England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2011] EWHC 2664 (Comm)
Case No: 2009 FOLIO 1099

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
26/10/2011

B e f o r e :

MR JUSTICE CHRISTOPHER CLARKE

Between:

JSC BTA Bank	**Claimant**
- and -	
Mukhtar Ablyazov and 16 Other Defendants	**Defendants**

Stephen Smith QC and Tim Akkouh (instructed by Hogan Lovells International LLP) for the Claimant
Duncan Matthews QC and Thomas Grant (instructed by Addleshaw Goddard LLP) for the First Defendant
Hearing dates: 6th and 7th October 2011

HTML VERSION OF JUDGMENT

MR JUSTICE CHRISTOPHER CLARKE:

1. JSC BTA Bank, the claimant, (hereafter "the Bank"), applies for an order that Mr Ablyazov should state the ultimate source of the funds which are being used to pay his legal expenses.

2. This is extraordinary litigation on a huge scale. The details are well known to the parties and have been referred to in several judgments. I do not propose to set them out again. It is sufficient to record that the Bank has commenced nine actions against Mr **Ablyazov,** in which it claims in respect of defalcations said to have been committed by him and others over the years, and particularly in the months leading up to his removal as Chairman in 2009, by which the Bank is said to have been defrauded of more than $ 4.5 billion.

3. In February 2009 Mr **Ablyazov** fled to England where he lives in a very valuable property – Carlton House in Bishop's Avenue – in London. The Bank contends (but he denies) that he owns that property and an estate in the country as well as several other English properties, as well as many valuable assets throughout the CIS and over 600 offshore companies, administered for him by trusted friends or close relations, which have been obtained, in whole or in part, by the misappropriation of the Bank's money. Typically this is said to have been done by the making of unsecured so called **loans** to companies which he secretly owns or controls.

4. Mr **Ablyazov** contends that he is the victim of a vicious political persecution by the President of Kazakhstan, his political enemy, and that these proceedings are part of that persecution. He has obtained political asylum in this country. He contends that, as a result of the campaign against him, anyone who renders assistance to him is a target for aggressive action by the Kazakh State in several different countries.

5. The present action ("the Drey proceedings") was begun on 13th August 2009. It includes a claim to trace the proceeds of $ 400 million paid to what are said to have been Mr **Ablyazov's** companies. When it was launched the Bank sought and obtained a worldwide freezing order against him and others. An interim Receivership Order over his assets was made by Teare J in August 2010.

The Freezing Order

6. Paragraph 4 of the Freezing Order orders Mr **Ablyazov** not to:

> "*a. Remove from England & Wales any of [his] assets which are in England & Wales ... up to the value of £ 451,132,000 ....*
>
> *b In any way dispose of, deal with or diminish the value of any of [his] assets in England and Wales up to the value of .... £ 451,132,000 ....*
>
> *c In any way dispose of, deal with or diminish the value of any of [his] assets outside England and Wales up to the value of .... £ 451,132,000 ...."*

7. Paragraph 5 provides:

> *"Paragraph 4 applies to all the Respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not [Mr **Ablyazov**] asserts a beneficial interest in them. For the purpose of this Order the Respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The Respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions*".

8. Paragraph 9 (a) contained a provision in relation to living expenses and legal fees in the following form:

> *"Paragraph 4 of this Order does not prohibit [Mr **Ablyazov**] from spending up to £10,000 a week towards [his] individual ordinary living expenses ..., nor does it prohibit [Mr **Ablyazov**] from spending a reasonable amount on legal advice and representation. **But before spending any money on legal advice and representation** [Mr **Ablyazov**] must notify the Applicant's legal representatives in writing where the money to be spent is to be taken from."*

9. Mr **Ablyazov** sought to vary the disclosure provisions in the order. That application was dismissed by Teare J, and an appeal was dismissed by the Court of Appeal. Mr **Ablyazov** purported to comply with the provisions but his disclosure was found by Teare J to have been "*extraordinarily inadequate*". He was ordered to attend for cross examination as to his assets and the whereabouts of monies to which the Bank made a proprietary claim. In the course of his cross examination Mr **Ablyazov** said that he had made an agreement with a third party called Wintop Services Ltd ("Wintop") to borrow money for his legal expenses. He said that Wintop was owned by a citizen of Kazakhstan who had family, brothers and sisters there and who was a friend of his. He said that he himself had no interest in Wintop.

10. On 18th March 2011 Stephenson Harwood, Mr **Ablyazov's** then solicitors, wrote to Hogan Lovells, the Bank's solicitors, to tell them that a company called Fitcherly Holdings Ltd ("Fitcherly") was now funding Mr **Ablyazov's** defence.

11. The funds provided by these two companies have not only been used to fund Mr **Ablyazov's** defence but some of his co-defendants as well. The number of lawyers so paid is large (over 10 leading counsel, more than 20 juniors and 75 other lawyers from at least 8 different firms) and the amount paid runs into millions of pounds.

The Receivership Order

12. In July 2010 Teare J made a Receivership Order. In the course of his judgment he said the following:

> *"there are … substantial grounds to believe that Mr **Ablyazov** wished to make enforcement of the Freezing Order difficult"* (see [2010] EWHC 1779 (Comm), [85]; *"I am not persuaded that Mr **Ablyazov** has indeed 'bared his soul'. The most I can say is that there is a reasoned suspicion that he has not disclosed all his assets"* (at [99]); and *"consideration of his conduct … has left me unable to trust him not to deal with his assets in breach of the Freezing Order"* (at [161]).

13. The Court of Appeal upheld the order and said that it was *"impossible to conclude that Mr **Ablyazov** had been doing his best to comply with the orders of the court"* and that there was *"a measurable risk that Mr **Ablyazov** will, if he is able to do so, act in breach of the Freezing Order"*.

14. In late 2010 and early 2011 the Bank obtained a very substantial amount of documentation from search orders executed in this jurisdiction and abroad and from *Norwich Pharmacal* orders made against email service providers. That enabled it to secure, in the first half of 2011, extensions to the Receivership Order covering shares in 636 companies.

15. In 2009 and 2010, Mr. **Ablyazov** had claimed that the vast majority of his assets were ultimately held for him by a [….] businessman named [Mr X] pursuant to declarations of trust, and that it was [Mr X] who administered the chains of offshore companies through which assets of real value were held. The information obtained pursuant to the search orders disclosed that the companies were administered by Mr. **Ablyazov's** brother-in-law, Syrym Shalabayev who had until recently been working alongside Mr **Ablyazov** in London. In his 13th witness statement Mr **Ablyazov** accepted that Mr Shalabayev worked for him together with Mr X providing asset management services.

16. The companies added to the Receivership in April 2011 included Wintop and Fitcherly. The evidence which led to them being added included the following:

i) A string of 12 emails prepared for Mr Shalabayev to be sent by Mr Batyrgareyev which refer to *"my company, Fitcherly"*. The preparation was done by personnel at Euroguard Assets Ltd, a company which managed some of Mr **Ablyazov's** assets and with which Mr Shalabayev was associated. The significance of these – says the Bank – was (i) that they were prepared for Mr **Ablyazov's** brother-in-law, who Mr **Ablyazov** accepted had been involved in the administration of his assets, (ii) they were to be sent by Mr Batyrgareyev, […],[1] and (iii) […..].

ii) **Loan** agreements executed in early 2011, pursuant to which a company called Vaida Trading

Limited (incorporated and operated by Mr Shalabayev, which has also been added to the Receivership) would advance an aggregate of US$40 million to Wintop and Fitcherly. These agreements purport to record **loans** on highly favourable terms, including (i) a provision that no interest would be payable until the end of the **loan** and (ii) no requirement that any security be provided.

17. No application was made by Wintop or Fitcherly to be excluded from the Receivership. (Mr P, (who is said now to be the beneficial owner of Wintop and Fitcherly: see paragraph 22 below) is said to have hired solicitors in the UK and to have hired lawyers in Cyprus in order to prove that those two companies should not be included in the Receivership). Instead on 3rd May 2011 Stephenson Harwood wrote to Hogan Lovells to say that Mr **Ablyazov** was arranging for his legal fees to be paid by another company – Green Life International SA, registered in Belize ("Green Life"). They informed Hogan Lovells that the ultimate beneficial owner ("UBO") of Green Life was a businessman from the former Soviet Union who did not want his identity to be revealed.

18. The Bank is not privy to the activities of the Receivers other than by receipt of their reports. These reveal, inter alia, the following:

    i) Paragraph 245 of the Receivers' March 2011 report records that Mr **Ablyazov** agreed in a meeting held on 21st January 2011 to *"provide copies of accounting information and agreements he has in place with Wintop and Fitcherly ...." "but on 22 February 2011 Mr **Ablyazov** has reneged on this agreement ...."*

    ii) Paragraph 261 of the same report records: that *"there are indications that Mr **Ablyazov** is supplementing his personal expenditure from other sources (e.g. Wintop, Fitcherly ...) which has not been explained".*

    iii) Paragraphs 44-45 of the Receivers' May 2011 report records that Fitcherly bank statements obtained by the receivers show the making of:

> *"... payments which are (or appear to be) for the benefit of Mr **Ablyazov,** or in discharge of liabilities or expenses incurred by him. Thus, substantial payments have been made from the account to Stephenson Harwood. Payments have also apparently been made to: (i) Lightacre Estates Limited, which appears to be a company that invoices for expenses in relation to properties used by Mr **Ablyazov;** (ii) Ashbury & Bloom, who are the estate agents for Carlton House ..., (iii) Park Hill Limited, an English company which is said by the Bank to be a company used by Mr **Ablyazov** to administer his network of companies ... , (iv) a number of corporate service providers who are known to provide services to companies listed in Schedules 3, 3A and 3B* [to the Receivership Order]. *The Fitcherly bank statements appear therefore to support the Bank's case that Fitcherly is another company owned by Mr **Ablyazov,** and not a company owned by an anonymous third party who is prepared to **loan** Mr **Ablyazov** sums in order to fund his legal and certain other personal expenses."*

    iv) Paragraph 155 of the Receivers' June 2011 report states: *"We note that living expenses, excluding rental costs, as identified on Mr **Ablyazov's** credit card statements, have exceeded the £10,000 limit per the Freezing Order on several occasions. This excludes rental expenses which alone exhaust the £10,000 limit and which Mr **Ablyazov** claims have been paid by a third party, Fitcherly ..."*

19. The Fitcherly bank statements also show the making by Fitcherly of large payments to third parties connected with Mr **Ablyazov** including Peters & Peters who act for Mr Zharimbetov, a co-defendant in these proceedings, and Byrne & Partners who were formerly solicitors for 2 co-defendants in one of the other sets of proceedings.

    The Funding Application

20. On 13th May 2011 the Bank issued what has come to be known as the Funding Application, supported

by the first witness statement of Mr Alex Sciannaca of Hogan Lovells, by which it sought orders requiring Mr **Ablyazov** to disclose to the Bank various categories of information relating to the three companies (Wintop, Fitcherly and Green Life) which were or had been funding his legal costs, including who was their UBO and what was the ultimate source of the funds.

The contempt application

21. On 16th May 2011 the Bank applied to commit Mr **Ablyazov** for some 35 alleged contempts which included spending far in excess of £ 10,000 per week on living expenses and dealing with disclosed assets and, also, assets which he had failed to mention. One of the allegations made was that Mr **Ablyazov** failed to disclose his interests in Wintop and Fitcherly. A representative selection of those allegations is due to be heard in November. These do not include the Wintop and Fitcherly allegations but these charges remain pending and the Bank is at liberty to seek permission to proceed with them in the future.

22. The Funding Application was due to be heard on 9th September 2011. However, a few days before that Addleshaw Goddard came on the record in place of Stephenson Harwood and applied for an adjournment. By now the Bank had discovered from the documentation that it had obtained who was the apparent beneficial owner of Wintop and Fitcherly. The beneficial owner of Wintop was said to have been Mr Shalabayev and now to be a Mr P. The beneficial owner of Fitcherly is said to be Mr P. In the light of what the Bank had discovered Mr **Ablyazov** was prepared to confirm the beneficial ownership of these two companies and to provide a witness statement with the information and documentation sought by the Funding Application so far as it related to them.

23. On 8th September Eder J adjourned the hearing of the present application on terms that Mr **Ablyazov** provide a witness statement with the information and documentation relating to those two companies by 15th September 2011. On that day the second witness statement of Mr Hargreaves, a partner in Addleshaw Goddard, was filed in pursuance of Eder J's order. The Funding Application is now confined to information and disclosure in relation to Green Life.

24. At the hearing before Eder J a timetable was set for the production of further evidence. Mr **Ablyazov** was given permission to serve a witness statement in response to the second witness statement of Mr Sciannaca by 15th September 2011. That was also done by Mr Hargreaves' second witness statement. The Bank had permission to serve any evidence in reply by 22nd September. That time was extended by Teare J on 26th September until 11 a.m. on 3rd October. At the hearing before Teare J Mr **Ablyazov's** counsel made plain that evidence in reply was contemplated.

25. On Monday, 3rd October the Bank served the 31st witness statement of Mr Hardman. A response to that – the 6th statement of Mr Hargreaves – was served on Wednesday, 5th October. I overruled the Bank's objection to its admission. Mr Duncan Matthews, QC, on behalf of Mr **Ablyazov,** told me that it did not encompass all that Mr **Ablyazov** might wish to put before the court but was the best that could be done in the short time available in response to what had only been provided on Monday 3rd. The Bank has not had the opportunity to reply to Mr Hargreaves' statement, both on account of the time at which it was produced and because it is headed "*Contains information for restricted circulation*".

The issues

26. Mr **Ablyazov** contends that he has been funding this litigation and his expenses pursuant to bona fide arm's length **loan** agreements entered into:

i) between himself and Wintop on 1st September 2009 (when Wintop was owned by Mr Shalabayev) and 1st April 2010 (after Mr Shalabayev had sold Wintop to Mr P), and

ii) between himself and Fitcherly (always owned by Mr P) on 17th August 2010 and 1st December 2010.

In each case, the **loan** facility granted by the relevant agreement was in the amount of £10 million, making £ 40 million in all.

27. Each of those agreements provides for the **loan** to be available over a 2 year period, for the **loan** to be disbursed in one or several disbursements on the Borrower's written request, for interest at 5% and for repayment of principal and interest not earlier than 4 years after the date of the Agreement. There appears to be no security. Each contains the following provision:

> *"1.12 Use of Proceeds. The proceeds of the **Loan** Facility shall be used at the Borrower's sole discretion. The Borrower may direct the Lender to transfer the proceeds of the **Loan** Facility to any third party".*

28. Mr **Ablyazov** says that he does not know the ultimate source of the funds used by Mr Shalabayev to fund his legal expenses but that they did not come from him or any of his companies. In respect of Mr P, he says that he, together with others, held an interest in the "Iceberg" business centre in Kyiv, Ukraine which is funded by a company called Neshani Investments Limited ("Neshani") in which Mr P and two others have an interest.

29. The Bank says that there is good reason to believe that the funding from Wintop and Fitcherly has, in fact, come from Mr **Ablyazov's** own assets, probably themselves derived, at least in part, from the Bank, and that the agreements are nothing more than a façade to conceal the true position. The same, it contends, is likely to be true in respect of Green Life. In those circumstances Mr **Ablyazov** should be ordered to reveal – but only, in the first instance, to the Bank's UK lawyers – the identity of the UBO of Green Life and the source of that person's funds.

Jurisdiction

30. In the lengthy skeleton argument prepared by the Bank for the hearing jurisdiction to make the order sought was said to arise in two ways. First paragraph 9 (a) of the Freezing Order requires Mr **Ablyazov** to notify the Bank's solicitors "*where the money to be spent [on legal fees] is to be taken from*", which, the Bank submits, requires more than the bare assertion that Green Life is the provider. Secondly section 37 of the *Senior Courts Act 1981* gives the Court power to make the order sought.

31. At the hearing, however, Mr Stephen Smith, QC on behalf of the Bank advanced a new contention, namely that, even if the financing by Mr **Ablyazov** of his defence has been and continues to be effected by the borrowing of money from a bona fide third party, the use of finance from such a source is, itself, a breach of the Freezing Order. This line of argument derived from a consideration of (a) the decision of Neuberger, J (as he then was) in *Cantor Index Ltd v Lister* [2002] CP Rep 25, which holds the opposite and was relied on in the skeleton argument for Mr **Ablyazov;** (b) the wording of paragraph 5 of the freezing order, which provides for an extended definition of "assets", not applicable in the *Cantor* case; and (c) paragraph 1.12 of the **loan** agreements in respect of Wintop and Fitcherly.

32. In *Cantor* Neuberger J had to decide, inter alia, whether the defendant was entitled to borrow money and spend it in excess of the funds permitted by the order for living expenses and costs. The submission made to him was that the effect of spending money on a credit card or directing payment of money from a third party was to create a debt in favour of the third party and to reduce the defendant's overall net assets, which were already less than the £ 200,000 limit applicable. Neuberger J, whilst seeing the force of that submission "*as a matter of good sense and practicality*", rejected it. He did not think it right to construe the prohibition against dealing with "*any of his assets*" as disobeyed by borrowing from an existing creditor or even from a new one, at least where the creditor was not secured on any of the debtor's assets because that did not, as a matter of ordinary language, involve disposing of or dealing with or diminishing the value of any of the debtor's assets. Such borrowing resulted in a diminution in the debtor's net asset position. But that was not what the operative paragraphs of the freezing order were about. The argument the other way involved a less natural meaning on the basis of commercial common sense. But, he held, the court should not easily be persuaded to construe a freezing order other than in its primary way if the consequence was to render the debtors potentially subject to penal sanctions.

33. Mr Smith submits that the case is distinguishable; but he does not flinch from stating that, if it is not, it was wrongly decided. The argument put before Neuberger J about the depletion of net assets did not, he submitted, hit the mark. The true analysis is that a right to borrow is a chose in action and that by availing himself of the right and the monies to be obtained therefrom, Mr **Ablyazov** was disposing of, or dealing with, such chose since he was exchanging the chose for the payment under the **loan.** Further the money which went from the Bank to the lawyers constituted an asset which Mr **Ablyazov** had " *power, directly or indirectly, to dispose of, or deal with as if it were [his] own"* and he was "*to be regarded as having such power"* because the lending bank*," a third party, holds or controls the assets* [i.e. the **loan** money] *in accordance with* [his] *direct or indirect instructions*" – see clause 1.12 of the **loan** agreements – within the extended definition of assets, which was not present in the *Cantor* case.

34. I would add that, if borrowed monies are wholly outwith the freezing order it would be open to an unscrupulous defendant to evade the operation of the order by borrowing as much as he could and disposing of the proceeds.

35. On the second day of the hearing Mr Matthews objected to me entertaining a case put on this basis. It had not featured in the application notice or the skeleton argument. Prior to its appearance in oral argument in the afternoon of Day 1 the case of the Bank had been presented on the footing the Court should make the order because the **loans** from the companies were all disguised funding from Mr **Ablyazov.** If the proposition argued for was correct it had widespread repercussions, not only in the **Ablyazov** litigation, where several defendants have had their legal expenses advanced to them, but in many other cases as well. *Cantor* had stood unchallenged for many years: it is cited in *Gee* on *Commercial Injunctions*, without observation or query. If the Bank was to be allowed to advance it more time would be required to consider the law, including any non UK cases; and the question of what exactly is constituted by a chose. It was in any event odd to regard an entitlement to a **loan** whereby the bank advances money in exchange for a debt as a chose in action of *the debtor* (as opposed to the bank). Any money over which the borrower has a power of disposition is money of the bank. Moreover difficult questions would arise if the Bank was right. If **loans** for legal expenses are to be regarded as assets, how are they to be valued as assets of the defendant for disclosure purposes? Does every credit facility, overdraft or credit card limit have to be declared? In addition Mr Matthews said that he might wish to adduce further evidence; and other parties concerned might wish to be heard.

36. When these objections were raised I indicated that I would not rule on this point without giving Mr Matthews a further opportunity to make submissions – written in the first instance. I shall, therefore, assume, without deciding, that, if the legal expenses are being funded by a bona fide third party lender, that is not a breach of the injunction.

37. The debate on whether this issue should be entertained has provided some illumination as to the nature of any jurisdiction to order the production of further evidence which paragraph 9 (a) of the order may afford. Paragraph 9 (a) is one of the Exceptions to the order. It follows, as it seems to me, that, if borrowing for the purpose of paying legal expenses is not a breach of paragraph 4 of the Freezing Order there is no obligation under the last sentence of paragraph 9 (a) to notify the Bank's legal representatives "*where the money to be spent is to be taken from*" (although Mr **Ablyazov** has, in fact, purported to do so in the case of Wintop and Fitcherly). That obligation is not a free standing obligation whatever the circumstances. It is a condition of entitlement to rely upon the exception provided for by the first sentence of paragraph 9 (a). If there is no need to rely on the exception in order to pay legal expenses, the obligation to provide the information does not arise. If however, use of the monies used for legal expenses is within paragraph 4, then paragraph 9 (a), including the second sentence applies.

38. The Bank contends that there are very good grounds to believe that funds which come from Green Life are, in reality, funds of Mr **Ablyazov;** in which case he is bound to notify Hogan Lovells where the money to be spent is to be taken from. The Court should order the production of the information sought.

39. If such an order is made, and if the information provided by Mr **Ablyazov** confirms the Bank's suspicion that Green Life is another of Mr **Ablyazov's** companies, the Bank will be in a position to

take steps to enforce the freezing and receivership orders by (*inter alia*):

i) making an application for Green Life to be added to the Receivership (such that its operations will be subject to the scrutiny of the Receivers);

ii) making an application seeking the freezing of Green Life's assets (on the basis that there is good reason to believe that they are Mr **Ablyazov's** assets);

iii) putting the Bank and the Receivers in a position to be able to monitor and enforce Mr **Ablyazov's** compliance with the Freezing Order (by preventing improper payments being made to third parties; preventing Mr **Ablyazov** from spending in excess of £10,000 per week on personal expenses; and ensuring that only reasonable sums are paid on legal fees); and

iv) tracing and securing the assets that the trail of funding down to Green Life is likely to lead back to.

40. Mr **Ablyazov** contends that Green Life is a bona fide third party, in which case (on the present assumptions) the identity of the funder, much less its UBO, does not require to be named. Moreover there are a series of understandable reasons why the UBO of Green Life does not wish to be named. There is no jurisdiction to make any such order; and, even if there is, it is not an order that should be made.

Discussion on jurisdiction

41. I cannot on the present interlocutory application reach, and do not to purport to reach, any final conclusion as to whether Green Life is Mr **Ablyazov** in disguise, or his creature or conduit, or funded by him. The relevant questions to determine are (a) whether, absent a finding that Green Life is not a bona fide third party lender, it is open to the Court to require Mr **Ablyazov** to provide the information about the funding of his legal expenses which is sought; if so (b) what test or tests, if any, need to be satisfied before the Court contemplates doing so; and (c) whether, if there is jurisdiction, discretion should be exercised in favour of making the order or not.

42. A similar issue arose in *JSC BTA Bank v Solodchenko* (unreported) 17th January 2011. These are the AAA proceedings in which the Bank claims that certain triple-A investment bonds with a nominal value of $ 292 million were transferred in January 2009 from the Bank to the fourth to eight defendants, all BVI companies, allegedly for no consideration and for no commercial purpose. Mr Kythreotis, the second defendant, was alleged to have dishonestly assisted in that transfer. In July 2010 a freezing order was made against him and others up to $ 68 million. In affidavits sworn by him pursuant to the disclosure provisions of a freezing order, he said that he believed a Mr Sadykov was the beneficial owner of the BVI companies. The basis of his belief was a letter from Mr Sadykov. In his defence, however, he did not make a positive case that Mr Sadykov was the beneficial owner. The second defendant's solicitors had stated in a letter that they understood that two sums - £ 85,000 and £ 50,000 – which they had received had been received by them from Mr Sadykov. The application was for an order that Mr Kythreotis should file evidence explaining upon what basis Byrne & Partners had that understanding; how those sums were received; and what contact details he had for Mr Sadykov.

43. Mr Justice Peter Smith made the order sought. In an *ex tempore* judgment he observed that the purpose of a provision such as paragraph 9 (a) is:

> *"to enable the claimants to be satisfied that the defendant is not funding his defence from sources of money which he has not disclosed pursuant to the order for disclosure of assets made in the freezing injunction. The second one is to ensure that he is not being funded by using his own assets, but concealing that fact by having funds provided by a third party who he himself has put in funds. The third area in which it is important is where a claimant has a proprietary claim [in] ..that the claimant is entitled, when it has a proprietary claim, prima facie to have an order which prevents a defendant from using for his living or legal expenses (unless the court orders to the contrary) any monies which are to be the subject of the proprietary claim".*

He went on to say:

> *"...the question is whether or not simply saying the money might have come from Mr Sadykov ...is enough to comply with that provision. In my view it is not ..the purpose of these provisions is clear: they are to show that, if a defendant is to have the benefit of spending money which would otherwise be frozen, he must show that there is no possibility of this money being the subject matter of a claim by the claimants from a tracing point of view.*[2] *He must also show that there is no possibility of this money, in reality, being his money, but being provided through a nominee to disguise the fact that it's his money. It therefore follows, in my view, that to comply with [a provision in very similar terms to paragraph 9(a) of the freezing order] the respondent must show ultimately who has provided the money and where that person obtained the money from... Simply identifying Mr Sadykov, without the details to enable the claimants to be satisfied that Mr Sadykov exists and that Mr Sadykov is not spending money which has either come from the defendant or has come from the claimant's funds, is not enough."*

44. It is apparent that the situation facing the Court in that case was that there was reason to suppose that the money to pay the legal expenses may have been derived from either the relevant defendant or be money to which the Bank had a proprietary claim. The order was not made because it was established that the money had those characteristics but because it was quite possible that it did.

45. Jurisdiction to make the order was said to arise from the equivalent of what in this case is paragraph 9 (a). Invocation of such a clause is open to the objection, made in this case, that the clause can only be relied on if the money being used for legal expenses is in fact that of the defendant, which has not been established. I do not regard this as correct. A line of authority on section 37 of the *Senior Courts Act 1981* (as it is now called)[3] holds that the power of the court to grant a freezing injunction extends to making all such ancillary orders as appear to the court to be just and convenient to ensure that the freezing injunction is effective to achieve its purpose: *A.J.Bekhor & Co Ltd v Bilton* [1981] QB 923; *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286; *JSC Bank v Solodchenko* [2011] EWHC 2163 Ch per Henderson J.

46. In *CBS United Kingdom Ltd* v *Lambert* [1983] Ch 37, at 42 G Lawton LJ spoke of the use of section 37 to require a defendant to disclose "*what his assets are and whereabouts they may be found*". Mr Matthews submitted that an order that Mr **Ablyazov** should provide information and disclosure as to a company which he says he does not own is, in a sense, the opposite of what Lawton LJ was referring to (being an order that he disclose what are not his assets), would not be an order ancillary to a freezing order, and is one which the Court had no jurisdiction to grant. I disagree. Lawton LJ's observation is not a limit on the Court's jurisdiction but an example of when it may appropriately be used. In any event, whilst the Court would, no doubt, not make any order in respect of a third party when there was no reason to suppose that he was not advancing his or its own monies, not derived directly or indirectly from the defendant, in the present case the order is sought because the Bank apprehends that Green Life's assets are in fact those of Mr **Ablyazov.**

47. The jurisdiction is essentially protective: its purpose is to ensure that assets are not disposed of in (disguised) breach of the freezing order. It is not, I think necessary, to set a particular threshold which the claimant must cross in order to secure such an order. The order may be made if it is just and convenient to make it in order to ensure that the injunction is effective. There must, therefore, be grounds to believe that there is a real risk that the injunction may be being broken. Whether the order is in fact made is likely to depend on the strength of those grounds and the considerations which militate in favour and against making such an order. It is not a precondition of making the order that the money in question has been established to be that of the defendant. But the Court will always seek to be careful to ensure that a freezing order is not used as a weapon to oppress the defendant: *House of Spring Gardens Ltd v Waite* [1985] FSR 173, 181. I turn, therefore, to the matters upon which the Bank relies in order to secure such an order and the considerations which Mr Matthews urges upon me as to why no such order should be made.

The Bank's evidence

48. Firstly, the Bank draws attention to the evidence relating to Mr Shalabayev, who is said to have been the UBO of Wintop until March 2010. As to that:

i) There is evidence that Mr Shalabayev spends his time conducting the often mundane administration of Mr **Ablyazov's** companies, which is a surprising activity if he is a man able to lend £ 10 million to help his brother-in-law;

ii) The "usual residential address" given by Mr Shalabayev to Companies House in 2006 was Flat 79, Elizabeth Court, NW1, a sixth floor flat in St John's Wood. Mr Shalabayev remained there in 2009. This flat was purchased for £650,000 in 2002 by a BVI company (as the Land Registry entry shows) – a modest residence for a millionaire;

iii) Mr **Ablyazov** refuses to be drawn as to the source of Mr Shalabayev's wealth. His response, despite being ordered to provide this information, is simply that he is "*not currently in contact with Mr Shalabayev*". But this is insufficient where:

a) Messrs **Ablyazov** and Shalabayev are *"close relatives and work together, with both attending Eastbridge's offices in London together for an extended period and Mr Shalabayev (finally) having been admitted to be Mr **Ablyazov's** nominee"* (see Hardman 31, paragraph 10);

b) Messrs **Ablyazov** and Shalabayev continue jointly to instruct Clyde & Co on certain aspects of the AAA proceedings: they appeared by the same counsel at a hearing before Arnold J on 13th September 2011; and

c) Mr **Ablyazov** has suggested, in the context of the committal proceedings, that he is able to ask questions of Mr Shalabayev.

iv) The Bank has recently obtained documentation which enables it to trace the probable source of at least some of the funds used by Wintop to discharge Mr **Ablyazov's** legal fees and personal expenses. This reveals that those funds were paid to Wintop by three companies which the Court has found good reason to believe are owned by Mr **Ablyazov** and has, therefore, added to the Receivership Order. These companies are Sunstone Ventures Ltd, which **loaned** Wintop € 500,000 on 7th July 2009; Venizon Holdings Ltd, which made 4 **loans** totalling over $ 27,000,000 between August and November 2009; and Zalou Investments Ltd, which **loaned** Wintop $ 500,000 on 4th November 2009. Stephenson Harwood, Mr **Ablyazov's** own solicitors have accepted that Mr **Ablyazov** has essentially guaranteed the debts of Zalou: see Hardman 23, appendix 7, paragraphs 132 to 133;

v) Wintop was listed amongst several companies of which Mr **Ablyazov** has admitted ownership which in March 2009 were notified by a Cypriot corporate service provider to Mr Shalabayev as being available immediately following his request to register 15 BVI and 15 Cyprus companies for "*our Group*". Furthermore, it has many additional characteristics of a company belonging to Mr **Ablyazov** (e.g. the familiar identities of those who were granted powers of attorney over its affairs): see Hardman 31, paragraphs 5(c) and 7; and

vi) On his present case Mr **Ablyazov** gave false evidence when cross-examined in late October 2009 regarding Wintop. He now says that, between August 2009 and March 2010, Wintop was ultimately owned by Mr Shalabayev. But on 27th October 2009 Mr **Ablyazov** stated on oath that it was owned by a citizen of Kazakhstan, with family in Kazakhstan who was a friend. In fact Mr Shalabayev was Mr **Ablyazov's** brother-in-law (not just a "friend"); and Mr Shalabayev and his wife were resident in London, together with Mr **Ablyazov** and his family.

49. I do not attach much significance to the fact that, when cross-examined, Mr **Ablyazov** described the owner of Wintop as a friend rather than his brother in law in circumstances where he was seeking to conceal the UBO of Wintop. More significant is his failure to reveal anything about the source of Mr Shalabayev's wealth. Mr **Ablyazov's** evidence, as reported in Mr Hargreaves' sixth witness statement, is that Mr Shalabayev is independently wealthy but that he lacks "*detailed knowledge*" of his wealth. He has, however, revealed practically nothing.

50. Secondly, the Bank relies on the characteristics of the **loan** agreements for Wintop and Fitcherly,

which, it suggests, are shams:

i) The agreements provide for (i) a **loan** period of at least four years at a modest rate of interest, (ii) that interest is rolled up until repayment is demanded, and (iii) the **loans** are on an unsecured basis, with (iv) the virtual certainty of default in the event that the Bank prevails in this litigation;

ii) The terms of the **loan** agreements are identical, notwithstanding that they were (on Mr **Ablyazov's** case) entered into by companies controlled by two entirely different businessmen (i.e. Mr Shalabayev initially; then Mr P); and

iii) The **loan** terms provide that *"the **Loan** Facility shall be disbursed in a form agreed by the Parties in one or more or several disbursements ... upon the Borrower's written request"*: see paragraph 1.2. No written requests have been disclosed by Mr **Ablyazov.** Moreover, it is inherently unlikely that Mr **Ablyazov** in fact issued such written requests, given the tiny sums that were frequently distributed by Fitcherly in relation to Mr **Ablyazov's** expenses.

51. I do not regard the periods of the **loans** as particularly significant. If funding was to be provided for the litigation by a supporter it would make sense for it to be for a period over which the litigation might extend. But, if Wintop and Fitcherly are bona fide third parties, the absence of any security is surprising, although not determinative, as is the absence of a single written request for drawdown.

52. Third, the Bank submits that the accounts given of the alleged sale of Wintop to Mr P and of Mr P's wealth do not stand up:

i) According to the evidence of Mr **Ablyazov,** through Mr Hargreaves, Mr P decided to acquire Wintop from Mr Shalabayev so that Mr P could continue to use it as a conduit for funds **loaned** to Mr **Ablyazov.** It is unclear why he should do that and make a **loan** of £10 million to Mr **Ablyazov** through it on 1st April 2010 when, at that stage, Wintop had liabilities to Sunstone, Venizon and Zalou, all of which are linked to Mr **Ablyazov** and have been added to the Receivership, in a cumulative amount in excess of US $27,000,000. Mr **Ablyazov** says that he owns none of these companies;

ii) Mr Shalabayev's interest in Wintop is said to have been transferred to Mr P pursuant to a declaration of trust dated 3rd March 2010. But there is evidence that Mr Shalabayev remained involved in Wintop's administration thereafter. On 15th March 2010 Mr Shalabayev gave instructions for the execution of a **loan** agreement on behalf of Wintop. The agreement was seemingly executed the same day, and backdated to 4th March 2010 (i.e. the day after Mr Shalabayev purportedly assigned his interest). (I accept that that may be simply completing something in hand before the change of ownership), On 2nd February 2011 an email was sent from the 'Ligai11@yahoo.co.uk' email address, used by Mr Shalabayev, giving instructions for the execution of a **loan** agreement between Wintop and Vaida Trading Limited. (Mr Matthews observed that Mr **Ablyazov** did not know, nor do we, whether that agreement was signed, or concluded, or drawn upon, but that must have been intended);

iii) The Banks says that the entry by Wintop into a **loan** agreement in February 2011 also undermines Mr Hargreaves' evidence that *"... Mr P, when he was acquiring Wintop and Fitcherly, ... hoped to use them not only for funding Mr **Ablyazov** but also for some of his personal projects. However, Mr P abandoned the idea of a wider use of the companies ...."* (paragraph 18, emphasis added). This is because, on Mr Hargreaves' analysis, Fitcherly (and not Wintop) was funding Mr **Ablyazov's** legal expenses by August 2010. So, on the evidence as relayed by Mr Hargreaves, Wintop was no longer used by February 2011 and would have had no need to borrow US$20 million. It seems to me, however, that the validity of that point depends on when Mr P abandoned the idea of using the two companies for personal projects. According to Mr Hargreaves the abandonment was due to requests and allegations from the Bank and its lawyers with regard to the companies;

iv) In April 2010, the Treppides & Co corporate services provider confirmed to Euroguard Assets Ltd ("Euroguard"), which provides asset management services, that Gaziz Zharimbetov had been appointed as the Wintop 'contact person'. Gaziz Zharimbetov, who is related to Mr Zharimbetov, the

third defendant, has been working in Tower 42, (formerly the Natwest Tower) in London, alongside Mr **Ablyazov** for months, which suggests that Mr P is being used by Mr **Ablyazov** to disguise his assets; and

v) The Bank's preliminary inquiries reveal that Mr P lives (as his registered address) in a single floor apartment thought to be worth about $ 100,000 and that he and his wife are the registered owners of a BMW worth $ 30,000 and a Nissan worth $ 5,000. Further, enquiries into certain of Mr P's business interests reveal that (i) they were often minor in nature and (ii) at least two of the companies in which he was interested have been the subject of bankruptcy proceedings or liquidated. These are not the indicia of an individual who can afford to **loan** £ 30 million, for a period of in excess of four years, with a substantial risk of default. Mr P, who is said to be a major figure in the coal and energy sector, has, according to the Bank's Ukrainian counsel, no significant public presence. No documentation is exhibited in support of the third-hand evidence given by Mr Hargreaves about Mr P's wealth.

53. I pay limited regard to the last point. According to Mr Hargreaves' 6th witness statement it is, according to Mr **Ablyazov,** very common for wealthy citizens to hold their assets through nominees due to the political pressures which exist in the Ukraine, and this may well be so. It is, of course, the Bank's case that that is what Mr **Ablyazov** does. Mr P is reported to have said that he owns five cars and four flats and lives in an eight room two floor flat in the central district of Donestk worth about $ 1.2 million. Ukrainian legal advice given to Mr Hargreaves is that public officials typically seek to maintain their assets anonymously. Mr **Ablyazov** remains of the view that Mr P is a man of significant means.

54. Mr Hargreaves states that, in order to preserve anonymity, payments to Fitcherly were channelled from Neshani through two conduit companies called Vaida Trading Limited ("Vaida") and Constance Trading Limited ("Constance"), Mr P having agreed with his associates to guarantee the repayment of the **loans** made to Mr **Ablyazov** to the extent of their proportionate participation. Vaida and Constance were introduced to Mr P by a Russian associate of his who *"is not Mr **Ablyazov** or Mr Shalabayev"* (at paragraph 27). But other evidence shows the following:

i) On 13th December 2010, 12 emails were sent to Mr Shalabayev, for his approval, and for onwards transmission by Mr Batyrgareyev to various corporate services providers. They were sent from Euroguard, with which Mr Shalabayev is associated[4]. Each email referred to one or more of Mr **Ablyazov's** disclosed assets. In each draft Mr Batyrgareyev, […..], stated that Fitcherly was "*my company*". Mr Hargreaves' explanation is that this mistake was missed by Mr Batyrgareyev and Ms Kabanova. But this does not explain why Mr Shalabayev, who had allegedly sold Wintop to Mr P, and who was responsible for administering Mr **Ablyazov's** assets, should have missed this obvious error (especially when it was made in 12 separate emails and when Mr Shalabayev, who studied for an MBA in London, speaks good English);

ii) On 2nd February 2011, Mr Shalabayev used the Ligai11 email address to send a draft **loan** agreement between Fitcherly and Vaida to a corporate services provider for execution;

iii) On 23rd January 2011, Mr Shalabayev sent instructions for the execution of various **loan** agreements by which Vaida would lend US $ 40,000,000 to various companies. Those instructions were carried into effect less than two hours later; and

iv) On 17th January 2011, Mr Shalabayev issued instructions for the execution of a **loan** agreement on behalf of Constance. He had issued similar instructions the month before.

55. Lastly the Bank says that it can demonstrate that it has a strong case (i) that Mr **Ablyazov** owns Neshani and the Iceberg group of companies and (ii) that the funds **loaned** by Fitcherly to Mr **Ablyazov** emanated from one of Mr **Ablyazov's** own assets. Paragraphs 401 to 441 of Mr Hardman's second affidavit show the following:

i) The Iceberg Business Centre is owned by LLC GMSI, which is in turn owned by companies called Urbas Industrial Limited (as to 1.01%) and Batitrav Resources Limited (as to 98.89%), which are in

turn owned by a company called Lankom Limited;

ii) There is strong evidence to suggest that Mr **Ablyazov** owns (through Mr Shalabayev acting as his nominee) the Lankom group of companies and therefore the Iceberg Business Centre. By way of example:

a) A declaration signed by Mr Shalabayev on 11th December 2009 records Mr Shalabayev as being the beneficial owner of Lankom;

b) Various press reports link the Iceberg Business Centre with Mr **Ablyazov** or companies of which he has admitted ownership, in particular the Eurasia-Ukraine investment and industrial group of companies; and

c) Mr Shalabayev regularly gives instructions in relation to the Lankom group of companies, for instance by sending emails to the eduardpakhomov@yahoo.co.uk email address (which Mr Shalabayev also seems to control) for execution.

iii) There is strong evidence to suggest that Mr **Ablyazov** also owns Neshani Limited, principally in the form of various instructions having been issued by Mr Shalabayev in relation to this company's business;

iv) The evidence as to Mr **Ablyazov's** ultimate ownership of Urbas, Batitrav, Lankom and Neshani has already been accepted by the Court, when it added the shares of these companies to the receivership on the basis that there was good reason to believe that they were owned by Mr **Ablyazov;**

v) Mr Shalabayev was responsible for giving instructions for the execution of **loan** agreements between Neshani, on the one hand, and Vaida and Constance, on the other;

vi) Mr Shalabayev gave instructions for the sale of part of the so-called Iceberg debt owed by GMSI with a value of € 29,200,000 from Neshani to BTA Ukraine in return for the payment by BTA Ukraine of the same amount. BTA Ukraine made the payment on 17th December 2010; and

vii) This, it is said, shows that the €29,200,000 used by Neshani to pay Mr **Ablyazov's** legal and personal expenses in fact derived from BTA Ukraine, one of Mr **Ablyazov's** principal assets.

56. The point at 55 (vii) is in issue and I place little weight on it. According to Mr **Ablyazov** GMSI owed Neshani € 70,000,000. By way of partial repayment € 29,200,000 was assigned to BTA Ukraine and BTA paid that sum to Neshani. GMSI then entered into a new credit agreement with BTA Ukraine to which it became a debtor. So the sum was effectively paid by GMSI not BTA Ukraine. There is an issue as to whether Mr **Ablyazov** now controls BTA Ukraine.

Byrne & Partners

57. On 27th July 2011, Byrne & Partners, solicitors acting for two corporate defendants (Lux and Usarel) in the related "Chrysopa" proceedings, received a payment into their client account of £137,496.84 from a Geneva law firm called Chabrier & Partners. Byrne & Partners (who had previously had their fees met from funds provided by Wintop and Fitcherly under purported **loan** arrangements) were aware – see their letter to Addleshaw Goddard of 6th October – that they were going to receive this money into their client account to meet billed and unbilled fees with the balance to be held against future fees. They did not know that the money was to come from a Geneva law firm.

58. Byrne & Partners contacted Chabrier & Partners to seek information as to the source of the funding. Two days later, Byrne & Partners informed the Bank that the *"source of the funds ... is Green Life ...* [which] *has agreed to finance certain of Mr **Ablyazov's** expenses".* One of Byrne & Partners' clients – Lux - was struck off the BVI corporate register at the end of 2010, and remains struck off. It would, the Bank suggests, appear to be an especially unsuitable borrower of a large amount of money. What

happened in relation to Byrne & Partners is inconsistent – the Bank submits – with Green Life being owned by a reputable third party. Such a third party would, it suggests, only transfer substantial funds when needed, upon request and after the execution of appropriate documentation.

59. I do not regard these latter events as casting much light on the bona fides or otherwise of Green Life. It is not clear that there is no Green Life **loan** documentation (although none has been produced); and a genuine third party anxious to assist Mr **Ablyazov** and those associated with him because of a genuine wish to help him might be prepared to lend without the sort of documentation that a commercial lender would require.

The Bank's submissions

60. The Bank submits that the evidence it has adduced shows that there is a real risk that, if the order sought is refused, the Freezing Order will be circumvented. In the light of this material there is good reason to believe that Mr **Ablyazov** has already given inaccurate evidence in relation to the true ownership of Wintop and Fitcherly and that these companies are, in reality, beneficially owned by Mr **Ablyazov.** In particular:

i) Mr **Ablyazov's** account that Mr Shalabayev is Wintop's beneficial owner is inconsistent with what he said when cross-examined, and with the evidence the Bank has deployed about Mr Shalabayev's job, property and lifestyle. Wintop was incorporated alongside, and treated in like manner, with other companies of which Mr **Ablyazov** has admitted ownership, and was funded by companies which the court has found good reason to believe belong to Mr **Ablyazov;**

ii) It is inherently improbable that two good Samaritans would agree to lend huge amounts of money to Mr **Ablyazov** on the highly disadvantageous terms contained in the **loan** agreements concerned. The Bank statements obtained for Fitcherly show it being treated as an offshore bank account and not a third party lender;

iii) The alleged sale of Wintop is extremely odd. It is not at all clear (i) why Mr P should buy this company when it was so indebted to Mr **Ablyazov's** companies; (ii) why Mr Shalabayev should continue to administer it after sale (together with Gaziz Zharimbetov, a relative of one of Mr **Ablyazov's** co-defendants, who worked alongside Messrs **Ablyazov** and Shalabayev); (iii) why Wintop should enter into an agreement in early 2011 to borrow US$20 million when it was, on Mr P's evidence, no longer required for any business activity. Mr P's wealth is suspect. He appears to be yet another nominee to disguise the true ownership of Mr **Ablyazov's** assets;

iv) The evidence produced by the Bank shows that Mr Shalabayev administered Constance and Vaida, which financed Fitcherly, no doubt on behalf of Mr **Ablyazov;** and

v) Neshani and the Iceberg companies are, in fact, owned by Mr **Ablyazov.** The evidence adduced by the Bank correctly led the Court to add Neshani and other related companies to the receivership. That evidence also shows that the monies used by Fitcherly to pay Mr **Ablyazov's** legal fees and expenses ultimately derived, as the Bank has suspected all along, from one of Mr **Ablyazov's** assets.

61. All the above, it is submitted, shows that Mr **Ablyazov's** assertions in relation to the ownership of Green Life cannot be taken at face value.

*Mr **Ablyazov's** submissions*

62. Mr Matthews submits that no such order should be made. These are not standard Commercial Court proceedings. The background underlying them includes, on Mr **Ablyazov's** evidence, the following:

i) Mr **Ablyazov** had previously been a government minister serving under President Nazarbayev but resigned in protest against political abuses. Subsequently he was for a number of years a senior figure within the Kazakh political opposition. Whilst a minister he fought nepotism and sought to introduce market-orientated policies. He went on to co-found in 2001 the Democratic Choice of Kazakhstan

("DCK"), a pro-reform movement;

ii) This step, and Mr **Ablyazov's** overt support for democratic reform, resulted in his being imprisoned in August 2002 with a six year sentence on trumped-up charges. These charges were politically motivated. The European Parliament in its Resolution on Kazakhstan of 13th February 2003 and the OSCE censured the prosecution;

iii) During Mr **Ablyazov's** imprisonment he was subjected to mistreatment, torture and an unsuccessful plot to assassinate him by an agent appearing to be a prisoner at the instigation of the Government;

iv) Mr **Ablyazov** has been the subject of unlawful expropriation of assets by the regime. Whilst he was imprisoned in 2002 his assets were seized without compensation or any form of court decision or due process and distributed to the President's coterie. A television company he owned was closed down and his shareholding in that was later expropriated. He needed to hold his assets offshore in order that the Government could not expropriate them;

v) The President's motives in respect of his expropriations are not primarily greed based; but rather to prevent political opponents from using their wealth as a means to challenge his power;

vi) After his release from prison in 2003, following international pressure, Mr **Ablyazov** moved to Moscow, but continued covertly supporting the democratic opposition in Kazakhstan;

vii) While in Moscow in 2004 he was subject to another Government assassination plot. Political assassination as a means of silencing opposition is part of the Government's *modus operandi*: see the instances set out at paragraphs 97-99 of his 3rd witness statement;

viii) Having returned to Kazakhstan in 2005 and acquired majority ownership of the Bank, Mr **Ablyazov** was subjected to repeated threats to persuade him that he should hand over a controlling interest in the Bank to the President's nominees for nil consideration, together with threats by the President that he should stay out of politics on pain of being subjected to further harassment and prosecution;

ix) These demands increased in intensity throughout 2008, as the world economic crisis emerged;

x) At the same time Mr **Ablyazov** was increasingly vocal concerning the Government's response to the financial crisis and he proposed radical changes. This resulted in Mr Kulibayev, President Nazarbayev's son-in-law, spearheading a campaign against Mr **Ablyazov,** and President Nazarbayev deciding to take over the Bank;

xi) The campaign against him culminated in the forced takeover of the Bank, through a form of nationalisation, by Samruk-Kazyna National Welfare Fund JSC, a Joint Stock Company wholly owned by the Government of Kazakhstan ("Samruk-Kazyna"); and

xii) A warrant was issued against Mr **Ablyazov** for his arrest. He arrived in England and has resided there ever since. He has since been granted political asylum. The current proceedings are brought to eliminate him as a vocal leader of the Kazakh democratic opposition to the current Kazakhstani autocratic regime.

63. Mr **Ablyazov** has also given evidence in his second witness statement and elsewhere concerning the steps which have been taken by the Bank and the Kazakhstan State to harass him and expropriate his assets, and to target those who are associated with him. In his twelfth witness statement he explains how his shareholdings in BTA Georgia and BTA Ukraine, two banks set up by him in those countries, have effectively been confiscated from him. What this evidence also shows is how the Kazakhstan State is able to extend its reach and influence outside the borders of Kazakhstan.

64. Based on this evidence Mr **Ablyazov** issued an application to stay the current proceedings as an abuse of process. His allegation is that:

> *"[The Bank] has brought and is prosecuting the present proceedings in the English Court with the* ***collateral*** *purpose of (i) undermining and damaging Mr* ***Ablyazov's*** *reputation in Kazakhstan and internationally (ii) facilitating the expropriation of Mr.* ***Ablyazov's*** *assets worldwide and, thus, diminishing or eliminating his wealth; and (iii) thereby achieving or assisting the elimination of Mr.* ***Ablyazov*** *as a political force in opposition to Nazarbayev [the President of Kazakhstan] and the current regime in Kazakhstan."*

65. In a judgment of 10th May 2011 Teare J declined to stay the proceedings (a decision which is under appeal) but held that it was arguable that President Nazarbayev had caused the Bank to bring these proceedings for the purpose alleged and that that was the Bank's predominant purpose. Against that background the current application should be seen as an attempt to stifle the funding of the defence.

66. Three firms of solicitors have satisfied themselves that the funding of Mr **Ablyazov's** legal expenses is not in breach of the freezing order. In order to do so they must necessarily have had regard to the Money Laundering Regulations, the Know Your Customer requirements of the Law Society and the need to be assured that they were not being paid in breach of the freezing order. Two partners of Addleshaw Goddard have had a telephone conversation with the man who says that he is the UBO of Green Life, who has told them (i) that the money which Green Life had provided was his personal money and did not come in any way from Mr **Ablyazov;** (ii) that he has absolute confidence in Mr **Ablyazov** as a businessman and expects to get his money back with interest; and (iii) that his support is given because he sympathises with Mr **Ablyazov** and respects people like him who stand against political persecution. That alone should be sufficient for the Bank and the Court.

67. There is no evidence, let alone a prima facie case, that Green Life is Mr **Ablyazov** under another guise. Despite the mountain of documentation that the Bank has obtained and deployed against Mr **Ablyazov,** including documentation relating to the internal management of Mr **Ablyazov's** companies, no reference to Green Life appears to have been found. If it had, it would surely have been produced. No application has been made to join Green Life to the Receivership. The Bank should not be allowed, especially during the pendency of a contempt application, to procure information to allow it to build up a case against Mr **Ablyazov.** Even if there is ground to suggest that Wintop and Fitcherly are his companies, it does not follow that Green Life is as well.

68. The making of an order would be an oppressive and unacceptable invasion of privacy. There is no reason why a third party (who himself has privacy rights) should be named. Especially is this so when the likelihood is that, once his name is revealed, steps will be taken to ferret around for information about him with a view to establishing a case that he is not a genuine third party; to harass him with allegations of illegality or tax evasion; all in order to lead him no longer to finance Mr **Ablyazov's** defence. There is an acute danger that the process of the court is being misused so as to undermine Mr **Ablyazov's** ability to defend himself. Mr **Ablyazov** is seriously concerned that, if the identity of the UBO or other information about Green Life is revealed, Green Life would cease to lend and other potential lenders would be unwilling to assist him for fear that their identity would become known as well.

69. For the information to be limited to the Bank's UK lawyers in the first instance is scant comfort. The Bank has already successfully applied to have the information relayed back to itself on three different occasions. Once the information has crossed the line into the Bank's camp the probability is that application will be made for it to be released to the Bank. Once it reaches the Bank its use will, in practical terms, be unrestricted (whatever undertakings are given). The Bank, and as, if not more, importantly, those behind it, will be able to threaten, intimidate or make life difficult for the UBO of Green Life, whom the Bank will seek to cast in the worst possible light, and the Bank will seek to bring Green Life into the Receivership and may even allege that it is in contempt.

70. Mr Matthews also submitted that, large though the costs figures are, they are relatively insignificant in comparison with the billions at issue in the litigation against Mr **Ablyazov.**

Discussion

71. The evidence to which I have referred affords, in my judgment, strong ground for believing that Wintop and Fitcherly are in fact Mr **Ablyazov's** creatures or conduits. There is also good reason to believe that Green Life may be one as well. The fact that first one and then another company appear to be of that character (although represented to be entirely independent) strongly suggests that the third in line may be another from the same stable. I do not regard the fact that the documentation so far produced has not thrown up any reference to Green Life as much of an indication that it is in a different category. Mr **Ablyazov** operates through industrial quantities of corporations in jurisdictions "*where secrecy is highly prized and official regulation is at a low level*"[5]. It would not be at all surprising to find that Green Life in Belize was a corporation kept in reserve for use in case of need or that it was bought "off the shelf" when needed. There is no evidence that it has ever done anything except fund Mr **Ablyazov.**

72. I also take into account the history of Mr **Ablyazov's** response to the freezing order, which gives me no confidence that his statements (or those made on his instructions) can be taken at face value.

73. I do not accept, as Mr Matthews submitted, that Mr **Ablyazov** has some legitimate expectation, arising from the failure to take steps at or immediately after his cross examination in October and November 2009 to ask for the name of the beneficial owner of the companies funding him, that an order of the type now sought would not be applied for or would not be made.

The "balance of prejudice"

74. I turn then to consider what was described in argument as the balance of prejudice i.e. the respective detriment that the parties may suffer if relief is either granted or refused.

75. If no order is made the Bank runs the risk that Mr **Ablyazov** will, secretly and with impunity, use assets of large value, some or all of which may belong in equity to the Bank, in breach of the Freezing Order. This will frustrate the Court's purpose in making it. Moreover legal costs will be met from those assets without any control or limit.

76. If an order is made, the Bank's lawyers will, in the first instance, examine the information given to see whether or not the identity of the UBO and his business gives any ground to suppose that he is not a bona fide third party. Unless it is clear that he is such a third party (or the Bank is likely to be unable to cast any light on whether he is), the likelihood is that the Court will be asked to allow the lawyers to reveal the identity of that individual to the Bank to see if it knows anything to suggest that he is simply a nominee for Mr **Ablyazov.** If there is evidence to suggest that that is the position, an application is likely to be made to add Green Life to the Receivership with a view to the Receiver exercising control over the amount of money that is used in the defence of Mr **Ablyazov** and others.

77. Mr **Ablyazov** submits that that is reason enough not to make an order because the effect of doing so will be to enable the Bank, and the Kazakh authorities behind it to pursue and harass the UBO. This may cause Mr **Ablyazov** to lose his backer, a result which could be instantaneously catastrophic. His assets are said to be largely illiquid, consisting mainly of construction projects in the CIS, and it would be difficult to raise money on them swiftly. He gives evidence of the difficulties he has had in working with the Receivers, who may not be familiar with the realities involved in dealing with assets in the CIS. Even if Green Life and its UBO do not walk away, but it is added to the Receivership Order, the likelihood is that every obstacle will be put in his way to impede the proper conduct of his defence by attempts – no doubt involving prolonged and hard fought applications to the court – to limit what is spent on legal costs and demands to know the source of any monies coming into or from Green Life.

78. I am quite prepared to accept that Mr **Ablyazov** may well have considerable difficulty in disposing in short order of the assets which he has disclosed in order to pay legal expenses, although, as Teare J observed at a hearing on 26th September 2011, he can apply to the Court if the Receivers are, without adequate justification, putting obstacles in the way of his securing the means to defend himself. Such an application might, for instance, include an application to be allowed to pledge assets and for directions to enable him to do so.

79. The fact that revelation of the identity of the UBO to the Bank's UK lawyers may well not be the end of the matter is not, in my view, a ground for refusing to make any order at all. The further release of the name beyond the Bank's solicitors and counsel can only take place with the leave of the Court and then only for good reason. Any such application would have to be made inter partes. The UBO of Green Life could appear at the hearing. Any such release may, itself, be subject to restrictions or dependent on undertakings. I recognise, however, that revelation of the name of the UBO is the thin end of what may be a very significant wedge. The Bank's lawyers and the Bank will, not surprisingly, be astute to examine whether there are grounds for saying that he is not a bona fide third party and, if it can, to bring Green Life within the scope of the Receivership. I do not regard that as a reason for not making an order either. Whether there is any such scope for such an application and whether or not the Court accedes to it will depend on the facts and the Court's view of them.

80. The most significant potential prejudice to Mr **Ablyazov** is the risk that the making of an order will cause the UBO of Green Life to withdraw his funding, possibly as a result of actions which the Kazakh authorities take or threaten, or procure others to take or threaten, against him, or from his fears as to what might happen; and that that will make it impossible for Mr **Ablyazov** to defend himself properly at a critical time.

*Mr **Ablyazov's** evidence of pressure on him and others*

81. In support of his contentions as to the reality of this risk Mr **Ablyazov** has filed a sizeable amount of evidence (part of what Teare J described in May 2011 as "*a tsunami"* of evidence) as to the steps that have been taken in the past against him and his supporters by President Nazarbayev. Much of that evidence is said to be either not within the Bank's knowledge or contentious; and what follows must be read subject to that caveat.

82. According to Mr **Ablyazov** 44 current and former employees of the Bank were taken in for questioning in March 2009 and, he believes, subjected to coercion to accept guilt and identify an "*organised criminal group*" comprising the Bank's top management led by Mr **Ablyazov,** in return for which they would be kept out of prison. A further 12 employees were subjected to a trumped up trial in September 2009 in order to obtain a court decision as to the existence of a criminal conspiracy masterminded by him. In December 2009 all but one were given sentences of immediate imprisonment from 2-8 years in length.

83. On 11th February 2009 Veronika Efimova, a former employee of the Bank, who has given a long and detailed statement, was threatened whilst in hospital following a stroke by representatives of the General Prosecutor's Office of Kazakhstan and told she would not receive medical treatment if she did not assist them with their allegations against Mr **Ablyazov.** After she refused to do so she was, in March 2009, joined in the criminal case brought against Mr **Ablyazov** in Kazakhstan. She went to Moscow for medical treatment where she was arrested by Russian police accompanied by two agents from Kazakhstan, taken into custody, and detained without charge until July 2010. Since then strenuous but not yet successful attempts have been made to extradite her to Kazakhstan. A Strasbourg court decision currently prohibits such extradition.

84. The Bank has tried to persuade the Central Bank of Russia to impose a regime of administration on the AMT Bank, Mr **Ablyazov's** most important asset, or to transfer shares in it to the Bank and has asked the Central Bank several times to revoke AMT's banking licence. (The Bank denies the latter two allegations). Criminal cases have been launched against Mr **Ablyazov** in Ukraine without notice as a result of materials provided by the Bank relating to these proceedings and he has been put on a wanted list. A criminal case has also been instigated against him in Russia, as a result of improper pressure from the Kazakhstan authorities, and also against the top managers of a Russian company with whom he had a previous business relationship who were placed on extended remand in custody. He was again put on a wanted list despite having provided the authorities with his London address.

85. Mr Mukhtar Dzhakishev, who had secured Mr **Ablyazov's** release from prison in 2002 by persuading President Nazarbayev that Mr **Ablyazov** would stay out of politics, was sent to London to get him to return. When he failed to achieve this, he was arrested in May 2009, tried in a trial which was procedurally unfair, and sentenced in March 2010 to 14 years imprisonment.

86. Pressure has been brought to bear on people to enable the expropriation of Mr **Ablyazov's** assets. The Chairwoman of BTA Ukraine was forced to re-register 39.96% of the shares in that company which were owned by Mr **Ablyazov's** companies. His right to use the remaining 51% of his shares was blocked. His indirect interest in BTA Georgia was expropriated as a result of pressure from the Kazakhstani authorities on his Georgian partners. (The Bank says this is not so; the expropriation was done by his partners). An online television company has come under pressure from the Kazakhstan secret police under the erroneous belief that Mr **Ablyazov** funds it.

The Marchenko telephone conversation

87. Mr Hargreaves exhibits to his sixth witness statement a transcript of a telephone conversation between Mr P and Mr Marchenko of Ilyashev & Partners, Ukrainian lawyers for the Bank. His evidence is that Mr Marchenko and his firm are closely associated with the current Presidential administration in Ukraine. That firm had written to Mr P with certain inquiries. Early on in the conversation Mr Marchenko tells Mr P that he needs to consult his lawyers. In the course of it he indicates that Mr P should either confirm or deny the information he has obtained of Mr P's beneficial ownership (of Wintop and Fitcherly). He indicates that if Mr P says that Fitcherly really is his company he will file a request with the National Bank to see if he obtained a permit for this investment[6] and will send requests to the tax authorities to see if he duly declared the information in accordance with the legislation. Mr P does not in the telephone conversation declare whether or not he is the owner of Fitcherly. At one point Mr Marchenko says (in translation) that:

> *" a significant number of people have been used…in some way and many of them today face a fairly large number of problems in this connection… So in this case for the time being there is still nothing ... I am not telling you anything. We have asked you a simple question*".

At this point Mr P says that Mr Marchenko is threatening him and the latter says "*No, no absolutely not*". Mr P says that he can read between the lines. Mr Marchenko tells him that he must know full well that:

> *"any action has its consequences. In other words if an action has been performed, certain consequences may arise. I am saying that if you confirm that this is your company, there will be certain consequences, if not – there will be different consequences but there are bound to be some consequences, considering the fact that you are now involved in some capacity or other in the English court proceedings*".

Mr P says that he was not involved in any way and was going to talk to lawyers. Mr Marchenko says that that is fine and that it will be simpler that way. Mr P asks for and is given Mr Marchenko's mobile number and Mr P says he will call back.

88. Mr Matthews submits that this conversation is an example of the sort of improper pressure being brought to bear on third parties, even if they are bona fide. I am not convinced of that for a number of reasons. First, Mr Marchenko makes plain at the beginning that Mr P should contact lawyers and at the end that it will be simpler if he does. Second, he states that he is not making a threat. Whether the context and tone of his voice belied that cannot be readily picked up from a transcript. Third, reference had been made to this conversation in Mr Hargreaves' second statement and the suggestion of any threat refuted in Mr Hardman's 31st witness statement. The transcript (and the fact that the conversation was being recorded) did not appear until Mr Hargreaves' sixth witness statement, filed on 5 October. The Bank has not, therefore, had the opportunity to adduce evidence from Mr Marchenko in the light of the transcript, which is in English of a conversation in Russian. Fourth, in circumstances where the Bank is said to have been defrauded of enormous sums of money it is scarcely surprising that the Bank's lawyers should seek to know whether Mr P was really the owner of Fitcherly, and to indicate that, if he said he was, inquiries would be made as to whether this statement was correct including whether any necessary authorisations had been obtained.

89. The evidence to which I have referred, taken at face value, indicates considerable ruthlessness on the

part of the Kazakh authorities at any rate against political opponents or those who it has treated as participants in the defrauding of the bank. There must be some risk that the Kazakh authorities may try to make life difficult for the UBO in unacceptable ways. I do not forget that the authorities in countries where the UBO may reside or do business may have ways of doing that without his having, in practice, the protections afforded, in this country, by the operation of our laws.

90. I do not, however, regard it as at all easy to assess the extent of that risk, particularly in the absence of any information about the UBO and the nature and location of his business. The UBO is reported to have said that he fears that, if his identity is known to the Bank and subsequently to the Kazakh authorities, he will suffer harassment, his business will suffer, and his assets may be misappropriated, and that he would have "*to seriously reconsider whether to continue his funding*" if his identity is revealed. That is his current position if the Kazakh authorities learn of his identity (although I appreciate that he regards revelation of his identity to the Bank's UK lawyers as highly likely to lead to revelation to the Kazakh authorities). He stops short of saying that funding will, even in that event, be withdrawn.

Conclusion

91. I have come to the conclusion that the considerations in favour of making the order outweigh those to the contrary. I appreciate the potential scope for a dispute as to whether the UBO/Green Life is a bona fide third party and for examination of the nature of that link. But if Green Life and the UBO are what they are said to be, there should be no sound basis for taking the matter any further or, at any rate, for including Green Life in the Receivership. Per contra, if the facts are such as to justify taking that course, that is a protection which the Bank is entitled to seek. I appreciate that it is possible that, even though the UBO/Green Life are bona fide third parties, the UBO might nevertheless withdraw his funds because of the possibility of unwelcome inquiries being made about him and his company or fear of harassment or worse. I do not, however, regard that possibility, which is what it is, as sufficient grounds not to make any order for the production of information at all, even for production to the Bank's UK lawyers.

92. Accordingly, subject to certain conditions and undertakings from the Bank, I propose to order that Mr **Ablyazov** should, within a time that I shall appoint, make and serve on Hogan Lovells, the Bank's solicitors, a witness statement stating, to the best of his knowledge and belief:

i) the identities of the directors, shareholders and ultimate beneficial owner of Green Life;

ii) the nature of the business of Green Life;

iii) the ultimate source of the funds being used by Green Life for the payment of his legal expenses;

iv) the terms of the arrangements between him and Green Life;

and exhibiting copies of all documents in his control which evidence the answers to these questions.

93. The conditions are that the information and documents provided shall be subject to the restricted information regime (so far as relevant) set out in paragraph 15 of the Freezing Order. The undertaking is that the information and documents provided will not, without the permission of the Court, be used for the purpose of the committal applications now pending or any future such applications.

94. I should make clear that nothing in this judgment is to be taken as implying that any further order will (or will not) be made permitting greater access to the information provided, or as to the terms of any such order or the undertakings that may be required if it is to be made.

95. The essential basis for making the order is to ensure that the Freezing Order is effective and is not sidestepped. It is equally important that the provision in the freezing order that Mr **Ablyazov** should be allowed to use his funds for the purpose of paying reasonable costs, subject to compliance with paragraph 9 (a) is not rendered a dead letter. It is also important that a bona fide third party should be able to advance funds for that purpose without being intimidated.

96. It seems to me that the Court has powers in its armoury which are apt to deal with problems that may arise under either head. The Court may give directions to the Receiver which it has appointed. It may require undertakings from the Bank if information is to go any further than the Bank's solicitors and counsel, which may extend to undertakings to procure that certain things do (or do not) happen. It has power to adjourn proceedings if that is necessary in order to ensure that Mr **Ablyazov** is able to defend himself. It may be that, in extreme circumstances, if, for instance, the Bank or those behind it applied improper pressure, which prevented the effective running of a defence, that the proceedings would be stayed on the ground that, as a result of those actions, no fair trial could be had.

97. As is apparent, it is has not been necessary to decide whether use of genuinely borrowed monies is itself a breach of the freezing order. If the Bank seeks to have that matter determined, that must be the subject of a fresh application.

98. I invite counsel to draw up an order to give effect to this judgment.

Note 1 See Mr **Ablyazov's** third witness statement, dated 16th April 2010, paragraph 244. [Back]

Note 2 Support for this proposition comes from a number of decisions of the Court of Appeal. For instance, in *Fitzgerald v Williams* [1996] QB 657, Sir Thomas Bingham MR held, at 669H to 670A: *"The plaintiffs are in my view right to contend that unless and until the first defendant can establish on proper evidence that there are no funds or assets available to him to be utilised for payment of his legal fees and other legitimate expenses other than assets to which the plaintiffs maintain an arguable proprietary claim he should not be allowed to draw on the latter type of assets. ..."* See also the unreported decision of the Court of Appeal in *Ostrich Farming Corpn v Ketchell* (10.12.97). [Back]

Note 3 *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."* [Back]

Note 4 Mr **Ablyazov's** case is that Mr Shalabayev (and Mr Udovenko) assisted him in the management of his companies rather than Euroguard (and another company called Eastbridge) itself and that these two also managed other companies with which he was not concerned. [Back]

Note 5 Per Robert Walker J in *ICIC v. Adham* [1998] BCC 134, cited by Teare J in *JSC BTA Bank v.* ***Ablyazov*** [2010] EWHC 1779 (Comm), [21]*(4/30)*. [Back]

Note 6 There is an issue as to whether a licence is required from the National Bank only for the transfer of money out of the Ukraine for the acquisition of interests in non Ukrainian companies. [Back]
