INTERNATIONAL FRAUD LITIGATION

'Trial process before trial, with particular reference to the *JSC BTA Bank v Ablyazov & others* litigation'

Introduction

My title is pre-trial process in fraud litigation with a particular look at, what I shall refer to loosely as, the "Kazakh bank litigation", by which I mean to encompass all 9 actions brought by the JSC BTA Bank, or Receivers appointed by it, against its former chairman, Mr. Mukhtar Ablyazov, and at least 17 other people, or bodies, said to be associated with him.

These proceedings, brought by the newly invested "JSC BTA Bank" of Kazakhstan, are said to be the biggest collective fraud action ever to be tried in the UK and is currently valued at $4.5 billion, but may yet rise.

I have not been involved in the Kazakh bank litigation - one of the few members of the Bar not to be instructed so far - our Chairman may assist me if he feels able to comment, because he is instructed.

The publicity around the litigation makes it an example we can all follow and it is relevant to anyone practicing in fraud litigation because it is extreme:

- firstly, for the sums involved;
- the range of parties;
- the range of tactics being deployed to achieve each side's ends; and,
- the zeal and determination of the Claimant to succeed;

- the quantity of hearings and appeals;
- the perceived capacity of the Claimant to achieve its purpose - crudely put, it is presumed that the Kazakh bank can afford the fees of going to trial and even losing;

In the manner of its prosecution the case is in the vanguard pushing back the boundaries; and might mark a watershed as to how fraud cases are litigated and may influence the extent to which people come to England to do their business – justice is being marketed as better in London.

Also the role of the Central London property market as a safe haven has never been greater and with so much money pouring into the Capital from Greece, Syria, Spain etc.… if any of it has been obtained fraudulently, so the courts here are going to be used to assist in its recovery.

In the Kazakh bank litigation there have been over 100 hearings so far, but no trials, so it is not possible to cover all of the interesting things that have been happening, but I have taken a few examples and will look and see what we can learn from them.

RB background

Before giving a background to the Kazakh bank litigation I am going to take a moment to tell you about my role in fraud litigation, particularly acting for HMRC as principal creditor, because there are important consonances, which help inform me as to how and why the Kazakh bank litigation is unfolding as it does:

I work with IPs who has been invited by HMRC, or SOCA, to act as Provisional Liquidators, and then Liquidators, of companies whose directors, and their movers and the shakers - are abusing the tax system.

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You may be familiar with the term 'MTIC fraud' - standing for 'Missing Trader Intra Community' fraud - or 'carousel fraud', which typically uses high-value but low volume goods, such as mobile phones and CPU's, which are traded across the EU, where there is no liability for VAT on the importation.

The purpose of MTIC fraud is to start with a zero-sum balance and then create a chain of VAT set-offs between inputs and outputs. VAT is a neutral tax in business, and is supposed to be payable only by end consumers, so by using a short-lived chain of rapid transactions in which genuine and bogus (aka 'Buffer') traders are used, with the common characteristic that they are all VAT registered, by the time VAT is reclaimed by the last trader on his purchase of the imported goods, the party that imported them, and who received VAT from his first customer, has gone missing without remitting anything to HMRC.

However, HMRC must decide whether to pay a VAT reclaim to the end trader (or allow a set-off) and so subsidise the fraud, or disallow it and blame the trader for his failure to appreciate that he was engaged in a racket and then fight the matter out in the VAT tribunal.

In the meantime, the buffers, mostly small traders who are persuaded that this is an easy way to earn small commissions, and who know, or should suspect something untoward, do not have the wherewithal to pay any of the missing VAT, and they fall by the wayside for commercial reasons. However, a tactical decision has to be made as to what extent they will be hastened into their oblivion by joining them to proceedings.

That type of MTIC fraud had its heyday in the mid-nineties, but has been replaced by, or morphed into, a number of other similar frauds, including platinum smelting, alcohol slaughter, and payroll services. There is fear it may be rearing its head among intangibles, such as blocks of electricity on the grid, or telephone airtime.

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In these cases HMRC finds itself having to make difficult decisions:

- how to stop the fraud;
- how to recoup Crown debts; and,
- against whom to invite the liquidators to bring proceedings;

in order to achieve these objectives.

Because it is fraud, the ill-gotten gains move fast around the globe and through many pairs of hands - sometimes using real-time banking, or informal Hawala systems, so tracing becomes a real issue. Collecting and holding tax does not create a trust and so these claims are not proprietary, but brought under equitable compensation principles. It is believed that some of the cash proceeds get turned into precious metal and taken by land to Afghanistan and used to fund terrorism and narcotics.

These types of fraud require a large injection of capital at the outset, a 25,000 kg articulated trailer of mobile phones, depending on the model, might require up to £1m of seed capital. And if you are the Chancellor and you add 2.5% to VAT, then if VAT rises from 17.5% to 20%, as in the last hike, you are increasing the profit of the fraudster by 14.28% with no extra risk to his capital.

In fact, you encourage an increase in fraudulent activity by those already engaged and by others who come and join the party. No-one has yet pleaded a defence that George Osborne was agent provocateur.

So who is attracted to this fraud? - 'organised crime': which is why both SOCA and HMRC work hard to stop them. No-one really knows what they cost the Exchequer, but it could be between £2 billion and £4 billion per annum - and that brings us in line with the Kazakhs' - the difference being that the Kazakh bank has money to invest in litigation, whereas HMRC…….

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Civil or criminal proceedings?

VAT and Excise evasion, PAYE frauds - they are all offences under the criminal law with very hefty penalties of imprisonment and confiscation of property. However, not many VAT frauds end up going through the criminal courts. Why?

HMRC has made a policy decision to tackle many of these very serious and high-value frauds through the medium of company insolvency and so uses the civil process, knowing that, in doing so, the perpetrators are unlikely to ever see the inside of a prison cell and that the only account will be to pay over money, otherwise face financial ruin.

This has a lot to do with:

- the availability of civil procedures to grant and police far-reaching injunctions;
- speedy access to the courts for effective interim relief;
- the burden and standard of proof; and,
- hearings before purely professional tribunals of fact (no juries), where judges have the intellectual rigour and capacity to assimilate complex issues of law and fact;

So, like the Kazakhs, HMRC appreciates the quality of justice in the Rolls Building. And it is why we are following the developments in the Kazakh bank litigation carefully to see what we may borrow for the future.

Kazakh bank litigation - background

Let's go on a whistle-stop tour of the Kazakh bank litigation, hopefully nothing I say will be actionable as defamatory, or contemptuous:

Mr. Mukhtar Ablyazov, is the 48 year old former Chairman of the former 'Bank TuranAlem', or the 'BTA' in Kazakhstan, who is said to have treasured up to $4.5 billion of bank assets,

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some of which, such as investment bonds, have simply disappeared, others come from unsecured and un-serviced loans made to companies in which he appears to be the ultimate beneficial owner. His timing was not great, because he was active during the first credit crunch in 2008, making the bank seriously under-capitalised and on the brink of bankruptcy, which is how it came to the attention of the authorities.

The Kazakh government pitched in to prop up BTA in 2009 using 'Samruk–Kazyana', its sovereign wealth fund, to inject liquidity, for which it became the majority shareholder (75.1%), but the price for restructuring the bank's debt and agreeing forbearance from some creditors was an obligation to pursue those who had brought BTA to its knees and, in particular, Mr. Ablyazov (and members of his extended family). It then became known as JSC BTA.

He was not just the chairman but someone who had been formerly active in Kazakh politics and he moved to London, or fled here, depending on your angle, in 2009 and has since complained that any action taken against him is politically motivated by his old political adversary President Nazarbeyev, so that he applied for and was granted political asylum in July 2011. However, his attempt to impeach the Kazakh bank litigation on the grounds that it is all an attempt to silence him, as a political opponent, has failed.

As well as the JSC BTA's civil claims there are outstanding arrest warrants for Mr. Ablyazov to answer criminal charges of money-laundering in Kazakhstan and Russia, and the Prosecutor-General for Kazakhstan has applied for his extradition.

Freezing orders/disclosure orders

In 2009, Hogan Lovells commenced proceedings on behalf of the newly branded 'JSC BTA', against a range of Respondents, claiming a paltry $2 billion for misappropriation of assets. This was attended with a worldwide freezing injunction granted by Mr. Justice Blaire against

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Mr. Ablyazaov and others, whose passports were also confiscated. These orders were continued by Mr. Justice Teare.

The freezing order was largely in standard form but, as this was a tracing claim, and proprietary in nature, what was of particular interest was the disclosure order, requiring Mr. Ablyazov to identify assets over £10,000 worldwide and in typically short order – i.e. *tell us what you have done with the money!* It was not complied with and never has been to the satisfaction of the Claimant bank.

Appeals against disclosure

The Court of Appeal rejected an appeal in September 2009 that the Respondents to the freezing order proceedings should not have to answer far-reaching disclosure orders, on the grounds that such disclosure would prejudice them in future criminal cases in Kazakhstan. Given that the disclosure obligations were largely confined to tracing the bank's own assets the argument was always going to be difficult (reported as: JSC BTA Bank v. Ablyazov & Ors [2009] EWCA Civ 1125 CA (Civ Div)).

9 actions

There are now 9 claims in the UK which have grown to recoup aggregate losses of c. $4.5bn. There are 8 cases in the Commercial Court and 1 in the Chancery Division, which have been split into 5 tranches for administrative ease. The lead trial, known as the AAA action, relating to the embezzlement of $290 million of AAA rated investment bonds, and is due for hearing in October 2012 (having already been adjourned from November 2011).

As I said, there have been over 100 hearings so far, using 5 judges at first instance (I have not counted the Appellate panels, but both sides have appealed decisions they have not liked), 22 partners, 33 barristers, of which 8 are QC's.

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The lead partner at Hogan Lovells, Mr. Christopher Hardman, has made least 37 witness statements and sworn 17 affidavits - so far.

That was the broadest of overviews

Interim applications

So now I am going to look at some of the more extreme interim applications and the law that has emerged from them - in no particular order:

But, before doing so, what needs to be kept in mind is that these claims are, ostensibly, proprietary and so the steps taken are not just to move the case forward to trial and judgment, the relief being sought are declarations of liability, ownership and orders for payment, but to preserve something worth fighting for at the end.

Accordingly, the claim is as much about identifying, tracking down and securing the assets - the trial of any action, while important, is not the end itself.

Compliance is the watch-word that repeats throughout all that follows, because the bank has been up against a formidably reluctant cohort of opponents.

Also remember that much of what has happened is about the court exerting and proving its authority.

Receivership order

As a consequence of Mr. Ablyazov not giving the disclosure of his assets and of trying to defeat the freezing order by dealing with some of the assets caught under it, in August 2010, Mr. Justice Teare granted a JSC BTA receivership order saying that Mr. Ablyazov cannot be trusted not to dissipate (JSC BTA Bank v Ablyazov [2010] EWHC 1779 (Comm)).

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Here receivership was used to supplement the powers of the freezing order, which was not providing adequate protection on its own.

KPMG took control, and that order has been extended 4 times, to include a further 636 assets/companies with connections to Mr. Ablyazov that have been unearthed by JSC BTA's lawyers. An unusual feature of the receivership is that all, or almost all, of the assets now governed by the receivership order are held outside the UK.

In the course of events, Mr. Batyrgareyev, who is Mr. Ablyazov's principal disclosed nominee, was found by the court to have taken steps to deal with assets within Mr. Ablyazov's holding structures, in breach of the freezing and receivership orders, including back-dating novation agreements. In particular he tried to sell a 10 per cent interest in a company called Novaya Tabachnaya Companiya for €77 million.

The original receivership order had required Mr. Ablyazov's co-operation, and was designed not to be overly invasive, as long as he co-operated, but he has since gone into hiding overseas (as we will come to in the context of committal) and is no longer under the supervision and control of the court, so something wider was needed.

Accordingly, Hogan Lovells applied successfully to the court, using s. 37(1) of the Supreme Court Act 1981 to appoint KPMG not just as 'receivers', but as 'receivers and managers', so that they could suspend Mr. Batyrgareyev's role as a director of companies.

Applying Lord Atkinson's dictum in Moss SS Co Ltd v. Whinney [1912] AC 254, 263:

> "*This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking a possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the*

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conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

The Bank and KPMG limited the relief sought to offshore holding companies and not operating companies so that there was no question of trying to step in and run Mr. Ablyazov's business as, under the usual exceptions to the freezing order, he was still entitled to deal with assets in the ordinary course of business.

Cross-examination on affidavits served pursuant to a freezing order In JSC BTA Bank v. Ablyazov & Ors [2009] EWHC 2833 (QB) Mr. Justice Teare ruled that it was appropriate and fair that Mr. Ablyazov attend for cross-examination upon his 2 affidavits meant to disclose his assets, because they were 'extraordinarily inadequate' and did not serve their purpose of enabling JSC BTA's Solicitors to police the operation of the freezing order. An order for cross-examination was an alternative means of providing the information sooner, even though Mr. Ablyazov was applying to set aside the freezing order.

The Court cited the following passages from authority:

In Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia & Ors [1996] EWCA Civ 759 Phillips LJ, as he then was, said:

"In my judgment the test is simply whether, in all the circumstances, it is both just and convenient to make the order. In applying this test the court will have regard to the fact that it is a very considerable imposition to subject a defendant to cross-examination and consider carefully whether or not alternative means of achieving the same end that are less burdensome. The Court has to weigh the various options

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in order to decide which best meet the dual requirements of justice and convenience."

In Den Norske Bank ASA v Antonatos [1998] EWCA Civ 649 Waller LJ said:

"*It is finally important to recognise that it is only in exceptional circumstances that cross-examination would be ordered on an affidavit sworn pursuant to a Mareva order."*

Committal for contempt following cross-examination

That cross-examination took place over 3 days in front of Mr. Justice Peter Smith. Unfortunately for Mr. Ablyazov, his answers were regarded by JSC BTA as contemptuous and so Hogan Lovells issued an application to commit him based on 35 separate allegations.

These 35 allegations were whittled down to 3 as a case management decision by Mr. Justice Teare (the remaining 32 were not abandoned, just parked) and can be summarised as follows:

i) Mr. Ablyazov failed, in breach of the freezing order, to disclose his beneficial ownership of the shares in Bubris Investments Limited, (a company incorporated in the British Virgin Islands).

ii) Mr. Ablyazov, when cross-examined under oath as to his assets, lied to the court when: (a) he stated that he was the short-term tenant of two properties in London and stated that all the residential properties he owned were included in his schedule of assets; and, (b), he denied that he was the beneficial owner of shares in FM Company Limited (a company incorporated in the Marshall Islands), Bergtrans

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Contracts Corp and Carsonway Limited (both being companies incorporated in the BVI).

iii) Mr. Ablyazov, in breach of the freezing order, dealt with an asset, namely loans held by Stantis Limited (a company incorporated in Cyprus) by assigning them to Nitnelav Holdings Limited in December 2010.

This trimming of the committal application was challenged by Mr. Ablyazov on appeal (Ablyazov v. JSC BTA Bank [2011] EWCA Civ 1386), but the Appeal Court rejected his complaint because of the importance of ensuring the efficacy of a freezing order, noting that such an application might encourage improved compliance (applying Dadourian Group International Inc. v Simms [2006] EWCA Civ 1745. [2007] 1 W.L.R. 2967).

So the case went back to Mr. Justice Teare and the 3 trimmed allegations took 14 days to try (and Hogan Lovells put in a bill of costs of £2.6 million - of which it was awarded £750,000 on account).

Mr. Hardman, the lead partner at Hogan Lovells, was tendered for cross-examination and it was put to him that the committal application was being used, improperly, to squash Mr. Ablyazov so that he could not defend himself at trial. Mr. Hardman denied it, but did concede that the point of committal being used as interim relief was to exert pressure on Mr. Ablyazov to comply with the obligations, especially of disclosure, under the freezing order. Mr. Justice Teare commented on this evidence in his judgment (para 14):

> *"Notwithstanding the determination and aggression with which these proceedings have been pursued I do not consider that there is any reason for me to doubt [Mr. Hardman's] evidence on that matter. Whilst the consequences of Mr. Ablyazov being committed for contempt may impede his ability to defend the claims brought against him (as well as being damaging to his financial and political future) I am satisfied that Mr. Hardman's purpose, and the Bank's purpose, in bringing this application, is*

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legitimate. Committal for contempt may bring with it certain consequences, but that does not persuade me that the Bank has not brought this contempt application for the legitimate purpose of bringing pressure to bear upon Mr. Ablyazov to comply with the [freezing order]…"

He also rejected a complaint that the Bank was not merely acting as public prosecutor and unfairly advancing its own interests delivering a mild rebuke to Leading Counsel for JSC BTA for the use of some hot rhetoric.

On 15th February 2012 Mr. Ablyazov was given a 22 month sentence of imprisonment by Mr. Justice Teare for his 'brazen', 'deliberate' and 'substantial contempts' in a bid to try and hide the assets, which JSC BTA has been trying to reconstitute - in the course of which it was found he was the beneficial owner of 3 properties for which he had failed to account (a 9 bedroom house on Bishops Avenue, an estate near Windsor, and a flat in Central London).

This order follows 2 other sentences of imprisonment for contempt of court in assisting Mr. Ablyazov: Paul Kythreotis (a British business associate) and Syrym Shalabayev, his brother-in-law, who has done a runner – both of which I will touch on.

Mr. Ablyazov has also gone missing, and it is believed that he went to France, by coach, on a passport that he had failed to surrender having failed to turn up to the hearing at which judgment was handed down, despite indications that he would attend.

Tipstaff

In JSC BTA Bank V Mukhtar Ablyazov & 6 Ors [2012] EWHC 455 (Comm) QBD Mr. Justice Teare ordered that Mr. Ablyazov submit himself to the Tipstaff so that he could execute the

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warrant of committal as he had gone into hiding, by using s. 37(1) of the Supreme Court Act, as well as A.J. Bekhor & Co. Ltd v. Bilton [1981] Q.B. 923, Maclaine Watson & Co Ltd v International Tin Council (No.2) [19891 Ch 286, and JSC BTA Bank v Solodchenko [2011] EWHC 2163 (Ch). [2012] 1 All E.R. 735 to make ancillary orders in support of the original freezing order. These cases recur as 3 important authorities of general application in using ancillary orders to beef up injunctions when it is 'just and convenient' to do so.

In the same application Mr. Justice Teare ordered that Mr. Ablyazov provide further disclosure of his assets and to do so under the sanction of a debarring order. The only relief for Mr. Ablyazov was that the Judge ordered the debarring sanction should be subordinate to the timing of any appeal he might launch against the committal findings (which I believe he has done).

In making the debarring order the Judge stated he was doing so in order to make the freezing order and the receivership orders more effective and so also applied Derby & Co Ltd v. Weldon (Nos.3 and 4) [1990] Ch. 65, JSC BTA Bank v. Ablvazov [2010] EWHC 2219 (QB) [2011] 1 All E.R. (Comm) 1093 and JSC BTA Bank v. Shalabavev [2011] EWHC 2903 (Ch).

Further points on committal

Mr. Kythreotis

We now come to the case of Mr. Kythreotis, a British man based in Cyprus, and a lawyer by training, who ran a nominee service for some of Mr. Ablyazov's network of companies.

He found himself joined to the action and subject to a freezing order in July 2010 that contained the usual disclosure obligations. He failed to provide any disclosure and so an application was made to commit him. Shortly before the hearing he admitted his contempt, but tried to purge himself and did so with sufficient conviction that Mrs. Justice Proudman

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determined he should not be sentenced to imprisonment. As Mr. Kythreotis was in Cyprus an order committing him to prison might have been seen as a pyrrhic victory.

But with characteristic determination, Hogan Lovells did not accept the judgment and appealed. However, they also discovered the so-called 'purging' was in fact 'perjury' and applied to adduce new evidence in the Court of Appeal to show how Mr. Kythreotis had lied to Mrs. Justice Proudman. Mr. Kythreotis admitted he was in contempt again and eventually dispensed with his lawyers. The Court of Appeal proceeded in his absence and sentenced him to 21 months.

In sentencing him, the following principles were applied when contempt consists of non-compliance with the disclosure provisions of a freezing order:

> (i) Freezing orders are made for good reason and in order to prevent the dissipation or spiriting away of assets. Any substantial breach of such an order is a serious matter, which merits condign punishment.
>
> (ii) Condign punishment for such contempt normally means a prison sentence. However, there may be circumstances in which a substantial fine is sufficient: for example, if the contempt has been purged and the relevant assets recovered.
>
> (iii) Where there is a continuing failure to disclose relevant information, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor.
>
> (iv) In the case of continuing breach, out of fairness to the contemnor, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches and (b) what portion of the sentence the court might consider remitting in the event of prompt and full compliance thereafter (in this instance 9 months for past conduct). Any such indication would be persuasive, but not binding upon a future court.
>
> (v) When the court is passing sentence it is nominal - the actual time spent in prison will be less, because of remission, possible release on tagging and so forth. The court

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does not have regard to those factors in determining the proper sentence in any case.

Disclosure of client contact details

Shalabayev/Clyde and Co.

Hogan Lovells were faced with a problem when Shalabayev and Ablyazov went to ground and what to do about bringing aspects of the proceedings to their attention – especially orders that required personal service in the first instance.

Wouldn't it be good to find out how the lawyers contacted their client? Undoubtedly, they would also have wanted to use any information gleaned from knowing how that contact was made to pursue other avenues of forensic inquiry.

So they applied to Mr. Justice Henderson for Shalabayev's Solicitors, Clyde and Co., to disclose their client's contact details (see judgment with neutral citation [2011] EWHC 2163 (Ch) 5th August 2011).

The matter was fully argued before so that the Judge had to consider whether any privilege arose that prevented disclosure, and to what extent a man had the right to consult his lawyer in confidence.

In the Judgment Mr. Justice Henderson affirmed that no-one is an outlaw - so that a person's rights exist regardless of his status, even as a contemnor and fugitive from justice.

He considered that an order requiring a Solicitor to disclose contact details he held for his client would, inevitably, undermine the Solicitor/Client relationship and so inhibit the right to obtain legal advice.

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He also decided there was an obvious conflict of interest when a Solicitor was asked to make such a disclosure, especially where this was in the teeth of an express prohibition from the client.

However, he determined that the power existed to make the order sought under s. 37(1) of the Senior Courts Act 1981, again ancillary orders which are required to make an injunction effective, as long as it is just and convenient to do so (see AJ Bekhor & Co. Ltd. v .Bilton [1981] Q.B. 923, and Maclaine Watson & Co Ltd v International Tin Council (No.2) [19891 Ch. 286).

Mr. Justice Henderson found, on balance, that he would order Clyde and Co. to make the disclosure of their clients' contact details, the final justification for which was the fact of his committal by Mr. Justice Briggs and the bench warrant he had issued otherwise Mr. Shalabayev could dip in and out of proceedings as he wished and British justice would look like 'an a la carte menu from which you can order at choice without ever having to pay the bill'.

Asset disclosure

Hogan Lovells had also applied for Clyde and Co. to make disclosure of Mr. Shalabayev's assets of whose existence they were aware. However, that was a request too far and the Judge held it was likely that if Clyde and Co. held such information then that knowledge came to them in circumstances where privilege attached.

Mr. Justice Henderson was also concerned about the floodgate effect of making such an order, so that similar applications would become routine wherever a party defaulted on his freezing order disclosure obligations.

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Funding

He also refused to make Clyde and Co. who was funding Mr. Shalabayev's costs. Hogan Lovells asserted that JSC BTA was considering claims against non-party funders for relief under s.51 of the Senior Courts Act, but was obliged to accept Clyde and Co.'s bare assertion that it was not being paid by 3rd party funders with an interest in the outcome of the litigation.

Adelshaw Goddards/Ablyazov

It followed then that Hogan Lovells would try to obtain the same relief against Ablyazov's lawyers, Adelshaw Goddard to disclose 'all historic and current contact details' that they held for him once Ablyazov disappeared. In the teeth of objection Mr. Justice Teare ruled that the over-riding need was to maintain confidence in the administration of justice when a contemnor cocks a snook at the court and so it is important to be able to serve him with its orders – disclosure ordered.

Interim costs and committal

In JSC BTA Bank V (1) Roman Solodchenko & 15 Ors (2) Anatoly Ereshchenko [2012] EWHC 550 (Ch) Mr. Justice Henderson was faced with an application for the costs of a 3 day cross-examination of the 17th Defendant, Mr. Ereshchenko, who had been joined to the action, one purpose of which was for disclosure.

Having cross-examined him, Hogan Lovells then applied for his committal on the basis that some of the answers he gave were deliberately false.

Mr. Ereshchenko argued that the court should postpone the costs determination until after the committal otherwise there was a real risk of prejudice that findings of fact about his conduct in the cross-examination on the civil standard (indemnity costs were sought) could infect the court's view of him at the committal. The Judge agreed and commented in the

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course of his judgment that: 'The Bank is clearly not short of money, and it is able to devote huge resources to the prosecution of this litigation on a number of different fronts.'

Emails

Going back in time a bit, Hogan Lovells executed a search order at a North London storage facility, which yielded a heap of evidence and led to an application, granted, for an order, without notice to the Defendants, allowing access to an internet account under Yahoo's control.

When, in June 2011, Mr. Shalabayev was sentenced to 18 months imprison for hiding assets, Mr. Justice Peter Smith ordered that he could be served with the order using an email address that he thought he had anonymised, by which strike he discovered that his emails had been monitored as he was sending them.

Most civil litigation is about looking through the reterospectoscope long after the moment has passed, but here we have procedural tools being used to eavesdrop on a story as it was unfolding.

I have recently tried to get information out of Yahoo in a case and they are decidedly (even unnecessarily) guarded - I do not know if it is as a consequence of this experience.

Debarring orders for failure to give disclosure

JSC BTA Bank v. Syrym Shalabayev [2011] EWHC 2903 (Ch) was an application before Mr. Justice Henderson, brought by JSC BTA, asking for a debarring order unless Mr. Shalabayev provide disclosure - he cross-applied for disclosure from the bank before the bank should rule on the main application.

The worldwide freezing order contained obligations to disclose details of Mr. Shalabayev's

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assets and provide answers to a schedule of questions to enable the bank to trace the proceeds of investment bonds it claimed he had helped to misappropriate. However, after being served he disappeared and took no steps to comply. In his absence Mr. Shalabayev was sentenced to 18 months' imprisonment for contempt. However, he had complied with 2 previous unless orders, in relation to filing of his defence and directions.

Mr. Shalabayev served an affidavit explaining that he had not given disclosure because it could lead to the discovery of his whereabouts and he feared for his safety and that of his family, associates and clients, who would be identified. He argued that the court could not make even provisional findings about the credibility of his evidence without cross-examination and disclosure of documents held by the bank.

The Judge held that the court was not required to suspend its critical faculties on an interim application and could form a view as to S's credibility, Lexi Holdings plc v Luqman [2007] EWCA Civ 1501. This was one of the rare cases where the court should exercise its discretion to make an unless order: CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance) [2004] EWCA Civ 827, Independent, July 2, 2004, Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463, [2007] 1 W.L.R. 1864, JSC BTA Bank v Ablyazov [2010] EWHC 2219 (QB), [2011] 1 All E.R. (Comm) 1093 and JSC BTA Bank v Ablyazov [2011] EWHC 2506 (Comm) considered. Mr. Shalabayev's evidence was far too flimsy to show that he or his family or associates were in such imminent danger as to justify deflecting the rule of law from its normal course (Coca-Cola Co v Gilbey (Leave to Appeal) [1996] F.S.R. 23 applied). Given Mr. Shalabayev's disregard of earlier orders a less draconian order would not suffice. Disclosure to Mr. Shalabayev would be undesirable as it would give him knowledge of the information that the bank had collected and he could tailor his evidence or contentions accordingly. It was a legitimate tactical advantage enjoyed by the bank that it should not be compelled at the instant stage to reveal all the information it had, when all that was required of Mr. Shalabayev was that he should do his honest best to state what he actually knew about the disclosure required of him (para 67).

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Revocation of relief from the sanction of a debarring order where lies found

In a similar vein, the court revoked the relief from sanction it had granted in favour of 8 Respondent companies in the case reported at JSC BTA Bank v Mukhtar Ablyazov & 11 Ors [2011] EWHC 2506 (Comm) who had been caught out lying when giving evidence about their ultimate beneficial owner. The court had to decide if it had been misled on the civil standard and then to consider the proper sanction. It was decided that parties should not be in a better position by lying than if they had said nothing, so that it was right to revoke the relief and re-enter judgment.

Disclosure of funding arrangements

In JSC BTA Bank v. Mukhtar Ablyazov & 16 Ors [2011] EWHC 2664 (Comm) QBD Mr. Justice Christopher Clarke decided he had power under s. 37(1) of the Supreme Court Act 1981 which he would exercise to require Mr. Ablyazov to reveal who were the ultimate funders of his legal fees as there was suspicion that he was using funds frozen by the freezing order. He had argued that his funder was a wealthy Russian who had reasons to conceal his identity. Using the 'just and convenient' test in A.J. Bekhor & Co Ltd. v. Bilton [1981] Q.B. 923, Maclaine Watson & Co Ltd v. International Tin Council (No.2) [1989] Ch. 286, JSC BTA Bank v. Solodchenko [2011] EWHC 2163 (Ch) [2012] 1 All E.R. 735 the s.37 power could be used to require a defendant to disclose what his assets were and where they might be found, CBS United Kingdom Ltd v Lambert [1983] Ch. 37 followed. The jurisdiction to make such an order was essentially protective: its purpose was to ensure that assets were not disposed of in disguised breach of a freezing order. There was no particular threshold which a claimant had to cross in order to secure such an order, but there had to be grounds to believe that there was a real risk of the injunction being broken. Whether the order was in fact made was likely to depend on the strength of those grounds and the considerations which militated in favour and against making it. It was not a precondition of making an order that

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the money in question was established to be that of a defendant (see paras 45-47 of judgment). There were strong grounds for believing that the funding companies were actually Mr. Ablyazov's alter egos, or conduits, because he operated through corporations in jurisdictions where secrecy was prized and official regulation was low, so it would not be surprising to find corporations kept in reserve for Mr. Ablyazov's use in case of need. If no order was made, there was a risk that Mr. Ablyazov would, secretly and with impunity, use assets of large value, some or all of which might belong in equity to the bank, in breach of the freezing order and frustrate the court's purpose. If an order was made and the identity of the funder was disclosed to the bank's lawyers, they would examine the information given to see whether or not there were any grounds to suppose that he was not a bona fide third party. The further release of the name beyond the bank's solicitors and counsel could only take place with the leave of the court, and then only for good reason.

The 221 Schedule - privileged documents

In JSC BTA Bank v. (1) Shalabayev (2) Ablyazov [2011] EWHC 2915 (Ch) Mr. Justice Henderson was asked to resolve a problem that had arisen when Mr. Ablyazov and his brother-in-law, Mr. Shalabayev, found themselves on the wrong end of an unless order with which they had not complied in respect of indicating which documents, that had been found on execution of a search order at the storage facility rented by Mr. Shalabayev in Finchley, they claimed to be immune from disclosure on grounds of privilege.

Among material seized were fourteen boxes of documents that appeared to contain Clyde & Co. client files, which were taken into the custody of the supervising solicitors. About 8,000 documents might have been privileged.

Eventually, that was whittled down to 221 documents in a painful process in which Clyde and Co. suffered some public and direct criticism from the court for the manner in which they had carried out the disclosure exercise and an apparent failure to appreciate what was meant by disclosure and Palermo privilege (or collation privilege).

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The court found that because privilege is absolute it cannot be over-ridden by the operation of a debarring order:

> *35 "…..As Lord Scott said in Three Rivers (No. 6) at [25]:*
>
> > *"… if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute …, but it is otherwise absolute. There is no balancing exercise that has to be carried out … "*
>
> *34. Given the strength of this principle, I find it hard, if not impossible, to envisage any circumstances where legal professional privilege could properly be directly overridden by an order of the court made in exercise of its case management powers: compare R (Kelly) v Warley Magistrates' Court [2007] EWHC 1836 (Admin), [2008] 1 WLR 2001. Since, however, privilege has to be claimed, and since the onus is on the person claiming it to make good the claim, the possibility clearly exists that, without waiving privilege, a person may nevertheless indirectly forfeit the right to claim it (if, for example, having been given every opportunity to do so within a reasonable period, he fails to do so). Similarly, a potentially valid claim may fail because it is not made with sufficient particularity, or because the evidence to support it is for some reason not available. Nevertheless, the court should in my view be very wary of allowing a potentially valid claim to privilege, however late it is made, to be indirectly overridden by exercise of a case management power. Otherwise there is a danger of a litigant's substantive right to legal privilege being forced to yield, indirectly, to just the kind of balancing exercise that the highest authority says is impermissible."*

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Witness familiarisation and effective pre-trial cross-examination

Familiarisation

- *"There's no place for witness training in our country. We don't do it. It's unlawful."*
- Judge LJ "*so far as is practicable, [a witness should give evidence] uninfluenced by what anyone else has said, whether in formal discussions or informal conversations*"
- however, familiarising witnesses "*with the layout of the court, the likely sequence of events when the witness is giving evidence and a balanced appraisal of the different responsibilities of the various participants*" was a different matter "*indeed, such arrangements are generally to be welcomed*"
- "*how*" versus "*what*"
- when to use relative to the trial/hearing
- use of role-play scenarios
- record-keeping

see: R v Momodou [2005] EWCA Crim 177, R v Salisbury – May 2004, Chester Crown Court, Transcript no. T20037200 and Ultraframe (UK) Ltd v Fielding and others [2005] EWHC 1638 (Ch)

Cross-examination

- the Judge as umpire
- springing traps, or advance notice?
- deploying documents
- good use of limited time

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April 2012

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