Neutral Citation Number: [2018] EWCA Civ 819

Case No: A3/2016/2264

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE PHILLIPS
[2016] EWHC 1346 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2018

Before:

LORD JUSTICE SALES
and
LORD JUSTICE NEWEY

- -

Between:

Ilyas Khrapunov	**Appellant**
- and -	
JSC BTA Bank	**Respondent**

- -
- -

Charles Samek QC and Marc Delehanty (instructed by **Hughmans Solicitors LLP**) for the **Appellant**
Stephen Smith QC and Tim Akkouh (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing date: 27 March 2018

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Judgment Approved

Lord Justice Sales:

1. This is the judgment of the court to which we have both contributed. It concerns an appeal in respect of an order made for cross-examination of the appellant in relation to assets he owns or controls, with a view to ensuring the effectiveness of a worldwide freezing order made against him. He also appeals against a costs order made against him. The appellant is resident in Switzerland. He lives there with his wife and two young children.

2. This is the latest episode in the long running litigation between the respondent ("the Bank") and Mukhtar Ablayzov, its former manager, and associates of his in relation to very large sums which the Bank claims were stolen by Mr Ablyazov and then concealed with assistance from his associates. The Bank has obtained judgments against Mr Ablyazov in respect of his fraud for sums in the order of US$4.6 billion. One of the alleged associates of Mr Ablyazov is the appellant, who is Mr Ablyazov's son-in-law. As observed by the Supreme Court, the litigation between the Bank, Mr Ablyazov and the appellant is on a large scale: see *JSC BTA Bank v Khrapunov* [2018] UKSC 19, at [1].

3. The worldwide freezing order in relation to the appellant was granted by Males J on 17 July 2015. It covered assets of the appellant and any assets of Mr Ablyazov under his control. It included, at para. 7, an obligation to provide full information about the appellant's assets and assets administered by him in accordance with instructions given him by Mr Ablyazov in the period from 1 January 2013, subject to the appellant's privilege against self-incrimination, where the assets in question were worth more than £10,000.

4. It is not necessary to set out the full procedural history thereafter. Suffice it to say that the appellant secured an extension of time for compliance with para. 7 of the freezing order in relation to his personal assets until 23 November 2015. He also objected to being sued by the Bank in England as part of its litigation against Mr Ablyazov, but the Supreme Court's recent decision has confirmed that he may be so sued, as Teare J had originally ruled.

5. By letter dated 23 November 2015 from the appellant's solicitors, shortly before the deadline set by the court for provision of information about the appellant's personal assets, the appellant invoked his privilege against self-incrimination as a reason for providing no information at all about his assets. He did not explain how the privilege covered these matters.

6. On 24 November 2015 the Bank issued an application for an order to compel the appellant to provide disclosure pursuant to the freezing order regarding his personal assets. At a hearing on 1 December 2015 an adjournment of the hearing of that application was ordered.

7. By letter dated 4 December 2015, the appellant purported to provide disclosure in relation to the other assets covered by para. 7 of the freezing order ("the non-personal assets"). This was confirmed by an affidavit dated 9 December 2015. The appellant maintains that he has not administered or dealt with any assets on Mr Ablyazov's instructions at any time since 1 January 2013.

8. However, the Bank does not accept this. As Teare J, who is a judge with great familiarity with this case, observed in his ruling on cross-examination on 23 March 2016 ([2016] EWHC 901 (Comm)), "the Bank has a lot of evidence which suggests that [this cannot be true]". Moreover, in the appellant's challenge to the jurisdiction of the English court for the claim against him, he did not seek to suggest that the Bank had failed to establish an arguable case against him that he had conspired with Mr Ablyazov to assist Mr Ablyazov to hide assets in breach of Mr Ablyazov's own obligations under a worldwide freezing order against him, including by acting on instructions given by Mr Ablyazov. Likewise, in the hearings before Phillips J below and before us, Mr Samek QC for the appellant has not sought to challenge this or to go behind Teare J's assessment of the effect of the evidence deployed by the Bank. Accordingly, we proceed on the footing that the Bank has, at the least, a good arguable case that the appellant has lied when purporting to provide information pursuant to the freezing order about the non-personal assets.

9. On 18 December 2015 the Bank issued an application for an order for cross-examination of the appellant in the High Court in relation to his disclosure obligations under the freezing order. Since that time the appellant has been on notice of the Bank's case that he should be subject to cross-examination in relation to relevant assets and that, if he wished to oppose that course or propose alternative arrangements, he should be preparing his case accordingly.

10. On 19 January 2016 the adjourned hearing of the Bank's application in respect of the appellant's disclosure in relation to his personal assets took place before Phillips J. He gave his ruling the following day: [2016] EWHC 289 (Comm). He held that in light of confidentiality club arrangements which could be put in place the appellant had failed to show he had a good claim to rely on the privilege against self-incrimination, as the risk of incrimination was "remote and indeed fanciful" ([36]); he also observed that "[The appellant's] changed stance in relation to the effectiveness of the [confidentiality club] regime he himself proposed [i.e. to argue that it would in fact be ineffective as a safeguard] suggests that his present motivation is to avoid giving proper disclosure to the Bank, not a genuine concern as to an increased risk of prosecution" ([38]). We have been shown nothing by Mr Samek which would call into question that assessment. Phillips J extended time for providing the disclosure in relation to personal assets to 22 January 2016.

11. On 22 January 2016, the appellant failed to provide the disclosure ordered by Phillips J. Instead, he issued a notice of appeal. But he took no steps to seek a stay of the disclosure order. Accordingly, he was in breach of it from that date. In due course, on 23 March 2016 Longmore LJ dismissed the appellant's application for permission to appeal at an oral hearing.

12. Also on 23 March, the Bank's application for an order for cross-examination of the appellant in respect of his disclosure regarding assets covered by the freezing order was heard by Teare J. Teare J held that this was an appropriate case for cross-examination. The Bank had shown there were objective grounds to suspect that the appellant had not been truthful in relation to his disclosure regarding the non-personal assets and he was in breach of the order that he give disclosure of his personal assets. After debate with the parties as to when the cross-examination should take place, and on application that it should take place on a date convenient to counsel on both sides and after appropriate dates were provided to the court after the hearing, the judge

made an order for cross-examination in paras. 5 and 6 of his order of that date ("the 23 March order"), as follows:

> "5. The Cross-Examination Application be allowed and the [Bank] shall be at liberty to cross-examine [the appellant] in respect of his purported compliance with paragraphs 7 and 8 of the Freezing Order granted by Mr Justice Males on 17 July 2015.
>
> 6. [The appellant] do attend before a Judge of this Court to be cross-examined as aforesaid. The hearing is to be listed (with a time estimate of one day) for 26 May 2016, being the earliest available date convenient for leading counsel for [the Bank] and leading counsel for [the appellant]."

13. When the terms of the order were being discussed, Mr Samek persuaded the judge to insert at para. 7 of the order a liberty to apply, as follows:

> "7. [The appellant] has permission to apply to vary paragraph 6 above to provide that he attend for cross-examination by way of remote video-link instead."

14. At that stage, the appellant did not have any worked out proposal as to how cross-examination via a video-link might be achieved, nor had he put any evidence before the court regarding the practicalities and any limitations in seeking to arrange this.

15. At the hearing of this appeal, an issue arose as to the meaning and effect of these paragraphs of the 23 March order. Mr Samek submits that para. 7 was intended to operate as a liberty to apply to postpone the date of the cross-examination from 26 May, if the appellant came forward before that date with proposals for giving evidence by way of video-link at some later time. We disagree. In our judgment, the clear intended effect of para. 7 of the 23 March order was simply to provide the appellant with a final opportunity to make an application which would have the effect that the cross-examination scheduled to take place in the High Court on 26 May should take place on that date by video-link instead. Indeed, we consider that this is the obvious reading of the order in circumstances where the cross-examination was intended to assist in the enforcement of the freezing order obtained by the Bank; the appellant had already had a long period of notice since 18 December 2015 of the Bank's case that he should be cross-examined; the court and the parties had been at pains to find an appropriate date for the cross-examination which was convenient to both sides; the time between 23 March and the scheduled date of 26 May was such as would allow the appellant to prepare any application for cross-examination by video-link in good time for that to be resolved before the scheduled date of 26 May, provided he acted with reasonable promptness; and no good reason had been suggested on 23 March why there should be any further delay in arranging the date for cross-examination of the appellant.

16. By letter dated 29 March 2016 the appellant purported to provide disclosure of his personal assets pursuant to the freezing order and the order of Phillips J made on 20 January 2016 and the order of Longmore LJ made on 23 March 2016. The disclosure was confirmed by an affidavit dated 1 April 2016. The only asset of the appellant was

said to be that he is the sole beneficiary of the Vilder Foundation, based in Panama, which has certain subsidiary companies of uncertain value, worth no more than US$10m. Mr Smith QC for the Bank makes the comment that it is surprising that the appellant does not own a property to live in or a car of reasonable value. In the absence of any explanation how the appellant and his family had conducted their lives before and after the grant of the freezing order without the benefit of assets of this usual kind, we think that this is a fair observation.

17. In any event, since 29 March 2016 the Bank has obtained information from other sources which provides reasonable grounds for suspicion that the appellant has not provided full information about his personal assets. In particular, we were shown a document which suggests that in October 2013 a company controlled by Mr Ablyazov called Sartfield paid US$414.8m to a Seychellois company called Northern Seas Waterage Inc. under the control of a Mr Aggarwal, which then paid on US$69m as a loan to the Vilder Foundation or companies within the Foundation. The appellant has filed an amended defence to deal with these and other allegations, but has not provided information about what has been done with this money. He does not say that it was repaid.

18. In our view, having regard to these matters and the previous history of non-disclosure by the appellant in relation to his personal assets, the Bank has a good arguable case that he has lied in the disclosure he has given in relation to his personal assets in the same way that it has a good arguable case that he has lied in the disclosure he has given in relation to the non-personal assets.

19. On 4 May 2016 Moore-Bick LJ refused the appellant's application for permission to appeal against the 23 March order for cross-examination and certified it as totally without merit. It is clear that there is a compelling case for the Bank to be able to cross-examine the appellant in relation to the disclosure he has given.

20. Since about April 2014 it has been known that the appellant has been notified by the authorities in Kazakhstan to Interpol as a wanted person, who should be arrested and extradited to Kazakhstan to face criminal charges there. Already by 14 April 2016 the appellant had obtained an opinion of Aaron Watkins of counsel, a specialist in extradition matters, regarding the risk of the appellant being arrested if he came to England and then extradited to Kazakhstan, Russia or Ukraine. It seems that this opinion was obtained with a view to making a case for variation of para. 6 of the 23 March order to provide for cross-examination of the appellant in Switzerland by video-link.

21. However, it was only by a letter dated 27 April 2016 that those acting for the appellant first canvassed the idea of the cross-examination taking place by video-link to Switzerland. Even then, no application notice was issued to allow that proposal to be ventilated in proper time before the date on which the cross-examination was scheduled to take place.

22. Instead, it was only on Friday, 20 May 2016 that the appellant issued his application notice which is in issue on this appeal, applying pursuant to the liberty to apply in para. 7 of the 23 March order for an order that he be cross-examined by video-link from Switzerland; that the video-link cross-examination be conducted in accordance with the Hague Evidence Convention 1970, as applied in Switzerland; and that the

hearing listed for 26 May 2016 be vacated. No attempt was made by the appellant to apply for a variation of para. 6 of the 23 March order at a stage which would allow any issue arising in relation to such proposed variation to be sorted out in good time before the scheduled date for cross-examination on 26 May. Moreover, the appellant did not seek any stay of paras. 5 and 6 of the 23 March order, even though he had no intention of coming to England on 26 May as he had been ordered to do by those paragraphs.

23. 20 May was the last day on which an application notice could be issued to allow three clear days' notice before the hearing on 26 May, as required under the Civil Procedure Rules as a basic minimum for an "on notice" application. The application notice and supporting evidence were only served on the Bank at 3.45pm on 20 May. Given the complexities of the issues which would arise on the appellant's application, regarding the extent of the risk of arrest and extradition and the nature of arrangements which could be put in place in Switzerland pursuant to the Hague Evidence Convention, and as must have been obvious to the appellant and those representing him, this timing made it all but impossible for the Bank to put together its own evidence and case so as to be ready to resist the application for a variation of the 23 March order at the hearing on 26 May.

24. Despite the short notice, for the hearing on 26 May the Bank managed to put in a witness statement dated 25 May 2016 from Mr Hardman of Hogan Lovells International LLP, the solicitors for the Bank. This was prepared under great pressure of time. It dealt, as best as Mr Hardman could do in the circumstances, with the conduct of the appellant in the proceedings, the risk of extradition and difficulties with video evidence. In relation to the risk of extradition, having commented on the position as regards Kazakhstan, Mr Hardman turned to the appellant's suggestion that he would be at risk of extradition by Russia or Ukraine and included in his statement what was essentially a comment on the evidence presented by the appellant to the effect that he had "not pointed to any extant criminal proceedings in either Russia or Ukraine, nor identified any matters that might lead to such proceedings … In fact there is no evidence that Russia or Ukraine have any interest in [the appellant] at all …". Therefore Mr Hardman made the comment that the appellant had produced no credible evidence to suggest that there was a real risk of his being subject to arrest and detention following an extradition request being made by any of Ukraine, Russia or Kazakhstan.

25. The hearing on 26 May 2016 took place before Phillips J. Since the appellant was not in attendance and had no intention of submitting to cross-examination that day, the hearing was used for the hearing of the appellant's application notice of 20 May.

26. Phillips J gave judgment at the hearing: [2016] EWHC 1346 (Comm). He refused the appellant's request to vacate the cross-examination hearing scheduled for that day and to adjourn the cross-examination to a later date and he dismissed the application generally. He did this on the simple basis that, contrary to what Teare J had allowed for in the 23 March order, the appellant had issued his application far too late to allow for his proposal for cross-examination in Switzerland by video-link to be considered in proper time before the scheduled cross-examination date of 26 May. Phillips J said:

> "In my judgment there is no basis upon which it would be appropriate to grant an adjournment of today's hearing or

> vacate it. In my judgment, [the appellant] has failed to comply with [the 23 March order] and has done so without reasonable or indeed any justification."

27. The judge went on to say that, in any event, he did not accept that there was a proper basis on which to order that the cross-examination take place by video-link from Switzerland. On the available evidence, and in particular in light of the fact that there is no extradition arrangement between the United Kingdom and Kazakhstan and given the absence of any example at all of an *ad hoc* extradition arrangement being agreed between those countries, the judge's assessment was that the risk to the appellant of arrest with a view to extradition to Kazakhstan if he came to England for one day of cross-examination "is effectively non-existent, and certainly, on the face of it, no greater than the continuing risk to him in Switzerland." There was no real risk of detention with a view to extradition to any of Kazakhstan, Russia or Ukraine.

28. Phillips J also reviewed the way in which questioning of the appellant might be conducted in Switzerland pursuant to the 1970 Convention. Direct application of the English trial process in Switzerland would be unlawful and, as a matter of comity, the English court should not seek to set up a procedure involving undertakings given by the appellant to the English court to answer questions, in an attempt to allow the English court to exercise its powers "remotely" to require the appellant to answer questions, in circumstances where the Swiss authorities would regard the process as governed by Swiss law. Instead, there would have to be questioning under a Swiss process, and that process would not be equivalent to or as effective as cross-examination in the High Court in England.

29. Therefore, on the judge's assessment, the appellant faced no real risk of being subject to any extradition process if he came to England to be cross-examined for a day and the Bank would suffer detriment if the 23 March order were varied, because it would not be able to question the appellant about relevant assets in such an effective way as it could if he were cross-examined in the High Court in London.

30. It is this decision of Phillips J which is the subject of the present appeal before us. This has come about in the following way.

31. On 3 June 2016 the appellant issued his notice of appeal. On 25 November 2016, Longmore LJ refused the appellant's application for permission to appeal in relation to the decision of Phillips J and certified it as totally without merit.

32. By that time, the appellant had learned from a journalist on 5 November 2016, with documents provided to him on 15 November 2016, that he was in fact the subject of a criminal investigation by the Ukrainian authorities in relation to a complaint made to the Ukrainian police by a partner ("the complainant") at a Ukrainian law firm ("Ilyashev & Partners"). Ilyashev & Partners is the law firm which acts for the Bank in Ukraine in relation to the litigation against Mr Ablyazov, the appellant and others, and the complaint was that the appellant had been party to a scheme unlawfully to hack into the complainant's computer to obtain information about the case. This was not drawn to the attention of the court in time for it to be provided to Longmore LJ.

33. However, the appellant later used this material as the basis for an application to this court pursuant to CPR Part 52.17 (old numbering) to re-open the appeal. In the light

of the evidence adduced on that application, it has also emerged that the Bank had discussed with Ilyashev & Partners and the complainant the possibility of a criminal complaint to the Ukrainian police about alleged computer hacking involving the appellant being made by them in their private capacity (rather than on behalf of the Bank). According to a further witness statement by Mr Hardman dated 10 March 2017, prepared after discussion with relevant personnel at Ilyashev & Partners, it is therefore accepted that by the spring of 2016 at the latest the Bank was aware that a criminal complaint had been made against the appellant in Ukraine by its representatives, Ilyashev & Partners and the complainant, in their private capacity. In other words, this was known by the Bank before the hearing before Phillips J on 26 May 2016.

34. Mr Hardman's evidence, which Mr Samek does not question and which we accept, is that the Bank's legal team in London was not aware of this complaint at the time of the hearing on 26 May 2016, nor at the time when written submissions were submitted to the court to oppose the appellant's application for permission to appeal against the decision of Phillips J of that date. Mr Hardman's evidence in his witness statement of 25 May, referred to above, was honest and the failure to inform the judge about the criminal complaint in Ukraine was inadvertent.

35. From information which was not available to the Bank at the material time, it now appears that on 17 March 2016 a "notice of suspicion" was issued against the appellant in Ukraine, pursuant to the complaint by Ilyashev & Partners and the complainant, and on the same day the appellant was placed on a "wanted" list in Ukraine. On 22 March 2016 the District Court of Kiev granted a motion that the investigating officer should have the power to detain the appellant for the purpose of bringing him to court and to ensure his participation in a motion that he be detained as a preventative measure. From such evidence as is before the court, the likelihood is that between about 9 and 21 June 2016 the appellant was added to Interpol's "wanted" list at the request of Ukraine by letter dated 10 May 2016, and an Interpol Red Notice was issued in relation to him. On 19 August 2016 the District Court of Kiev granted a further motion to permit the investigating officer to detain the appellant as a preventative measure.

36. By order dated 26 April 2017 made on the papers, Gloster LJ gave the appellant permission to rely on further evidence regarding the position in relation to the criminal proceedings in Ukraine and granted him permission to re-open the appeal and Longmore LJ's decision of 25 November 2016 in the light of that evidence. She directed that the appellant's application for permission to appeal (i.e. the application which had been determined by Longmore LJ) should be re-heard at a "rolled up" hearing, with a full appeal to follow the application if permission were granted.

37. Since April 2017, each side has applied to admit additional fresh evidence regarding the Ukrainian criminal proceedings. Ukraine made an application to the Swiss authorities for the extradition of the appellant. The Bank seeks to adduce evidence in the form of letters from the Ukrainian police purporting to explain that no request for extradition of the appellant from the United Kingdom (if he comes here) would be made until after a decision was reached by the Swiss authorities on the extradition request made to them. The appellant queries the reliability of any assurance which might be spelled out of these letters, which appear to emanate from the Ukrainian police rather than the prosecutor's office, which would usually be the appropriate

entity to make such a statement. We would also observe that it seems odd that the Ukrainian authorities would wish to tie their hands in the way suggested by the Bank. If they have a real desire to bring the appellant before a criminal court in Ukraine, why would they not seek to have him arrested wherever he might choose to travel, if that were a viable option? However, we do not need to spend time analysing the effect of these letters in detail, because the appellant seeks to put in further evidence of his own which makes clear that the Swiss authorities have now refused the Ukrainian extradition request to them. Therefore, even on the Bank's case regarding the effect of the letters, the way is now clear for Ukraine to make a request to the United Kingdom for the arrest and extradition of the appellant, if he comes here.

38. At the outset of the hearing of the appeal, as a result of its pre-reading in the case the court was able to indicate that it granted permission to appeal. The hearing therefore proceeded as a full substantive appeal hearing. We also indicated that, subject to any submissions to the contrary, it seemed appropriate to admit in evidence all the additional evidence which each side wished to adduce, without prejudice to any party's ability to argue that on any particular issue it was not evidence which should be regarded as material or as satisfying the usual criteria for admission of fresh evidence and hence should not be taken into account. The parties agreed with this course.

Analysis (1): the appeal

39. The appeal was launched prior to October 2016, so it is the old Civil Procedure Rules which apply. The relevant provisions are the same as the equivalent provisions in the current version of the CPR. CPR Part 52.11(1) (old numbering, now Part 52.21(1)) provides, so far as is material, that an appeal in this court will be limited to a review of the decision of the lower court "unless … the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing." CPR Part 52.11(2) (now Part 52.21(2)) provides that unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court. The approach to the exercise of the appeal court's discretion under the CPR whether to admit fresh evidence remains closely in line with that established under the previous rules regime in *Ladd v Marshall* [1954] 1 WLR 1489, which reflects factors relevant to the application of the overriding objective in CPR Part 1. CPR Part 52.11(3) (now Part 52.21(3)) provides that this court will allow an appeal where the decision of the lower court was "wrong" or was "unjust because of a serious procedural or other irregularity in the proceedings of the other court."

40. Mr Samek submits that this court should proceed under CPR Part 52.11(1) by way of a rehearing rather than by way of a review. He submits that there has been a procedural or other irregularity in the proceedings before Phillips J of sufficient seriousness to warrant adopting that approach, alternatively that in light of the new evidence which was not available before Phillips J regarding the Ukrainian criminal proceedings fairness requires that we should do so.

41. We do not accept these submissions. There has been no serious procedural or other irregularity in the proceedings before Phillips J. For the purposes of responding to the appellant's application which was before the judge, which was an ordinary *inter partes* application, the Bank was not subject to a duty of full and frank disclosure such as would apply if it were making an application of its own without notice to the

appellant. It is common ground that the relevant procedural duty owed by the Bank was a duty not to mislead the court deliberately: *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm); [2015] 3 All ER 577, at [224]. But in this case Mr Samek rightly accepts that the failure by the Bank to inform the court that Ilyashev & Partners and the complainant had made a criminal complaint to the Ukrainian police was inadvertent.

42. On proper analysis, therefore, this is not a case involving any procedural or other irregularity in relation to the hearing before Phillips J. Rather, it is a case in which – as happens from time to time – evidence which was not available to the court at the time of making a decision emerges later on, and the question arises whether this means there has been a sufficient change of circumstances to warrant revoking or varying the order which has already been made. We address that issue below. Strictly, on this analysis, since the court at first instance is not *functus officio* in relation to its case management role as regards the enforcement of the freezing order, this is a matter which could be dealt with by that court by reference to its power under CPR Part 3.1(7) to vary or revoke any order, applying the principles set out in the leading authority of *Tibbles v SIG Plc* [2012] EWCA Civ 518; [2012] 1 WLR 2591. However, since we have heard full argument on the point and since under CPR Part 52.10 (now CPR Part 52.20) we have all the powers of the lower court, both sides agreed that if the question of application of CPR Part 3.1(7) arises, this court should determine that issue itself so as to avoid the further delay and wastage of effort and resources which would be involved if we remitted the matter back to the court at first instance: see further below.

43. Nor do we consider that there is any requirement based on fairness between the parties which requires us to proceed by way of re-hearing rather than by way of review. In a case where it appears that a judge has made a case management or other discretionary decision based on a misapprehension as to some important factual matter which is directly material to the decision they have made, it may be in the interests of justice for this court to hold a re-hearing or to allow the appeal and then exercise the discretion afresh. But the circumstances of the present case are very different. The judge was aware that the appellant wished to present an argument that he was at risk of extradition to each of Kazakhstan, Russia and Ukraine, but according to the primary reason he gave he dismissed the appellant's application for an adjournment by reason of the unwarranted and unexplained delay by him in making it. The new evidence about the existence of criminal proceedings in Ukraine affords no answer to that reasoning.

44. To make the same point in a different way, although we have formally admitted all the fresh evidence in order to facilitate the debate in this court, none of it could be said to satisfy the second criterion in *Ladd v Marshall*, namely that if it had been before the judge it would probably have had an important influence on the result of the hearing. If it had been available at the hearing on 26 May 2016, it would only have been capable of affecting the alternative reasoning of the judge. It did not undermine his primary reason for refusing the appellant's application.

45. In our judgment, the short answer to the appeal is that Phillips J was fully entitled to dismiss the appellant's request for an adjournment and his application generally for the primary reason given by him. That reason was that the appellant had delayed without good reason before issuing his application and had failed without good reason

to apply to the court pursuant to para. 7 of the 23 March order to allow the question whether he should be cross-examined in the High Court or by way of a video-link to be sorted out in time before the date scheduled for that cross-examination, as had been contemplated by that order.

46. We do not accept Mr Samek's submission that the judge misunderstood the intended effect of the 23 March order: see paragraph [15] above. Nor do we accept his further submissions that the judge did not appreciate that he had a power to adjourn the cross-examination or to vary the 23 March order and that he did not properly apply the overriding objective when making his decision. The judge clearly did understand that he had power to vary the order and to adjourn the cross-examination, since it was to that very question that his reasoning was addressed. It was not incumbent on him to refer in terms to the provision in CPR Part 1 setting out the overriding objective, which is very well understood by trial judges. Nor was it incumbent on the judge to work through each element in the definition of the overriding objective in CPR Part 1.1 before coming to his decision. His reasoning focused on the most important feature of the case which in his view indicated the just result on the appellant's application, which was that it was made late without good explanation and in such a way as to frustrate the intended effect of the cross-examination order made by Teare J without good reason. The judge did not have to say more than he did in his judgment, but we observe that the overriding objective to deal with cases justly and at proportionate cost includes as an important element, so far as is practicable, "enforcing compliance with … orders" (CPR Part 1.1(2)(f)). The judge was plainly entitled to focus as he did on the unjustified frustration by the appellant of the order made by Teare J.

47. Accordingly, there is no proper basis for allowing the appeal. Phillips J made a case management decision which was lawfully open to him. He did not misdirect himself as to the effect of the 23 March order or as to his own powers. The primary reason he gave for his decision was sound. It cannot be said that he reached a conclusion which was perverse. In no sense can his decision be said to be wrong or such as ought to be set aside by this court on appeal. It is not necessary to examine the judge's alternative reasoning in detail for the purposes of deciding the outcome of the appeal. However, we make our own assessment in our further analysis below of the risk to the appellant in relation to extradition and of the likely practical effectiveness of cross-examination in Switzerland in the context of this case.

48. Since the main appeal is dismissed, it follows that Phillips J was entitled to make the costs order that he did against the appellant. That order simply applied the usual rule that the loser on an application should pay the costs and was well within the judge's discretion in making an award of costs.

Analysis (2): Should the order made by Phillips J below be discharged and the 23 March order varied pursuant to CPR Part 3.1(7) to provide for cross-examination in Switzerland?

49. As noted above, in the event the appeal is dismissed the parties are agreed that we should nonetheless proceed to examine the question whether, in light of the new evidence about the criminal proceedings in Ukraine, the order of Phillips J should be discharged and the 23 March order for cross-examination of the appellant in the High Court should now be varied so as to provide instead for a process of examination of the appellant in Switzerland pursuant to the 1970 Convention.

50. In deciding whether to vary an order pursuant to CPR Part 3.1(7), the court should give great weight to the interest of finality in litigation, including finality in relation to interlocutory applications. Where evidence or submissions could and should have been adduced and canvassed at the time the previous order was made, the court will not ordinarily allow those matters to be raised at the time of a later application to set the previous order aside or to vary it: *Tibbles v SIG Plc* [2012] EWCA Civ 518. As Rix LJ stated in that case at [39(i)], although the rule in CPR Part 3.1(7) "is apparently broad and unfettered, … considerations of finality, the undesirability of allowing litigants to have two bites of the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion." As Rix LJ also observed, "where facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited …" ([39(v)]). See also *Thevarajah v Riordan* [2015] UKSC 78; [2016] 1 WLR 76, [14]-[18]; and *Coates v Secretary of State for Communities and Local Government* [2017] EWCA Civ 940 at [61] et seq.

51. There is no new evidence before us, not available to Phillips J, nor any material change of circumstances regarding the risk to the appellant of extradition proceedings at the instigation of Kazakhstan or Russia. Accordingly, we do not consider that there is any good reason for us to revisit the judge's assessment that there was no real risk to the appellant in relation to such proceedings if he came to England to be cross-examined. In any event, we agree with the judge's assessment about that.

52. There is new evidence before us relevant to the risk of extradition proceedings at the instigation of Ukraine. It is not suggested that this is material of which the appellant could or should have been aware at the time of the hearing before Phillips J. Therefore it does constitute something to which we should have regard in order to decide whether to discharge or vary the order made by Phillips J to dismiss the appellant's application to vary the provisions in the 23 March order in respect of his cross-examination.

53. In our view, the new evidence shows that there is an increased risk of the appellant being made the subject of extradition proceedings at the instigation of Ukraine if the appellant were to come to England to be cross-examined. On the evidence before Phillips J, there were no criminal proceedings on foot against the appellant in Ukraine, which meant that the judge was able to make the assessment that there was no real risk of extradition proceedings at the instigation of Ukraine if the appellant came to England. That picture has now changed in a significant way, in that it has emerged that there is a criminal process on foot against the appellant in Ukraine and Ukraine has issued an Interpol Red Notice in relation to him. That Red Notice constitutes a request to other states to arrest and extradite the appellant should he come on their territory. Even if there was some form of enforceable assurance from the Ukrainian authorities at an earlier stage that would have prevented them from making a request to the United Kingdom for his extradition (as to which we have considerable doubt), the effect of that assurance has been brought to an end by the termination of the attempted extradition of the appellant from Switzerland: see above.

54. There has, then, been a material change of circumstances which justifies this court revisiting the question whether the appellant's application to vary the 23 March order should be granted so as to provide for his cross-examination in Switzerland via video-link and subject to the 1970 Convention. This requires us to make an assessment of

the risk and extent of detriment to the appellant if he came to England for cross-examination; to make an assessment of any detriment to the Bank from being required to cross-examine the appellant in Switzerland; and then to balance these and any other factors to decide how best to proceed in light of these circumstances so as to further the overriding objective in CPR Part 1.1 to secure justice at proportionate cost.

55. Conscious of the nature of this balancing exercise, each side has offered undertakings to the court with a view to minimising, as each would say, the detriment to the other.

56. The appellant, through Mr Samek, offers the following undertakings:

i) To attend for the said cross-examination by video-link from Switzerland on such date or dates as may be agreed between the parties or fixed for such purpose;

ii) To co-operate in arranging for the said cross-examination to take place by video-link from Switzerland;

iii) To take the oath prior to the commencement of the said cross-examination;

iv) Not to refuse to answer any questions properly put to him in the said cross-examination by reason of any privileges which are or may be available to him under Swiss law or procedure;

v) Not to refuse to answer any questions properly put to him in the said cross-examination by reason of any duty on him arising under Swiss law;

vi) To answer every question properly put to him in the said cross-examination.

Mr Samek explained to us that the test for whether a question is properly put to the appellant for the purposes of these undertakings will be whether, upon objection being taken, the High Court judge observing the cross-examination by video-link rules that it is properly put.

57. The Bank's legal representatives, through Mr Smith, offer the following undertakings to be recorded in an order confirming that the appellant should be cross-examined in the High Court in England:

> "… AND UPON Hogan Lovells International LLP ("Hogan Lovells") undertaking to the Court (until further order of the Court) that (a) its partners and employees who receive information relating to the arrangements for the Second Defendant's cross-examination (including, in particular, the date(s) and time(s) of the said cross-examination) (the "Information"), shall keep the Information confidential (and shall, in particular, not disclose the same to the Claimant) and (b) the Information shall only be provided to partners and employees who are directly concerned with the case
>
> AND UPON Stephen Smith QC and Tim Akkouh, counsel instructed by the Claimant in relation to this case ("Counsel"),

> undertaking to the Court (until further order of the Court) that they shall keep the Information confidential
>
> Provided that (a) the said partners and employees of Hogan Lovells and Counsel shall be permitted to share the Information with one another and the Court and (b) Hogan Lovells shall be permitted to engage a stenographer for the said cross-examination"

The object of these undertakings would be to ensure that not even the Bank would know the date and time to be fixed for the cross-examination, so as to obviate any risk of the Bank tipping off the Ukrainian authorities in order to prompt them to make an extradition request if the appellant came to England.

Cross-examination in England: Risk of extradition proceedings in relation to Ukraine and detriment to the appellant

58. Submissions were made to us regarding three principal aspects of this part of the case: (i) if the appellant came to England, would he be arrested with a view to possible extradition to Ukraine? (ii) if that happened, would he in fact be extradited to Ukraine? and (iii) if he were detained here, under what conditions would that take place?

59. The risk to the appellant in relation to possible extradition proceedings at the instigation of Ukraine depends on both law and extradition practice. Accordingly, the parties invited us to have regard to evidence adduced on each side from experienced practitioners in the field of extradition as to extradition practice and likely outcomes. The appellant relied on evidence from Mr Watkins; the Bank on evidence from Mr Knowles QC. We have had regard to this material in making our assessment.

60. Mr Samek submits that the undertakings offered by the Bank's legal representatives do not eliminate the risk that the appellant might be detained by the British authorities if he came to England, with a view to allowing an extradition request to be made and then pursued by Ukraine. This is principally because of the Red Notice issued by Interpol in relation to him at the request of the Ukrainian authorities. Mr Samek also says that the Bank could set private investigators to follow the appellant's movements and could learn about him coming to England in that way, so as to be able to tip off the Ukrainian authorities.

61. According to the evidence, in broad terms an Interpol Red Notice has no legal status in the United Kingdom. Where, however, the Red Notice comes from a State designated for the purposes of extradition under Part 1 or Part 2 of the Extradition Act 2003, it might be open to the police to treat it as a request for detention with a view to extradition. While Kazakhstan is not so designated, Ukraine is designated under Part 2 of the Extradition Act and so is a "Category 2" territory. Information about the appellant's presence in the United Kingdom might well be passed by the United Kingdom authorities to the Ukraine. Were the appellant to be stopped in the United Kingdom on the strength of a Red Notice issued at the request of Kazakhstan, he could expect to be released quickly; but it does not appear that this would be the case if he were stopped on the basis of a Red Notice issued at the request of Ukraine. We accept the assessment of Mr Watkins that when crossing an international border,

"there is a risk that [the appellant] will be detained pursuant to the Interpol Red Notice". As Mr Knowles explains, if Ukraine were to submit a request for the appellant's extradition, he would be subject to extradition proceedings at Westminster Magistrates' Court under Part 2 of the Act.

62. In our view, although the undertakings offered by the Bank's representatives would reduce to some degree the risk of the appellant being detained here and made subject to an extradition request by Ukraine, there would remain a real risk that the appellant might be subject to being detained in the United Kingdom pending an extradition application being put forward by Ukraine.

63. There has already been a degree of practical experience with extradition requests from Ukraine, including in relation to an associate of Mr Ablyazov said to be connected with his frauds: see *Government of Ukraine v Kononko*, Deputy Senior District Judge Emma Arbuthnot, Westminster Magistrates' Court, decision of 31 October 2013; *Government of Ukraine v Kononko* [2014] EWHC 1420 (Admin). In that case, extradition was refused by the District Judge because of her assessment that the individual would be at real risk of suffering a flagrant denial of justice contrary to Article 6 of the European Convention of Human Rights ("ECHR") and also at real risk of being imprisoned in conditions which would violate Article 3 of the ECHR if he were sent there. An appeal to the Administrative Court was dismissed on different grounds, in that evidence had emerged that Ilyashev & Partners acting for the Bank and Kazakhstan had suborned the Ukrainian prosecutor into making the request for extradition, in what amounted to an abuse of process. Accordingly, the Administrative Court did not need to reach a detailed concluded view about whether the decision at first instance as to violations of Article 6 and Article 3 of the ECHR was correct, but the court was not prepared to accept that it was wrong: see [23]. Mr Watkins and Mr Knowles refer to other cases in which extradition to Ukraine has been refused. Mr Knowles says that to the best of his knowledge Ukraine has never successfully obtained extradition of a defendant from the United Kingdom in a contested case. We agree with his assessment, which is not seriously called in question by the evidence from Mr Watkins, that absent cogent evidence of a change in relation to prison conditions and the independence of the judiciary in Ukraine, it is likely that an English court would eventually discharge the appellant on ECHR grounds if Ukraine sought his extradition.

64. Neither party has sought to put in evidence to suggest that there has been a significant change in relation to prison conditions and the independence of the judiciary in Ukraine. No doubt the appellant wishes to keep his powder dry so far as that is concerned, since he would not wish to do anything which might undermine any defence against extradition he might seek to rely upon if he is made subject to extradition proceedings in relation to Ukraine.

65. If the appellant came to England and were arrested pursuant to the Red Notice, Ukraine would be given an opportunity to put in evidence in the Magistrates' Court to try to persuade it that there would be no impediment to his extradition to Ukraine. There has been political change in Ukraine since the time of the *Kononko* case, but the problems which have been identified in the cases appear to be longstanding ones which are unlikely to change very quickly. It is possible that Ukraine might be able to show that it is now a place to which the appellant could be safely extradited, but we consider that on the evidence available to us that possibility is speculative and the

prospects of it being able to do so are low. We consider that it is unlikely that the appellant would be extradited to Ukraine at the end of an extradition process and that the risk of that occurring is low; but it is not so low as to be regarded as completely unreal or fanciful.

66. As regards the conditions under which the appellant would be detained in the United Kingdom while any extradition process was pursued, we agree with the assessment of Mr Knowles that the strong likelihood is that very quickly after arrest he would be granted conditional bail, subject to a residence condition to stop him leaving the United Kingdom. Mr Knowles's best guess as to the length of the extradition process here is that it would be likely to last about six to nine months, which appears to us to be broadly realistic. There is a risk the process could take longer. The appellant has known since September 2017, when Mr Knowles's first opinion in these proceedings was filed in evidence, that the Bank's case is that this is how he would be likely to be treated. In dealing with the detriment that he would suffer if he came to the United Kingdom and was arrested, the appellant has said only that he would find it distressing to be separated from his wife and children if he were detained. He has not suggested that there would be any serious difficulty in them relocating to England to live with him here while he is out on bail. He has not suggested that he would suffer any other significant detriment if he were allowed to be at liberty on bail in the United Kingdom.

The Evidential Process in Switzerland

67. The appellant's case is that his evidence should be taken pursuant to chapter II of the 1970 Convention, which comprises articles 15-22. Article 17 provides as follows:

> "In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -
>
> > a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
> >
> > b) he complies with the conditions which the competent authority has specified in the permission."

Switzerland has declared that evidence may be taken according to article 17 "subject to prior authorization by the Federal Justice and Police Department".

68. Article 17 of the Convention is supplemented by article 21. Under that article, where a commissioner is authorised under article 17 to take evidence:

> > "a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have

> power within such limits to administer an oath or take an affirmation;
>
> …
>
> c) the request [to a person to appear or to give evidence] shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;
>
> d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
>
> e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11."

69. With regard to article 21(c) of the Convention, Switzerland has not filed a declaration under article 18. As for article 21(e), the "privileges and duties to refuse to give the evidence contained in Article 11" allow a witness to refuse to give evidence where he has a privilege or duty to refuse to give evidence under the law of the "State of execution" (here, Switzerland).

70. Guidance as to how the Convention applies to Switzerland is to be found in a publication of the Swiss Federal Office of Justice, "International Judicial Assistance in Civil Matters – Guidelines". The section of this document dealing with requests under chapter II of the Convention begins by referring to article 271 of the Swiss Criminal Code, which makes it an offence for anyone to carry out "activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official" as well as for anyone to carry out "such activities for a foreign party or organisation" or to encourage such activities (see section I.B of the Guidelines). Thus, as paragraph 1.2.1 of section III.C of the Guidelines explains, "unless they have authorisation, foreign parties who proceed with the hearing of witnesses or obtaining evidence on their own initiative in Switzerland are liable to be punished".

71. Paragraph 1.2.2 of section III.C of the Guidelines expands on article 21 of the Convention. Among other things, the paragraph states:

> "The summons must indicate the fact that the person concerned … is not obliged to appear or to participate in the evidence-taking. The person in question is therefore free not to cooperate at all or to interrupt the taking of evidence (Art. 21 let. c Hague Evidence Convention). The … commissioner may not take any coercive measures against the witness. Article 18 Hague Evidence Convention, however, provides that states may declare that foreign persons authorised to take evidence may apply to the competent authority to obtain the assistance

> required to carry out such acts by using coercive measures. Switzerland has made no declaration in relation to this subject, which makes it impossible to force the persons specified by the procedural steps to collaborate in terms of Chapter II of Hague Evidence Convention….
>
> In contrast to the proceedings under Chapter I of the Hague Evidence Convention, the evidence is to be taken, as a rule, according to the procedures provided for by the law of the requesting court. However, if the specified procedures are against the law of the state of execution, they may not be used."

72. Paragraph 1.2.2 of section III.C of the Guidelines notes that cross-examination is authorised. In that connection, paragraph 1.2.3 says this:

> "If cross-examination is intended, there are two possible approaches. First, a sole commissioner can be appointed – for example, a neutral person – who will chair the taking of evidence and will see to it that the examination by the lawyers of the parties is conducted in accordance with Swiss law (no coercion, reminder of exemptions or any prohibition from giving evidence). In this case only one authorisation will be given. Second, it is also possible that each agent is appointed commissioner. In this case, authorisation will be granted to each person to conduct the examination."

73. Paragraph 1 of section III.D of the Guidelines is concerned with video-conferencing. It includes this:

> "One can equally imagine recourse to video conference techniques in terms of Chapter II of the Hague Evidence Convention. Authorisation is in this case subject to the same conditions as in the 'traditional' cases of authorisation (see III.C.1.2, p. 28)."

74. Where, accordingly, it is proposed that evidence should be taken in Switzerland under article 17 of the Convention, authorisation must first be obtained from the Swiss Federal Justice and Police Department. Subject to that, evidence is to be taken by a commissioner (or more than one if "each agent" is appointed as such). The request to the witness must inform him that he is not compelled to appear or to give evidence (so that, to quote the Guidelines, the person in question is "free not to cooperate at all or to interrupt the taking of evidence"), and the commissioner "may not take any coercive measures against the witness". In fact, one of the functions of a commissioner is to "see to it that the examination … is conducted in accordance with Swiss law (no coercion, reminder of exemptions or any prohibition from giving evidence)". Video-conferencing is permissible, but "subject to the same conditions as in the 'traditional' cases of authorisation". Should evidence be taken otherwise than in accordance with the Convention, those involved would be likely to commit a criminal offence under Swiss law.

75. On the face of it, accordingly, a cross-examination of the appellant pursuant to article 17 of the Convention would differ radically from the conventional cross-examination in front of a judge of England and Wales that Teare J will have had in mind. The process would be presided over by one or more commissioners appointed for the purpose, not, as Teare J plainly envisaged, a High Court judge. The appellant would, moreover, be under no obligation to participate or to answer any question he did not wish to: he could choose to walk away at any time without fear of sanction. Further, the convenient course would presumably be for the appellant, the commissioner(s) and the parties' lawyers to assemble in a single room in Switzerland rather than for questions to be relayed to the appellant by video from London. If video-conferencing had any part to play, it would only, it seems to us, be for the benefit of the High Court judge.

76. The undertakings that the appellant offers are, of course, intended to address such points. In oral submissions, Mr Samek expanded on what was envisaged. The judge in London would, Mr Samek said, oversee the process and rule on whether the appellant had to answer any particular question. Perhaps the judge could not, Mr Samek accepted, *order* the appellant there and then to answer a question, but the appellant would still expose himself to the possibility of committal proceedings if he failed to answer a question that the judge had determined was proper.

77. As we see it, however, the proposed undertakings would not solve by any means all the problems. In the first place, there would be no effective method of enforcement. Were the appellant to refuse to answer a question that the judge in London considered should be answered, there would plainly be no possibility of the Bank obtaining any redress in Switzerland: it is abundantly clear that, as matter of Swiss law, a witness is under no obligation to give any evidence pursuant to chapter II of the Convention. More than that, while the appellant might commit a breach of his undertakings to this Court if he declined to answer a proper question, there would in practice be no way of forcing him to come to this country to respond to a committal application. Mr Samek agreed that the "practical reality" was that the appellant would not come here to be arrested. He suggested that the Bank could seek a debarring order against the appellant, but Mr Smith maintained that the Bank could have done this already had it wished on the strength of past defaults on the part of the appellant. On that basis, no additional sanction would be available to the Bank if the appellant failed to honour his undertakings. Rulings by the judge in London on whether questions were proper would be toothless.

78. Secondly, we doubt whether the commissioner(s) who would be taking the evidence would be prepared to allow the High Court judge the role ascribed to him by Mr Samek. Neither the Convention nor the Guidelines makes any provision for a judge from the requesting State to have any role. In keeping with the terms of article 17 of the Convention, the Guidelines speak of a commissioner "chair[ing]" the taking of evidence. Further, the Guidelines envisage that a commissioner will "see to it" that the examination is conducted "in accordance with Swiss law (no coercion, reminder of exemptions or any prohibition from giving evidence)". The commissioner(s) might very well feel that, in the circumstances, they should not afford a judge in London the chance to rule on whether a question was proper (with, explicitly or otherwise, the possibility of failure to answer being viewed as contempt). Such an approach might be thought to be incompatible with the Swiss emphasis on lack of compulsion.

79. A third point relates to the propriety of a High Court judge playing the role mooted by Mr Samek. Switzerland, as already noted, eschews compulsion. A person asked to give evidence there under chapter II of the Convention is to be "free not to cooperate at all or to interrupt the taking of evidence" and is not to be subject to any coercive measures. If, however, the appellant gave the undertakings that he is offering, they would (so far as the Courts of England and Wales are concerned) bind him to attend for cross-examination and to answer every question properly put to him and bar him from relying on privileges or duties available under Swiss law or procedure. The undertakings would thus be designed to achieve a regime inconsistent with that depicted in the Guidelines. In our view, considerations of comity mean that it could not be appropriate for a High Court judge to participate in such a process without specific authorisation from the Swiss Federal Justice and Police Department, the more so since someone involved with taking evidence in Switzerland can, if not duly authorised, commit a criminal offence under Swiss law.

80. That leads to a fourth point. The taking of evidence in Switzerland under article 17 of the Convention requires "prior authorization by the Federal Justice and Police Department". Under article 21(a), moreover, evidence can be taken only if not "contrary to any permission granted pursuant to the above Articles". Given, however, the extent to which what Mr Samek suggests departs from the Guidelines, it must be highly questionable whether the Swiss authorities would sanction it.

The way forward

81. Mr Samek submits that we should now discharge the order made by Phillips J and vary the cross-examination provisions of the 23 March order to provide for the cross-examination of the appellant to take place in Switzerland with a video-link, with new directions as to timing and procedure.

82. The high point of Mr Samek's submissions is that this should be the outcome if there is any material risk that the appellant would be subject to detention in this country as a result of the Interpol Red Notice and any extradition request made by Ukraine. He relied in particular on the decision of the House of Lords in *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10; [2005] 1 WLR 637. Still more should that be the case if the appellant faces a real risk of extradition to and detention in Ukraine.

83. Mr Smith, on the other hand, emphasises the importance of the court giving practical effect to the freezing order which has been made against the appellant. He cites the observation of Gross LJ in *JSC BTA Bank v Ablyazov (No. 7)* [2011] EWCA Civ 1386; [2012] 1 WLR 1988 at [48] that it was "of paramount importance" in the circumstances of that case "for the court to do and to be seen to be doing all it could to ensure the efficacy of the freezing order" which had been made against Mr Ablyazov. He also cites the judgment of Rix LJ in *JSC BTA Bank v Ablyazov (No. 8)* [2012] EWCA Civ 1411; [2013] 1 WLR 1331, who makes a similar point at [188], as follows:

> "The authorities demonstrate that it is vital for the court, in the interests of justice, to have effective powers and effective sanctions [sc. in relation to enforcement of a freezing order]. Without these, it would be possible for a defendant … to flout the orders of the court, which are the court's considered means

> by which to keep the scales of justice for the parties even. If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice. Those wrongly accused of fraud would be relieved of a certain amount of inconvenience, but fraudsters would rejoice and hitch a free ride to interminable litigation on the back of ill-gotten gains."

84. Mr Smith says that the proposed process of cross-examination of the appellant in Switzerland will not be as effective as direct cross-examination of him before the High Court in London. There is force in this. He submits that, in light of the strong grounds for suspecting that the appellant has lied thus far in the disclosure he has given pursuant to para. 7 of the freezing order, which are the grounds justifying the order for cross-examination in the first place, the court should require the cross-examination to occur under conditions which involve the most serious threat of adverse repercussions for the appellant if he does not answer or lies in his replies to questioning. Only then will there be any real chance of extracting more information from the appellant of any practical utility to assist in enforcement of the freezing order. To that end, Mr Smith submits that even if there is a risk of detention of the appellant in the United Kingdom and a risk of his extradition to Ukraine, these are risks which in the circumstances of this case it is not unjust to require him to face. In that regard, Mr Smith cites the decision of Neuberger J (as he then was) in *The Canada Trust Company v Stolzenberg* [1997] WL 1102707, decision of 3 October 1997.

85. In our judgment, the just result in this case is to continue to require the appellant to attend for cross-examination at the High Court in London. The alternative which he proposes, of cross-examination in Switzerland, is unlikely to be an effective means of obtaining useful information from the appellant which could assist in the enforcement of the freezing order. There is a significantly greater prospect of achieving that if he is cross-examined here.

86. We reject Mr Samek's primary submission, that the 23 March order should be varied if there is any significant risk that the appellant might be detained if he came to England. The *Polanski* case does not support that submission, nor does it assist the appellant more generally.

87. In that case, the film director Roman Polanksi, who was a French citizen resident in France and immune there from extradition to the USA, brought a libel action in England against the publishers of a magazine. Fearing that he would be arrested in England and extradited to the USA for unlawful intercourse with a 13-year old girl if he came to give evidence here, he applied for leave to give his evidence by video-link from France pursuant to CPR Part 32.3. The judge at first instance granted this application, but his order was set aside by the Court of Appeal. The judge's order was restored by the House of Lords, by a majority. The headnote summarises the reasoning of the majority (Lord Nicholls, Lord Hope and Baroness Hale) thus:

> "…the claimant was entitled to bring proceedings in England to protect his civil rights notwithstanding that he was a fugitive from justice; that although there was a public interest in not

> assisting a fugitive from justice to escape his just desserts the claimant would in fact do so whether or not a video link order was made, and there was a strong public interest in allowing a claim properly brought in England to be properly and fairly litigated; that if the administration of justice was not brought into disrepute by the claimant bringing proceedings in England it would not be brought into disrepute by allowing him recourse to the procedural facility of video conference link; that, as a general rule, where proceedings were properly brought in England a claimant's unwillingness to come to England because he was a fugitive from justice was a valid, and could be a sufficient, reason for making a video link order; and that the judge's order should be restored."

88. Lord Nicholls gave the main speech for the majority, with which Lord Hope and Baroness Hale agreed. He first analysed the competing interests of the parties at [11]-[15]. The course proposed by Polanski would not prejudice the defendant to any significant extent; if anything, it would be more likely to prejudice Polanski himself as evidence given via video-link was liable to have less impact on the jury: [13]-[14]. On the other hand, if the order were refused Polanski would be gravely handicapped in the conduct of the proceedings, as he would be prevented from giving oral evidence on the crucial dispute of fact in the case: [15].

89. By contrast, in the present case, the Bank would suffer a serious detriment if the appellant is only subject to cross-examination in Switzerland rather than before the High Court in London. It is also important that, by contrast with the position in *Polanski*, the order for cross-examination is a measure designed to make the freezing order granted by the court effective, rather than a measure aimed at the eventual fair trial of the Bank's claim against the appellant. Subject to the issue regarding the risk of arrest and extradition of the appellant, there can be no doubt that the just order as between the appellant and the Bank is that the appellant should be made subject to cross-examination in the High Court in London.

90. Lord Nicholls then turned to the wider question of the public interest in the administration of justice, with particular reference to the position of fugitives from justice: [16]-[34]. He noted that a fugitive from justice is not as such precluded from enforcing and defending his civil rights through the courts of this country: [25]-[26]. Accordingly, it would be inconsistent to rely on his fugitive status to disentitle him from a procedural facility which is readily available to all litigants: [31]-[32]. Therefore, "the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, from making a VCF [video-conferencing] order": [33].

91. Again, this is to be contrasted with the present case. The order for cross-examination in our case has been granted in order to make the freezing order as effective as possible. It is not directed to enabling the appellant to bring or defend a civil claim in order to vindicate his rights in this jurisdiction. In *Polanski*, the factor which weighed most with Lord Nicholls (see [32]) was that the administration of justice is not brought into disrepute by allowing a fugitive from justice to bring a claim, so it was difficult to see why it would be brought into disrepute by permitting him to have

recourse to a familiar procedure which would enable him to do that in an effective manner. But in our case, the administration of justice is liable to be brought into disrepute if the court is disabled from enforcing a freezing order in the most effective way possible. That would be the effect of granting the variation of the 23 March order proposed by the appellant, to substitute cross-examination in Switzerland for cross-examination in the High Court in London.

92. The *Polanski* ruling is inconsistent with Mr Samek's primary submission that cross-examination in Switzerland should be ordered if there is any prospect that the appellant might be detained if he came to England. Even in the case of a fugitive from justice who is a claimant seeking to vindicate his rights in the English courts, the majority in the House of Lords only said that this was a valid reason, which could be sufficient, for making a VCF order. They did not say that such an order should be made if there was any risk of detention here or abroad, nor that the risk of detention with a view to extradition would always provide a sufficient reason to make a VCF order.

93. The *Canada Trust* decision relied on by Mr Smith is also inconsistent with Mr Samek's primary submission. That case concerned a Swiss national, Mr Banziger, resident in Switzerland, who was subject to an order to give disclosure in relation to a freezing order. Mr Banziger was in breach of the ancillary disclosure order in the freezing order itself and the claimant sought an order for further disclosure from him regarding relevant assets. Mr Banziger maintained that he should not be compelled to give evidence about certain bank accounts in Switzerland since to do so would involve him in committing a criminal offence under an article of the Swiss penal code which provided in case of breach for imprisonment in serious cases and/or a fine. Whilst there was a real chance that if ordered to give disclosure Mr Banziger might have a defence under Swiss law, there was a real chance that he would not. Although the risk of prosecution was low, it could not be entirely discounted. Neuberger J accepted that the risk of prosecution was a factor which could be taken into account, but having regard to the compelling case against Mr Banziger that he had been closely involved in a substantial fraud on an international basis and the need for the court to take prompt and effective steps to counter multi-million pound transnational crime, the judge granted an order for further disclosure. The interests of justice were such as to require Mr Banziger to be placed at some risk of prosecution and punishment, including potential imprisonment. Contrary to the suggestion of Mr Samek, we can see no basis for saying that this case was wrongly decided.

94. Similarly, in the present case, we consider that the Bank has made out a strong case that the appellant has been involved in assisting in a massive international fraud and is concealing evidence about relevant assets. The public interest in the court trying to give maximum practical effect to the freezing order it has granted against him and in being seen to do so is strong.

95. Reverting to *Polanski*, Lord Nicholls accepted that although Polanski's criminal conduct did not take place in this country, the public interest in furthering proper processes of investigation, trial and punishment of criminal offences also applies in cases where an extradition crime is alleged to have been committed in a country with which the United Kingdom has a relevant extradition treaty: [24]. That is significant here. It is no part of English public policy to protect the appellant against extradition to Ukraine, provided that an English court can be satisfied that no violation of his

rights would occur if he were sent there. The existing case-law shows that the English courts are vigilant and effective at scrutinising claims for extradition to Ukraine to ensure that an individual's rights will indeed be protected.

96. Finally, Lord Nicholls noted as a relevant factor that a VCF order would not assist Polanski's evasion of justice, since he would not come to England and put himself at risk of arrest whether a VCF order were made or not: [28]. Mr Samek makes a similar point in this case. He says that the appellant will not come to England for cross-examination even if he is ordered to do so, so the best that can be achieved is that he is cross-examined in Switzerland with the Bank having the benefit of the undertakings which have been offered to this court by the appellant. Mr Samek maintains that this is not the appellant holding a gun to the court's head to say it must do as he says, but is simply a recognition of the practical reality.

97. It may transpire that Mr Samek is right that the appellant will continue to refuse to obey an order that he come to the High Court to be cross-examined about his disclosure pursuant to para. 7 of the freezing order, although the appellant has not directly asserted that in terms in his own evidence. However, in our view, in the circumstances of this case the proper course is to put that to the test by maintaining the order for cross-examination in this jurisdiction. It is difficult to be sure whether, in the light of this judgment, the appellant will obey that order or not. There may well be pressures on him - for instance the risk, if he does not obey, of having a final judgment entered against him which might be enforceable in other jurisdictions – which may yet induce him to comply with it. The relatively low level of the risk of detriment that he would run by coming here, as further bolstered by the undertakings offered by the Bank's representatives, is itself indicative of a possibility that he may do so. Certainly, it seems to us that the court would be perceived as bowing to blackmail by him and would be liable to bring the administration of justice in this country into disrepute if it simply accepted the appellant's assertion that he will not come with a shrug of the shoulders and a sigh.

98. In our view, there is nothing in the other cases particularly relied upon by Mr Samek – *Rowland v Bock* [2002] EWHC 692; [2002] 4 All ER 370 and *McGlinn v Waltham Contractors Ltd* [2006] EWHC 2322 (TCC) - which affects this analysis. Both concerned impediments in the way of an individual seeking to participate in litigation in England to vindicate their civil rights, as Polanski sought to do, and are not concerned with measures taken to enforce a court order.

Conclusion

99. For the reasons given above, (1) we dismiss the appeal in relation to the decision of Phillips J of 26 May 2016 and in relation to the costs order made by him, and (2) we dismiss the appellant's application to discharge the order made by Phillips J and to vary the provision in the 23 March order requiring cross-examination of the appellant in the High Court in London. The court accepts the undertakings offered by the Bank's legal representatives. The parties should now seek to agree directions and a confidential timetable to set a date for the cross-examination.