points were made by Mr Knox QC on behalf of Madiyar:

(1) BTA's argument that the gift was conceived by Mr **Ablyazov** in early 2009 as a ruse to put monies beyond the reach of his creditors, runs up against the fact that the process of applying for Madiyar's investor visa began over a year before this, in January 2008, when Gherson was instructed. Since, if that process was carried through to conclusion, there would inevitably have had to be the Transfer which in fact occurred in February 2009, this demonstrates that the Transfer could not have been part of a scheme concocted by Mr **Ablyazov** in early 2009 as a response to the net that was beginning to close around him.

(2) The suggestion by BTA in its skeleton argument that, even if the process had begun in early 2008, it had lapsed by around September 2008, does not reflect the contemporaneous communications between Gherson and Mr **Ablyazov**'s associates about the application that continued throughout the period from September 2008 to January 2009.

(3) In any event, the amount of the Transfer, £1.1 million was, in the context of the enormous sums Mr **Ablyazov** appears to have embezzled, a tiny sum and not likely to justify the effort involved in using the investor visa application as a scheme to defraud his likely creditors.

(4) It is, moreover, notable that the source of the money for the Transfer was Sunstone, the BVI entity apparently used by Mr **Ablyazov** to shelter embezzled funds. If Mr **Ablyazov**'s plan was simply to use the application for an investor visa as a scheme to put money out of the reach of his creditors, it does not make sense, says Mr Knox, for Mr **Ablyazov** to have moved the money from that off-shore account and to bring it within the UK via an account in his own name into the account of his son, all of this in the context of a process that would have had a fair amount of visibility.

97. In my view the points made by Mr Knox in this regard are compelling and I accept them. In particular, I find that it is most unlikely that Mr **Ablyazov** would have embarked on the process of obtaining an investor visa for Madiyar as part of a scheme to put the £1.1 million outside the hands of any future creditors; it is far more likely that Mr **Ablyazov** initiated and carried through that process because he wanted Madiyar to have an investor visa and was willing as part of this to do what had to be done, including gifting the £1.1 million to Madiyar to enable him to acquire the necessary investments. The process of making that application was not one that had lapsed before February 2009; it was one that continued throughout the period from when it was initiated until its conclusion, albeit that activity and progress was sometimes sporadic.

98. I also agree with Mr Knox that if Mr **Ablyazov**'s conduct in relation to the £1.1 million was directed to putting the money out of the hands of possible creditors rather than assisting Madiyar to obtain the investor visa, it would have made little sense for Mr **Ablyazov** to have arranged for the money to be taken from the relative obscurity of an account held by Sunstone and then paid into the Swiss Account, which was in his name, before being transferred into the Account, which was in the name of his son.

99. For broadly the same reasons, I have come to the conclusion that the Memorandum of Gift, which expressly stated that the money was given to Madiyar as a gift was not a sham. However dishonest Mr **Ablyazov** may be, I find it difficult to believe that he would have been willing to implicate his son in a fraud on the UK Border Agency given the relatively small sum involved, at least when compared with the amounts that Mr **Ablyazov** has apparently embezzled. In my view, it is far more likely that Mr **Ablyazov** really did have the interests of his son in mind and, if this required that he should gift a sum of £1.1 million to Madiyar, then this is what he was willing to do.

100. Put shortly therefore, I find that the Transfer of the Fund was intended by Mr **Ablyazov** as a gift to Madiyar.

101. My conclusion in this regard is unaffected by the fact that, in April 2014, Madiyar sought to have £1 million in the Account transferred to Mr de Bavier, nor by the fact that Madiyar only began using that money for his own expenses after the imposition of the Freezing Order in August 2009. Nor is my conclusion affected by the fact that the evidence of Madiyar and Mr **Ablyazov** was in important respects unreliable, and that Madiyar did not produce his mother, aunt or uncle as witnesses.

102. So far as concerns the attempt to transfer £1 million to Mr de Bavier, it seems to me that even if BTA had been correct to suggest that Madiyar was content for the money to be used to pay for Mr de Bavier's legal fees incurred in relation to Mr **Ablyazov**'s extradition woes, it does not necessarily follow that when, in February 2009, Mr **Ablyazov** caused the Transfer to be made, he did not at that time intend the Fund to be a gift to Madiyar. Implicit in BTA's case in this regard is the notion that a son such as Madiyar is likely to have been willing to provide money to assist his father, even one in as much difficulty as Mr **Ablyazov** found himself, only

where the father and son both understood and believed that the money in truth always belonged to the father and not the son. I do not see why that is so; it is at least as plausible, and perhaps even likely, that a son in this position would be willing to provide the money to his father even if both understood and believed the money originally to have been the subject of a gift from father to son.

103. In other words, even if BTA had been able to satisfy me that the attempt to transfer the £1 million to Mr de Bavier was in respect of Mr **Ablyazov**'s legal fees, this of itself would not have led me to conclude that, when, 5 years earlier, the £1.1 million was paid into the Account, the money could not have been intended as a gift to Madiyar. In fact, however, as I explain below, I am far from satisfied that the intended transfer to Mr de Bavier in April 2014 was for the purposes of meeting Mr **Ablyazov**'s own legal costs.

104. It is necessary to have in mind the events that led up to the production of Mr de Bavier's invoice in April 2014, set out above. In summary:

(1) By January 2014, Madiyar had been granted indefinite leave to remain in the UK, and in circumstances where the UK Gilts acquired for the purposes of the investor visa application were due to mature in March 2014, he had contacted EFG London to discuss the reallocation of the Fund into different, more aggressive, investments.

(2) The only reason the Fund was not reallocated into different, more aggressive, investments was because EFG London was concerned about the risk of acting in contravention of the Freezing Order.

(3) At around the same time as EFG London made clear to Madiyar its concern about acting in contravention of the Freezing Order, it also expressly indicated to Madiyar its preference for the Account to be closed.

105. One can quite see why in these circumstances Madiyar would have been looking to move the Fund elsewhere. He suggests he was keen to move the Fund out of the UK and place it in Switzerland because he was concerned that if the Fund was simply moved to another bank in the UK he would encounter the same difficulties he had run up against with EFG London because of concerns about the Freezing Order and its effect. He also says that he believed these difficulties might be avoided if the Fund was placed with a bank in Switzerland. He says further that Mr de Bavier had agreed to facilitate this for him.

106. Whilst Mr Jones QC, leading counsel for BTA, was able through skilful cross-examination to highlight certain difficulties with parts of the evidence given by Madiyar on this issue, in my judgment the main thrust of what Madiyar says about this part of the story is likely to be true. In particular, in circumstances where EFG London was resistant to him dealing with the Fund because of a concern about the Freezing Order, it is in my view entirely credible that Madiyar should believe, rightly or wrongly, that he was more likely to have a greater freedom to access the money without interference if it were placed in a bank account in Switzerland rather than in an account in this jurisdiction. In my judgment, this is most likely what he was seeking to do in April 2014.

107. BTA's case to the contrary, that the money was to be paid to Mr de Bavier for Mr **Ablyazov**'s legal fees, depends necessarily on Mr de Bavier being Mr **Ablyazov**'s lawyer. BTA says that its contention that Mr de Bavier was indeed providing or intended to provide legal services to or for Mr **Ablyazov** is supported by at least two things.

108. BTA relies, first, on a photograph of Mr de Bavier waiting outside the Aix-en-Provence court on 1 August 2013 which shows Mr de Bavier standing next to Mr **Ablyazov**'s daughter, Madina, whilst an unidentified French lawyer stands close by. The caption below the picture

refers to Madina talking "*to lawyers*" and identifies Mr de Bavier as a "*legal adviser*" without saying by whom he was instructed. Given that it is the evidence of both Mr **Ablyazov** and Madiyar, whose evidence on this point I accept, that Mr de Bavier was a legal adviser to Madina and her husband, and indeed to Mr **Ablyazov**'s wife, this photograph and the accompanying caption does not seem to me to take the matter any further.

109. BTA also relies on certain quotes attributed to Mr de Bavier by a Kazakhstan news website known as Tengrinews following the hearing on 1 August 2013. The report refers to Mr de Bavier twice. The first reference appears to describe him as "***Ablyazov**'s French lawyer*" and attributes to him a quote about Ukraine being a "*friendly country, while Kazakhstan came under a lot of pressure over expulsion of his (**Ablyazov**'s) wife for possession of fake passport*". The second reference is to comments apparently made by Mr de Bavier about the circumstances in which Mr **Ablyazov** was arrested.

110. I am not satisfied that the Tengrinews article provides reliable evidence on which to form a conclusion that Mr de Bavier was a lawyer engaged by Mr **Ablyazov** in relation to his extradition position. I note that the same article also identifies Bruno Rebstock as Mr **Ablyazov**'s lawyer and whilst it is of course possible that Mr **Ablyazov** could have had more than one French lawyer acting for him, Mr de Bavier is not in fact a French lawyer at all. Indeed, it appears from Mr de Bavier's own website that he is a Swiss lawyer whose identified areas of practice do not on the face of it extend to criminal or extradition work; he identifies his areas of practice as commercial law, international taxation law, company law, residence permits and trusts and estates. This would not make him a natural candidate to act as Mr **Ablyazov**'s lawyer in relation to extradition proceedings in France.

111. I would add also that whilst BTA relies upon the comments attributed to Mr de Bavier on the Tengrinews website about the circumstances in which Mr **Ablyazov** was arrested as indicating that he was Mr **Ablyazov**'s lawyer, those comments, in my view, might have been made whether or not his presence there was as lawyer to Mrs **Ablyazov**, Madina and her husband or as lawyer for Mr **Ablyazov**.

112. There is another more detailed report of the proceedings in Aix on 1 August 2013, which refers to Mr de Bavier, not as a lawyer acting for Mr **Ablyazov**, but rather as an attorney who "*has come from Geneva with Madina*". This accords with what Madiyar says was the involvement of Mr de Bavier.

113. Having regard to all the matters referred to above, it seems to me that the evidence on which BTA relies to establish that Mr de Bavier was Mr **Ablyazov**'s lawyer in relation to events in France is somewhat exiguous and I do not accept that BTA has established that Mr de Bavier was in fact Mr **Ablyazov**'s lawyer.

114. But if that is right, what then of Mr de Bavier's invoice? After all, if Madiyar's evidence about the purpose of the payment is correct, namely that the £1 million was to be sent to Mr de Bavier so that he could place it in a Swiss bank account for his, Madiyar's, own benefit, it would follow that the invoice was misleading; even allowing for any language difficulties, it is unlikely that the maker of the invoice could have thought that providing assistance in opening a Swiss bank account could accurately be described as a "*retainer for legal services*", still less one for which a charge of £1 million would be appropriate. The difficulties that arise in this regard are compounded by the fact that, as BTA has noted, Madiyar has failed to disclose the email, apparently from his sister Madina, to which Mr de Bavier's invoice was attached. Although Madiyar offered an explanation for this, I did not find this entirely convincing.

115. One possible explanation for what I have found to be a misleading invoice is related to what I have suggested was Madiyar's wish to have an account in Switzerland to which he would have free access without concerns being raised about the Freezing Order. It may well be

that, in order to achieve this, consideration was given to the need for a structure that would disguise the source of funds and so reduce the likelihood of the account being linked back to Madiyar. One imagines that arrangements for the setting up of such an account might well be carried out or facilitated by a lawyer. This would also explain why Madiyar might have been keen that the email to which Mr de Bavier's invoice was attached should be deleted. However, since it is probably unnecessary to reach any conclusions about this, I propose in fairness to Mr de Bavier to say no more about the real nature of his invoice.

116. I turn next to the fact that Madiyar did not actually use the Fund to meet his own expenses and that he took no money from the Account until after the Freezing Order was granted. As already noted, BTA says that this shows that Madiyar did not actually regard the money as his to use. It follows from the conclusion I have already expressed above that I do not agree. It seems to me that the fact that Madiyar did at some point begin to make withdrawals from the Account to meet his own needs, even if this was only after the making of the Freezing Order, is at the very least equally consistent with his own case, namely that the Fund was his to use. That he did not utilise the Account in this way until after the Freezing Order may indicate no more than that, from that point, he could not as readily rely on hand-outs from his parents in order to meet the demands of his lifestyle and education.

117. Finally, I am not dissuaded from the conclusion at which I have arrived as to Mr **Ablyazov**'s intention in making the Transfer by reason of the fact, as I have noted, that parts of the evidence of both Madiyar and Mr **Ablyazov** were in my view unreliable. I have already explained the manner in which I approached their evidence in light of this. Equally, I do not consider it would be appropriate to draw any adverse inferences in relation to the factual issues I have considered above because of the failure by Madiyar to call his mother, aunt or uncle to give evidence at the trial. I can quite understand why in circumstances where witness statements were provided by Mr Bartlett, Mr **Ablyazov** and Madiyar himself, the view might have been taken that the Court would have before it evidence from all the main protagonists and that it was therefore not necessary that evidence should also be adduced from these other individuals.

118. I therefore conclude that BTA's Trust Claim fails on the facts. I turn next to BTA's Section 423 Claim.

BTA's Section 423 Claim.

119. I propose to deal with the Section 423 Claim by considering first whether BTA has been able to satisfy the requirements of section 423 of the Insolvency Act 1986 and thereafter to consider the various limitation issues that arise.

120. Section 423, headed "*Transactions defrauding creditors*", provides (so far as material) as follows:

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration…;

(b) …

(c) …

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) …

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

121. Section 424 identifies the persons who may apply for an order under section 423. These include the "*victim of the transaction*" which, if it is right in what it says about the purpose for which the Transfer was made, would certainly include BTA. Section 425 sets out the provisions which may be made by order under section 423.

122. As noted above, BTA's Section 423 Claim involves the contention that the Transfer made by Mr **Ablyazov** to Madiyar was (1) a transaction at an undervalue or for no consideration; (2) made "*for the purpose*" of putting assets outside BTA's reach. If BTA is right about this, it will have satisfied the requirements of sections 423(1) and (3) and, subject to any limitation issue, will be entitled to a remedy in accordance with section 425.

123. Madiyar cannot and does not dispute that the Transfer was a transaction at an undervalue and/or for no consideration. He does however dispute that the Transfer was one within section 423(3), i.e., that it was "*for the purpose*" of putting assets outside BTA's reach.

124. Guidance on the meaning of the phrase "*for the purpose*" in section 423 is to be found in the decision of the Court of Appeal in ***Inland Revenue Commissioners v Hashmi*** [2002] BCC 943.

125. Arden LJ, giving the leading judgment of the Court, addressed this issue at [23]-[25]:

The question arising on this appeal is whether on the true construction of section 423 the purpose shown must be a dominant purpose. In my judgment the answer to that question must be arrived at taking into account the role, as explained above, of section 423 in insolvency legislation. Accordingly it is not necessarily helpful to apply the construction placed on similar words in different provisions and none was suggested. In my judgment there is no warrant for excluding the situation where purposes of equal potency are concerned. … Thus one purpose can co-exist with another. Moreover, as Jonathan Parker J said in In re Brabon, there is no epithet in the section and thus no warrant for reading one in. Accordingly, in my judgment, the section does not require the inquiry to be made whether the purpose was a dominant purpose. It is sufficient if the statutory purpose can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended. Moreover, I agree with the observation of the judge that it will often be the case that the motive to defeat creditors

and the motive to secure family protection will co-exist in such a way that even the transferor himself may be unable to say what was uppermost in his mind.

To take a homely example, suppose that I need to post a letter and also need to take the dog for a walk, and combine both operations in the same outing. I approach this example on the footing that neither objective counts as trivial. It will be clear that I have two purposes in leaving the house. It is a meaningless enquiry to ask whether I regard one of those objects as superior to the other or regard them as of equal potency. By contrast, if I go out to post a letter and the dog gets out of the house, slips under the gate and runs after me, it could certainly not be said that I had two objects in that I was not intending to take the dog for a walk at the time. Likewise, if I go to take the dog for a walk, and going past the postbox find an unposted letter in my pocket and take the opportunity of posting a letter at the same time, it will not be correct to say that I had two objects in that walk. I had only the one object, that of walking with the dog, and the posting of the letter was but a consequence of it. On the other hand, if I decide to take the dog for a walk but take the view that I will use the opportunity to post the letter at the same time, it can be said that I had two objects in that outing even if I would not have posted the letter until another day but for the need to take the dog for a walk.

I cite these examples to emphasise that for something to be a purpose it must be a real substantial purpose; it is not sufficient to quote something which is a by-product of the transaction under consideration, or to show that it was simply a result of it,…, or an element which made no contribution of importance to the debtor's purpose of carrying out the transaction under consideration. I agree with the point made by Lord Justice Laws in argument, that trivial purposes must be excluded.

126. Laws LJ, at [32]-[33], said this:

It is clear that the statutory purpose referred to in section 423(3) of the Insolvency Act 1986 need not be the only purpose for which the impugned transaction was entered into. Moreover, there is in my judgment no warrant for a construction of the statute which would qualify the term "purpose" by the adjective "dominant". No such qualification is required to make sense of the Act or to give it pragmatic efficacy. On the contrary, it is easy to envisage cases where more than one purpose is at hand between whose weight or influence it is on the evidence impossible to distinguish in practical terms.

In such a case, in my judgment, the application of section 423(3) is by no means necessarily excluded. What in my judgment is required is that the claimant show that the donor, vendor or settler was substantially motivated by one or other of the aims set out in section 423(3)(a) and (b) in entering into the transaction in question. There may be cases in which, even absent the statutory purpose, the transaction would or might have been entered into anyway. That would not necessarily negate the section's application; but the fact-finding judge on an application made to him under section 423 must be alert to see that he is satisfied that the statutory purpose has in truth substantially motivated the donor if he is to find that the section bites.

127. Simon Brown LJ, between [36] and [40], added the following:

To have a transaction struck down under section 423 of the Insolvency Act the creditor ("the victim” in the language of the statute) must satisfy the court that the debtor entered into it "for the purpose of" putting assets beyond the creditor's reach or otherwise prejudicing his interests. Must that be the debtor's (a) sole purpose or (b) dominant purpose or (c) merely a substantial purpose; if the latter, how should the question be approached? As Lady Justice Arden and Lord Justice Laws have demonstrated, the arguments against the test being one of sole or dominant purpose, and in favour of it being one of substantial purpose, are compelling.

Rather more difficult, however, as it seems to me, is the correct approach to that test. At an early stage in the argument I suggested that the question for the judge might be, "Am I satisfied that this transaction would not have been entered into (on the facts of the present case, that this gift would not have been made) but for the debtor's wish to put his assets beyond his creditors' (or prospective creditors') reach?" If, in other words, the judge were to conclude that the gift would or might have been made in any event, then on this approach the creditor's claim to set it aside would necessarily fail. Such an approach assumes that if the gift would have been made in any event, it could not properly be said to have been made for the purpose of putting it beyond the creditors' reach.

I became persuaded, however, that this is the wrong approach. Assume, say, that the debtor makes a gift partly out of a wish to avoid inheritance tax and partly to escape his creditors; and assume further that he would have made it in any event purely for inheritance tax purposes. That, to my mind, should not save the gift from being set aside. Escaping the creditors may well, after all, have been a substantial factor in the donor's thinking. No more should a gift, in my opinion, be saved merely because the debtor would in any event have made it to benefit the donee.

It therefore seems to me that the test cannot be refined beyond saying that in each case the question to be asked is: can the court be satisfied that a substantial purpose of the debtor's transaction was (putting it in shorthand) to escape his liabilities?

I would, however, add this. If in fact the judge were to find in any given case that the transaction is one which the debtor might well have entered into in any event, he should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities….

128. The approach to be taken to establishing the existence (or otherwise) of the purpose necessary for section 423(3) might therefore be summarised as follows:

(1) The inquiry for the Court is as to "*the purpose*" of the transferor in entering into the transaction. More particularly, was the transferor's purpose to put assets beyond the reach of a person who is making or may at some time make a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make? I refer to this below as the 'statutory purpose'.

(2) In order for section 423(3) to be engaged, it is sufficient that the statutory purpose was a purpose of the transferor in entering into the transaction. It need not be his dominant purpose, but must play more than a trivial role in his consideration in the sense that it made a contribution of importance to the transferor's purpose in entering into the transaction. Put differently, the transferor must be "*substantially motivated*" by the statutory purpose.

(3) It follows that provided that the statutory purpose was a purpose of the transferor in entering into the transaction, the fact that the transferor might also have had some other purpose in entering into the transaction will not prevent section 423(3) being engaged. This is so even if that other purpose was in fact the transferor's dominant purpose in entering into the transaction.

(4) It is important in this context to distinguish between something being a purpose of the transaction as opposed to it being merely a consequence or by-product thereof. For something, e.g., an outcome, to be regarded as a purpose of a transaction rather than merely a consequence or by-product thereof, it must be shown that the outcome was positively intended by the transferor; if such a positive intention on the part of the transferor cannot be shown, the outcome will be merely a consequence or by-product of the transaction rather than its purpose.

(5) The fact that, even absent the statutory purpose, the transferor would have entered into the transaction, does not necessarily entail that section 423(3) will not be engaged. Where however this is the case, the Court must be "*alert to see that….the statutory purpose has in truth substantially motivated the donor if he is to find that the section bites*" (per Laws LJ). As Simon Brown LJ put it, where the Court concludes that "*the transaction is one which the debtor might well have entered into in any event",* the Court *"should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities*".

129. I start my consideration of this issue by making four preliminary points.

130. First, as a consequence of my judgment in relation to BTA's Trust Claim, it was at least an outcome of the Transfer that the Fund was put beyond the reach of BTA as a person who was and/or might make a claim against him. What I therefore have to determine is whether this was also a purpose of Mr **Ablyazov** in making the Transfer. That depends, as noted above, on whether Mr **Ablyazov** positively intended that outcome.

131. Secondly, whilst Mr **Ablyazov**'s decision in January 2008 to set in train a process that would enable Madiyar to obtain an investor visa occurred long before any claims were actually instituted against Mr **Ablyazov**, even at that early time Mr **Ablyazov** is very likely to have appreciated that he had been involved in serious wrongdoing against BTA for which he might get sued. There can moreover be no doubt that Mr **Ablyazov** would have been well aware he would face such claims and that BTA would seek to recover assets from him at the time of the Transfer in late February 2009.

132. Thirdly, it is in my view likely that Mr **Ablyazov** would have made the Transfer to enable Madiyar to pursue the investor visa application even if he was not at risk of a claim being made against him by BTA. I have already noted that BTA accepts that Mr **Ablyazov** may have wanted to obtain an investor visa for Madiyar; this accords with all the contemporaneous documentary materials that I have seen. I have of course also already decided that there was no lapse in the process that in January 2008 had been instituted to pursue this objective and I have rejected the suggestion that the process, having lapsed, was only revived following Mr **Ablyazov**'s having to flee Kazakhstan at the beginning of 2009. This being so, I keep in mind the warning given by Simon Brown LJ that I "*should not …too readily infer*" that Mr **Ablyazov**, in making the Transfer, "*also had the substantial purpose of escaping his liabilities*". In the language of Laws LJ, I must satisfy myself that "*the statutory purpose has in truth substantially motivated the donor if [I am] to find that the section bites"*.

133. Fourthly, it is clear that determination of this issue depends upon the state of mind of Mr **Ablyazov**. I note that he, in his witness statement, does touch on the question as to the purpose for which he made the Transfer. However, in light of what I regard as the unreliability of Mr **Ablyazov** as a witness, I have considered the position without positively relying on what he has there said, save where his evidence is corroborated by contemporaneous documentary material or where, having regard to all the circumstances, I regard it as probable that his evidence is likely to be correct.

134. So, what is the evidence that is said to establish that Mr **Ablyazov**, in making the Transfer, positively intended to defeat the potential claims of his creditors in respect of this money, as opposed, perhaps, to simply recognising, as he may well have done, that this would be a consequence or by-product of the Transfer? What are the matters on which BTA relies that show that defeating the potential claims of his creditors was in truth something that substantially motivated Mr **Ablyazov** in making the Transfer?

135. Generally speaking, BTA relies for its Section 423 Claim on broadly the same facts as were relied upon in relation to the Trust Claim. More particularly:

(1) BTA refers to the fact that the Transfer was effected after Mr **Ablyazov** had fled Kazakhstan following the AFN uncovering his fraudulent misappropriation of billions of dollars of BTA's assets.

(2) It further notes that, at the time of the Transfer, Mr **Ablyazov** must have understood it was inevitable that claims would be commenced against him in this jurisdiction; he had already sought and taken advice from Clyde & Co relating to those claims and the prospect of interim relief being granted against him and his assets.

(3) BTA makes the point that Mr **Ablyazov** is a man who has demonstrated time and again that he will do all he can to prevent BTA from being able to preserve and enforce against his assets.

136. I agree with all of these points, in so far as they go. In particular, as I have already noted, it seems to me near certain that Mr **Ablyazov** at the time of the Transfer would have been well aware that he would be facing claims against himself and his assets. I also entirely accept that Mr **Ablyazov** is a person who time and again has shown that he will do all he can to prevent BTA from being able to preserve and enforce against his assets.

137. However, given my conclusion that Mr **Ablyazov** would have made the Transfer to Madiyar even if there was no possibility of any claims against him, as already noted, I am unwilling too readily to infer from those matters that Mr **Ablyazov** when making the Transfer also had in his mind and was in truth substantially motivated by the 'statutory purpose'. In my judgment, more is required before I conclude this to be the case.

138. In considering the other evidence that may bear on this question, there are two additional factors that seem to me relevant in this regard.

139. First, although the sum of £1.1 million is a great deal of money for most people, for Mr **Ablyazov**, who on BTA's case had successfully embezzled more than US$6 billion, the amount would have been almost *de minimis*. A calculation done by Mr Knox suggests that it represented approximately 0.03% or less of the amount BTA says had been embezzled. As Mr Knox observed, having regard to the enormous amount he is said to have embezzled and that was therefore at risk so far as he was concerned, it might be thought unlikely that Mr **Ablyazov** would go to the lengths he did, including specifically setting up a London bank account in Madiyar's name, having to produce a quantity of personal documents, and applying for a visa with all the attendant legal fees, for such a small benefit.

140. Secondly, as already mentioned, it is common ground that the £1.1 million eventually paid into the Account was sourced from Sunstone, a BVI company in relation to which Mr **Ablyazov**'s ownership and control was, at least in February 2009, far from transparent. In other words, even before the Transfer, the money in question could already be said to have been out of Mr **Ablyazov**'s hands and perhaps already not straightforward for any creditor to reach. If Mr **Ablyazov**'s motivation was to keep money away from his creditors, he could very easily just have left it with Sunstone. At the same time, if putting money out of the reach of creditors was a substantial motivation for his actions, it is not easy to see why Mr **Ablyazov** would have regarded that objective as being well served by moving the money out of Sunstone in the BVI and into the Account held in London in his son's name by way of a transfer from an account, the Swiss Account, in his own name.

141. In my view, these are well-founded points and I am not able to see how these are matters that can readily be reconciled with Mr **Ablyazov** having been in truth substantially motivated by the 'statutory purpose'.

142. Having regard to all the matters set out above, the conclusion at which I have arrived is that whilst Mr **Ablyazov** may perhaps have been conscious that a by-product of the Transfer would be (as it was) that the Fund would be placed out of the hands of potential creditors including BTA, this was not a substantial purpose of his making the Transfer. It follows, in my judgment, that BTA has not established that Mr **Ablyazov**, in making the Transfer, had the purpose required for section 423(3) and, accordingly, BTA's Section 423 Claim fails.

The Limitation Act issues

143. In light of the conclusions I have reached above, it is not strictly necessary to say any more about the limitation issues raised in relation to the Section 423 Claim. However, for the sake of completeness I deal with these below.

144. The limitation issues arise in the following way. It will be recalled that the Transfer took place on about 26 February 2009. BTA's claim form was issued more than 6 years later, on 11 December 2015. It follows that if the relevant limitation period is 6 years then BTA's Section 423 Claim would have been out of time. This is what Madiyar contends. He says the claim falls within section 9 of the Limitation Act 1980 and that this provides for a 6 year period. BTA disagrees. It says that the relevant provision in the Limitation Act is section 8 and that the relevant limitation period is therefore 12 years. BTA further contends that if it is wrong about this it is in any event entitled to take advantage of the extended period introduced by section 32(1) of the Limitation Act. Needless to say, Madiyar disputes this.

145. It may be helpful to set out at the outset the provisions of the Limitation Act relevant to these issues.

146. Section 8, headed "*Time limit for actions on a specialty*", provides as follows:

(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

147. Section 9(1), headed "*Time limit for actions for sums recoverable by statute*", provides as follows:

An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

148. Section 32, headed "*Postponement of limitation period in case of fraud, concealment or mistake*", provides as follows:

(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action—

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place….

(4) …

(4A)…

(5) …

149. Finally, section 38(5) provides that:

Subject to subsection (6) below, a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled.

150. There is no dispute that a claim in respect of section 423 of the Insolvency Act is to be regarded as an "*action upon a speciality*". As Arden LJ noted in ***Hill v Spread Trustee Co Ltd and anor*** [2007] 1 WLR 2404 (CA), at [116], the "*essence of a speciality is a covenant under seal or an obligation imposed by statute*". It follows that the limitation period applicable to the Section 423 Claim is that stipulated by section 8(1) of the Limitation Act, namely 12 years, unless of course section 8(2) applies because the claim is one "*for which a shorter period of limitation is prescribed by any other provisio*n" of the Act. That will be the case here if the Section 423 Claim is properly to be regarded as one falling within section 9(1) because it is a claim "*to recover any sum recoverable by virtue of any enactment*". As noted above, the limitation period applicable to claims within section 9(1) is 6 years.

151. The first question that therefore arises is whether the Section 423 Claim is in fact one to recover a sum recoverable by virtue of an enactment. Since there can be no doubt that the Section 423 Claim is one brought by virtue of an enactment, the applicability of section 9(1) turns on whether it is a claim to recover a sum of money within the meaning of section 9(1).

152. In ***Re Priory Garage (Walthamstow) Limited*** [2001] BPIR 144 (Ch), John Randall QC sitting as a Deputy Judge of the High Court, having reviewed earlier relevant authorities, suggested (at page 160) that what matters for the purposes of section 9(1) is to identify whether "*the substance or essential nature*" of the claim is one to recover a sum of money and that, in

so doing, the Court is not confined to looking just at the pleading; the Court may look also at the substance behind the pleading. I note that Arden LJ in ***Hill*** (supra) referred to ***Re Priory Garage*** with approval (or at least no disapproval).

153. In dealing with this issue, Mr Jones QC for BTA notes that the form of relief it seeks against Madiyar is the return of the Fund to the Swiss Account. This, Mr Jones says, is not a claim for the recovery of money. Rather, he contends, relief in this form would simply put BTA in a position whereby it would be able to enforce its judgment debts against the chose in action that would therefore exist in relation to the Swiss Account. According to Mr Jones, it would therefore only be at this second stage, i.e., the stage of enforcement, that one would be dealing with the recovery of money, but even then only by way of the realisation of an asset.

154. Mr Knox QC for Madiyar disputes this. He contends that BTA is ultimately seeking to recover money under the judgments it has obtained against Mr **Ablyazov** and, as part of that, it wishes to obtain payment to it of the Fund currently held in Court. So characterised, he says, the Section 423 Claim falls squarely within section 9(1). He notes also that, on the face of its pleaded case, BTA seeks an order that EFG London should transfer the Fund back to EFG Geneva or alternatively into Court. He observes that the latter has already happened and that BTA's real claim is therefore, as it always has been, for an order for payment out to it, i.e., its claim is one to recover money. That would be so even had BTA still been seeking an order against EFG London requiring it to transfer the Fund back into the Swiss Account. Either way, says Mr Knox, the Section 423 Claim is one for payment of a sum of money and the applicable limitation period is six years.

155. Standing back and seeking to identify the "*substance or essential nature*" of the Section 423 Claim, it is in my view important to keep in mind that the transaction BTA seeks to impeach is the Transfer, a transaction that in essence involved the payment of a sum of money by Mr **Ablyazov** to Madiyar, albeit that the payment was made from one bank account (Mr **Ablyazov**'s) into another (Madiyar's). Thus, what BTA in substance seeks in this action is the recovery from Madiyar of that sum of money; in other words, that Madiyar should be required to repay the money paid to him by Mr **Ablyazov**. Viewed in this way, I regard it as clear that the Section 423 Claim is in substance and essence one for the recovery of a sum of money and thus a claim within the meaning of section 9(1).

156. It is true that strictly speaking, the means by which the Transfer was accomplished, with money being paid from one account into another, from the Swiss Account into the Account at EFG London, meant that the only right Madiyar would have acquired was the right to claim this money from EFG London, or, put another way, a chose in action in respect of the Fund in the Account. It is also correct to note that, at least when the claim form was issued, all that BTA's Section 423 Claim sought in addition to certain declarations, was relief in the form of an order obliging EFG London to transfer the Fund to the Swiss Account so that it would be Mr **Ablyazov** rather than Madiyar who would possess a chose in action in respect thereof. But, this does not change what is the substance and essential nature of the claim, which is, in my judgment, a claim for the recovery of a sum of money.

157. I conclude, therefore, that the Section 423 Claim falls within section 9(1) rather than section 8(1) of the Limitation Act and that the limitation period applicable was 6 years. It follows that the claim was in my judgment out of time, unless of course BTA was able to rely on section 32(1) of the Limitation Act to extend time. It is to that issue that I turn next.

158. BTA's argument that it was able to take advantage of section 32(1) depends in the first instance on its contention that the Transfer involved either a fraud or a deliberate concealment on the part of Mr **Ablyazov**. In light of my judgment on the Section 423 Claim I have, of course, already decided this issue against BTA. The analysis below therefore proceeds on the

basis that I am wrong about this and that there was in fact a fraud or deliberate concealment on the part of Mr **Ablyazov** in relation to the Transfer.

159. Even then, however, the question arises whether a fraud or deliberate concealment on the part of Mr **Ablyazov** would have been sufficient to bring the Section 423 Claim within section 32(1)(a) or (b).

160. The point made by Mr Knox QC in this regard was to note that, even if there had here been fraud or concealment, (1) the fraud or concealment required for the purposes of section 32(1)(a) is that of "*the defendant*" against whom the claim for which an extended limitation period is sought is pursued, and (2) if there had been any fraud or concealment here, it would have been that of Mr **Ablyazov**, not Madiyar.

161. There can be no doubt that Mr Knox is right to say that, in general terms, the fraud or concealment with which section 32(1) is concerned must be that of the defendant or his agent rather than some other person: see ***Compagnie Noga D'Importation Et D'Exportation SA v Australia and New Zealand Banking Group Limited and ors*** [2005] EWHC 225 (Comm) per Langley J at [51] and ***AG Zambia v Meer Care & Desai*** [2007] EWHC 952 (Ch) per Peter Smith J at [399]. But the position is a bit more complicated than that because it is necessary to have regard also to the final sentence of section 32(1). This provides that references in section 32(1) to the defendant "*include references to the defendant's agent and to any person through whom the defendant claims and his agent*. "

162. There will ordinarily be no difficulty in ascertaining who might have been the agent of the defendant. More complex, however, may be ascertaining who is to be regarded as a "*person through whom the defendant claims*" although guidance is provided on this by section 38(5) which, as noted above, provides that "…*a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled*".

163. Thus, contends Mr Jones QC, whilst Madiyar himself may not have been responsible for any fraud or concealment, he is on the facts of this case to be treated as 'claiming through' Mr **Ablyazov** because he, Madiyar, only became "*entitled through, under, or by the act o*f" Mr **Ablyazov** "*to the right claimed*" which, in the present case, Mr Jones says, is the chose in action that Madiyar holds against EFG London in respect of the Fund in the Account.

164. In ***G.L. Baker Limited v Medway Buildings and Suppliers Ltd.*** [1958] WLR 1216 (Ch), the claimant (Baker) had entrusted money to its auditor, Mr Titley. The money was paid into Mr Titley's bank account at a time when it was overdrawn. Mr Titley subsequently failed to account to Baker for all of the money entrusted to him. At some point, however, Mr Titley drew two cheques on the bank account in favour of the defendant company, Medway Ltd (Medway), of which he was a director. The cheques were met and the funds transferred to Medway. Baker subsequently sued Medway, Medway raised a limitation defence, and Baker relied in response on among other things section 26 of the Limitation Act 1939 which was in terms similar to the current section 32(1), extending the limitation period, inter alia where "*the action is based upon the fraud of the defendant or his agent or of any person through whom he claims*…."

165. Danckwerts J, at page 1223, considered the point arising under section 26. He said:

There has been no fraud in this case by the defendant company. They are in a way the innocent victims of Titley, in the same way as the plaintiffs have been defrauded by him of the moneys in question. Do they claim, however, in regard to the subject-matter of the action, through Titley? In my view, the answer is plainly that they do. How did they come to have the

moneys? By means of cheques which were handed to them by Titley in respect of which they were not holders for value in due course, and they received the moneys by cashing those cheques. It seems to me that their claim to the moneys must be through Titley and through nobody else, and therefore it seems to me that they are plainly within the provisions of section 26 (a) , that is to say, “the action is based upon the fraud of the defendant or of any person through whom he claims.” It is based on the fraud of Titley, because Titley made the payments in fraud of the plaintiffs and, therefore, within those terms…

166. I note that the case went to the Court of Appeal but not on the point with which I am concerned. ***Baker*** was however referred to with apparent approval in the later Court of Appeal decision in ***Eddis and anor. v Chichester Constable and others*** [1969] 2 Ch 345, where section 26 was again considered.

167. The Court in ***Eddis*** was concerned with a claim arising out of the sale, in 1951, by a Brigadier Chichester Constable, of a painting by the artist Caravaggio, to an art consortium. The sale was in breach of trust; the painting was not the Brigadier's to sell. The painting was sold on by the art consortium to a gallery in the United States. The Brigadier's actions were only discovered in 1963 by which time he had died. In 1966, a claim for damages for breach of trust was issued against the Brigadier's personal representatives. A claim for damages for conversion was bought against the art consortium.

168. One defence raised by the art consortium was that the claim against them was statute barred. The plaintiffs in response sought to rely on section 26 to extend the limitation period. This gave rise to an issue as to whether the plaintiffs could for the purposes of section 26 rely upon the fact that the right to the painting claimed by the art consortium was a right claimed through the Brigadier, who was guilty of fraud and concealment.

169. I would note that the proviso to section 26 of the 1939 Act was at the time in terms similar to what is currently found in section 32(3) save in one respect: the current provision extends also to preventing such claims for the value of property, rather than simply for or in respect of the property itself; the proviso to section 26 did not on its face include reference to claims for the value of property. It was this absence of any reference in the proviso to protecting purchasers in good faith and for value from claims in respect of the value of property that gave rise to the argument advanced by the defendants in ***Eddis***, namely that, since the proviso applied only to actions for recovery of land or specific delivery of a chattel, but not to actions for conversion, the scope of the 'claiming through' language in section 26 itself should also not extend to actions for conversion because, so it was said, it would “*be absurd …to hold that time should run differently in an action for conversion from an action for specific delivery: for it would mean that a plaintiff could always avoid the proviso by suing in conversion*”: see Lord Denning MR at 357F.

170. Lord Denning agreed that this would be absurd. However, he regarded the proposition for which the defendants contended, that the words “*through whom he claims*” in section 26 should be confined to actions brought to recover the very property itself, as leading “*to an equal absurdity*” (358A-B). Lord Denning's solution was therefore to read the proviso as if it applied not only to the action for detinue, i.e. to recover property, but also to an action for conversion, i.e. to recover the value of the property. He therefore dismissed the defendants' argument that the 'claiming through' provisions in section 26 should be limited to claims for specific property. As already noted above, the statute was in due course amended to expressly reflect this interpretation.

171. Winn LJ and Fenton Atkinson LJ delivered separate concurring judgments.

172. Winn LJ, whilst agreeing with the result, was not willing to adopt the approach taken by Lord Denning. He said (at 362F and following):

For my part I think it unnecessary in this case and therefore undesirable to attempt to expound the meaning of the proviso to section 26. I am all the more ready to refrain from any such attempt because I do not understand its scope or meaning.

The expression in section 26 (a) and (b), "any person through whom he claims," is to me no less difficult to comprehend, but on the whole I think that it must be held to comprise any person from whom the property or any right asserted or challenged has been received or derived. This is an alarmingly wide provision, so interpreted, but I am not prepared to dissent in this respect from Danckwerts J., who so held in *Baker (G. L.) Ltd. v. Medway Building and Supplies Ltd. [1958] 1 W.L.R. 1216* ; or from the trial judge in the instant case [1969] 1 W.L.R. 385.

I have applied the epithet "alarming" to the provision because, notwithstanding my reluctant adoption of the wide meaning, I am rather apprehensive lest that meaning may startle some of the many persons who in the course of their daily activities deal in chattels by buying, selling or auctioning them…

173. Fenton Atkinson LJ also referred to the decision of Danckwerts J in ***Baker***, noting that Goff J at first instance had also followed this authority. He went on to deal with the argument that the scope of the 'claiming through' language in the section should be coterminous with the scope of the proviso in the following way (at 364C):

(8) … On the plain words of section 26 read with section 2 (1) (a) of the Act, section 26 (b) must apply to an action for damages for conversion. It is true that an anomalous situation arises, and it is very difficult to understand what the legislature intended. If the anomaly creates such an absurdity that the court must seek some construction of the language used which avoids the absurdity, then I agree the best way to do this is to extend the meaning of the word "recover" to include "recover the value of."

(9) …

(10) Once section 26 (b) is held to apply in an action for damages for conversion ... it only remains to decide whether the brigadier was a person through whom [the defendants] claim. I agree with my Lords that he was…. [A]pplying the definition in section 31 (4) , it was from the brigadier that they received the property and it was from him alone that they could derive any right to do what they did, namely, to resell the picture under an implied condition that they had the right to do so.

174. It is clear from the foregoing authorities on section 26 that (1) the 'claiming through' language was not to be narrowly construed; (2) the fact that there may be circumstances caught by that language which are not coterminous with the proviso to section 26 was not a reason for cutting down the application of that language; (3) the provision was not limited in its application to claims in respect of specific property but could extend also to personal claims; and (4) a defendant might be said to be 'claiming through' another even where the right asserted by the defendant was as to money in a bank account. In my judgment, the same points apply equally to the 'claiming through' language in section 32(1), which is not materially different.

175. It is helpful, against this background, to consider next the arguments advanced by Mr Knox QC as to why, as he suggests, Madiyar does not in the present case claim through Mr **Ablyazov** for the purposes of section 32(1). His argument, as I understood it, was as follows:

(1) The right claimed in the present case is to the debt (or chose in action) to which Madiyar was entitled as against EFG London. The asset or property constituted by that debt (or chose in action) is not the same asset or property as was the debt (or chose in action) to which Mr

Ablyazov was entitled as against EFG Geneva. That this is so follows from authorities such as ***R v Preddy*** [1996] AC 815 (at 834B-835B) which establish that a payment from one bank account in credit to another pro tanto extinguishes that chose in action, and that the resulting chose in action created in the transferee's account is a new one.

(2) Building on this, it is then said that what is contemplated by section 32(1) and the 'claiming through' language is a transfer of property. Thus, where there is no transfer of property, which is said to be the position in the present case, the section has no application.

(3) It is further suggested either as a different point or a different way of making the same point that the sum of money in the Account is not the original sum. The original sum, it is said, has been depleted and then restored; in this way the original property has been destroyed. Here too therefore it follows that the right claimed by Madiyar cannot be the same as that which was transferred to him by Mr **Ablyazov**.

(4) It was, as I understood it, further suggested that it was only where one was dealing with proprietary claims that the 'claiming through' language in section 32(1) might apply. It was suggested that support for this comes from the language of section 32(3) which seems to contemplate only property claims, the contention being that it would be odd if the language of section 32(3) did not map on to the scope of the 'claiming through' language itself. It was contended further in this context that ***Baker*** was itself a proprietary claim and that fundamental to the decision in ***Baker*** was the fact that Mr Titley made the payment by way of cheques handed by him to the defendants.

(5) This, it is said, is a key point of distinction between ***Baker*** and the present case where the chose in action to which Madiyar asserts a right did not arise through property given to him by Mr **Ablyazov**; rather, it is said, that right arose simply because of transfers through the banking system so that it cannot be said that the right which Madiyar claims is the same right as that previously held by Mr **Ablyazov**.

176. In my judgment, the argument made by Mr Knox in this regard is not well founded. In the first place, the suggestion, if it be made, that the defendant only claims through another person for the purposes of the 'claiming through' language in section 32(1) where the claim is a proprietary claim seems to me inconsistent with the decision of the Court of Appeal in ***Eddis*** where the claim was one for damages, albeit in respect of the conversion of property.

177. Secondly, I do not accept that a defendant will only claim through another person where the property concerned is precisely the same property as was transferred to him by that other person. I find it difficult to see how this can be squared with the analysis of Danckwerts J in ***Baker***, which, as noted above, appears to have been approved by the Court of Appeal in ***Eddis***. In ***Baker*** too, the claim was in respect of money paid into one bank account and then paid out of that bank account into another. There too the original chose in action would have been destroyed when the money was paid out, so that any chose in action that arose on the money being paid into the first bank account would have been destroyed when the money was withdrawn and paid into the second bank account, and so would not have constituted precisely the same property as that in respect of which the defendant claimed a right.

178. Thirdly, I find it hard to accept that there is a material distinction between the present case and ***Baker*** arising merely from the fact that in ***Baker*** the means of payment which resulted in the money moving from one account to the other was by cheque, whereas in the present case the means of payment was by way of a bank transfer. I do not think that this can or should make all the difference in circumstances where (1) in both cases, the right to which the defendant claims to be entitled is a right to money held in an account (or put differently, the defendant's claim is to the chose in action in respect of the money in the account); and (2) in both cases, the defendant's right to claim the money (that is the defendant's chose in action) has

arisen "*through…or by the act of that other person*", i.e., the fraudster. This being so, I regard the present case as indistinguishable from ***Baker***.

179. The conclusion at which I arrive, therefore, is that the right claimed by Madiyar to the chose in action in respect of the money in the Account is properly to be regarded as a right to which he became entitled "*through, under or by the act of*" Mr **Ablyazov** so that Mr **Ablyazov** also should be regarded as the defendant to the Section 423 Claim against Madiyar for the purposes of section 32(1). This being so, I find that had the Section 423 Claim been maintainable, BTA would have been entitled for the purposes of that claim to rely on the extended limitation period provided for by section 32 of the Act.

180. But that of course is not the end of the story. It will be recalled that section 32(1) provides, where it is applicable, that "*the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it*". BTA contends that it only discovered (what for the purposes of this analysis one is to assume was) the fraud or concealment when BTA learned of the transfer in April 2015 and that it could not with reasonable diligence have discovered it any earlier. If this is right, then BTA's Section 423 Claim would have been in time. Madiyar disputes this. It says that BTA could with reasonable diligence have discovered the (assumed) fraud or concealment prior to 11 December 2009.

181. Useful guidance on the approach to be taken to the application of section 32(1) is provided by the judgment of Aikens LJ (with whom Richards and Davis LJJ both agreed) in the recent decision of the Court of Appeal in ***Allison & Anor v Horner*** [2014] EWCA Civ 117. Aikens LJ said (at [14] to [16]):

Three points on the construction of [section 32(1)] that are relevant to the present appeal have been made in the cases. First, in ***Barnstaple Boat Co Ltd v Jones*** [[2008]1 All ER 1124]***,*** Waller LJ (with whom Moore-Bick and Moses LJJ agreed) held that the phrase "the plaintiff has discovered the fraud" in ***section 32(1)*** refers to knowledge of the precise deceit which the claimant alleges had been perpetrated on him [para [34] of that judgment]. It follows that knowledge of a fraud in a more general sense is not enough to start the limitation period running under ***section 32(1).***

Secondly, in ***Peco Arts Inc v Hazlitt Gallery Ltd*** [[1983]3 All ER 193] Webster J held that the acts or omissions of an agent of the claimant were not to be attributed to the claimant for the purposes of ***section 32(1)*** [page 202F]***.*** Thus knowledge of the deceit alleged on the part of a claimant's agent will be insufficient to start the limitation period running under ***section 32(1).*** Similarly, the fact that the claimant's agent could with reasonable diligence have discovered the alleged deceit does not start the limitation period running. I would accept this construction of ***section 32(1)*** for the reasons that Webster J gives at page 202G-H of the report….

Thirdly, in ***Paragon Finance PLC v Thakerar & Co*** [[1999]1 All ER 400] Millett LJ (with whom Pill and May LJJ agreed on this point) held that ***section 32(1)*** was concerned with whether the claimant *could* (rather than *should*) with reasonable diligence have discovered the relevant deceit at any particular time. This meant that the burden of proof was on a claimant to establish that he *could not* have discovered the fraud without taking exceptional measures which he could not reasonably have been expected to take. In the business context, this meant "how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency"[page 418C-D]. This point was taken up in the judgment of Neuberger LJ in ***Law Society v Sephton & Co*** [[2005] QB 1013]. He concurred with the view of the trial judge in that case (Michael Briggs QC sitting as a deputy High Court Judge) that it followed from Millett LJ's construction of ***section 32(1)*** that there must be an assumption that the claimant desires to discover whether or not there had been a fraud committed on him. Not to make such an assump-

tion would rob the word "could" in the section of much of its significance. Moreover, the concept of "reasonable diligence" carried with it the notion of a desire to know and, indeed, to investigate [[116]].

182. It is thus clear that for BTA to have brought itself within section 32(1), it would have needed to establish that, even motivated by a reasonable but not excessive sense of urgency and a desire to discover whether or not there had been a fraud committed on it, BTA, without taking exceptional measures it could not reasonably have been expected to take, could not have discovered prior to 11 December 2009 that Mr **Ablyazov** had made the Transfer for no consideration and (as is to be assumed for the purposes of this analysis) with the purpose of defrauding his creditors.

183. The evidence adduced by BTA in support of its contention that it could not with reasonable diligence have discovered the (assumed) fraud or concealment any earlier than it did, is contained in the witness statement of Mr Lewis, who was not cross-examined. The matters referred to by Mr Lewis, many of which have already been referred to above, include the following.

(1) In August 2009, the Freezing Order was obtained against Mr **Ablyazov**. Mr **Ablyazov**, however, did not properly comply with the order requiring him to disclose assets. This set a pattern that was to continue in which BTA had to work hard to get accurate information about Mr **Ablyazov**'s assets.

(2) On 30 September 2009, Mr **Ablyazov** did disclose a number of assets including indirect interests in 25 offshore companies said to hold valuable assets as well as two bank accounts, one of which was the Swiss Account. However, the only document disclosed in relation to the Swiss Account was a one page statement of account dated 3 August 2009 showing movements on the account between 1 July 2009 and 31 July 2009. (This was not especially surprising given that, for the purposes of the Freezing Order, BTA was limited to investigating the assets of Mr **Ablyazov** as at the date that order was made, rather than such assets as he might have held at some earlier time.)

(3) On 12 October 2009, and in circumstances where Mr **Ablyazov** had been evasive about his assets, BTA applied to cross-examine Mr **Ablyazov** on his disclosure. This led to an order being made by Teare J providing for BTA to conduct this cross-examination.

(4) On 27 October and then again on 18 November 2009, the cross examination of Mr **Ablyazov** took place. During the course of that cross-examination there was specific discussion about the Swiss Account, although no investigation of transactions on that account occurring prior to the date of the Freezing Order. It is said that Mr **Ablyazov** was again not truthful in answering questions asked in the course of that cross-examination.

(5) Between 27 October and 18 November 2009, BTA's solicitors wrote to Clyde & Co requesting undisclosed documents referred to by Mr **Ablyazov** in cross-examination. That chain of correspondence is notable especially for the fact that it culminated in a letter dated 15 December 2009 in which Clyde & Co made clear that Mr **Ablyazov** would not be answering any further questions.

(6) The difficulties in securing co-operation from Mr **Ablyazov** continued thereafter, long after the 11 December 2009 date that is relevant for the purposes of the limitation issue. It is important to note that Mr **Ablyazov** continued to be obstructive and unhelpful in relation to providing information about his assets, culminating, as noted above, in the appointment of receivers and the contempt proceedings.

184. It is thus clear that BTA had become aware of the existence of the Swiss Account at the end of September 2009, just over two months before 11 December 2009, the relevant date for the purposes of the limitation period. It did not at that stage have any access to information about the Swiss Account for the period prior to August 2009 and indeed, given the terms of the Freezing Order, would not have had any basis to obtain such access. It would of course have understood by this time that Mr **Ablyazov** appeared to have embezzled many hundreds of millions of dollars of assets from it and, indeed, it was by this time already seeking to recover the same against him in both personal and proprietary claims.

185. Against this background, Mr Knox QC contends that BTA has failed to discharge the burden of establishing that it could not with reasonable diligence have discovered, prior to 11 December 2009, not only that the Transfer had been made to Madiyar for no consideration but also (as is to be assumed for the purpose of this analysis) that it was made for the purpose of defrauding his creditors. Mr Knox highlights the following points.

(1) It would, he says, have been obvious from the statement of account produced to BTA in September 2009 that the Swiss Account had been existence prior to July 2009 and that it could well have been in existence since at least February 2009, if not earlier.

(2) A diligent claimant desirous of discovering whether wrongful transfers out had been made by Mr **Ablyazov** would at that stage have enquired into what transfers had been made out of this account since, at the very latest, February 2009, if not considerably earlier.

(3) Despite this, says Mr Knox, when BTA cross-examined Mr **Ablyazov** on 27 October and again on 18 November 2009, it did not ask him about earlier transactions from the Swiss Account before September 2009, even though the account was actually referred to in both cross-examinations. Nor did it ask him, either before or after this cross-examination to disclose bank statements or any other documents relating to the Swiss Account going back to February 2009.

(4) This being so, says Mr Knox, it is simply not possible for BTA to say that it could not have discovered the fraud without taking exceptional measures which it could not reasonably have been expected to take.

186. BTA makes a number of points in response. It contends, first, that Madiyar should not be permitted to make this argument at all because the same was not sufficiently pleaded. I would note that Madiyar has made a similar complaint about the nature of BTA's pleading in relation to the section 32(1) issues. I do not accept either of the pleading points. In my view, both parties might have produced more fulsome pleadings on this issue but I am not inclined to shut either out from making the arguments that they have before me on the basis of such points. Neither can say that they have been taken by surprise in relation to the arguments that have been advanced.

187. BTA also says that Mr Knox should not be permitted to advance the argument he does because, having failed to cross-examine Mr Lewis, Madiyar's case that BTA could with reasonable diligence have discovered what it needed to bring the Section 423 Claim was never put to Mr Lewis. Again, I do not accept this. It was not in my view necessary for Mr Knox to have required Mr Lewis to attend for cross examination in circumstances where no part of the evidence that he gave on this issue was challenged, simply in order that Mr Knox could formally put to him his contention that BTA could with reasonable diligence have discovered the fraud or concealment at some earlier time. I consider that Mr Knox is perfectly entitled to say that, if the burden of establishing this was on BTA, then it was incumbent on BTA to put forward the evidence on which it relied and it was open to him to accept the correctness of that evidence but nonetheless to submit that, even allowing for its correctness, BTA had still not discharged the burden that was on it in relation to this issue.

188. A more promising argument advanced by BTA was however as follows. In particular:

(1) As BTA notes, much of the criticism aimed at it in relation to its failure to discover the Transfer and (as I have assumed for the purpose of this analysis) the fraud or concealment in breach of duty in relation thereto, has proceeded on the basis that if questions or inquiries had been made of Mr **Ablyazov**, he would have answered them and would have answered them truthfully. That, says BTA, "*is about as farfetched as one can imagine [because Mr **Ablyazov**] is a serial contemnor and liar*".

(2) BTA also refers in this regard to the restrictions in terms of the scope of inquiries it could make in respect of the Freezing Order in terms of seeking to go back to the time prior to the date on which the order was made. A consequence of this, it notes, is that Mr **Ablyazov** would not have been obliged to disclose documents showing what had happened to his assets before the grant of the Freezing Order.

(3) BTA makes the further point that, this being so, had BTA had it in mind to seek to obtain disclosure of transactions going back to February 2009, it would have been necessary for it to have applied for a much wider order than an ordinary freezing injunction. BTA says that in the context of the huge piece of litigation on which it had embarked as recently as August 2009, there really can be no basis for criticism of it for having failed to do this.

(4) Given this, says BTA, even if it had occurred to it, in the period between September and 11 December 2009, to seek details of what was in the Swiss Account in the period prior to August 2009, Mr **Ablyazov** could and would have refused to provide those details. As BTA points out this is precisely the approach in fact taken by Clyde & Co in relation to a request made of them in November 2009; there is, it is said, no reason to think that the position would have been different in relation to any questions asked about the Swiss Account, especially if the position was that it had been used by Mr **Ablyazov** to defraud his creditors as alleged.

(5) Thus, says BTA, it is simply not realistic to suggest: (a) that BTA should have sought bank statements and SWIFT transfers for the Swiss Account for periods of time preceding the grant of the Freezing Order; and (b) that such an application could have been made, granted and complied with by 11 December 2009, the second day of cross-examination having taken place on 18 November 2009; and (c) that BTA would have obtained sufficient information to have enabled it to discover that there was (on the assumption on which this analysis has proceeded) a transaction at an undervalue entered into for purposes which included putting assets beyond the reach of creditors etc., within 3 weeks of that second day of cross-examination.

189. In my view BTA is right about this. In particular, I accept BTA's contention that it could not have discovered the fraud without taking exceptional measures it could not reasonably have been expected to take.

190. I come to this conclusion not because there were no other steps that BTA might have taken prior to December 2009, but rather because, in the circumstances of this case, the massive task that BTA faced in pursuing Mr **Ablyazov**, the difficulties that BTA encountered in obtaining information from Mr **Ablyazov** because of the obstructive approach taken by Mr **Ablyazov**, obtaining the necessary information by that time would have involved taking what I would regard as exceptional measures going beyond what could reasonably have been expected of BTA in the circumstances in which it found itself.

191. Put differently, I do not consider that BTA can properly be criticised for not doing more, prior to December 2009, in relation to uncovering activity on the Swiss Account and investigating transactions on that account prior to the Freezing Order. Nor, even if BTA had done more, do I think it likely that it would, prior to 11 December 2009, have discovered the (assumed)

fraud and concealment in sufficient detail to have enabled it to bring the Section 423 Claim. It is in my view much more likely that Mr **Ablyazov** would have taken steps to ensure that this did not happen.

192. It follows, in my view, that had BTA in fact had a maintainable Section 423 Claim, that claim would not have been time barred. In the event, however, and for reasons set out above, I have concluded that BTA's Section 423 Claim fails for other reasons.

Conclusion

193. In short, and for the reasons set out above, I conclude that BTA's claims, both the Trust Claim and the Section 423 Claim, must fail.

194. I accordingly decide (1) that BTA is not entitled to the relief it has sought and (2) that Madiyar is entitled to a declaration that he is the owner of the Fund.