BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0307

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED

Applicant

-and-

(1) TEMUJIN INTERNATIONAL LIMITED
(2) TEMUJIN SERVICES LIMITED
(3) HAKKISAN FINANCE CORPORATION LIMITED
(4) MYRZALY LIMITED
(5) NORGULF HOLDINGS LIMITED
(6) INCOMEBORTS LIMITED
(7) TIGERKHAN LIMITED

Respondents

Appearances:

Mr James Drake of 7 King's Bench Walk, London and with him Mr Philip Kite and Mr Andrew Thorp of Harney Westwood and Riegels for the Applicant
Mr David Lord of 3 Stone Buildings, London and with him Mr Richard Evans of Conyers Dill & Pearman for the 3rd and 4th Respondents
Mr Samuel J. Husbands and Ms Julie Engwirda of Walkers BVI for the Receiver, Mr William Tacon
In attendance, Ms Sarah Caroline Rees, solicitor of Blake Lapthorn Tarlo Lyons, London and Mr William Tacon, the Receiver

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2007: December 12, 13
2008: July 31, August 11

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** "Everything has an end" is a variant to the old English proverb that "all good things must come to an end." In this case, this may not be wholly accurate but the Court is comforted that there has been a marked reduction in the torrent of applications which flooded the BVI Courts over the last 20 months as the parties have shifted their focus

and legal skirmish to the New South Wales Court which is seized of the substantive proceedings.

[2] Before me now are two discrete but related applications by the Applicant, MWP for an order that unless and until the 3rd Respondent, Hakkisan and the 4th Respondent, Myrzaly [collectively "the Respondents"] comply with the freezing orders and co-operate with the court-appointed Receiver, they should be debarred from defending or taking any further steps in these proceedings. It appears that these applications may have been triggered not only by the Receiver's Second Report of 18 September 2007 but also by the fact that the Respondents have applied for the striking out of the claims against them and/or (reverse) summary judgment. The Court heard the two applications in December 2007. It was agreed that judgment should be reserved until the hearing and determination of the applications to strike out the claim: the logic being that if the claims are struck out, the receivership order will be set aside and the Receiver discharged with immediate effect. Thereafter, there would be no need for the Respondents to comply with any orders if the Court were to find that there was non-compliance. The applications to strike out commenced on 13 December 2007 but unfortunately were not completed until mid-March 2008: Having dismissed those applications,[1] the Court can now hand down this judgment.

[3] The Myrzaly notice of application will be dealt with first since it was filed before the Hakkisan notice of application. Both applications are supported by affidavits of Michael Earl Wilson ("Mr Wilson") and the Reports of the Receiver.

Chronological history

[4] On 30 January 2007, this Court made an ex parte order freezing the assets of Myrzaly. It ordered that Myrzaly must not remove from the British Virgin Islands ("the BVI") or in any way dispose of, deal with or diminish the value of certain assets which are defined as Specific Assets and its assets (other than the Specific Assets) which are in the BVI up to the value of

[1] See Judgment in Suit No. BVIHCV2006/0307 – Michael Wilson & Partners Limited v (3) Hakkisan Finance Corporation Limited (4) Myrzaly Limited – delivered on 31 July 2008 and 14 August 2008 respectively [unreported].

US$30 million.[2] Paragraph 8 of the Order requires Myrzaly to provide within three days of being notified of the Order (a) all their assets worldwide, whether in their own name or not and whether solely or jointly owned, giving the value, location and details of all such assets and (b) the nature details and location of the Specific Assets. Myrzaly must also within seven days after being notified of the Order, swear and serve on MWP's solicitors an affidavit setting out such information.

[5] The Freezing Order was made returnable on 28 February 2007. The Order was served promptly on Mossack, the registered agent of Myrzaly. Myrzaly did not comply with the Order. It did not provide MWP with the information nor did it swear the required affidavit. Additionally, it did not appear on the return date. On that date, Mr Lawrence Cohen QC, then Counsel for MWP, applied for the appointment of a receiver over the assets of Myrzaly. As a result of the disregard for the Freezing and Disclosure Orders, this Court appointed Mr Tacon as the Receiver over the undertaking and assets of Myrzaly.

[6] The relevant paragraphs of the Receivership Order are set out below:

> 3. The Receiver shall take all steps which he considers necessary or desirable, including (without limitation) to:-
>
> (a) identify and secure the Myrzaly Assets
>
> (b) transfer into his own name any of the Myrzaly Assets including any shares or other rights in Max Petroleum plc or the proceeds of sale of such shares or any other asset into which they have been applied and, if necessary, to apply for the cancellation and replacement of all and any share certificates or other documents of title
>
> (c) investigate the affairs of Myrzaly for the purposes of the discharge of his duties under this Order and in order to cause Myrzaly to comply with other Orders made against it
>
> 4. The Receiver shall have the power to do all acts and things necessary for the purpose of complying with this Order including (without limitation) each of the following powers, namely to:

[2] See paragraph 4 of the Freezing Order dated 30 January 2007, Myrzaly Compliance Bundle 1 Tab 2

(a) manage the business and affairs of Myrzaly;

(b) require any director or officer or former director or officer of Myrzaly to supply all and any information and documents to him (in both a physical and electronic format) concerning the affairs of Myrzaly including the shareholder, director, pledgeholders and other registers of Myrzaly as well as its financial statements and books of account;

(c) take control of all bank accounts and any other property included within the Myrzaly Assets;

(d) supply to the Claimant all information which Myrzaly has been ordered to give to it and any other information which he shall think appropriate of expedient.

5. Myrzaly through its Sole Director and other officers shall cause to be forthwith delivered up and transferred to the Receiver any share certificates or other documents of title and its shareholder, director, pledgeholders and other registers, as well as all of its accounting and other books, records and dates.

6. The Receiver be authorized:

6.1 to take such steps as may seem to them [sic] to be appropriate for the purpose of getting in, recovering and preserving all assets;

6.2 …..

6.3 ….

6.4 to enter any premises of Myrzaly and have access to all documentation, files whether held electronically or not, and the cooperation of all employees, agents, consultants, contractors, sub-contractors and directors of Myrzaly with respect to their investigations;

6.5 to exercise all of the corporate powers of Myrzaly which would be vested in its Board of Directors save for power to defend these proceedings or other powers which the Court on an application on notice permits it to exercise.

9. The powers of the Receiver in relation to the Myrzaly Assets shall be vested in him to the exclusion of the powers of its Board of Directors and other officers save that the Board of Directors and other officers may cause Myrzaly to make applications and take other steps in these proceedings and otherwise with the permission of the Court."

[7] The terms of the Order required Mr Tacon to provide a Report by Wednesday, 25 April 2007. On 23 March 2007, he lodged a Preliminary Report. Myrzaly made no application to vary or

discharge either the Freezing Orders (that were continued on the return date) or the Receivership Order at this stage of the proceedings. The significant aspects of Mr Tacon's Report are:

1. He wrote to David Risbey on 2 and 8 March 2007respectively. He did not receive any response. As a result, he telephoned Mr Risbey who denied any knowledge of Hakkisan and Myrzaly.

2. He considered Mr Risbey's responses to be inadequate, misleading and deceitful as he had seen affidavits sworn by Mr Risbey as a director of Hakkisan as well as documents executed by him in that capacity.

3. He contacted a Mr Adrian Harvey, the Company Secretary at Max Petroleum, who initially stated that he had no record of either Hakkisan or Myrzaly but later recanted and indicated that he was advised that he could not provide him (Mr Tacon) with any further information.

4. He obtained information that the Max shares held by Hakkisan and Myrzaly were transferred out to ODL (Nominees) Limited ("ODL"). He is continuing his investigation.

5. He attached the statutory information for Myrzaly to his Report. The copy of register of directors shows that Mr Risbey was the director previously but he has been replaced by Tigakhan Limited ("Tigakhan") which in turn was replaced by Mr Ozusaogullari ("Mr Musa"). Tigakhan appears to operate from the address of Mr Risbey or his company in Zug, Switzerland.

6. He believes that neither the Register of Directors nor the Register of Members of Myrzaly are genuine records. His suspicion is premised on the following:

    i. Mossack only received notification of the change in directorship of Myrzaly from Mr Risbey to Tigakhan after the freezing order was made.

ii. The Register of Directors purports to indicate that Mr Risbey ceased to be a director of Myrzaly in May 2006. However, the publicly available list of current directorships of Mr Risbey on 12 June 2006 included Myrzaly.

iii. The Register of Directors and the Register of Members do not appear to be genuine documents. They appear to be documents produced on a single occasion by a computer rather than document that are updated from time to time.

iv. As far as the letters of resignation are concerned, Mr Risbey's letter appears to have been adapted very slightly for the later resignation of Tigakhan. Further, there is no evidence in the file of the acceptance of the directorship by Mr Musa, the director purportedly appointed.

v. Mr Tacon formed the view that the documents are forgeries in that they were not produced at the date or time stipulated.

[8] Mr Tacon learnt from Mr Risbey that the ownership of Myrzaly had changed to Zoron Juric. He immediately wrote to Mr Juric to advise him of his appointment but the letter was returned undelivered. He also wrote to Mr Musa but as of 23 March 2007, the letter was not received by him.

[9] The material asset previously owned by Myrzaly was 18 million Max shares that were transferred to ODL. ODL confirmed that it no longer holds those shares on behalf of Myrzaly and Mr Tacon is still awaiting information as to their transfer. He has not yet identified or traced any bank accounts for Myrzaly.

[10] He indicated that he has a number of areas where further enquiries are necessary.

[11] Mr Tacon concluded his Preliminary Report by indicating that Mr Risbey's stance is seriously hindering his enquiries and it is likely that Mr Risbey has books and records for both

Respondents as he has seen documentation showing that Mr Risbey's company was providing accounting and financial services.

[12] Mr Tacon next reported on 18 September 2007. This report formed the basis of these applications. In that report, he said that he was able to make some progress in that he had received some bank statements for an account held by Myrzaly at Credit Suisse. He identified several areas which needed explanation or further clarification and reiterated that he still does not have all the documents and bank statements that he requires. This report dealt substantially with the lack of co-operation received from Myrzaly and its non-compliance generally.

[13] As a result of alleged non-compliance, MWP made the Myrzaly application on 17 October 2007. It came before me on 7 November 2007. The application was supported by the 19th, 20th and 22nd affidavits of Mr Wilson. In response to MWP's application, Sarah Rees swore her 9th and 10th affidavits on behalf of Myrzaly. Mr Wilson highlighted Myrzaly's non-compliance with the Receiver while Ms Rees was of the view that Myrzaly had complied and is complying with the Receiver's queries identified in his Second Report of 18 September 2007. She deposed in both affidavits that *"I do not consider that the Receiver will have any additional questions in relation to the affairs of Myrzaly, but if he does, they will take instructions on those questions and respond as fully as possible."*

[14] At a hearing on 7 November 2007, the Court heard all parties including Mr Husbands, Learned Counsel for the Receiver and ordered that:

1. Myrzaly takes the appropriate action as stated in the 9th and 10th affidavits of Sarah Rees and the letter of Conyers Dill and Pearman of 25 October 2007 by 4pm, 14 November 2007 and as further stated at Schedule 1 of this Order.

2. The Receiver shall consider the evidence supplied and action taken by Myrzaly pursuant to paragraph 1 above, the letter from Conyers Dill and Pearman to the Receiver dated 25 October 2007, the 9th and 10th affidavits of Sarah Rees and the 1st affidavit of Mr Battig, and will write to Myrzaly with a comprehensive list of all outstanding enquiries by 4pm on 21 November 2007.

3. Myrzaly shall respond to the Receivers enquiries by 28 November 2007.

4. The Receiver shall report to the Court and the parties on or before 5 December 2007.

5. The hearing of the application is next listed before the Court on 12 December 2007.

[15] In compliance with the above Order, Mr Tacon produced his Third Report on 5 December 2007. He reported on his ongoing attempt to locate and secure all assets of Myrzaly and the additional information that he has obtained. He helpfully tabulated the queries which he mentioned in his Second Report, the responses and his comments. I will use this as a guide in dealing with the applications before the Court.

Myrzaly's application

[16] This application identified the specific directions from Mr Tacon that MWP wants Myrzaly to comply with. These are:

1. Myrzaly co-operates with the Receiver appointed to enable him to fulfill his duties to the Court and that the assets of Myrzaly be preserved.

2. Myrzaly provides the Receiver, forthwith, with the names and addresses of its directors, shareholders and beneficial owners.

3. Myrzaly provides the Receiver, forthwith, with details of all assets and banking arrangements.

4. Myrzaly provides a sworn power of attorney and signed resolutions such as to enable the Receiver to have access to and control of Myrzaly, its assets, financial statements and corporate documentation pursuant to his appointed powers.

5. Unless the compliance above is forthcoming within 14 days, Myrzaly be debarred from defending these proceedings; and

6. Mr Risbey as former director and current administrator of Myrzaly do take steps to cause Myrzaly to comply with the above.

[17] Point 6 is no longer being pursued as Mr Risbey was not personally served.

[18] The grounds of the application are set out in full below:

1. Myrzaly has failed to comply with the orders of this Court and has failed to co-operate with the Receiver (as is detailed in the Receiver's Report dated 18 September 2007).

2. Assets have been moved from the Myrzaly bank account subsequent to this Court's freezing order.

3. Myrzaly is failing to answer or deal with the Receiver's queries.

4. Despite being appointed over the entire assets and undertaking of Myrzaly, the Receiver is yet to identify its ultimate beneficial owner and directors.

5. Mr Risbey appears to be the administrator and the director of the nominee director of Myrzaly. As such, he is the controlling mind of Myrzaly and should cause the company to comply (it is now shown that Mr Bättig is the director of the nominee director and not Mr Risbey).

6. Given the time that has passed since the receivership order was made, Myrzaly should comply with the Receiver in all respects failing which it should be debarred from taking any further steps in the proceedings.

[19] For present purposes, ground 5 is not being pursued.

Compliance/ Non-Compliance by Myrzaly
Share Certificates

[20] Mr Tacon requested that all share certificates issued by Myrzaly be couriered to him for safekeeping. It is not disputed that Mr Tacon received an old cancelled share certificate which does not reflect the current position. It was conceded at the hearing that the share certificate that was submitted to Mr Tacon was the old cancelled share certificate. Learned Counsel for Myrzaly, Mr Lord assured the Court that he will use his best endeavours to rectify the current unsatisfactory state of affairs. Hopefully, this request has been carried out and it is no longer an issue.

Resolution to be passed to make the Receiver a signatory on the Credit Suisse Bank Account

[21] Prior to his First Report dated 23 March 2007, Mr Tacon requested that he be provided with a letter instructing Credit Suisse to co-operate with him and to confirm that the account may only operate on his instructions. He did not receive this letter as of the date of the Second Report. He emphasized that it is of great concern to him as he has not secured the only known assets of Myrzaly [3].

[3] See paragraph 4.5 of the Receiver's Second Report dated 18 September 2007 – Bundle 1 Tab 7a

[22] In his Third Report, Mr Tacon stated that as at 30 September 2007, the balance held in the account was $49,790.74 but he is unable to operate the account despite making significant efforts to do so. He was provided with the necessary forms for him to be added as a signatory. Upon completion, he returned them to Conyers, Myrzaly's BVI legal representatives for onward transmission to Credit Suisse. It appears that Mr Tacon was given and therefore completed the copies of the forms instead of the originals. Mr Battig subsequently sent him the original forms by regular mail from Switzerland instead of courier on 13 November 2007. As at the date of the hearing of this application, he had not received them.

[23] Due to the aforesaid difficulties, on 21 November 2007, Mr Tacon requested that the balance in that account be transferred to his firm's account. As at 5 December 2007, his request had not been complied with. Conyers indicated that they were instructed that the payment has been put into effect and so too, the payment of the balance on the account to the Receiver's trust account in accordance with Mr Tacon's recent request. Conyers noted further that because there is a nil balance on the account, it will be closed.

[24] Mr Lord argued that the closing of the Credit Suisse account was a natural consequence of the instructions from Mr Tacon to transfer all of the funds out. He added that the bank account can be reopened if that is Mr Tacon's wish. He however cautioned that there is no gain in such an exercise as all that would happen is that bank charges will accrue.

[25] Mr Tacon is of the view that the account should remain open even if it necessitates holding a small balance. He emphasized that he has never authorized the closure of the account. The only reason why he had requested that the funds be transferred is because it was taking a long time for him to be added as a signatory on the account. It appears therefore that the transfer of the funds was as a result of the actions, deliberate or otherwise (I need not decide on this issue) of Myrzaly and its officers. It is noted that Myrzaly was trying to comply with the request for Mr Tacon to be added as a signatory but the process embarked upon by its director was protracted. If I understood Mr Lord correctly, the money has been transferred. If that is the case, then Myrzaly has complied with the request to transfer the funds but has not

yet complied fully with Mr Tacon's request that he be added as a signatory to this account. Under those circumstances, Myrzaly must reopen the account and have Mr Tacon added as a signatory as soon as practicable. Mr Lord's concern regarding the costs that will be incurred by keeping the account open is not convincing and will be dealt with in greater detail at a later and a more appropriate stage in these proceedings. For the avoidance of any doubt, Myrzaly is to reopen the old account; not open a new account at Credit Suisse as Mr Tacon may have to make enquiries into the account.

Power of Attorney

[26] The Power of Attorney that Mr Tacon requested was provided but according to Mr Husbands, it was deficient because it gave no powers to Mr Tacon. Mr Lord indicated that Myrzaly executed the Power of Attorney which Mr Tacon provided but if he now wants another to be executed in a slightly different form, then Myrzaly will do so. There appears to be some discrepancy with the Power of Attorney which Mr Tacon provided and the one which was executed. It is unfeasible to resolve factual issues without cross-examination as to whether Myrzaly intentionally executed a different version from what Mr Tacon provided. Be that as it may, the short answer is that Myrzaly executed a Power of Attorney which is wanting but it is willing to execute a more comprehensive one as soon as it is provided. In the circumstances, it is difficult to find that Myrzaly has failed to comply with this request.

Director, Shareholder and Beneficial Owner of Myrzaly

[27] By a shareholders' resolution on 1 June 2007, Mr Juric appointed Tigakhan as the director of Myrzaly[4]. Mr Tacon inquired of Myrzaly whether the date appearing on the resolution is correct. He is of the opinion that it is not, given that Conyers were unable to inform Walkers (legal practitioners for the Receiver) as to the identity of the director until 18 October 2007.

[28] Mr Tacon stated that the entire share capital for Myrzaly was sold to Mr Juric on 14 December 2006 for no consideration as the only invoice that was disclosed is an invoice from FCI for services in providing Mr Juric with the company. At that time, Tigakhan ceased to be the sole director and was replaced by Mr Musa who died on 29 March 2007 in

[4] See page 2 of exhibits to Ms. Rees' 9th affidavit - Bundle 1 Tab 2

Turkey. Mr Tacon was not informed of the death until late October 2007. Subsequently, he was given a permit of burial which confirmed that Mr Musa died. It is noted that on 12 April 2007, Mr Risbey swore an affidavit and stated that he was authorized by the current director of Myrzaly to swear the affidavit on its behalf. The truth is that Mr Musa had long died and no other director was appointed at that time.

[29] Mr Tacon got no explanation for the substantial delay in appointing a replacement director after Mr Musa's death. It appears also that on 1 June 2007, the shares held by Mr Juric were repurchased by Tigakhan.[5] According to MWP, this transfer or sale of shares as well as the appointment of Tigakhan as the director of Myrzaly took place while the Receiver was in place but without his knowledge.

[30] Learned Counsel for MWP, Mr Drake submitted that a number of questions flow from the fact that Myrzaly was without a director for approximately two months; chief among them is who, on behalf of Myrzaly was providing instructions to its legal representatives and if it was Mr Rigoll, where is the resolution of the directors giving him approval to do so? Learned Counsel observed that ordinarily, shareholders do not have authority to give those instructions unless they were given the authority by a resolution of the directors.

[31] Mr Tacon was informed that instructions in respect of Myrzaly were received from Blake Lapthorn in early April 2007 which in turn received instructions from Mr Rigoll. In my judgment, the question was asked and answered. The answer may not be acceptable to MWP and the actions taken by Myrzaly may not be legally proper but that is for another application or for trial. In these circumstances, Mr Tacon nor MWP can complain that Myrzaly had not complied with Mr Tacon's request.

[32] In addition, Myrzaly submitted that Mr Tacon was informed its shares were going to be transferred back to Tigakhan and he did not object because he wanted Tigakhan and Mr Rigoll to get back control so that they could give control to him. Ms Rees stated[6] that Mr

[5] See page 10 of exhibits to Ms. Rees' 9th affidavit - Bundle 1 Tab 2
[6] See paragraph 5 of the 10th affidavit of Ms. Rees – Bundle 2, Tab 6

Tacon was aware of the intention to regain control over Myrzaly since it was brought to his attention in May 2007. He never objected. Ms Rees made reference to a letter from Conyers to Walkers dated 11 May 2007[7] as evidence that Mr Tacon was aware of the intention. The relevant portion of the letter reads: "*(a) Mr Juric required a company quickly and he did not know how else to obtain it. This was the sum he was prepared to pay; and (b) We wonder if there is any point in doing this now, in view of the steps being taken to regain control over the company*…"

[33] The intention to regain control was brought to Mr Tacon's attention, however the date and manner in which it was going to be done were not revealed in that letter. Furthermore, Mr Tacon would and should expect that even if he did not object to the intention to regain control, at the very least, he should have been informed that Myrzaly was going to be resold to Tigakhan long before the sale took place. He is a court-appointed officer and should have been informed of this so that he could properly and faithfully report to the court.

Queries 4, 5, 6 and 7

[34] It appears that Mr Tacon received satisfactory responses to queries 4, 5, 6 and 7. He was provided with information regarding the director, shareholder and ultimate beneficial owner of Myrzaly as well as the changes (if any) in its beneficial ownership, directorship and shareholding. In addition, he was shown a copy of the share register which was exhibited to Ms Rees' 9th affidavit[8].

Documents and Records in respect of Myrzaly

[35] With respect to query 8, Mr Tacon stated that *"it is apparent that those instructing Conyers hold documents and records in respect of Myrzaly, yet despite requests that these documents and records be handed over, we are informed that none are held and instead referred to Myrzaly's registered agent. We again request that all documents, records, books, account information, etc in respect of Myrzaly which are in Myrzaly's custody, control or possession be immediately handed over*."

[7] See page 14 E of Exhibits SCR8 – Bundle 2, Tab 6
[8] See page 10 of exhibit SCR7

[36] The response which was received on behalf of Myrzaly suggested that no information beyond what was already provided had been found. In respect of the books and records, Myrzaly said that Mr Tacon was informed that it had written twice to Mossack instructing that these documents be sent to him and if Mossack has failed to address the issue, then Mr Tacon should advise them immediately.

[37] Mr Drake submitted that Mr Tacon is not seeking the corporate registers as he already has those documents. He desires the underlying transaction of documents, records, books, accounts and information in respect of Myrzaly which are not maintained by Mossack but by Myrzaly or for Myrzaly. He submitted that to redirect the request to Mossack is both disingenuous and uncooperative.

[38] Learned Counsel referred to Mr Risbey's 2nd affidavit where he (Mr Risbey) mentioned an agreement entered into between Hakkisan and Myrzaly for services rendered by Hakkisan to Myrzaly. The agreement was exhibited to the affidavit. Mr Drake submitted that books and records were maintained by Myrzaly and he relied on the agreement. The agreement states that Myrzaly appoints Hakkisan on a non-exclusive basis to provide administrative, banking, bookkeeping and support services for Myrzaly including but not limited to those set out in Clauses 2.2 and 2.3. Clauses 2.2 and 2.3 state that the services shall include: (i) raising of invoices on a monthly and ad-hoc basis for the purposes of the business of Myrzaly; (ii) recording of payments received for the business of Myrzaly; (iii) keeping an up-to-date schedule of invoices raised for each calendar month and (iv) keeping an up-to-date schedule of payments received for each calendar year, monthly reporting of the invoice and payment schedules to Myrzaly, providing liaison services in respect of invoicing being undertaken, including routine liaison with the staff of Myrzaly and keeping full and accurate records of the time spent performing such services.

[39] Mr Drake submitted that this agreement verifies that Hakkisan was providing record keeping and invoicing for Myrzaly and charged $44,000 for these services yet Mr Tacon was told that Myrzaly does not hold any books and records of the company. He argued that one of the statements must be untrue.

[40] Mr Lord reiterated Myrzaly's position that no further information has been located beyond what was already provided. He submitted that this is not surprising as Myrzaly, like Tigerkhan Limited ("Tigerkhan") was run at the behest of Mr Rigoll who did not need to keep detailed books and records. He fortified his submissions by referring to the fact that Mr Tacon found the same position with respect to Tigerkhan. In fact, he submitted that Mr Tacon was quite happy with it and accepted that it was not unusual. This is contained in the Receiver's Report dated 2 May 2007.[9] In that report, Mr Tacon stated:[10]

> "I have sought clarification as to the extent to which management or other periodic accounts have been prepared by or on behalf of Mr Rigoll in respect of the Company and have been told by Conyers and Blake Lapthorn that Mr Rigoll has treated his companies in a highly proprietorial manner, in effect, as an extension of himself. For this reason, I have been advised that periodic accounts have not been prepared, notwithstanding the substantial value and volume of transactions entered into by the Company. **This approach is often seen in proprietorial companies and is therefore not unusual, especially in the context of BVI incorporated companies where audited accounts are not required and there are no taxation implications** [emphasis added]. Given the nature of the Company's activities, I can accept that Mr Rigoll or his advisors would be able to understand the underlying financial position of the company through periodic reviews of statements provided by bankers, brokers and contracts for different providers."

[41] In my judgment, the services that Hakkisan was paid for required that it kept accurate and up-to-date records on behalf of Myrzaly. It is plain that Hakkisan should have some of these transactional books and records. Thus, the statement that there are no further documents to be provided is inconsistent with the evidence of the agreement between Hakkisan and Myrzaly. I am not convinced that Myrzaly has complied fully with this request. As a consequence, Myrzaly must, within 21 days hereof, swear an affidavit indicating that checks have been made with Hakkisan and provide to Mr Tacon, the results of those checks.

Payment to Conyers

[42] Query 10: Mr Tacon asked the following questions: *"Did Conyers receive a retainer (money on account) from or on behalf of Myrzaly when first instructed or subsequently? If so how were funds transmitted to Conyers and from what account? Please provide (a) full details of*

[9] See Bundle F tab 2 in the application to strike out and for reverse summary judgment.
[10] See paragraph 2.2 on page 6 of the Receiver's Report dated 2 May 2007

the payer, (b) identify the account from which funds were received by you and (c) the date of payment(s). Please also specify the retainer amount. If payment was remitted via Blake Lapthorn or some other party please provide the same information in respect of the party from whom they received payment."

[43] The answer received indicated that Conyers received $10,000 on account of costs via Blake Lapthorn when it was first instructed and that those funds were received from Tigakhan as funds subsequently held by Blake Lapthorn on account of costs. Mr Tacon commented that the account from which payment was received and the date of payment were not disclosed.

[44] Mr Lord identified the account as Tigakhan's Swiss account but provided no other information as to the bank or account number. He submitted that the question does not go to identifying the assets of Myrzaly but it is a request as to how Myrzaly is funding its litigation and the request is answered.

[45] From the information at hand, it appears that the litigation has not been funded from the assets of Myrzaly and therefore, the requests or questions do not go to identifying and securing the assets of Myrzaly. If the funds were coming from Myrzaly, then that should be a concern of Mr Tacon. In my opinion, Myrzaly has answered the request and is not obliged to identify the account from which the funds were taken.

[46] Query 11 requires that Mr Tacon be provided with details of any other payments (amount and date) in respect of legal representation of Myrzaly. He was told that Conyers received payments for costs from funds held by Blake Lapthorn and also from Conyers' client account belonging to Tigakhan. Mr Tacon concluded that the requested information is not provided. Myrzaly is of the belief that the request has been fully addressed.

[47] I am of the opinion that Myrzaly has not fully addressed the issue. It could have been more candid in its answer. As a consequence, Myrzaly must, within 21 days hereof, provide full details of Mr Tacon's query.

Queries 12 and 13

[48] It appears that Myrzaly have provided satisfactory answers to these queries and Mr Tacon is happy with the responses which he got.

Credit Suisse Account

[49] Mr Tacon gave instructions for the transfer of US$14,461.25 (plus transfer fees and charges) from Myrzaly's Credit Suisse Account to Harneys' client account in satisfaction of the statutory demand of 20 September 2007. Mr Lord acknowledged that there were delays because initially, Myrzaly did not have Harneys' client account details but they have now obtained that information and the transfer is being done. Mr Tacon was informed that the debit advice/s will follow and copies will be provided when they are received. In the circumstances, I would not categorize this delay as non-compliance. It appears that attempts are being made to comply with this request; albeit leisurely.

[50] Mr Tacon raised some concerns regarding the correspondence between Myrzaly and Credit Suisse which relates to him and Mr Batting being added as authorized signatories to Myrzaly's account. He also inquired about the identity of the signatories on that account between November 2006 and 28 February 2007 (the date when he was appointed Receiver). He made no comments in respect of the response he received for the latter except to note that the response is subject to confirmation by Credit Suisse.

[51] He observed that he had received no evidence that the documents which he signed have been sent to Credit Suisse. Mr Lord explained that this is because the account has been closed since Mr Tacon requested that the entire proceeds of the account to be transferred to him and therefore, there was no need for him to be added as a signatory. Myrzaly has not indicated that the documents were sent so the inference that can be drawn is that the documents were not sent to Credit Suisse. If that is the case, then this is non-compliance with Mr Tacon's request. Mr Tacon only requested that the money be transferred because of the delay in having his name added as a signatory to the account. In light of his request to maintain the Credit Suisse account, Myrzaly should or cause to have correspondence sent to its Credit Suisse Bank so that Mr Tacon can be added as a signatory.

[52] He was not provided with the letter regarding Mr Battig and he noted that he was not consulted before steps were taken to add Mr Battig as a signatory to Myrzaly's account. Again, this is a staggering proposition in light of the fact that a court-appointed receiver is in place and a person is being added as a signatory to Myrzaly's account (the only known asset of Myrzaly) and the Receiver was not informed. This approach by the officers and person behind Myrzaly is contemptuous and from this date onwards, Mr Tacon should be consulted whenever anything is being contemplated which will affect the assets of Myrzaly or severe consequences may follow. I will order that Myrzaly produce the correspondence that Mr Tacon requested within 21 days hereof.

[53] Query 18 relates to the provision of information in respect of Mr Battig. Mr Tacon appears contented with the response he received.

The Relationship between Mr Risbey and Myrzaly

[54] Mr Tacon requested that he be provided with copies of all documentation regarding the appointments of Mr Risbey and FCI Zug as administrator of Myrzaly. In response, Conyers asked Mr Tacon to provide the basis of this observation so that it can take instructions. Suffice it to say, the request is still outstanding.

[55] Mr Lord contended that the response was given because the request was not understood. However, he opined that the request does not go to identifying and securing the assets of Myrzaly and in so far as Mr Tacon wants to know who is running Myrzaly he has that information since he knows the director, the persons who has signatory powers, the shareholders and the beneficial owner.

[56] It is not in dispute that Mr Risbey has sworn most of the affidavits in these proceedings on behalf of Myrzaly. As such, it would not prejudice Myrzaly in providing Mr Tacon with that information. I am of the firm belief that both Mr Tacon and the Court wish to be assured of Mr Risbey's role in Myrzaly. As such, Myrzaly must comply with this request within 21 days hereof. For the record, I state that I do not consider the failure to produce the documents pursuant to this request as non-compliance on the part of Myrzaly as this request does not go

to identifying and securing the assets of Myrzaly but instead, who is the controlling mind of Myrzaly.

[57] Mr Tacon observed that Conyers have provided contradictory statements in relation to authorization of Mr Risbey to provide instructions. On 25 October 2007, Conyers wrote to Walkers[11] indicating that "*Information relating to the Receiver's questions regarding Myrzaly is received from Mr Risbey via Blake*."

[58] Subsequently, Ms Rees deposed that Mr Risbey only provided information in relation to questions raised by the Receiver regarding the historical background of Myrzaly. She stated that "…*instructions in relation to the conduct of the litigation itself on behalf of Myrzaly Limited are received from Mr August Battig on behalf of the corporate director Tigakhan Limited. Mr Risbey has no control over Myrzaly Limited whatsoever; he is neither director nor administrator of the company and is unable to take any steps to cause Myrzaly Limited to comply with any order of the Court*."

[59] Mr Lord succinctly submitted that there is no mystery in the two responses as Mr Rigoll is the beneficial owner and provides instructions while Mr Risbey was involved with Myrzaly and therefore provides historical information on its behalf. I agree with Mr Lord that the two statements are not contradictory. Both statements assert that Mr Risbey provided only information. It appears though, that Conyers and Blake Lapthorn receive instructions from both Mr Battig and Mr Rigoll and not Mr Risbey.

Debts owed by Mr Emmott to Mr Risbey

[60] Mr Tacon requested that he be provided with full particulars of the debts which were owed by Mr Emmott to Mr Risbey and were repaid to the accounts of Myrzaly/Hakkisan as was referred to in paragraph 5 of Mr Risbey's 1st affidavit. He clarified that this query did not refer to the US$540,000 which Mr Emmott paid to Myrzaly. Conyers asked Walkers to provide details of the particular debts and explained that from their instructions, Mr Emmott had never

[11] See paragraph 8, page 160 of the exhibits to 22nd affidavit of Mr Wilson – Bundle 2, tab 2

owed any debt to Myrzaly and had never repaid any monies in relation to any debt to Myrzaly. Mr Tacon noted that this request is outstanding.

[61] Mr Drake accepted that Mr Risbey has changed his affidavit evidence in relation to the US$540,000 but stated that the question flowing from that previous evidence is what debts were there between Mr Risbey and Mr Emmott? In response, Mr Lord submitted that the debts were investigated in cross-examination and this query resulted from Mr Risbey's incorrect earlier version of events which he has repeatedly acknowledged in both his 11th and 12th affidavits.

[62] In my opinion, this question presupposes that there are/were debts owed by Mr Emmott to Mr Risbey. Mr Risbey retracted his previous statement that the $540,000 was repayment of debt owed by Mr Emmott. I do not think that MWP can infer from Mr Risbey's statements that there are other debts owed that are/were not disclosed. Conyers has answered categorically that there are no debts owed to Mr Risbey by Mr Emmott. The request was asked and answered.

Queries 25, 26 and 27

Kazgas transaction

[63] Mr Tacon requested that he be provided with all documentary evidence regarding the transactions involving Kazgas, the purchase of property at St. Georges Wharf as well as all transactions over US$50,000.The Kazgas transaction involved the receipts of $1,050,000 in February 2006 into the Credit Suisse bank account. On 28 November 2007, Conyers wrote to Walkers stating in response to each of the above transactions that: "*the transactions pre-date the commencement of any proceedings against Myrzaly and have nothing to do with the identification of assets of Myrzaly Limited. In the premises, there is no basis for your client to be entitled to this information. In any event, as made clear in the table served under cover of our letter of 21 November 2007, Myrzaly does not have any documents*."

[64] The response from Conyers raises the vexed and recurrent question of whether a receiver is entitled to ask questions of purely historical significance. Both sides hold different views. The

Receiver also. Myrzaly is of the view that Mr Tacon is only entitled to know that the sum in regard to the Kazgas transaction was received in but that he need not know what the current state of play is on the bank account as at the date of his appointment nor as at the date of the Freezing Order. He next submitted that in asking about these historical matters, Mr Tacon is assuming the role of a gatherer of information or evidence for MWP and consequently, he is acting outside the scope of his duties to identify and preserve the assets of Myrzaly. Mr Drake opined that the fact that the transactions pre-date the proceedings is irrelevant as the payments may or may not have generated assets or liabilities on the part of Myrzaly and thus fell within the receiver's bailiwick.

[65] In these proceedings, the powers of the Receiver are spelt out in the Order dated 28 February 2007[12]. Mr Tacon's role is clear. It is to identify and secure the assets of Myrzaly. Myrzaly received US$1,050,000 in relation to the Kazgas transaction. It is an asset of Myrzaly and as such, I am of the view that Mr Tacon is entitled to inquire what became of this money. Therefore, he could ask for the underlying documents which relates to the money after it came to Myrzaly. Sometimes, it might be necessary for a Receiver to move backward in order to proceed forward. Inevitably, each case will depend on its own facts and circumstances. However, I do not think that he is entitled to get documents relating to how the money came to be paid to Myrzaly as this would involve getting information which relates to matters that are in issue in these proceedings. This can be gleaned from Mr Wilson's 20th affidavit[13] where he averred that MWP claim is for Mr Emmott's share of £1,835,484 and US$1,050,000.

Property at St. Georges Wharf

[66] MWP alleged that the property at St. Georges Wharf was purchased by Balty Pacific Finance using Myrzaly's monies. If this is so, then this would be an asset belonging to Myrzaly and Mr Tacon is entitled to secure this asset. To do that, he needs the documents that relate to its purchase. If it turns out that the property is not an asset of Myrzaly, then that is the end of the matter. The information that is presently in Mr Tacon's possession is insufficient to resolve

[12] See Order dated 28 February 2007 and referred to in paragraphs 6 of this judgment.
[13] See paragraphs 25 and 26 – Bundle 2 Tab 2

this issue. As a consequence, I will order that he be provided with the documents underlying this transaction within 21 days hereof.

Transactions over $50,000

[67] Transactions over $50,000 which came from Myrzaly's account may result in the acquisition of tangible assets and therefore must be identified and preserved. This is what Mr Tacon is trying to do in asking for such documents. I am positive that some of those transactions may result in mere purchases of stationary and other miscellaneous items and again, if that is the case, then so be it. At the very least, Mr Tacon would have satisfied himself. There need not be so much uncooperativeness on the part of Myrzaly in providing mundane requests of the Receiver. Consequently, I will order that Myrzaly provide these transactions within 21 days hereof.

Queries in respect of identified bank accounts

[68] Mr Tacon questioned the debit entry of US$2.57 which was done on 30 December 2005 and reflected in Myrzaly's Credit Suisse Account. He requested that Myrzaly (i) identifies the account to which the entry refers, the holding bank, the account holders details and (ii) provides all statements for that account to the extent that it is under the control of the Receiver. Mr Tacon indicated that his interest in this debit entry arises from the narrative against the entry which read "*Saldo der Abschlussbuchungen R3012 9999-051230-00-00000-917410"* which is said to mean "balance of closing entries" as this transaction may evidence a further bank account once held by or on behalf of Myrzaly.

[69] Mr Tacon also sought the identity of the recipient/s of a number of transactions appearing on the account in respect of "City Reisen"…"City Reserbür" or similar transactions between 15 August 2006 and 30 December 2006 which amount to approximately $97,000 paid out to City Resebüro or City Reserbür. He also requested supporting documentation in respect of each and every transaction and asked Myrzaly for an explanation in relation to each transaction.

[70] Myrzaly argued that both requests are of a purely historical origin to which Mr Tacon is not entitled since those transactions occurred before any proceedings were commenced against

it and has nothing to do with identifying or securing its assets, either at the time of the proceedings or at this time.

[71] Mr Tacon observed entries and required further information from Myrzaly about these transactions. In his opinion, these entries led him to assume that the transactions may evidence another bank account belonging to Myrzaly. In my opinion, there is a reasonable train of inquiry for Mr Tacon to ask for the information. He is entitled to ask for this information as well as documents to support any information that is given. He cannot be provided with information unsupported by contemporaneous documentary evidence. I will order that the information and documents requested in Queries 28 and 29 be provided to the Receiver within 21 days hereof.

18 Million Max Petroleum Shares

[72] Mr Tacon wrote to Conyers indicating that he was putting them on notice that he considers the 18 million Max shares are held by Tigerkhan on trust on Myrzaly's behalf and are repayable to Myrzaly. He also asked for an explanation as to why Myrzaly has failed to disclose this asset. He referred to a letter dated 30 November 2006 from Myrzaly to ODL, signed by Mr Risbey (at a date when allegedly he was not a director) which states:

> "We write to clarify **the Loan** [emphasis added] of Max Petroleum Plc shares between Myrzaly Ltd company and its parent company.
>
> *Myrzaly Limited* (IBC 666148) a wholly owned subsidiary of Tigerkhan Limited (IBC 577692) *is lending 18 million Max Petroleum Plc shares to its parent company*." [14]

[73] Mr Drake quite correctly submitted that the letter plainly suggested a loan and not a sale of the Max shares to Tigerkhan and it is on this basis that those shares are still an asset of Myrzaly. He emphasised that there is no evidence of any change in that position since that date. He next submitted that there has been no satisfactory explanation of the correspondence nor any further documentation provided to Mr Tacon in respect of this transaction and all that Mr Tacon is left with is a bare allegation that it is not a loan.

[14] See page 48, Tab 8 of Myrzaly's compliance bundle 2.

[74] In its letter of 14 November 2007, Myrzaly responded by stating that it had fully addressed the issue. It gave two explanations. First, the transaction was a transfer of shares and not a loan so that it did not create an asset in the hands of Myrzaly. Second, Mr Tacon had all the relevant correspondence in the files of Insinger and he did not raise any concern on this point at the time. In fact, he reported on it in his Report dated 2 May 2007 in respect of Tigerkhan.

[75] Mr Lord contended that the letter referring to the loan, signed by Mr Risbey, was clearly a mistake. He argued that Mr Tacon had the letter since May 2007 and he was quite satisfied at the time that *the 18 million Max shares were transferred from Myrzaly to Tigerkhan*. He explained that once the shares were transferred to Tigerkhan they were sold and it took out or invested in contract for differences in relation to the Max shares which does not involve actual ownership of them but is akin to the economic ownership of the shares. He alluded to several documents which showed that the transaction was a transfer and not a loan and that Mr Tacon accepted it as a transfer. These documents and their contents are referred to below.

[76] In a letter dated 1 December 2006, Mr Risbey wrote to Mr Harvey stating "*we write to confirm the transfer of sixteen [sic] million Max Petroleum Plc share from Myrzaly to its parent company, Tigerkhan Limited. We confirm that Myrzaly being a 100% wholly owned subsidiary company of Tigerkhan Limited there was no change of beneficial ownership of the shares.*[15]"

[77] Then, Insinger wrote to Blake Lapthorn[16] stating that Mr Risbey has confirmed that 18 million Max shares was transferred from Myrzaly to Tigerkhan and that the transfer incurred no stamp duty as there was no change in the ultimate beneficial ownership. Pursuant to a Disclosure Order of 12 April 2007, the solicitors for Insinger wrote to Mr Tacon's London solicitors stating that the 18 million shares were initially transferred from an account with ODL to an account in the name of Myrzaly Limited held with Perishing Securities Limited ("PSL"), Insinger's custodian and settlement agent and were subsequently transferred to an account held with PSL in the name of Tigerkhan. They indicated that Mr Risbey instructed them to make the transfer. They also indicated that the shares were sold by Tigerkhan to two

[15] See Bundle D1, Tab 5 (eight pages in)
[16] Bundle D1 Tab 4 page 6 to the exhibits of Mr Risbey's affidavit

separate CFD providers GNI and Cityindex and added: "*there were no transfer forms effecting such transfers since the shares were held in dematerialised form and transferred through Crest. However, copy deal notes relating to the transfers to CFD providers are enclosed*."

[78] Mr Lord referred to the documents that were produced pursuant to the Disclosure Order against Insinger but it is necessary to address them as all save one speak to transfer of the shares from Myrzaly to Tigerkhan. He submitted that Mr Tacon had all this information when he was previously investigating this transaction in relation to Tigerkhan and he was happy to report to the Court that there had been a transfer.

[79] Mr Tacon submitted a report dated 2 May 2007.[17] In relation to the Max shares, he stated:

> 2.7 "The Company held 6 million shares in Max and Myrzaly held a further 18 million. I have been told by Conyers that Condor also held 11,775,000 Max shares, to give a total of 35,775,000 (I am not the Receiver of Condor and have made no investigations into its affairs). I have seen statements from brokers, which disclosed that all the above shares have been sold and the proceeds of sale have been made available to the company. Blake Lapthorn have told me that the shares formerly held by Myrzaly were transferred to the company for no consideration. I have no knowledge of the basis of transfer of Condor's assets to the Company.
>
> 2.8 It is not clear to me exactly what documentation exists to record the transaction between the Company and Myrzaly, but I have seen correspondence between Mr Risbey on behalf of Myrzaly and the broker, Insinger, which refers to the shares being "lent" to Tigerkhan. The letter says that as both Myrzaly and Tigerkhan are owned by Tigakhan, the transfers are within a group and there are no UK tax implications of the transfer. Shares, or any other assets lent to a third party, whether the parent company or not, would normally give rise to an inter-company balance receivable in the hands of the lender and payable by the borrower. I referred in paragraph 2.4 to accounting issues; the absence of an inter-company balance payable from the Company's accounts suggests the transfer is being treated as a dividend distribution by Myrzaly to the Company. Blake Lapthorn have told me that they consider their client's intention was that no inter-company balance should have been created. This is consistent with the view that a dividend was paid by Myrzaly."

[17] See Tab 2 of Bundle F

[80] Mr Lord submitted that not only was Mr Tacon happy to report that the transaction was a transfer in relation to Tigerkhan but also in relation to Myrzaly. In his Myrzaly Report dated 18 September 2007, Mr Tacon said:[18]

> 2.1 "In paragraph 9.1 of my report dated 23 March 2007, I noted that Myrzaly had owned 18 million shares in Max. Given the absence of any meaningful co-operation from the director of Myrzaly (it should be noted that I am yet finally to determine who are the current director(s) and shareholder(s) of Myrzaly), I had to undertake extensive enquiries with third party brokers.
>
> 2.2 I am now satisfied that by November 2006 Myrzaly did not have an interest in Max shares, and it does not appear that there has been any change to that position since.
>
> 2.3 From information available to me it appears that the 18 million Max shares formerly held by Myrzaly were transferred to Tigerkhan, a company owned by Mr Rigoll, by the end of 2006."

[81] For completeness, I will refer to one final document: a letter dated 4 May 2007[19] written by Mr Tacon to Mark Forté of Conyers in response to an invitation to Mr Tacon to indicate to the Court that Myrzaly has no assets and that there is no point in him continuing as a receiver over Myrzaly. Mr Tacon wrote: *"I am satisfied that it no longer owns the 18 million shares it previously held in Max Petroleum plc, but before I can definitely say that the matter can be closed, I do need to see the bank statements for the company*."

[82] In his latest Report to the Court dated 5 December 2007, Mr Tacon's radically changed his initial views on the transaction. He asserts:

> 4.3 "In section 2, at paragraph 2.2 of my report dated 18 September 2007, I indicated that I was satisfied that by November 2006 Myrzaly did not have any interest in the 18m shares it previously held in Max Petroleum Plc ("Max"). I formed this view as a result of information provided to me on behalf of Myrzaly. After reviewing documents exhibited to affidavit evidence filed in the proceedings, I re-reviewed the correspondence that passed between Myrzaly and ODL Securities Limited and others in November 2006 in respect of the apparent transfer of these shares. In a letter dated 30 November 2006 from Myrzaly Limited to Insinger de Beaufort ("Insinger"), Mr Risbey (who signed as a director of Myrzaly although he had resigned from that office in May 2006) confirmed a "loan" of the

[18] See Bundle 1 Tab 7a page 3 at paragraph 2
[19] See page 8 to the exhibits of Ms. Rees' 10th affidavit – Bundle 2 Tab 6

> 18m shares held by Myrzaly in Max to its then parent company, Tigerkhan. The letter contains two references to the loan, and implies that it is not the first correspondence sent by Myrzaly to Insinger in respect of the loan. This letter is dated 14 days before the sale to Mr Juric."

[83] Mr Tacon continued that he first made enquiries in April 2007 with Insinger as to this transaction and was told that it was a transfer but the references to a loan of the shares have not been explained. He said that he also made enquiries with Conyers and the response only repeated the information received from Insinger. No attempt was made to deal with the creation or discharge of the loan or to clarify how Tigerkhan gained legal title to the shares. He concluded that from the documents available to him it appears that a loan was created between Myrzaly and Tigerkhan and the amount of the loan is the equivalent value of the 18 million shares. He is concerned about this transaction as he has not obtained any documentary evidence in relation to the loan from Myrzaly and the explanation it provided is deficient.

[84] Mr Lord submitted that Mr Tacon had the letter which referred to the loan before May 2007 when he came to the conclusion that the transaction was a transfer. It appears that he did since he mentioned that he made inquiries in April 2007 with Insinger but reference to the loan of the shares was not explained. There is no indication as to when Mr Tacon received this letter. Additionally, the fax information at the top of the letter shows that it was faxed to Kroll BVI but the date is illegible. From Mr Tacon's report, it appears that this is the only document which he relies upon to change his conclusions as at September 2007 though mention was made of reviewing other documents. The reasonable inference is that he was aware of this letter before May 2007. He received no explanation for the reference to a loan but still concluded that it was a transfer from the perspective of both Tigerkhan and Myrzaly. He is unable to show that he relied on any other document that came to light since his September report and his letter to Mr Forte in May 2007 that would cause him to radically change his mind on this matter. In the circumstances, I agree with Mr Lord that it is clear that Mr Tacon was given several documents in respect of this transaction, investigated them and found out that the Max shares were a transfer and not a loan. It therefore follows that Myrzaly has complied with this request.

Credit Cards Statements

[85] Mr Tacon requested that Myrzaly provides him with copies of the credit cards statements in respect of the credit cards issued to Mr and Mrs Rigoll (Mr Rigoll is the director and sole shareholder of Tigakhan and he is said to be the ultimate beneficial owner of Myrzaly) which were linked and paid from Myrzaly's Credit Suisse bank account. From the bank statements, it appears that a substantial amount of money (over US$300,000) from Myrzaly's Credit Suisse bank account was used to discharge the indebtedness on these credit cards. At paragraph 4.8 of the Third Report, Mr Tacon explained:

> "Without having sight of the credit cards statements, I cannot form a view as to whether this expenditure has resulted in the creation of other assets for or on behalf of Myrzaly, however it is at least possible that it did. The statements will not only allow me to be satisfied whether or not any assets might have been created by their use for the account of Myrzaly, but also to understand the nature of any loan that might have arisen as between Mr & Mrs Rigoll and Myrzaly in respect of the use of credit cards. I have been refused access to this information."

[86] Mr Tacon is of the view that the statements may assist him to establish whether any debt arises as between Myrzaly and the Rigolls or whether the transactions reflect the creation of other assets on behalf of Myrzaly.

[87] Mr Lord put forward some reasons why Mr Tacon is not entitled to the credit cards statements namely:

1. Myrzaly does not hold copies of those statements. Nor does Credit Suisse.

2. The statements have no relevance to the role of the Receiver whose role is to preserve and maintain assets, i.e. to receive assets of the company as of the date of his appointment; not to trace and preserve assets, as he is not a liquidator. In any event, no payments were made by Myrzaly since its sale on 14 December 2006; i.e. since the commencement of these proceedings.

3. The statements relate to payments which are of historical origin to which Mr Tacon is precluded from investigating. He is entitled to a document to prove the current

position of Myrzaly as at the date of his appointment and he has bank statements to verify that position.

4. The credit cards statements are private credit cards in the names of the Rigolls and the account is simply "guaranteed and paid" for by Myrzaly. Myrzaly cannot get the credit cards statements unless and until the Rigolls volunteer them which they will not do.

[88] Mr Drake submitted that it is impossible to understand Myrzaly's position as it cannot be said that payments of that magnitude can be made out of Myrzaly's principal asset and yet somehow has no bearing on the asset and liability position of Myrzaly. He argued that to say that the credit cards were private credit cards of the Rigolls is to ignore the separate entity between the company and its ultimate beneficial owner. He submitted that if Mr Rigoll wanted to take distributions from Myrzaly, then the proper way to do it is by way of dividends as a shareholder and not simply as it would appear to be the case here where Mr Rigoll puts his hand in the till each time he wants to expend funds. Mr Drake submitted that Mr Rigoll cannot have his cake and eat it. He cannot put his hand in the till when it pleases him and then turn to the Court and say that he is not prepared to produce the statements because they are private and confidential.

[89] He next argued that if these credit cards really belonged to the Rigolls, then they would not be in Myrzaly's name. According to Mr Drake, even if using Ms Rees's words "Myrzaly guaranteed the credit cards", the expenditure on the card gives right to a primary or secondary liability in the name of Myrzaly. He further argued that even if the credit cards were not Myrzaly's, it is incredible that Mr Rigoll, who uses Myrzaly and Hakkisan as his personal piggy bank, should for the first time, draw a distinction between himself and the corporate entity and say that the credit cards are not Myrzaly but his. He concluded that Myrzaly should be ordered to comply with Mr Tacon and produce the credit card statements.

[90] Two principal issues arise for resolution namely: (i) whether Mr Rigoll is entitled to distribution in the manner in which Mr Drake described above and (ii) the role of the receiver.

Distribution

[91] Section 56 of the BVI Business Companies Act[20] is helpful. It provides:

> "For the purposes of this Division,
>
> (b) "distribution", in relation to a distribution by a company to a member, means
>
> (i) the direct or indirect transfer of an asset, other than the company's own shares, to or for the benefit of the member, or
>
> (ii) the incurring of a debt to or for the benefit of a member,
>
> in relation to shares held by a shareholder, or to the entitlements to distributions of a member who is not a shareholder, and whether by means of the purchase of an asset, the purchase, redemption or other acquisition of shares, a transfer of indebtedness or otherwise, and includes a dividend."

[92] From a reading of the section, it appears that distribution to a shareholder may take the form of actual payments by dividends, the transfer of an asset other than the company's own share or the incurring of a debt to or for the member's benefit. Mr Rigoll is said to be the ultimate beneficial owner of Myrzaly and Tigakhan. Tigakhan in turn is the sole shareholder of Myrzaly. It appears therefore that the credit cards payments can be considered distribution to the shareholder and as such, can no longer be considered an asset of Myrzaly. In particular, Mr Tacon himself found that this was the position between Mr Rigoll and Tigerkhan where he found that the sums made available to Mr Rigoll for his personal use or assets purchased on his behalf are to be treated as dividends.[21] It logically follows that there is no need for Myrzaly to obtain and provide Mr Tacon with these credit card statements. In fact, the Court has no power to require Myrzaly to obtain these credit cards statements from the Rigolls who are not parties in these proceedings.

Scope and powers of the receiver

[93] Generally speaking, the jurisdiction of the Court to appoint a receiver is exercised for the purpose of preserving the undertaking and assets of the company in question. The receiver's function is not to investigate the affairs of the company except to the extent necessary to locate and take possession of its assets. His duty is to act impartially and in accordance with

[20] No. 16 of 2004 as amended.
[21] See Tigerkhan's Report.

the directions of the Court, in administering the property to which the receivership extended. In short, the appointment of a receiver is the most effective way of "holding the ring" between warring litigants until the disputed issues could be finally resolved."[22]

[94] Sections 115 and 127 of the Insolvency Act, 2003 gives some statutory guidance as to the powers of a receiver. Section 115 (2) (a) states that "This Part applies to a receiver appointed by the Court." Section 127 provides:

> "(1) A receiver has the powers expressly or impliedly conferred on him,
>
> (a) in the case of a receiver appointed out of court, by the charge or other instrument by which he was appointed; or
>
> (b) in the case of a receiver appointed by the Court, by the Court order under which he was appointed.
>
> (2) Unless the charge or other instrument under which, or Court order by which, he was appointed expressly provides otherwise, a receiver may
>
> (a) demand and recover, by action or otherwise, income of the assets in respect of which he was appointed;
>
> (b) issue receipts for income recovered;
>
> (c) manage, insure, repair and maintain the assets in respect of which he was appointed; and
>
> (d) exercise, on behalf of the company, a right to inspect books or documents that relate to the assets in respect of which he was appointed in the possession or under the control of a person other than the company.
>
> (3) This section does not apply to an administrative receiver.

[95] Mr Tacon was appointed as a receiver by a Court Order. The Order empowered him to take all steps which he considers necessary or desirable including (without limitation) to identify and secure the Myrzaly assets and also to investigate its affairs for the purposes of the discharge of his duties under this Order and in order to cause Myrzaly to comply with other

[22] Capewell v Her Majesty's Revenue and Customs & Anor [2007] UKHL 2 -31 January 2007 –per Lord Walker of Gestingthorpe, paragraphs 19-20.

Orders made against it[23]. The Order also authorizes him to take such steps as may seem to be appropriate for the purpose of getting in, recovering and preserving all assets and to enter any premises of Myrzaly and have access to all documentation and files with respect to his investigations[24].

[96] It is plain from this Order that Mr Tacon was not only appointed and empowered to identify and secure the assets of Myrzaly but also to investigate the affairs of Myrzaly to the extent necessary to locate and take possession of its assets.

[97] However, his powers, although wide are still fewer than that of a liquidator - whose functions are **to trace and preserve** assets. In the case of a receiver, he is **to identify and secure** all assets of the company as at the date of the order. In short, he "holds the ring" between warring litigants until the disputed issues could be finally resolved. In order to hold the ring, he must first of all, **identify** the assets, then **secure** them unlike a liquidator who **traces and preserve**.

[98] Undoubtedly, there is a very fine distinction between "tracing" and "identifying". The Concise Oxford Dictionary defines the word "trace" as "observe, discover, follow to its origins". Thesaurus defines it as "find, locate, discover, hunt down, follow, track down." The word "identify" is defined in the Concise Oxford Dictionary as "to establish the identify of, recognize". Thesaurus defines it as "discover, find, ascertain, detect."

[99] It seems to me that a receiver "finds or discovers" the assets and preserves them, that is, to receive assets of the company as of the date of his appointment, not to trace and preserve, as he is not a liquidator. Therefore, Mr Tacon does not have all of the liquidator's powers to investigate what occurred in the past particularly in this case where it is categorically stated that there were no payments in relation to these credit cards since the commencement of these proceedings. Needless to say, he is entitled to bank statements to prove the current position as of the date of his appointment which he already has.

[23] See paragraph 2 of the Receivership Order – Bundle 1 Tab 2 page 20
[24] See paragraphs 6.1 and 6.4 of the Receivership Order – Bundle 1 Tab 2 page 21

[100] In addition, the credit cards are not Myrzaly but rather, are personal credit cards of the Rigolls, payment of which is guaranteed by Myrzaly. I agree with Mr Lord that the credit cards statements do not belong to Myrzaly and are not within its power to deliver up to Mr Tacon. Also, the Rigolls are not defendants in these proceedings so the Court cannot order them to do anything far less deliver up their personal credit cards to Mr Tacon. If they choose to, then that is a matter entirely up to them.

Due diligence when Myrzaly was sold to Mr Juric

[101] Mr Tacon asked what due diligence was carried out in selling Myrzaly to Mr Juric. He also requested that he be provided with copies of all due diligence documents. The response was that no due diligence was carried out on the part of Tigakhan in selling Myrzaly to Mr Juric. Myrzaly has answered the question and therefore this request is not outstanding.

Mr Juric's knowledge as to the Credit Suisse Account when he purchased Myrzaly

[102] Mr Tacon asked whether Mr Juric was aware that Myrzaly held a bank account with Credit Suisse when he was offered Myrzaly or purchased Myrzaly in December 2006 and if so, what arrangements were made in respect of the account after the sale. Myrzaly stated that it cannot comment on the state of knowledge of Mr Juric. Mr Tacon is of the view that Myrzaly can comment on what Mr Juric was told in respect of the bank account.

[103] The question was phrased in such a manner that the response from Myrzaly would no doubt involve speculation as to Mr Juric's knowledge. However, I agree with Mr Tacon that Myrzaly would know what Mr Juric was told and therefore could answer the question from that angle. Myrzaly should provide the information (if any) regarding the account it held at Credit Suisse that it gave to Mr Juric before the sale. This must be done within 21 days hereof.

Whether Mr Juric was informed of the loan of Max Shares

[104] Mr Tacon asked whether Mr Juric was informed of the loan of 18 million Max shares from Myrzaly to Tigerkhan. Myrzaly responded that there was no loan of shares to Tigerkhan. This was comprehensively dealt with above and no useful purpose will be served by revisiting it.

Copy of Share Transfer

[105] Mr Tacon requested that he be provided with a copy of the share transfer when the shares of Myrzaly were transferred to Mr Juric in December 2006. Mr Lord contended that the share transfer form should be with the books and records of Myrzaly at Mossack. He added that Myrzaly does not have the share transfer forms and there is nothing they can do as Mossack has indicated that it had given everything to Mr Tacon.

[106] In this respect, it is difficult to determine whether there has been non-compliance on the part of Myrzaly. I am not told whether Mossack has the register but has not delivered it up to Mr Tacon or that it has not received the share transfer from Myrzaly. If it is the latter, then Myrzaly would not have complied with Mr Tacon's request. Myrzaly should direct that Mossack provide Mr Tacon with the share transfer and if it did not receive it to indicate that to Mr Tacon. I cannot find without more whether or not Myrzaly has complied with this request.

Queries raised by Receiver on 5 November 2007

[107] Mr Tacon raised five queries on 5 November 2007[25]; three of which he had no comments and the other two relate to matters which have been fully explored above.[26]

Sale of Myrzaly to Mr Juric

[108] Mr Tacon expressed concerns with the responses that he got from Myrzaly in relation to the sale of Myrzaly to Mr Juric in the context of the nil consideration for which it was sold. He asserted that the responses provided other significant clarification about:

> "The precise circumstances as to why Mr Juric was offered a second hand BVI company with a fully functioning bank account at Credit Suisse holding a balance of least US$128,236.39 at the time of the sale with the possibility of it having other assets and liabilities. Although an invoice was raised in respect of the sale of Myrzaly (after the sale) for €4,500, this was not paid." [27]

[25] See page 10 of the Table of queries that was attached to the Receiver's Report dated 5 December 2007
[26] See paragraphs 49 to 52 of judgment [supra]
[27] See Paragraph 5.1 of the Receiver's Report dated 5 December 2007

[109] Mr Tacon sought an explanation as to why Myrzaly was sold with an operating bank account in place.[28] He was told that it was not intended that the company would be sold with the bank account in place but that the funds were left in Myrzaly to allow for remaining cheques to be cleared and for arrangements to be made to deal with the closure or transfer of credit cards issued to the Rigolls. Mr Tacon emphasized that he does not consider the explanation to be adequate especially in light of the significant number of electronic payments which were initiated on the account during January 2007; which he says, does not appear to represent the processing of transactions which had been initiated before the sale took place.

[110] MWP is of the view that Mr Tacon has not received a true explanation with respect to the sale of Myrzaly. According to Mr Drake, it is MWP's pleaded position that the sale to Mr Juric, if it took place at all, did not take place in December 2005 but at some date after the Freezing Order was obtained and that the documents were fraudulently backdated. He argued that either the sale to Mr Juric was effective and the entries on the directors and shareholders registers are to be taken at face value or the sale was ineffective and the registers misrepresent the true position.

[111] The sale of Myrzaly to Mr Juric is an issue in these proceedings as MWP claims that the transaction is fraudulent and that the transfer of the shares to Mr Juric was backdated. In light of the fact that this matter is in issue and given that the persons behind Myrzaly have given Mr Tacon an explanation as to why the money was left in the account, I cannot find that Myrzaly has not complied with Mr Tacon's request. Myrzaly gave an explanation but Mr Tacon is not happy with it. However, that cannot amount to non-compliance.

Affidavit of Assets

[112] The Freezing Order dated 5 February 2007 required that Myrzaly must within three days of being notified of the Order inform MWP of their assets worldwide, whether in their own name or not along with the nature, details and location of the Specific Assets. By letter dated 4 September 2007, Walkers wrote to Conyers outlining some additional information that Mr Tacon seeks. At paragraph 11 of the letter, Walkers requested that they be provided with full

[28] See paragraph 4.4 of the Receiver's Report dated 18 September 2007.

details of all assets of Myrzaly and that this information should be provided in the form of a declaration of assets and liabilities from the directors.

[113] Mr Drake submitted that Myrzaly has failed to provide the affidavit or declaration of assets despite this requirement in the Freezing Order and Mr Tacon's request. He referred to statements made by Mr Risbey in his 1st and 11th affidavits that Myrzaly had no assets when it was sold to Mr Juric and argued that those statements were untrue as Mr Tacon subsequently found out that when Myrzaly was sold, it had a balance of $128,236.39 in its Credit Suisse account.

[114] Mr Drake accepted that Mr Battig, one of the present directors of Tigakhan (the corporate director of Myrzaly) has since filed 2 affidavits on behalf of Myrzaly and that it was an attempt by Myrzaly to comply with its obligations under the Freezing Orders. He criticised Mr Battig's 1st affidavit stating that it is in the "present tense and says nothing at all about the historical position of these accounts." It appears that this submission is made because Mr Battig only identifies the monies in the Credit Suisse Account and not the 18 million Max shares.

[115] In his 1st affidavit, Mr Batting deposed that Myrzaly only has US$49,790.71 and no other assets. He stated that he was aware of the existence of accounts in the name of Myrzaly with brokers ODL and Insinger and that he has verified and confirmed that no bonds, securities or investments of any sort are held by either broker. He also mentioned the liability that Myrzaly has with MWP for $14,461.25 and the only other liabilities are bank charges in relation to the Credit Suisse account.

[116] In his 2nd affidavit, Mr Battig stated the position as it stood as of 31 January 2007 when the Freezing Order was made. He again indicated that Myrzaly only has $49,849.79 and no other assets. He reiterated the position in relation to Insinger and ODL.

[117] The affidavit of assets was done albeit very late - almost 10 months after the Freezing Order was obtained. MWP is dissatisfied with the affidavits because it is of the view that it should have included the 18 million Max shares. The issue relating to these shares has already been

fully explored.[29] It is clear that Myrzaly does not consider that the transfer of shares to Tigerkhan was a loan and therefore, not an asset belonging to it. The other assets that Mr Tacon alluded to are all denied by Myrzaly. I can only find in relation to the affidavit of assets that Myrzaly has complied with that request, albeit belatedly.

Resolution to be passed to confer control of Myrzaly's assets to the Receiver and to give him a Power of Attorney

[118] Mr Tacon stated that he has asked that a resolution be passed by Myrzaly conferring full control of all of its assets to him and that he be provided with a power of attorney. He indicated that as at 4 December 2007, no such resolution has been passed and he has not received the power of attorney.

[119] Mr Lord opined that there is no point in this request as subsequent events have overtaken this. I think that he might be referring to the fact that the balance in the account at Credit Suisse (the only asset he says that Myrzaly owns) has been transferred to Mr Tacon.

[120] I am of the view that Mr Tacon should be provided with the resolution and power of attorney despite the fact that the balance in the account was transferred to him. It may be that assets are recovered at a later date and he needs one or both documents to be able to deal with the assets even though I believe that the Order ought to be sufficient. In that regard, Myrzaly must pass the resolution within 21 days hereof and should also provide Mr Tacon with the power of attorney.

Hakkisan's application

[121] MWP applied for an Order that Hakkisan complies with the 28 February 2007 Order, particularly that:

1. Hakkisan co-operates fully with the Receiver in order to enable him to fulfill his duties to the Court and that the assets of Hakkisan be preserved.

2. Provides the Receiver, forthwith with all documentation requested and culminating in his letter of 23 November 2007.

[29] See paragraphs 72 to 84 of the judgment [supra].

3. Hakkisan without limitation provide the Receiver, forthwith, with details of all assets and banking arrangement.

4. Hakkisan provides without limitation its details of beneficial ownership.
5. Unless the compliance above is forthcoming within 14 days, Hakkisan be debarred from defending these proceedings

[122] MWP has abandoned Point 6 at this hearing but reserves its right to do so later on.

[123] The grounds of the application are:

1. There has been limited co-operation with the Receiver and confirmed non compliance with orders of the Court.

2. Despite being appointed over the entire assets and undertaking of Hakkisan, the Receiver is yet to identify its ultimate beneficial owner.

3. Hakkisan has a history of ignoring court orders and dealing with assets without recourse to the Receiver.

4. The legal representatives of Hakkisan in both, London and the BVI, are failing to answer or fully deal with the Receiver's queries.

Background facts

[124] Mr Drake has helpfully encapsulated the background facts. For present purposes, I shall gratefully adopt them. On 19 December 2006, the Court made an ex parte order freezing the general assets of Hakkisan up to US$540,000 as well as its Specific Assets (as defined). The Order also required that Hakkisan inform MWP and serve an affidavit within 7 days of (a) all their assets worldwide, whether in their name or not and whether solely or jointly owned, giving the value, location and details of all such assets; and (b) the nature, details and location of the Specific Assets (as defined) including what has become of the payments of $350,000 and $190,000 made by Mr Emmott to Hakkisan in late 2005.

[125] The original return date was 16 January 2007. The matter was adjourned because Hakkisan sought additional time to comply with the disclosure obligations. There was an *inter partes* hearing on 5 February 2007. At that hearing, the Court continued the freezing injunction and

disclosure order with minor amendments. The definition of Specific Assets was changed and the Court ordered Hakkisan to produce Mr Risbey for cross-examination on 27 February 2007. Hakkisan failed to produce Mr Risbey on that date or on any other date shortly thereafter. Hakkisan continued to breach the disclosure orders.

[126] At an *inter partes* hearing on 28 February 2007, the Court amended the Freezing Order by increasing the value of the assets frozen to $30 million; and appointed Mr Tacon (on an application by MWP) as Receiver over the undertaking and assets Hakkisan.

[127] There appeared to be some initial reluctance to produce Mr Risbey for cross-examination. Needless to say, months after, he did appear. Additionally, in the past, Hakkisan had failed and/or refused to comply with the Court Orders but it has since moved away from that position. It has also been making some efforts to comply with Mr Tacon's requests. I commend their new Counsel for that approach. Nonetheless, MWP has identified several matters which it says, Hakkisan has not complied with and as such, it should be debarred from defending or taking any further steps in these proceedings.

Hakkisan's Assets

Account at Credit Suisse in Switzerland

[128] At paragraph 2 of his Second Report, Mr Tacon indicated that he had been provided with statements for an account maintained by Hakkisan at Credit Suisse in Zug from its opening to its closure on 22 February 2007. He stated that a representative from Credit Suisse advised him that they do not recognize his appointment and therefore, was unable to provide him with any information. He requested that Mr Risbey instruct Credit Suisse to co-operate with him and that he be given full control of the account but up to 18 September 2007, that had not been done.

[129] To make a long story short, this is no longer the case. It appears that Mr Tacon is satisfied with the response from Hakkisan and that he is in control of the account as it was not mentioned in his subsequent report. I therefore find that Hakkisan has complied with this request. However, I must add that the closure of the account after the Freezing Order was a

flagrant breach of the Court Order. It has now moved away from that initial condescending position.

Patersons Securities Limited

[130] On receipt of Mr Risbey's 13th affidavit, Mr Tacon wrote to Patersons informing it of his appointment and seeking its co-operation so as to secure the assets of Hakkisan. He provided Patersons with the necessary documentation that it required but is awaiting confirmation from Patersons or its legal advisors as to whether they recognize his authority. He opined that the process could be expedited on Mr Risbey's instructions[30].

[131] Mr Tacon highlighted the fact that trading took place on the Paterson's account after his appointment which has caused the portfolio to change and also the linked bank balances. He concluded that he cannot identify all of the assets that are held in the name of Hakkisan until he receives full disclosure from Patersons.

[132] In his latest report, Mr Tacon is able to state the value of the portfolio of the quoted investments held in Patersons as AUS$4,334,273.36 as at 30 September 2007. He also indicated that Patersons has now acknowledged his authority over the account. He has completed and submitted the forms that are required by Patersons for him to be added as a signatory but at the time of preparing this report he had not received any response or confirmation from Patersons that the forms are in order and have been processed.

[133] It is clear that Mr Tacon has some control over Hakkisan's portfolio held by Patersons. Patersons have acknowledged his appointment and the only outstanding matter is for him to be made a signatory to this account. Whilst the delay in the latter might be outside of the control of Hakkisan, Mr Risbey could assist in its expedition. Hopefully, this issue has long been resolved.

[30] See paragraphs 2.2 and 2.3 of the Receiver's report dated 18 September 2007

Bank of Western Australia Limited (BankWest)

[134] On 13 September 2007, Mr Tacon received a letter from BankWest indicating that they have recognized his authority and that he would be provided with bank statements in respect of Hakkisan's account going forward.[31] In his Third Report, Mr Tacon stated that he has gained signatory rights over this account and the balance is AUS$5,000 as he had made arrangement for US$103,147 to be transferred to Harneys in respect of an outstanding costs order made on 19 October 2007 and AUS$146,293.49 to be transferred to his client account which will be used to meet the receivership expenses.[32]

[135] Mr Tacon appears satisfied with the position in relation to this account and as such, I cannot find that Hakkisan has not complied with Mr Tacon's request.

Dundee Securities Corporation

[136] Mr Tacon became aware of this trading account when he received Mr Risbey's 13th affidavit. He pointed out that as of 13 September 2007 his appointment was not recognized. He indicated that it is apparent from Mr Risbey's affidavit that trading took place on this account after his appointment and that market value as of 31 May 2007 was CAN$427,435 and liquid funds was CAN$10,128. He emphasized that the affidavit does not include all the statements and it has not disclosed all the activities on this account. He requested that Hakkisan provides him with full information.[33]

[137] Dundee has confirmed that it recognized Mr Tacon's appointment. Mr Tacon has also completed documentation to enable him to be added as the authorized signatory to the account. He has also delivered the documents to Conyers on 13 November 2007 for onward transmission to Mr Risbey for him (Mr Risbey) to complete his section and to deliver them to Dundee. On 5 December 2007, Mr Tacon was contacted by a representative of Dundee asking for the documents as he (Mr Tacon) had sanctioned a request for disposal of shares he received from Hakkisan. He made it clear that although his appointment is recognized by

[31] See paragraph 2.4 of Receiver's Hakkisan Report dated 18 September 2007
[32] See paragraphs 2.9 to 2.11
[33] See paragraphs 2.5 to 2.6 of the Receiver's Report dated 18 September 2007

Dundee he cannot operate the account, nor can he inform the Court that he has satisfactorily secured the account until he has been made a signatory.

[138] Mr Tacon's appointment is recognized by Dundee and the documents to enable him to be a signatory on the Dundee account are completed. It follows therefore that Mr Tacon have some control over this account and this is evidenced by the fact that he was contacted when a request was made to dispose of shares. One hopes that by now, he has complete control. Although Hakkisan was tardy in complying, it has now done so and cannot be guilty of non-compliance.

WH Ireland Limited

[139] On 4 December 2007, Mr Tacon received an email from the compliance director of WH Ireland who confirmed that Hakkisan had held an account with it. He was also provided with a spreadsheet which showed that Hakkisan owes WH Ireland £87,122.66. On receiving this information, Mr Tacon requested further details from WH Ireland in respect of this account and also sought clarification from Hakkisan as to its knowledge and understanding of the account as well as its knowledge of the debt that it owes WH Ireland. He still awaits a response from both WH Ireland and Hakkisan.

[140] From the spreadsheet, it is plain that a battery of activities took place on this account after the Freezing Order was made and which, for some inexplicable reason, was not disclosed. It can reasonably be inferred that the officers and/or beneficial owner of Hakkisan was/were aware of this account but chose not to disclose it. The transfer done on 2 March 2007 is a flagrant breach of the Receivership Order. All information pertaining to this transaction must be disclosed to Mr Tacon within 21 days hereof (if he has not yet received this information). Specifically, he should be told in whose name the account is and the reason for the transfer.

[141] In all fairness to Hakkisan, Mr Tacon first requested this information on 7 December 2007 and he gave 7 days to respond[34]. Mr Lord submitted that the request will be dealt with. As at the

[34] See page 36 of the Appendix 3 to the Receiver's Report dated 11 December 2007

date of this hearing, it cannot be said that Hakkisan had not complied with this request even though Hakkisan ought to have disclosed this account before.

Other Assets

[142] In his Second Report, Mr Tacon stated that "*Until I receive detailed answers to my substantive enquiries (see paragraph 3.1 below) and full disclosure from both Dundee and Patersons, I cannot identify any other assets that might be held in the name of Hakkisan, nor conclude whether I am satisfied that the assets identified to date represent all of Hakkisan's assets. Transfers from bank accounts so far disclosed may have been used to acquire other assets in the name of Hakkisan and I am awaiting clarification from Mr Risbey to detailed enquiries I have made via his lawyers Blake Lapthorn*."[35]

[143] Mr Tacon has received some information and is still awaiting responses to his enquiries from Hakkisan. I will deal with the provision of information or lack thereof below under the heading "Provision of Information and Documents by Hakkisan." Mr Tacon pointed out that he had written to several financial institutions at which he considered Hakkisan might have held accounts. So far, he has received a positive response from WH Ireland. Some other banks responded but stated that Hakkisan did not have an account with them. He is still awaiting responses from the other institutions. I would urge Hakkisan that if it has knowledge of any other undisclosed accounts (which I am positive it does), it should bring such information to Mr Tacon's attention. Otherwise, the Court may draw adverse inferences and serious consequences may ensue.

Trading by Hakkisan

[144] In my considered opinion, this issue has nothing to do with non-compliance of Mr Tacon's request. The issue of trading came before me on several occasions prior to the making of an Order on 29 October 2007. On that day, the Court established a protocol as to how trading activities in Hakkisan's marketable securities should be conducted. I believe it was placed in Mr Tacon's Report so as to update the Court.

[35] See paragraph 2.7 of the Receiver's Report dated 12 September 2007.

Third Party Funding for Hakkisan's Legal Fees

[145] In her 7th affidavit, Ms Rees revealed that Hakkisan had received the benefit of third party funding for its legal fees until late August which has created a liability for Hakkisan of over US$200,000.[36] This prompted Mr Tacon to make a request on 11 October 2007 for full details of this funding, the identity of the third party funder, amounts paid by the third party, dates of payment, copies of all invoice, other documents evidencing amounts paid, details of the loan created and the terms of such loan and an explanation as to how was the liability created without reference to him.[37] He said that he received a partial response on 5 December 2007 and he again requested the information by letter dated 10 December 2007. He is still awaiting a response to this letter.

[146] Mr Lord argued that this request has been completely answered by Conyers' letter of 5 December 2007 wherein it was stated:[38]

> "There is no loan documentation relating to the legal costs of Hakkisan. As stated in the 7th affidavit of Sarah Rees sworn on 5 October 2007, up until late August 2007 Hakkisan received third party funding in respect of its legal costs. As you are aware, funding has been provided by Tigakhan AG. The arrangement is informal, it is not addressed in the asset and liability position of Hakkisan."
>
> "The fact of the matter is that when Blake Lapthorn and Conyers were originally instructed in this matter, the main focus of the litigation at that point was Tigerkhan Limited, and funding was provided by Tigakhan AG up until late August 2007. As Hakkisan was subject to a freezing order and a receivership order, making it difficult on any basis for it to fund its own legal costs, Tigakhan AG was prepared to provide funding. It is the case that no precise thought was given to how the matter of such funding should be addressed. It is a matter of ongoing discussion between those behind Hakkisan (Mr Risbey) and those behind Tigakhan (Mr Battig and Mr Rigoll). All we can say at present is that Hakkisan has a potential liability to repay Tigakhan the portion of the costs funded by it that related to Hakkisan. We are not in a position to quantify that sum at present."

[147] This letter partially answered the request. It has provided details of the funding but has failed miserably to identify the amount owed to Tigakhan and has failed to address the issue as to how this liability was created without reference to Mr Tacon as a Receiver. There are other

[36] See Paragraph 8
[37] See page 4 of the Appendix 3 to the Receiver's Report dated 11 December 2007.
[38] See page 33 of the Appendix 3 to the Receiver's Report dated 11 December 2007.

questions relating to this loan that was sent under cover of a letter dated 7 December 2007 by Mr Tacon to Conyers. I will order that Hakkisan is to provide the information requested in this letter and any other outstanding information to Mr Tacon within 21 days hereof. May I add that both the Freezing and Receivership Order make provision for the payment of legal fees from Hakkisan's assets so there was no necessity to get funding from another source. To top it all, it created a liability on Hakkisan's assets without Mr Tacon's knowledge.

Provision of Information and Documents by Hakkisan

[148] At paragraph 5.1 of his 11 December 2007 Report, Mr Tacon stated that correspondence included at Appendices 2 and 3 demonstrates an ongoing refusal to provide him with information and documents in respect of transactions that took place before his appointment. He is of the view that these transactions may reflect the creation of other assets or liabilities by or on behalf of Hakkisan. He has outlined these outstanding information and documents at paragraphs 5.2 to 5.5 of his report and at appendices 2 and 3 to this report. They are dealt with below.

Questions arising from the 13th affidavit of Mr Risbey

[149] In his letter dated 19 July 2007 to Conyers, Mr Tacon requested that Hakkisan provide him with the following information and documents namely: (a) details of the underlying assets owned by Hakkisan; (b) clarification as to whether any balance sheets have been prepared at any time for Hakkisan; (c) if any liabilities, details of those liabilities, the amount and identity to whom the liability is owed; (d) details of the contract between Hakkisan and Patersons, the detail and extent of their trading discretion as well as any accommodation Mr Risbey may wish to enter into regarding these trading accounts; (e) information regarding the payment of $280,000 on 16 March 2007 to Jokula Limited; (f) copies of all bank statements for all accounts maintained by or on behalf of Hakkisan from the date the account was opened to current date or when they were closed; (g) any connection between Hakkisan and Ar-Sen Investment, Finance Cyprus Limited and Fuchs Forge Holdings Limited ("Fuchs") and (h) an explanation as to why Hakkisan overlooked over 40,000 shares in Max Petroleum at the time of preparing the asset table.

[150] By letter dated 23 October 2007, Conyers responded to Mr Tacon's requests. It appears to me that they have answered all of the requests save (a) and (h). In respect of request (a), the response was that *"Mr Risbey has acknowledged and accepted that a fuller and more accurate account of the assets of Hakkisan should have been provided a long time ago*." By this reply, it appears to me that Conyers is implying that the report was tardy, not fully detailed and partly inaccurate. So far, several assets have been disclosed to Mr Tacon and these are listed in the body of his 11 December 2007 Report. His concern is that there have been transfers out of bank accounts which may have resulted in the acquisition of other assets in the name of Hakkisan. This is more fully dealt with below.

[151] Though Mr Tacon has received a response for request (c), I am of the view that he should also have been provided with a copy of the written agreement between Hakkisan and Lane 3 or Fuchs. Hakkisan should make this agreement available to Mr Tacon within 21 days hereof. The request at (d) has been dealt with.[39] A protocol was established and this seems to be working well.[40] In relation to request (e), Conyers provided extensive information.[41] In addition, Mr Risbey gave an explanation for the transfer when he was cross-examined by Mr Sutcliffe QC, MWP's London-based Queen's Counsel. Mr Tacon has not raised this issue in any of his subsequent letter which leads me to conclude that he is satisfied with the response. He is however unhappy with the bank statements that he received and this will be dealt with below. Request (h) has been dealt with and Mr Tacon has received the share certificate for 50,000 shares that was reported lost.[42]

Request for documents and information promised to be provided by Mr Risbey

[152] At a meeting on 26 October 2007, Mr Risbey had agreed to provide Mr Tacon with reconstructed month end spreadsheets/ledgers in respect of Hakkisan's bank accounts but at the date of the hearing, they had not been transmitted to him. The spreadsheets/ledgers were used to reconcile what portion of funds received and paid from the bank accounts belonged to Mr Risbey and Mr Rigoll.

[39] See paragraph 3.3 of the Receiver's Report dated 11 December 2007.
[40] See Order of the Court dated 29 October 2007.
[41] See paragraph 12 of Conyers' letter of 23 October 2007.
[42] See page 9 of the Appendices to the Receiver's Report dated 11 December 2007.

[153] Mr Lord told the Court that he was present at the meeting and the documents agreed to be disclosed were not actually month's end spreadsheets. Rather, a reconstruction to show funds that went into Hakkisan belonging to Mr Rigoll and payment that went out from Hakkisan's bank account on behalf of Mr Rigoll. He is of the opinion that it was provided.

[154] As I see it, Mr Tacon did not have a chance to report on the documents that he received this week. Until that is done, I cannot comment on whether or not Hakkisan has complied with his request.

Questions arising from transactions appearing on the bank statements of Hakkisan

[155] Mr Tacon reiterated that he should be provided with the information and documents that he seeks so that he may form a view as to whether assets or liabilities have been created as a result of transactions which have taken place on Hakkisan's accounts. He emphasized that without seeing the underlying documentation or explanations as to the reasons for these transfers or provision of information as to the recipient, he cannot state that there are no other accounts held by or on behalf of Hakkisan and/or that the transfers created other assets or liabilities.

[156] The general response from Hakkisan is to offer an explanation without supporting contemporaneous documents. In other cases, Hakkisan's response has invariably been that (i) Mr Tacon is not entitled to receive the information because it is not relevant to the identification of assets of Hakkisan or (ii) the relevant transaction pre-dated the commencement of any proceedings against Hakkisan. Mr Lord has consistently reiterated this position. He submitted that the transactions referred to by Mr Tacon in paragraphs 5.2 and 5.3 are purely historical transactions going back over the years.

[157] As I found in relation to Myrzaly, the Receiver is entitled and empowered to identify, collect and secure the assets of the company. He is also empowered to investigate the affairs of Hakkisan to the extent necessary to locate and take possession of its assets. In doing so, he may have to look into purely historical transactions to understand certain transactions. In other cases, as in the case of the credit cards statements of the Rigolls, there were no

payments in relation to those credit cards since the commencement of the proceedings so it would be useless to investigate any prior transactions before the date of his appointment as receiver.

[158] In this particular instance, Hakkisan has not been wholly cooperative with Mr Tacon or for that matter, the Court. It first told the Court that it had no assets at all. Then, Mr Risbey has told many different stories, even when he was cross-examined. Later on, Mr Tacon, through sheer diligence, was able to identify another account at WH Ireland. Therefore, for Mr Tacon to effectively and efficiently carry out his function, he would need virtual transparency of all transactions. As stated before, in some cases, he may have to go backwards to satisfy himself particularly when there is an unhelpful director as in the instant case. There is the possibility that the transactions may result in accounts held for and on Hakkisan's behalf or has created an asset for Hakkisan. Those too will be caught by the Receivership Order as the Order covers Hakkisan's assets. In the circumstances, I will order that Hakkisan provides (i) explanations and contemporaneous documents in support and (ii) underlying documents that Mr Tacon requested within 21 days hereof.

Bank Statements

[159] Mr Drake submitted that Mr Tacon has not been provided with copy bank statements for certain periods. In his letter of 5 November 2007, Mr Tacon indicated that bank statements were missing for two accounts: 964562-22 and 964562-22-1. He requested that Hakkisan clarifies several payments in and out of Hakkisan's US Dollar account, Sterling account, the account with BankWest and the accounts at Patersons.[43].

[160] Mr Lord submitted that the bank statements were provided under cover of letter dated 5 December 2007. In that letter Hakkisan indicated that there is no missing bank statement in respect of account number 964562-22 as "sheets 1 & 2 of the statement dated 30 September 2006 show that there are no entries between 15 and 30 September 2006 and enclosed copy statements for the period 1 January to 30 September 2006 in relation to account number 964562-22-1, the copy statements for the period 1 January to 30 September 2006.

[43] Pages 9 to 16 of Appendix 3 to the Receiver's report dated 11 December 2007.

[161] Mr Lord submitted that most of these requests were answered in Conyers' letter of 5 December 2007. He stated that the information regarding the receipt of $100,000 from Max Petroleum was answered in this letter. The response given is that Mr Risbey cannot locate the invoice and supporting documents for this transaction. In respect of the Kazgas, Mr Lord submitted that Mr Tacon knows of the financial consequences of the transactions but because this transaction is in issue in the claim, his request for supporting documents is an unreasonable request as it upsets the balance between the parties.

[162] The letter addresses each of Mr Tacon's questions. In some instances, the question is answered and the issue clarified but in other cases, Hakkisan has taken the position that the transaction took place before proceedings commenced in this matter and as such Mr Tacon is not entitled to the information he seeks.

[163] Hakkisan has answered and complied with a number of Mr Tacon's requests that were outlined in his letter of 5 November 2007 but has refused to give information and documents in relation to transactions which took place before proceedings began in this matter. Mr Tacon is entitled to investigate and the affairs of Hakkisan for the purpose of identifying and securing its assets. Monies may have been used from Hakkisan's account prior to the beginning of these proceedings to purchase items or may have been transferred to an account that does not belong to Hakkisan. Mr Tacon is entitled to investigate any transfer from Hakkisan's accounts that does not appear to be in the normal course of business. He is also entitled to go after that asset or account if, from his investigation, it appears that the asset or account belongs to Hakkisan despite being in the name of another. For those reasons, I cannot agree with Mr Lord that Mr Tacon is not entitled to the information he seeks.

[164] Mr Tacon is however not entitled to information or documents which relate to matters or transactions that are in issue in the proceedings. I agree with Mr Lord that this would give MWP an unfair advantage. Hakkisan should provide Mr Tacon with the information and documents that were requested in his letter dated 5 November 2007 that were not already provided with the exception of documents or information relating to matters that are in issue between the parties.

Share Certificate

[165] Mr Lord explained that the share certificate that Mr Tacon required has not been provided as nobody is able to locate it. He stated that they will continue to look and when it is found then they will hand it over to Mr Tacon. Mr Drake submitted that it is incredible that Hakkisan cannot locate the share certificate and that it has not provided the Court with information as to the efforts that have been expended to locate the certificate.

[166] Hakkisan should provide Mr Tacon with the share certificate within 21 days hereof and if it cannot do so, it should cause an affidavit to be sworn indicating where the certificate was last seen, the efforts made to locate it and an undertaking that as soon as it is located it will be provided to Mr Tacon.

Relief sought

[167] Fundamentally, MWP seeks orders that unless and until the Respondents comply with Mr Tacon's requests that their defence should be struck out and they should not be heard in respect of any positive step that they wish to take in these proceedings.

[168] Mr Drake submitted that the basis of MWP's application is that the Respondents should not be heard on their positive application before this Court until such time as they would have purged their contempt. He placed great reliance on the judgments of Romer LJ in **Hadkinson v Hadkinson**[44] and Benjamin J in **Japan Chrome Limited and Others v Kazakhstan Mineral Resources Corporation and Others**.[45] Learned Counsel submitted that it is not a matter for the Respondents to take their own view about what documents and information Mr Tacon is entitled to but they are bound to abide by his directions since Mr Tacon has those powers pursuant to the Court Order. He next submitted that by disobeying Mr Tacon's directions, they are disobeying the Court Orders. Counsel reminded the Respondents that if they are dissatisfied with the Orders, the proper recourse is to seek a variation.

[169] Further, Mr Drake submitted that the abject failure of the Respondents to cooperate with Mr Tacon impedes the course of justice and it makes it more difficult for the Court to ascertain

[44] [1952] P 265.
[45] BVIHCV1998/0013 and 1998/0002

where the truth lies. He submitted that this Court has appointed Mr Tacon, amongst other things, to investigate the affairs of the Respondents and report to the Court as to the asset and liability position is in respect of them both and there has been willful disregard of the requests of that officer by person(s) behind the respondent companies. He submitted that surely, that was not what the Court expected when it appointed Mr Tacon. He added that their conduct flouts both the Freezing and Receivership Orders.

[170] Mr Drake feels that if the Respondents are allowed to flout the Court's Orders without any consequences then the inevitable result would be that every other party who finds themselves subject to a receivership order will thumb their nose at the receiver so as to undermine having a receiver appointed.

The Law

[171] Briefly stated, the facts in **Hadkinson v Hadkinson**[46] are that the mother of a child of a marriage on a petition for dissolution of marriage was directed that the child should remain in her custody and that he should not be removed out of the jurisdiction without the sanction of the Court. The decree nisi was granted and on the decree being made absolute, the mother took the child to Australia without first seeking the permission of the Court. The father filed a summons for an order directing the mother to return the child to the jurisdiction and the Court made the Order. The mother appealed against the order and the father objected on the ground that she was not entitled to be heard as she was in contempt. At page 568, Romer LJ stated:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it be irregular or even void."

[172] His Lordship quoted with approval several passages from the judgment of **Chuck v Cremer**[47] wherein Lord Cotterham stated that:

[46] [1952] P 265
[47] Cooper temp. Cott. 205,338

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular."
>
> "That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

[173] Romer LJ later stated that two consequences flow from the nature of the breach of a court's order, the first being that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise while the second consequence is that no application to the court by such person will be entertained until he has purged himself of his contempt. He made the distinction between disobedience of orders relating merely to matters of procedure which he said he is not now considering. He next identified exceptions to the principle but these do not apply in the present case.

[174] In **Hadkinson**, Denning LJ (as he then was) took another approach which was described by Mr Drake as the less vigorous test. He held that it is rare for the court to refuse to hear counsel for an appellant. He referred to a number of cases and held that they seem to point the way to the modern rule. He then stated (at pages 574-575:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance…. I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard but if his disobedience is such, so long as it continues, it impedes the course of justice in the case, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

[175] Denning LJ found that **Hadkinson** was a good example of a case where the disobedience of the party impedes the course of justice, so long as the boy remains in Australia as it is impossible for this court to enforce its orders in respect of him and additionally, no good reason has been shown why he should not be returned to the jurisdiction of the court. He also

held as did Romer LJ that the boy should be returned before counsel is heard on the merits of his application and until he is returned the court will decline to hear the mother's appeal.

[176] In **X Ltd. v Morgan-Grampian (Publishers) Ltd**[48] the House of Lords held that although the court had a discretion to decline to hear a litigant's appeal where he had willfully and contumaciously failed to comply with an order of the court, since the argument on behalf of G. would have been adduced by the first and second defendants in any event, since the plaintiffs did not oppose G. being heard and since his appeal was grounded on an alleged lack of jurisdiction to make the order at all, proper exercise of discretion favoured the hearing of argument on behalf of G. and the Court of Appeal had accordingly erred in refusing to hear him.

[177] In **Bastion Holdings Limited v Jorril Financial Inc. (Jamaica)**[49], Lord Scott of Foscote referring to the judgment of Denning LJ in **Hadkinson** stated:

> "These passages from Denning LJ's judgment in *Hadkinson* seem to their Lordships to fit this case. Mr Whittaker's contempt, in refusing to allow himself to be cross-examined on his affidavit and on the documents he had produced pursuant to the court's discovery order, impeded McIntosh J's endeavours to ascertain the truth about the Agreement. The allegation made against Mr Whittaker and Mrs Geddes, was a grave one. It was an allegation that they had conspired to put forward a falsely dated document in an endeavour to frustrate the purpose of the Mareva injunction that had been granted on 8 November 1999. Mr Whittaker may have been well advised not to present himself to be cross-examined but, whether that is so or not, his refusal to do so unquestionably made it more difficult for the judge to decide whether or not the allegation was made out. She was obliged to rely on inferences from documents instead of hearing the oral evidence of one of the parties to the alleged conspiracy. In their Lordships' judgment McIntosh J's decision to decline to hear submissions from Mr Manning was a decision that, in her discretion, she was entitled to take. Their Lordships agree with the Court of Appeal's rejection of Bastion's appeal on this point."

[178] In **Japan Chrome Limited and Others v Kazakhstan Mineral Resources Corporation and Others**[50] the defendants filed summonses seeking an order that all further proceedings be stayed and/or that the order granting leave to serve the Writ of Summons upon them out of the jurisdiction be discharged and/or service the Writ on them be set aside. The claimants took

[48] 1991 1 AC 1
[49] 2007 UKPC 60 Judgment delivered on 8 November 2007
[50] BVIHCV1998/0013 and 1998/0002

several preliminary objections including that the defendants were in flagrant breach of the Court's Order for an anti-suit injunction and the pursuit of their application before the Court amounts to a collateral attack upon that anti-suit injunction in circumstances where the defendants have made no attempt to purge their contempt. The submission was also made that to allow the application to proceed would be to validate the defendants' contempt, undermine the validity of the anti-suit injunction and permit the defendants to reap the benefits of the proceedings initiated by them in Kazakhstan which they were ordered by the BVI Court to discontinue or withdraw.

[179] Benjamin J held that there was ample evidence that the order granting the anti-suit injunction was brought to the attention of the defendants yet they acted in defiance of it. He also held that the Order was specifically directed to the defendants who have actively cooperated in promoting its breach and the Receiver's attempts to enforce the Orders of this Court and in the face of their clear disobedience of the order and there being no attempt to purge such contempt, he would decline to entertain their applications in these actions.

[180] The Learned Authors of Arlidge, Eady and Smith on Contempt state:

> "An effective sanction (deriving from canon law) was the practice that one who was in contempt might not be heard further in the same litigation, for his own benefit, unless and until he purged his contempt. In the words of Lord Brougham: "It is a general rule of all Courts that no party shall be allowed to take active proceedings, if in contempt." This was clearly a practice primarily coercive in nature rather than punitive. It was by no means universally applied. There have also been recognized so-called "exceptions", that for example a contemptor might be heard on an application to purge the contempt; or for the purpose of setting aside the order breach of which had put him in contempt; or of appealing against the order of committal for lack of jurisdiction; also, he was not precluded from defending himself in the action itself. So too, it has been held that a defendant in breach of the terms of an Anton Pillar (now known as a "search and seizure") order might seek to have the order set aside, although he could still be punished for contempt."

Analysis of the Law

[181] It is plain that in this area of the law, there is the rigid test that was taken by the Lord Justices (other than Denning LJ) in **Hadkinson** and the "more tempered" approach of Lord Denning, which was referred to and applied by the Privy Council in **Bastion Holdings Limited v Jorril**

Financial Inc. (Jamaica). Lord Bridge found favour with Lord Denning's approach in **X Ltd. v Morgan-Grampian**.

[182] However, it is beyond dispute that a court may refuse to hear a party who has been found to be in contempt and who has made no effort to purge that contempt: see **Hadkinson**, **Astro Exito Navegacion SA v Southland Enterprise Co Ltd [The Messiniaki Tolmi]**[51] and **X Ltd v Morgan Grampian**. But it is now recognised that there is no general rule that a court will not hear an application for his own benefit by a person in contempt unless he has first purged his contempt, so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exceptions. The approach which the court should adopt is now found in the judgment of Lord Bingham in **Arab Monetary Fund v Hashim and others**[52] where he said:

> "From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

[183] The question to be asked is whether the interests of justice are best served by hearing or refusing to hear the Respondents, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of its Orders.

[184] In the instant case, the Court made Freezing Orders and Disclosure Orders against the Respondents. It also appointed Mr Tacon as the Receiver. Pursuant to the terms of the Orders, Mr Tacon's duties included, among other things, to identify, collect and preserve the undertaking and assets of these two companies. He was also empowered to investigate these companies in order to carry out his functions. Both Respondents were aware of the orders and for months, have refused and/or failed to comply with them. In order to identify and secure the assets of these companies, Mr Tacon requested information which was not

[51] [1981] 2 Lloyd's Rep 595.
[52] 21 March 1997 [unreported]

forthcoming. Instead, he was faced with a stumbling block in the person of Mr Risbey who initially, denied the very existence of a company of which he was the sole director. He knew of Ha**kk**isan; now Haki**ss**an. This is incredible. Mr Tacon made several requests, some of which were answered and others not. To date, many requests, particularly in respect of Myrzaly have not been complied with. These have been identified and must be complied with. So, also, those in respect of Hakkisan.

[185] However, there has been a radical shift in the initial approach taken by the Respondents and they are trying their utmost best to comply with Mr Tacon's requests. The Court was informed that if the Respondents are told by the Court to comply with Mr Tacon's requests, they will do so. I do so now.

[186] In light of this metamorphosis, I do not think that the interests of justice will best be served by debarring the Respondents from having their current applications heard or until they have completely purged their contempt or to make an unless order against them. In fact, as the Learned Authors of Arlidge, Eady and Smith on Contempt said quoting Lord Brougham that it is a general rule of all Courts that no party shall be allowed to take active proceedings, if in contempt. However, that rule is not universally applied. There have been recognized so-called "exceptions", for example a contemptor might be heard on an application *to purge the contempt; or for the purpose of setting aside the order breach of which had put him in contempt.*

[187] I will therefore refuse to make unless orders against these companies. However, I hastily add that both Respondents must comply with Mr Tacon's requests so far as they are detailed in this judgment. Both Respondents have flouted with impunity the Court Orders and this approach should be discouraged forthwith. The contempt, though disdainful, cannot be considered as impeding the course of justice, as were found to be in the case of **Bastion Holdings Limited v Jorril Financial Inc. (Jamaica)**.

[188] The issue of costs will be reserved as I do not think success lies in one party. Counsel are to submit written submissions on costs within 21 days hereof and seek a hearing date from the Registrar of the High Court.

[189] Last but not least, I am most grateful to Mr Drake, Mr Lord and Mr Husbands not only for their sterling contribution and presentation to the Court but for their patience in awaiting this lengthy judgment. I also recognize the contributions of Mr Evans, Mr Kite, Mr Thorp and Ms Engwirda who have all performed incomparably.

Indra Hariprashad-Charles
High Court Judge