



Neutral Citation Number: [2019] EWHC 319 (QB)

Case No: CR/2018/926

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

MR JUSTICE JULIAN KNOWLES

Between :

(1) ATLANTICA HOLDINGS, INC
(2) BALTICA INVESTMENT HOLDING, INC
(3) BLU FUNDS, INC

**Plaintiffs/
Respondents**

- and -

(1) SOVEREIGN WEALTH FUND
SAMRUK-KAZYNA JSC
(2) BTA BANK JSC

Defendants

-and-

(1) PAVEL PROSYANKIN
(2) JOHN HOWELL

**Applicants/
Third Parties/**

Shaheed Fatima QC (instructed by Brown Rudnick LLP) for the First Applicant
Ruth den Besten (instructed by Bates Wells Braithwaite) for the Second Applicant
Andrew Hunter QC and Shane Sibbel (instructed by Cozen O'Connor) for the Respondents
Caley Wright (instructed by Hogan Lovells LLP) for the Second Defendant
The First Defendant did not appear and was not represented

Hearing dates: 15 and 16 January 2019

Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is an application by Pavel Prosyankin and John Howell (the Applicants) and the Second Defendant (BTA Bank/the Bank) to set aside the order for the Applicants' oral examination under oath made by Morris J on 21 December 2018 (the Order) or, in the alternative, a variation of the Order.
2. Following a hearing on 15 January 2019, on 16 January 2019 I announced that the applications were refused for reasons to be given later. These are my reasons. The examinations were scheduled to take place on 17 – 18 January 2019.
3. The Order was made pursuant to s 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the 1975 Act) following the receipt of two materially identical letters of request (LORs) issued on 6 December 2018 by the Honourable Judge Jesse M. Furman of the United States District Court for the Southern District of New York in civil proceedings in that Court brought by the Plaintiffs against the Defendants (the US Proceedings). The LORs were transmitted to the UK under the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which the UK ratified following the passing of the 1975 Act: see *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, 632.
4. The LORs and the Order were made on the application of the Plaintiffs, who consider that each of the Applicants (both of whom reside in the UK) has relevant evidence to give in relation to the issues involved in the US Proceedings. The Applicants' evidence will stand as part of the trial testimony in the US Proceedings, pursuant to the Federal Rules of Civil Procedure, rr 30 and 45.
5. The Order was made without notice to the Applicants and [16] and [17] of the Order gave the Applicants the right to apply to set it aside, which they have exercised. The applications are made on various grounds which I address below. Before doing that, it is convenient first to describe the US Proceedings.

The US Proceedings in outline

6. The litigation in New York concerns the purchase by the Plaintiffs of securities in BTA Bank, allegedly in reliance upon false statements and omissions by the Defendants. This occurred, it is alleged, pursuant to a large and complex fraudulent scheme whereby the Defendants diverted assets from BTA Bank over the course of two debt restructurings, at the expense of its international creditors, including the Plaintiffs, whose securities lost all or most of their value because of the Defendants' activities.
7. The Plaintiffs are corporations formed under the laws of the Republic of Panama, each of which purchased securities from the Bank through their broker-dealer in the State of Florida.
8. The First Defendant, SK Fund, is a sovereign wealth fund which was formed under the laws of, and is wholly owned by, the Republic of Kazakhstan. SK Fund is, and at all material times was, the majority owner of BTA Bank.

9. In February 2009 the Republic of Kazakhstan effectively took control of the Bank when significant concerns arose about its ability to continue as a going concern. It was discovered that sums of money running into billions of dollars had been misappropriated by Mukhtar Ablyazov, the Bank's former Chairman, and others, putting the Bank into a precarious financial position. Since 2009 there has been extensive litigation in the UK and elsewhere by the Bank in its attempts to recover the money stolen by Mr Ablyazov and his co-conspirators: see eg *JSC BTA Bank v Ablyazov (No 14)* [2017] QB 853.
10. In February 2009 the First Defendant, SK Fund, invested approximately US\$1.5 billion in the Bank in exchange for a 75.1% shareholding in the Bank's common stock. In April 2009 BTA Bank announced that it had ceased payment of principal on all of its outstanding financial obligations. Thereafter, it engaged in a restructuring of its corporate debt, which was finalised in or around August 2010 ('the 2010 Restructuring').
11. In connection with the 2010 Restructuring BTA Bank issued an information memorandum running to approximately 780 pages (the Information Memorandum), which described the terms of that restructuring and its intended effect on the Bank's future operations. The terms included that: (a) SK Fund would receive additional equity in the Bank, becoming an 80% owner; and (b) pre-existing holders of BTA Bank's debt (including Atlantica and Baltica) would receive, in exchange for their old securities, new ones, including certain subordinated notes (the Subordinated Notes).
12. The Information Memorandum incorporated by reference a deed of undertaking issued by SK Fund (the SK Undertaking). Both the Information Memorandum and the SK Undertaking stated that SK Fund had agreed, subject to certain very limited exceptions, to accept no dividends or distributions from BTA Bank until the newly issued securities (including the Subordinated Notes) had been repaid, or until seven years had passed. The Information Memorandum contained various other representations going to the financial position, expenditure and prospects of the Bank. These included details of its interest-based income and expenditure, its expectation that it would continue as a going concern, its expectation that it would achieve the requisite levels of capital ratio, and the objective of SK Fund to manage the Bank so as to maximise its long-term value.
13. The agreement of the Bank's existing creditors was required for the 2010 Restructuring to become effective. The Plaintiffs' case is that in reliance upon the Information Memorandum and the SK Undertaking, they provided their agreement on 28 May 2010 and thereafter accepted Subordinated Notes in exchange for their pre-existing securities.
14. In connection with the 2010 Restructuring, various creditors were issued with investments called 'Recovery Units'. These provided creditors with an interest in BTA Bank's ongoing efforts, at the time, to recover approximately US\$10 billion in BTA Bank assets that were alleged unlawfully to have been diverted from the Bank by its former management, including Mr Ablyazov (the Asset Recovery Process). Under the terms of the Recovery Units, the holders would collectively receive 50% of any assets recovered pursuant to that process.

15. Atlantica and Baltica later acquired additional Subordinated Notes on the secondary market between September 2010 and October 2012. The Third Plaintiff, Blu Funds, Inc ('Blu Funds') bought Subordinated Notes in April 2012.
16. In May 2011, it was revealed that the average interest rate which BTA Bank had been paying to SK Fund on its deposits (which were in the order of US\$1.6 billion) was 9.8%. As a result, the value of the Subordinated Notes substantially declined from 70% of their face value in May 2011 to less than 10% of their face value in January 2012.
17. In order to prop up the price of Subordinated Notes and other BTA Bank securities, SK Fund made a number of public statements between July 2011 and December 2011 to the effect that it intended to provide additional and ongoing financial support to BTA Bank in order to prevent a second debt reorganisation.
18. BTA Bank defaulted on its debt obligations in January 2012, and thereafter engaged in a second restructuring of its debt (the 2012 Restructuring).
19. In connection with the 2012 Restructuring, BTA Bank made a series of presentations to investors and others, including in January 2012 and March 2012, identifying (amongst other things) what were said to be its total external liabilities at the relevant time. The Defendants also publicly stated that the bank would be stabilised and capital injections would be made.
20. The Plaintiffs' claims against the Defendants arising out of these alleged events can be summarised as follows.
21. Proceedings were commenced in the Federal District Court against SK Fund on 5 December 2012 ('Case 1:12') and against BTA Bank on 16 August 2013 ('Case 1:13'). They have been managed from a very early stage by Judge Furman. The Court's dockets for the two cases demonstrate that Judge Furman has given hundreds of decisions and rulings on the two cases. If I may respectfully say so, he can be taken to be very familiar indeed with the subject matter of the litigation.
22. The first witness statement of Martin Bloor, one of the Plaintiffs' US attorneys, explains that:
 - a. Both claims are brought under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act). That section (and Rule 10b-5 thereunder) provides a right of action for a plaintiff who purchases or sells securities in reliance upon a defendant's materially false statements or omissions.
 - b. It is necessary to show, as part of such a claim, that the defendant acted with 'scienter', which means a fraudulent state of mind (which may be intentional or reckless).
 - c. Under the 1934 Act, the relevant misstatements may include 'forward looking' statements as to a defendant's intention, purpose or future plans, where the statement was material, unaccompanied by meaningful cautionary language, and made with actual knowledge that the statement was false or misleading.

23. The claims are set out in the Amended Complaints in Case 1:12 and Case 1:13. These pleadings are approximately equivalent to Particulars of Claim in English civil litigation. The Plaintiffs rely upon the following (*inter alia*):
 - a. The failure of the Information Memorandum to disclose that SK Fund and BTA Bank had entered into a series of transactions (collectively referred to as the ‘Negative Carry Swap’), the net effect of which was that BTA Bank would be liable for, and in the event paid, hundreds of millions of dollars to SK Fund in interest from 2010 onwards;
 - b. The contention that ‘the real purpose of the 2010 Restructuring was to enable SK Fund to siphon hundreds of millions of dollars from BTA Bank at the expense of BTA Bank’s other creditors’ and that the Defendants ‘intended to create and did create the false impression that the 2010 Restructuring would preserve BTA Bank’s status as a going concern... [with] ability to make future payments on its debt obligations’ when ‘under any realistic projection of its future cash flows, an additional restructuring would be necessary’;
 - c. Mr Bloor explains that the underlying scheme is relied upon to establish the scienter state of mind, in relation to representations made at the time of the 2010 Restructuring and thereafter; and
 - d. The failure of the Defendants, in 2012, when making representations as to the total liabilities of BTA Bank, to disclose the full extent of the Bank’s potential liability under the Recovery Units, in the event of a default by BTA Bank on its debts.
24. The parties have already exchanged written and document discovery and are currently taking depositions from witnesses in the United States and this country (by consent), to be completed by 18 January 2019. A pre-trial conference is scheduled for 22 January 2019, at which the Court will list motions for summary judgment and a trial date.
25. Mr Bloor’s second witness statement provides two updates on the status of the litigation in New York:
 - a. First, the District Court has ruled that the Plaintiffs are allowed to use, in the examinations (should they proceed), allegedly hacked documents, previously leaked online by third parties (referred to as the ‘Kazaword documents’).
 - b. Second, Mr Bloor addresses the Plaintiffs’ unsuccessful application to extend the 18 January 2019 deadline, which BTA Bank opposed. That application was made partly in order to ease the timetable within which the examinations that are the subject of the applications before me were to take place. In the course of that opposition, BTA Bank stated (significantly) that if the Order were to be upheld (ie, those applications were to fail), ‘the depositions can proceed within the deadlines already set by this Court’
26. The Plaintiffs’ case on wrongdoing in relation to the Asset Recovery Process as set out in the LORs is as follows. The Plaintiffs say that there is now evidence that:
 - a. BTA Bank underreported asset recoveries in 2009-2012;

- b. BTA Bank delayed the reporting of certain recovered assets until after the 2012 Restructuring; and
 - c. certain employees of BTA Bank and SK Fund, and related parties, misappropriated some of the recovered assets for themselves.
27. In his first witness statement Mr Bloor explains that those matters are relevant to the case on the pleadings as they stand, because:
- a. they go to the Plaintiffs' underlying contention that the Defendants were, at all material times, concerned with siphoning funds from BTA Bank at the expense of its existing creditors, rather than (as they represented) with saving the Bank and rendering it a going concern;
 - b. they are critical both to (i) the Defendants' allegedly fraudulent states of mind when making the various representations relied upon in the Amended Complaints and (ii) establishing the falsity of the "forward looking" statements concerned with how the Bank would operate following the restructurings; and
 - c. the wrongdoing in relation to the Asset Recovery Process is also relevant to establishing the true financial position of the bank, in the material period, for the purposes of causation and loss.
28. On that basis, Mr Bloor makes clear in his first witness statement that such wrongdoing will be included in the issues for trial.
29. Mr Bloor also says that the same wrongdoing reveals further misstatements, within the Information Memorandum and thereafter, as to the true nature of the Asset Recovery Process and the true financial position of the Bank. He says that the Plaintiffs intend to advance such allegations at trial, which arise out of the same facts and matters as are already in issue, and which fall under the same sections of the 1934 Act as form the basis of the claim. Their position, in this regard, has been ventilated on several occasions in the US proceedings, both within the LORs, and also in relation to the admission of the Kazaword documents.

The alleged roles of Mr Prosyankin and Mr Howell

30. The Plaintiffs say that Mr Prosyankin was at all material times the deputy head of the Recovery Sub-Committee and that he became a member of BTA Bank's Management Board in 2012. The Plaintiffs contend that he:
- a. was personally involved in all aspects of the 2010 Restructuring, the 2012 Restructuring, and the Asset Recovery Process;
 - b. knew since before the 2010 Restructuring about the Negative Carry Swap;
 - c. knew that BTA Bank was underreporting the assets recovered in the course of the Asset Recovery Process;

- d. instructed and assisted BTA Bank employees to set up and use personal Gmail accounts for business correspondence; and
 - e. has relevant evidence (for use at trial) on BTA Bank's document creation and retention practices.
31. Mr Prosyankin disputes the extent to which he was involved in the Asset Recovery Process or anything beyond that. He has made a witness statement in support of his application. In summary, he says that he was never part of the Asset Recovery Sub-Committee. He says that from April 2009 to May 2012 he worked as a consultant for BTA Bank in respect of the asset recovery project being undertaken for the Bank. Between May 2012 and November/December 2013 he says he was an employee of the Bank and became a Managing Director and member of its Management Board. In December 2013 he resigned as a Managing Director but remained a BTA Bank employee. He says that in early 2014 he remained a special advisor for several months but by June 2014 he says that his involvement was minimal.
32. The Plaintiffs do not accept Mr Prosyankin's evidence and say that the extent of his role will be a live issue at the examination. They point, for example, to a document in the evidence from a presentation which lists him as a member of the Asset Recovery Sub-Committee. Mr Prosyankin says this reflects a structure which was never put in place. They also point to evidence given on behalf of the Bank in *JSC BTA Bank v Soledchenko* [2012] EWHC 1891 (Ch), which Vos J (as he then was) summarised as follows (emphasis added):
- “105. Mr Hardman is a partner in the Bank's solicitors ... He was heavily cross-examined on his role in the litigation as a whole, it being suggested that Hogan Lovells International LLP was running the litigation rather than the Bank. I accepted Mr Hardman's denial of these propositions *and his evidence that he took instructions from the Bank's asset recovery sub-committee, normally represented by a Mr Prosyankin.*”
33. The Plaintiffs go on to say, however, that even on Mr Prosyankin's own evidence as to his positions with the Bank it can be inferred that he has relevant evidence to give.
34. Mr Howell is a consultant and principal of the firm John Howell & Co Ltd. He specialises in recovering misappropriated assets, among other things. The Plaintiffs say he was retained by BTA Bank to advise on the 2010 Restructuring and post-restructuring operations, particularly as a coordinator of the Asset Recovery Sub-Committee. The Plaintiffs contend that he:
- a. was personally involved in all aspects of the 2010 Restructuring, the 2012 Restructuring and the Asset Recovery Process;
 - b. knew since before the 2010 Restructuring about the Negative Carry Swap; and
 - c. knew that BTA Bank was underreporting the assets recovered in the course of the Asset Recovery Process.

35. Mr Howell disputes the extent to which he was involved in the Asset Recovery Process or anything beyond that. A witness statement has been made on his behalf by his solicitor, Alexander de Jongh. Mr de Jongh says at [13] et seq that in July 2009 Mr Howell was retained to advise the Bank on asset recovery and was involved in developing what became known as the ‘London Process’, ie, the attempt to recover through the UK courts, assets believed to be linked to Mr Ablyazov. He worked with lawyers and accountants and with the Bank’s own in-house team. After the team was established, his role evolved to co-ordinate the London Process and to report to the Bank’s Board. He denies being involved in the Bank’s restructuring in 2010 or 2012 and says, for example, that the first that he heard of the Negative Carry Swap was when documents were served on him on 17 December 2018 following the grant of the LORs.
36. Again, the Plaintiffs dispute the extent of Mr Howell’s roles and responsibilities and say that itself is a live issue for the examinations. For example, in his second witness statement at [45] Mr Bloor refers to an email sent by Mr Howell suggesting, say the Plaintiffs, that he was involved in restructuring, as well as other evidence they say is to the same effect. But anyway, say the Plaintiffs, even on his own evidence Mr Howell accepts that he was retained from July 2009 by BTA Bank as a consultant to advise the bank on the Asset Recovery Process and reported to its board in this regard.
37. There is another potential examinee, Mr Varenko, who has not been found, and I need say no more about him.
38. Mr Bloor says in this witness statement at [52] that ‘[n]one of BTA Bank’s current management or employees were in senior positions or directly involved...during the relevant period’. In his second witness statement he says at [51] that ‘[the Applicants] remain the best placed available witnesses with contemporaneous knowledge of the workings and actions of the Bank and SK Fund at the material time.’

The Letters of Request

39. The Plaintiffs’ application (motion) for the LORs was filed with the US District Court on 20 November 2018. The application was served on BTA Bank and SK Fund. By order of Judge Furman, they had until 28 November 2018 to file any opposition to the application. They did not do so.
40. The Plaintiffs’ application was accompanied by a Memorandum of Law in support of the application settled by Mr Bloor. This is described in Mr Bloor’s first witness statement at [53]. It set out the background to the US Proceedings, the key allegations being made in them, and it set out the Applicants’ alleged roles. It addressed the applicable principles of US law in relation to LORs and also stated at footnote 3:

“The English court will rely upon this Court’s decision regarding the scope of discovery under federal law and consider the issue only if this Court fails to do so. *Eg, CH(Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 (QB).”

41. The Memorandum of Law continued:

“Plaintiffs move this Court to issue a Letter of Request so that they may take the depositions of the BTA Witnesses and Howell in

London. Their depositions will address central issues relating [to] Defendants' alleged scheme to defraud Plaintiffs and other bondholders through material misstatements and omissions regarding Negative Carry Swap and the Recovery Units. For the reasons that follow, the Court should grant the Motion and issue the Letter ...

This Court should issue the Letter of Request because the depositions sought from the BTA Witnesses and Howell are essential discovery in this litigation. As key senior executives and an advisor personally involved in the 2010 Restructuring, the asset recovery process, and the 2012 Restructuring, testimony from the BTA Witnesses and Howell will address matters that are central to Plaintiffs' claims and Defendants' defenses. They will be able to address the Negative Carry Swap, including the Defendants' knowledge and understanding that the Negative Carry Swap would syphon hundreds of millions of dollars from BTA Bank to SK Fund, negatively affect BTA Bank's solvency and inevitably result in a second restructuring, and that this material was not disclosed to investors. They will also be able to address BTA Bank's asset recovery process, which is directly tied to the viability of the Bank as a going concern and the Recovery Units. As the leaders of this process, the BTA Witnesses and Howell knew which assets were recovered and when, that significant recovered assets were misappropriated, the costs of asset recoveries, and how the assets were reported within BTA Bank and externally to investors. Accordingly, their testimony will support, among other things, Plaintiffs' allegations that the Information Memorandum misrepresented the true purpose of the asset recovery process and that BTA Bank knew that asset recoveries would be insufficient such that the Recovery Units would be accelerated and advanced in BTA Bank's capital structure ahead of the Subordinated Notes.

The testimony of the BTA witnesses and Howell is made even more significant because none of BTA Bank's current management or employees were in senior positions or directly involved in these matters during the relevant period. Therefore, the testimony of the BTA Witnesses and Howell cannot be replicated from other witnesses that are currently controlled by the Defendants.”

42. Judge Furman granted the Plaintiffs' application on 6 December 2018, more than two weeks after it had been filed and more than a week after the time limit for the filing of any opposition by the Defendants. As I have said, there are two materially identical LORs, one for Case 1:12 and one for Case 1:13. Each LOR is addressed to the Senior Master of the Queen's Bench Division and each is signed personally by Judge Furman. The letters are written in the first person, eg, 'I, Judge Jesse M Furman ... respectfully request the assistance of your court ...' ([1]); 'I find that it is necessary for purposes of justice ...' ([20]).

43. Paragraph 5 of the LORs states as follows:

“The Plaintiffs request to examine English residents Nikolay Varenko (‘Varenko’), Pavel Prosyankin (‘Prosyankin’, collectively with Varenko, ‘BTA Witnesses’) and John Howell (‘Howell’) under United States Federal Rules of Civil Procedure 30 and 45 for purposes of using that testimony at trial. Plaintiffs aver that the BTA Witnesses, who now each reside in London, were executives of BTA Bank during the relevant period and have personal knowledge of the facts and circumstances at issue in this case. Plaintiffs aver that Howell was a London-based advisor to BTA Bank who also has personal knowledge of these issues.”

44. Paragraphs 10 – 13 then describe the nature of the US Proceedings and plead that the Plaintiffs seek damages and remedies under the Securities Exchange Act of 1934 from the Defendants in excess of US\$20 million.

45. At [14] – [19] the LORs summarise the key allegations in the US proceedings. I have already described these. Then, at [20], Judge Furman says:

“I find that it is necessary for purposes of justice and the due determination of the matters in dispute at trial in the aforesaid US Proceedings between the parties that you cause the BTA Witnesses and Howell to be examined for the purposes of using that testimony at trial.”

46. The Plaintiffs say that this paragraph makes clear that the sole purpose of the proposed examinations is to take testimony for use at trial. This is not a case where depositions are being inappropriately sought as part of general discovery: the proceedings are at a late stage and documentary discovery has already been exchanged. This latter point is made clear at [19] of the LORs.

47. Paragraph 21 of the LORs states that at trial the Plaintiffs must prove as part of their case, among other things, that the Defendants made material false statements and/or omitted information regarding the Negative Carry Swap and the Recovery Units and acted with scienter. To do so, the Plaintiffs may introduce the trial testimony of former advisers and employees of BTA, including Mr Prosyankin and Mr Howell.

48. The LORs explain at [21] to [30] that the Plaintiffs’ case is that in the material period Mr Prosyankin was in a senior position at BTA Bank and Mr Howell was a senior consultant to the Bank.

49. At [22] the LORs state that:

“Plaintiffs aver that discovery taken to date in the US Proceedings demonstrates that the BTA Witnesses and Howell each have personal knowledge of, among other things, the facts and circumstances underlying the Negative Carry Swap and Recovery Units.”

50. Paragraphs [28]-[29] are as follows:

“28. Plaintiffs represent that Prosyankin was the deputy head of the Recovery Sub-Committee during the entire relevant period, and became a member of BTA Bank’s Management Board in 2012. In these roles, Plaintiffs contend that the evidence suggests he was personally involved in all aspects of the 2010 Restructuring, the bank's asset recovery process, and the 2012 Restructuring. Plaintiffs aver that Prosyankin knew before the 2010 Restructuring about the Negative Carry Swap and later that BTA Bank underreported recovered assets, which caused, among other things, the Bank to lose hundreds of millions of dollars in recovered assets and the acceleration and advancing of the Recovery Units. Plaintiffs also aver that Prosyankin instructed and assisted BTA Bank employees to set up and use personal Gmail accounts for business correspondence, which makes him a key witness to the Bank's document creation and retention practices.

29. Plaintiffs represent that Howell is a consultant and principal of the firm John Howell and Co Ltd. He was retained by BTA Bank to advise on the 2010 Restructuring and post-restructuring operations, particularly as Coordinator of the Recovery Sub-Committee. Howell’s website highlights his engagement with BTA Bank:

One such case involves allegedly the second largest fraud ever; the disappearance of US\$10 bn+ from JSC BTA Bank Kazakhstan. Under our guidance and coordination, BTA assembled a team of top litigators, forensic accountants and other experts to recover assets for itself and creditors in excess of \$5bn in an operation unparalleled in its intensity and complexity.

Plaintiffs contend that the evidence suggests that Howell was personally involved in all aspects of the 2010 Restructuring, the Bank’s asset recovery process, and the 2012 Restructuring. Plaintiffs aver that Howell knew before the 2010 Restructuring about the Negative Carry Swap and later that BTA Bank considerably underreported recovered assets, which, among other things, caused the Bank to lose hundreds of millions of dollars in recovered assets and the acceleration and advancing of the Recovery Units.

30. Plaintiffs aver that none of BTA Bank’s current management or employees were in senior positions or directly involved in these matters during the relevant period, which makes the BTA Witnesses and Howell necessary trial witnesses in the US Proceedings.”

51. Mr Bloor states at [53(4)] of his first witness statement that the Applicants are ‘essential’ trial witnesses, whose evidence cannot be replicated from other available witnesses. None of BTA Bank’s current management were in as senior a position in the relevant period, or had equivalent involvement in the material events. He says although

both Mr Prosyankin and Mr Howell now dispute the Plaintiffs' position on the nature and extent of their roles, on their own evidence they worked for the Bank in the relevant period and were involved in matters which the Plaintiffs say are highly relevant.

52. A list of topics for questioning is attached at Schedule A to the Order of Morris J, and replicates the areas of questioning approved by Judge Furman at [35] of the LORs. As to these, Judge Furman said:

“The BTA Witnesses and Howell should be examined on the following subjects relevant to matters at issue in the US Proceedings.”

53. Among the proposed topics for examination are Mr Prosyankin's and Mr Howell's knowledge of documents and communications between April 2009 and May 2010 relating to the 2010 Restructuring topics listed in [35(d)]; their roles and responsibilities in connection with the BTA Bank's Asset Recovery Sub-Committee; the terms of Mr Howell's engagement with BTA Bank, and any separate contemporaneous engagements with the Kazakh government; the decision-making process of the Bank's Asset Recovery Sub-Committee, including for asset recoveries and reporting; their knowledge of documents and communications relating to the asset recovery and reporting and Recovery Unit topics listed at [35(i)]; their knowledge of documents and communications relating to the 2012 Restructuring topics listed at [35(j)]; manner and methods of communication among the parties about BTA Bank and SK Fund business; and the authentication of business records.
54. Paragraph 36 makes clear that neither Mr Prosyankin nor Mr Howell are requested to produce any documents.

Legal principles

55. I turn to the legal principles governing the exercise of this Court's powers to provide mutual legal assistance under the 1975 Act following the receipt of a LOR.
56. The relevant parts of ss 1 and 2 of the 1975 Act provide:

“1 Application to United Kingdom court for assistance in obtaining evidence for civil proceedings in other court.

Where an application is made to the High Court, the Court of Session or the High Court of Justice in Northern Ireland for an order for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction, and the court is satisfied—

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have

been instituted before the requesting court or whose institution before that court is contemplated,

the High Court, Court of Session or High Court of Justice in Northern Ireland, as the case may be, shall have the powers conferred on it by the following provisions of this Act.

2 Power of United Kingdom court to give effect to application for assistance

(1) Subject to the provisions of this section, the High Court, the Court of Session and the High Court of Justice in Northern Ireland shall each have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision—

(a) for the examination of witnesses, either orally or in writing;

...

(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.”

57. In dealing with a request for evidence from a foreign Court, the English Court must first decide whether it has jurisdiction to make an order to give effect to the request and, secondly, if it has, whether as a matter of discretion it ought to make or refuse to make such an order.
58. The jurisdictional requirements are contained in s 1 of the 1975 Act. There are three conditions of which the English Court needs to be satisfied before it has jurisdiction to make an order under s 2: *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, supra, p633, *per* Lord Diplock. Firstly, there must be an application for an order for evidence to be obtained in England and Wales. Second, the application must be made pursuant to the request of a court exercising jurisdiction outside England and Wales. Third, the evidence to which the application relates is to be obtained for the purposes of civil

proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated. As to this, as a matter of jurisdiction, in the ordinary way and in the absence of evidence to the contrary, the English Court should be prepared to accept the statement of the foreign Court in its request that the evidence is required for the purposes of civil proceedings in that Court: *ibid*, p634.

59. The question of discretion arises under s 2 once the Court decides that the three jurisdictional conditions precedent in s 1 are satisfied. Section 2(1) confers the power on the High Court (in England and Wales) to make an order for obtaining evidence to give effect to the request. Section 2(2) specifies the forms of order which may be made, subject to the limitations in the section, including the examination of witnesses (s 2(2)(a)). As to this, in particular, s 2(3) prevents the court from making an order requiring any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order. Section 2(4) contains restrictions in relation to documents which are not relevant to the matter before me.
60. I pause at this point to consider an issue of terminology. Whilst nothing may ultimately turn on the point, in my view it is important to be conceptually accurate in relation to the relevant principles. Ms Fatima QC for Mr Prosyankin described the issue of relevance arising under s 2(2) and 2(3) as being a matter of ‘jurisdiction’ (Skeleton Argument, [7]). She said that if the material sought did not satisfy Sir Richard Scott VC’s test of relevance in *First American Corporation v Zayed*, [1999] 1 WLR 1154, p1167 (see below), then there was no jurisdiction to make an order under s 2(1). This approach certainly finds some support in the authorities, for example, in *Gubarev v Buzzfeed Inc* [2018] EWHC 512 (QB), where Senior Master Fontaine dealt with the question of relevance under the heading ‘Jurisdiction’ (at [99] *et seq*). On the other hand, in *Galas v Alere Inc* [2018] EWHC 2366 (QB), [19], Morris J said that s 2(1) gives the High Court the power to give effect to a letter of request and a discretion to make such provision as may be appropriate to achieve that aim. He said that there were limitations as to the exercise of that discretion, namely those in s 2(3) and (4).
61. I respectfully consider Morris J’s approach to be correct. Section 2 is properly to be regarded as conferring a discretion on the High Court to make an order to give effect to an LOR, with restrictions on how that discretion may be exercised. It is not a section that confers jurisdiction to make an order: the jurisdiction to make an order under s 2 arises under s 1. This is consistent with Lord Diplock’s approach in *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, *supra*, where, as I have said, he referred at p633 to s 1 imposing three jurisdictional conditions precedent, and at p634C he referred to the power under s 2 as a discretionary power.
62. There are numerous cases providing a steer on how the discretion to make an order under s 2 is to be exercised once the jurisdiction to do so under s 1 has been established. An English Court will ordinarily give effect to a request from a foreign Court for assistance so far as is proper and practicable to do so and to the extent that is permissible under English law. This principle reflects judicial and international comity as well as the UK’s international obligations under the Hague Convention: *Seyfang v GD Searle & Co* [1973] QB 148 at 151. In the often-quoted words of Lord Denning MR in *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, *supra*, p560:

“It is the duty and the pleasure of the English Court to do all it can to assist the foreign Court, just as the English Court would expect the foreign Court to help it in like circumstances. ‘Do unto others as you would be done by’”

63. In *In re State of Norway's Application (No 1)* [1987] 1 QB 433, 470, Kerr LJ said:

“The court should strive to give effect to the request of the foreign court unless it is driven to the clear conclusion that it cannot properly do so.”

64. The need for international cooperation has been recognised as especially acute in cases of international fraud. In *First American Corporation v Zayed*, supra, p1165 the Vice-Chancellor emphasised at 1165H:

“It is, in my judgment, in the interests of all countries who conduct their affairs in accordance with the rule of law to provide such proper assistance as they can in order to try and ensure that the international complexities attending actions such as that in aid of which these letters of request have been issued do not prevent a just result being reached. It is trite to say that to deal with international fraud international corporation is needed. This applies, in my view, not only to governments and police forces but also to courts.”

65. A helpful distillation of the relevant principles on how the s 2 power is to be exercised in light of this steer was recently provided by Senior Master Fontaine (who deals with a great many requests for assistance under the 1975 Act) in *Aureus Currency Fund LP v Credit Suisse Group* [2018] EWHC 2255 (QB), [30] – [41], from which the following paragraphs are gratefully adapted.

66. First, there is the question of the width of the request. If the width of the topics for questioning is too wide, or uncertain or vague, it may be refused on the grounds that it is oppressive to the witness: *First American Corporation v Zayed*, supra, p1167. Also, such a request might lead to the inference that, ‘the letter of request was designed to elicit information which might lead to the obtaining of evidence rather than to establish allegations of fact, and that would amount to an impermissible fishing expedition’: *Smith v Philip Morris Companies Inc* [2006] EWHC 626 (QB), [37]-[40]. I return to ‘fishing expeditions’ later.

67. Second, if the request is considered to be too wide ranging, the court retains a discretion whether to grant the request and can ‘blue pencil’ - but not redraft - the request. The court has no power to redraft a question or supplement the request because it considers it expedient to do so: *State of Minnesota v Philip Morris Inc* [1998] 1 LPr 170, [50]-[51].

68. Third, there is the question of relevance, which Cockerill J referred to in *Allegan Inc v. Amazon Medica* [2018] EWHC 307 (QB), [54] as the ‘fundamental building block’ on which the correct approach to an application under s 2 ought to be based. An English Court can only require relevant evidence to be given, and this limitation is imported into the mutual legal assistance context by s 2(3).

69. In determining the question of relevance, there are two principal questions. These were set out by Sir Richard Scott VC in *First American Corporation v Zayed*, supra, p1167, and have been cited regularly thereafter in the cases:

“... an English Court ... should, in my opinion, ask first whether the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned in the ... schedule of request testimony, and second whether the intention underlying the formulation of these topics is an intention to obtain evidence for use at the trial or is some other investigatory, and therefore impermissible intention.”

70. As to the first of these questions, Simon J in *CH(Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 (QB), [14] (the case footnoted in the Memorandum of Law that accompanied the application for the LORs), in what he described as the fourth guiding proposition to be gleaned from the authorities, stated:

“If the letter of request states that a particular person is a necessary witness then the English court should not itself embark upon an investigation as to whether the requesting court is correct for the purpose of determining in advance whether the evidence is relevant and admissible.”

71. The second question is a reference to the principle that the Court's powers under s 2 cannot be used in aid of a ‘fishing expedition’. There are numerous authorities which confirm that the examination must be confined to eliciting relevant evidence for trial and cannot extend to US style oral discovery by deposition: *State of Minnesota v Philip Morris Inc*, supra, [13]; *Rio Tinto Zinc Corp v Westinghouse Electric Corp*, supra, p635; *In re State of Norway's Application (No 1)*, supra, p482; *Refco Capital Markets Ltd v Credit Suisse (First Boston) Ltd* [2002] CLC 301, [1]; *First American Corporation v Zayed*, supra, 1160, 1165, 1166, 1167; *Gredd v Arpad Busson* [2003] EWHC 3001 (QB) [27(3), (4), (5)].

72. The questions then arise: By what process is the question of relevance to be determined? Is it for the English Court to determine the question for itself, unguided by the views expressed by the requesting foreign court? Or is the English Court to give deference to the view of that court and, if so, what degree of deference?

73. The starting point is the principle that the English court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues for trial: *In re Asbestos Insurance Coverage Cases* [1987] 1 QB 331, p339.

74. However, there are circumstances where the English Court can consider for itself the relevance of the evidence sought. These include where the relevance of the topics for examination in the request has obviously not been considered by the requesting court. In *CH (Ireland) Inc v Credit Suisse Canada*, supra, [15], Simon J said:

"It seems to me, however, that [Counsel] is correct in his submission that the approach of the court will depend on whether the requesting court has itself considered questions of relevance. If it has, then it is hardly in the interest of comity that the court to

whom the request is made should embark upon a close consideration of questions of relevance on what is likely to be limited material and a less clear understanding of the issues than the requesting court. If, on the other hand, the requesting court has plainly not considered the question of relevance where it is clear, even on a broad examination, that the evidence is not relevant then the Vice-Chancellor's first question must be addressed".

75. This approach was adopted by Jay J in *Gubarev v BuzzFeed Inc* [2018] EWHC 1201 (QB), [57].
76. Earlier, at [55] Jay J referred to the comment of Stanley Burnton J in *Gredd v Busson*, supra, [27(7) and (8)] that:

“... orders for letters of request are normally made by the US judge without any real scrutiny. The order is normally made and the terms sought by the applicant without any (or any significant) amendment, and without the judge being informed of the significant differences between US federal procedure and of these courts”.
77. In my judgment, this passage must be approached with caution and I would respectfully query whether the use of the word ‘normally’ was apt. Certainly, this passage may be accurate in relation to some LORs issued by courts in the United States: see, for example, the LOR described in *Allergan Inc v Amazon Medica*, supra, [59] issued by the United States District Court for the Central District of California, which the English Court said merely recorded the applicant’s contentions as to relevance. In other cases, however, the LOR may make clear that the judge has clearly and expressly considered the question of relevance for himself or herself: see, for example, the LOR described in *Aureus Currency Fund LP v Credit Suisse Group* [2018] EWHC 2255, supra, [44], where the English Court said that it was apparent from the wording of the LOR that the requesting court (which was, as in this case, the United States District Court for the Southern District of New York) had considered the question of relevance for itself.
78. Equally, I do not myself consider it was apt for the judge in *Aureus Currency Fund LP v Credit Suisse Group*, supra, to say that it was only in an ‘exceptional case’ that the English Court should consider the question of relevance for itself. ‘Exceptionality’ is not to my mind an especially helpful test, at least in this context. I do not know whether or not it is ‘exceptional’ for a foreign court not to consider for itself the question of relevance.
79. In my judgment, the question whether the relevance of the topics for examination in the LOR has been properly considered on the merits by the requesting court is fact specific and should be determined by reference to the specific wording of the LOR in question, without any presumption one way or the other whether it will or will not show that the question of relevance is for determination by the English Court. This is consistent with Cockerill J’s approach in *Allergan Inc v Amazon Medica*, supra, [56], where she said that the English court should have regard to ‘wording of the letter of request in each case...’.

80. If an examination of the terms of the LOR and any other relevant material shows that the matter has been considered on the merits by the requesting court, and the topics found by it to be relevant, then the English Court should respect that determination because the requesting court is in the best position to judge relevance. In *Gubarev v BuzzFeed Inc*, supra, Jay J said at [54] that:

‘No possible issue arises if it is clear that the requesting court has given some consideration to the issue of relevancy in terms of the generality and specificities of the request.’

81. By ‘other relevant material’ I have in mind, for example, a situation where the English Court has evidence about relevance from a lawyer with experience and qualifications in the requesting state, and that evidence stands uncontradicted. Such evidence should be accorded considerable deference: *Gubarev v Buzzfeed Inc*, supra, [58].

82. However, if the opposite is the case and it is plain (and, I emphasise, plain) that the requesting court has not considered the question of relevance where it is clear, even on a broad examination, that the evidence is not relevant, then the English Court should consider the question of relevance for itself: *CH(Ireland) Inc v Credit Suisse Canada*, supra, [15]; *Allergan Inc v Amazon Medica*, supra, [59].

83. In *Galas v Alere Inc*, supra, Morris J summarised the principles on relevance as follows:

“52. The Claimant before the US court asserted that each of the topics for questioning is relevant to the issues in those proceedings. The Defendant did not raise any objection on the grounds of relevance to these areas of questioning and it must be taken to know the scope of the disputes in the proceedings. It cannot be said that the US court did not consider the issue of relevance. It is not for this court to second-guess the view of the US court.

Principles on relevance

53. In this regard I have been referred to the recent case of *Aureus Currency Fund, L.P. v Credit Suisse Group AG* [2018] EWHC 2255 (QB), where Senior Master Fontaine, at paragraphs 36 to 41, addressed this issue in some detail. She referred in turn to a number of other cases, including *In Re Asbestos Insurance Coverage Cases*, supra, at 339G, to *BuzzFeed Inc v Gubarev* [2018] EWHC 1201 (QB) at paragraphs 54 to 59; *Gredd v Arpad Busson* [2003] EWHC 3001 (QB) and; *CH (Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 (QB). From these authorities the relevant principles can be stated as follows:

- i) As a general rule, the English court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues for trial.

ii) There are limited circumstances where the court can consider the relevance of the evidence sought.

iii) If the requesting court has itself questioned questions of relevance, then the English court should not embark upon a close examination of questions of relevance.

iv) However, the English court may conclude that the intended witness should not be required to give evidence on a particular topic if two conditions are satisfied; (a) the requesting court has ‘plainly not considered the question of relevance’; (b) it is clear to the English court, even on a broad examination, that the evidence is not relevant.”

The parties’ submissions

The Applicants’ and the Bank’s submissions in outline

84. On behalf of Mr Prosyankin, Ms Fatima advanced three submissions in support of the application to set aside the Order. She submitted:
- a. that it should be set aside because it is oppressive as a consequence of the LORs which gave rise to it;
 - b. in the circumstances, I should consider the question of relevance for myself and should set aside the Order because Mr Prosyankin cannot reasonably be expected to have relevant evidence to give on the vast majority of the topics in Sch A to the Order;
 - c. that the topics listed in the LOR and in Sch A amount to an impermissible fishing expedition and/or were for an ulterior purpose.
85. As to oppression, Ms Fatima made a number of points in support of her submission. To summarise, she submitted that oppression arose (*inter alia*) because neither Mr Prosyankin nor Mr Howell had been given notice of the application for the LORs; the applications had been made very late in December 2018 and the examinations had to be completed by 18 January 2019 because of the timetable set by Judge Furman, which he had refused to vary; Mr Prosyankin had only been able to start to review material on 23 December 2018; the US Proceedings are complex and the examination topics extensive and serious and involve allegations of potentially criminal wrongdoing; he had only been provided with the examination bundle on 2 January 2018 and Mr Bloor had said that ordinarily 14 days would be needed to prepare for the examination (which was then listed for 16 January 2019), and Mr Prosyankin was also engaged with his lawyers on this application.
86. As to relevance, Ms Fatima submitted that Judge Furman did not, or did not properly, consider the question of relevance – there was ‘no clear or direct evidence’ that he had, as she puts it in her Skeleton Argument at [12.1] - and therefore it is for me to make the assessment, in accordance with the principles I have set out. Nor was there any basis for inferring that he had considered relevance. She pointed out, for example, that the motion for the LOR was unopposed so the question of relevance was not addressed

orally and in writing and she said that the Memorandum of Law submitted by Mr Bloor in support of the application for the LORs did not deal with the question of relevance as applied by the English Court. She said that Mr Prosyankin had no relevant evidence to give – she said, in effect that the Plaintiffs have got the wrong person. Mr Prosyankin’s evidence disputes the extent to which he was involved in the Asset Recovery Process and he says that he was never part of the Asset Recovery Sub-Committee and that the document which suggests that he was, is wrong. Ms Fatima relies in particular on the second witness statement of Alexander Sciannaca, a solicitor from Hogan Lovells LLP, who are the Bank’s English solicitors. This is based in significant part on instructions given to him by Jason C. Vigna, a partner in the Bank’s US counsel Katten Muchin Rosenman LLP. At [16] Mr Sciannaca states that:

“16. The Order requires the Third Parties. Mr Howell and Mr Prosyankin to be examined on a very broad range of topics. Having consulted with Mr Vigna (and without waiving privilege), my understanding is that many of the topics set out in Schedule A to the Order are of no relevance to the Plaintiffs’ claims in the US Proceedings (see for example items (c). (d)(i), (i)(i)-(xii) and (xiv) – (xx)), and those that arguably are of some relevance appear to be vague and general in nature and little more than window dressing to give the appearance of a connection to the claim (see for example items (d)(ii)-(vi) and (e)).”

87. As to the third submission, namely fishing/impermissible motive, Ms Fatima’s Skeleton Argument at [14] argues that the Order should be set aside because it is designed to ‘fish’, ie investigate issues, for the ulterior purpose of assisting Messrs Ablyazov and his alleged co-conspirators (including a Mr Khrapunov), rather than to establish/disprove allegations of fact in issue in the US Proceedings. She relies on the evidence of Mr Sciannaca and Mr Howell’s solicitor Mr de Jongh at [32] – [35] which argues that BTA Bank has adduced evidence that the Plaintiffs are connected to Mr Ablyazov and Mr Khrapunov, and he therefore suggests that the Order has been sought, or may be used, for an ulterior purpose: to elicit information relevant to their personal interests in impugning the judgments obtained by the Bank against them. He says that some of the topics are not obviously relevant to the US Proceedings (eg, Sch A, (g)), the topic ‘Allegations that BTA Bank’s asset recovery department was directed, at least in part, by the offices of the President and Prime Minister of Kazakhstan.) He also refers to the fact that the Plaintiffs have recently obtained an order from Judge Furman permitting them to use (subject to tests of relevancy and authenticity, etc) the Kazaward documents, which are said to be documents illicitly (and probably unlawfully) obtained via a computer hack. He says that the matters referred to appear to be intended to elicit information relevant to the alleged political persecution of Mr Ablyazov.
88. The Bank adopted Ms Fatima’s submissions and added some points in relation to the third ground of challenge in particular. I do not need to set these out.

The Plaintiffs’ submissions in outline

89. In response, Mr Hunter QC submits on behalf of the Plaintiffs as follows:

- a. As to oppression, the Applicants have known of the topics for questioning since 18 and 20 December 2018 respectively and of the documents to which the Plaintiffs intend to refer since 2 January 2019. The Plaintiffs have substantially reduced the number of such documents and the Applicants have had ample time to prepare notwithstanding the relatively short timescales. Further, the Applicants will have a variety of safeguards at and after the hearing. It would be inconsistent with this Court's well-established duty of comity to refuse the LORs, rather than for the parties to proceed and use the time that the U.S. Court has given them as best they can.
- b. On the question of relevance, the wording of the LOR shows that Judge Furman determined the relevance of the categories of questioning for himself, and so this is not a case where it is necessary or appropriate for the English court to examine whether or not the categories of questioning are relevant to the issues in the US proceedings. That is all the more so because the US Proceedings are complex and have been managed by Judge Furman for five years. Even if, contrary to that position, I were minded (exceptionally) to engage in a broad consideration of relevance, the topics are relevant to the proceedings and the witnesses (even on their own account of their roles) clearly have relevant evidence to provide: for reasons given by Mr Bloor in his first witness statement at [65-66] and his second witness statement at [32-45].
- c. As to fishing and the suggestion that there is an improper motive behind the LORs such that co-operation ought to be refused, the LORs expressly state that the examinations are for use at trial, not for discovery. Document discovery has already occurred, and these examinations will be the last depositions taken. There is no basis for the allegation that there is an improper motive behind the LORs. The Plaintiffs are pursuing the US Proceedings in their own interests, because they allege that the Defendants have defrauded them of substantial sums.

Discussion

Oppression

90. There is no doubt that this Court retains a discretion to decline to give effect to a LOR on the grounds that to do so would be oppressive to the person or persons affected by it. In particular, the requested Court should not order an examination where it would be oppressive to the proposed witness. The court must hold a fair balance between the interests of the requesting court and the interests of the witness: *United States of America v Philip Morris Inc and others* [2004] EWCA Civ 330, [17].
91. In my judgment none of the matters relied upon by Ms Fatima either collectively or individually come close to meeting the test of oppression such that I should, in the exercise of my discretion, and contrary to the important trans-national interests served by LORs, refuse to give effect to Judge Furman's requests to this Court for assistance.
92. I begin with the Applicants' complaint that the LORs were applied for at a late stage such that there was insufficient time for them to prepare for the examinations on 17 and 18 January 2019. I am not in a position to apportion blame (if that is the right word)

for the fact that the LORs were only applied for in November 2018 and had to be given effect to by 18 January 2019. That deadline was imposed by Judge Furman and it is not for me to decide whether that deadline, and his refusal to extend it following the Plaintiffs' application for him to do so, was appropriate or not. The case management of the US Proceedings is for him, not me. I accept the Plaintiffs' submission that once the LORs had been granted (with no opposition from either Defendant) they moved with appropriate speed to serve them on the Applicants and to make the application to this Court under the 1975 Act.

93. I do not accept that the timescales involved in this case, short though they are, as the Plaintiffs accept (and Morris J in granting the Order made observations to that effect) deprived the Applicants of a proper opportunity to prepare so as to make the Order oppressive. As Mr Bloor's second witness statement makes clear at [55] and [57] the Applicants have known of the topics in the LOR since at least 18 December 2018 or thereabouts, in other words, a month before the date of the examinations. Also, although the number of documents involved was initially quite sizeable, Mr Bloor has explained that the number of relevant pages have been reduced for both Applicants. Initially, around 1800 pages of documents (including duplicates) were served on each Applicant on 2 January 2019. After that matters were reviewed and the total number of pages for Mr Prosyankin has been reduced to 197 pages (with 25 pages of translations) and the total number of pages for Mr Howell is now only 182 pages. That is not a large amount of documentation and preparation within the time scales is perfectly possible. Also, as I observed during argument Mr Prosyankin and Mr Howell have made clear in their evidence that they intend, on a number of topics, to say that they have no relevant knowledge of some of the topics on which they are to be questioned. If that is right, their preparations for those topics will necessarily be brief. Furthermore during the hearing on 15 January 2019 I was told that the examinations, originally listed for three days, had been shortened to two days because of the reduction in documents. This confirms the conclusions which I have reached.
94. So far as Ms Fatima expressed concern that some of the topics of questioning raised concerns about wrongdoing, it is important to note that the Applicants have a number of safeguards, which were not in dispute. These are addressed in Mr Bloor's first witness statement at [68] to [69(8)]. As I have explained, the examinations are effectively part of the US trial proceedings. Under a protective order made in the US Proceedings Applicants will be able (at the examination, or within 15 days of receiving the transcript) to designate any testimony as confidential, if appropriate, in order to protect their confidentiality and/or privacy. Such material then receives a range of protections during, and after, the litigation, as explained by Mr Bloor [69(1) to (8)]. Also, as the LOR specifies at [38] the Applicants may designate any responses as protected by any of the privileges recognised either under the laws of the United States or the laws of England.
95. It is for these reasons that I was satisfied that it would not be oppressive to give effect to the LORs.

Relevance

96. In my judgment it is apparent from the LORs that Judge Furman considered the question of relevance for himself and was satisfied that the topics on which the Applicants are

to be examined are relevant to the issues arising in the US Proceedings. He did not merely rubber stamp the Plaintiffs' assertion that the topics were relevant. In those circumstances, it would be contrary to comity, and to the proper approach indicated by the cases that I discussed earlier in this judgment, for me to embark upon a process of trying to second guess whether he was right or wrong in his determinations.

97. The relevant paragraphs of the LORs are as follows:

“5. The Plaintiffs request to examine English residents Nikolay Varenko (‘Varenko’), Pavel Prosyankin (‘Prosyankin’, collectively with Varenko, ‘BTA Witnesses’) and John Howell (‘Howell’) under United States Federal rules of Civil Procedure 30 and 45 for purposes of using that testimony at trial. Plaintiffs aver that the BTA Witnesses, who now each reside in London, were executives of BTA Bank during the relevant period and have personal knowledge of the facts and circumstances at issue in this case. Plaintiffs aver that Howell was a London-based adviser to BTA Bank who also has personal knowledge of these issues.

...

20. I find that it is necessary for purposes of justice and the due determination of the matters in dispute at trial in the aforesaid US Proceedings between the parties that you cause the BTA Witnesses and Howell to be examined the purposes of using that testimony at trial.

”

35. The BTA Witnesses and Howell should be examined on the following subjects relevant to matters at issue in the US Proceedings ...”

98. The topics for examination are then listed in sub-paragraphs (a) – (l) of [35].

99. These paragraphs are an explicit statement that Judge Furman considered the topics and found them to be relevant. I completely reject the suggestion that I should infer he merely rubber-stamped the Plaintiffs' application without applying his mind to the merits. Ms Fatima at one point in her submissions said that there was ‘no evidence’ that the judge had considered relevance. The short answer is that there did not need to be. The LORs are, as I have said, written by the judge in the first person and they contain his reasoning and conclusions that the topics are relevant. Nothing more is required, any more than it would be if this Court were to issue an LOR to Judge Furman setting out a list of topics said to be relevant to litigation here.

100. In conclusion, I am entirely satisfied that the issue of relevance was considered on the merits by Judge Furman and the topics found by him to be relevant, and thus that as a matter of comity I must respect that determination because he was in the best position to judge relevance.

Ulterior motive

101. The fact that the topics for questioning are all relevant to the issues in the US Proceedings, and have been found to be so by the judge in charge of those proceedings, effectively disposes of the suggestion that the true motivation behind the LORs is somehow connected to Mr Ablyazov and showing that his prosecution is politically motivated. Judge Furman stated in [20] of the LOR (set out above) the reason why the Applicants' examination was necessary, and the suggestion in the evidence (see [87] above) that the applications for the LORs had an improper ulterior motive is effectively a suggestion that he was deceived into signing and sending them. I reject as far-fetched any such suggestion. It is unnecessary to say more.

Conclusion

102. It was for these reasons that I refused the applications to set aside the Order.

Post-script

103. Finally, in pre-hearing correspondence I raised with the parties the fact that in 2017, whilst I was at the Bar and shortly before I was appointed to the Bench, I acted as an expert witness for the Bank in *Khrapunov v. JSC BTA Bank* [2018] EWCA Civ 819 on a discrete issue of extradition law. I invited submissions as to whether I should hear this case, and I received submissions from all the parties. No-one suggested that the test for apparent bias in *Porter v Magill* [2002] 2 AC 357 was satisfied so that I should recuse myself. The stance of the parties confirmed the preliminary view that I had reached and I so indicated at the commencement of the hearing and which I then confirmed in a short ruling.