NCN: [2024] EWHC 1684 (Ch)

Claim No. BL-2020-001343

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD) AND INSOLVENCY AND COMPANIES LIST (ChD)

24 June 2024

Before:

THE HONOURABLE MR JUSTICE MILES

Between :

(1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS OF LONDON OIL & GAS LIMITED (IN ADMINISTRATION))

Claimants

-and-

(1) MICHAEL ANDREW THOMSON
~~**(2) SIMON HUME-KENDALL**~~
~~**(3) ELTEN BARKER**~~
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENTS LIMITED
~~**(10) HELEN HUME-KENDALL**~~

Defendants

Stephen Robins KC, Andrew Shaw & Daniel Judd (instructed by **Mishcon de Reya LLP**) for the **Claimants**
Timothy Dutton KC (instructed by **Kingsley Napley LLP**) for the **Fifth Defendant**

Hearing date: 24 June 2024

APPROVED JUDGMENT

Mr Justice Miles :

Introduction

1. There are two applications before the court. The first is an application dated 6 June by the fifth defendant for the withdrawal of a unilateral notice, which was made by the claimants in December 2023 in respect of a property owned by the fifth defendant near Lechlade ("The Property").

2. The second is an application by the claimants against the fifth defendant for a proprietary freezing injunction in respect of the traceable proceeds of money which derived ultimately from the first claimant ("LCF"), including the Property.

3. By way of background, in correspondence in early 2024, the fifth defendant, through his solicitors, contended that the claimants should not have applied for the unilateral notice, and sought the claimants' agreement to its withdrawal. The claimants refused, but at the same time said they would be prepared to withdraw the unilateral notice if the fifth defendant agreed to various undertakings in the nature of proprietary freezing relief. There followed discussions about the terms on which that might happen.

4. During those discussions, the claimants' solicitors provided a draft order dated 5 March 2024, which, among other things, would have included provision to the payment of legal fees and living expenses by the fifth defendant. The same draft order contained extensive obligations which would have required the fifth defendant to provide asset disclosure (in the nature of tracing information) concerning a large number of payments made by the sixth defendant ("Surge") to the fifth defendant, ultimately deriving from funds transferred by LCF.

5. After the draft order was sent there was further correspondence between the parties, but they were unable to agree the terms of the order. No agreement was reached.

6. The trial commenced in February 2024 and continued until mid-June. The fifth defendant was represented by solicitors Kingsley Napley and two counsel, Mr Ledgister OBE and Mr Curry. I reserved judgment at the end of the trial, and any judgment is likely to be given during the Michaelmas term of 2024.

7. The fifth defendant now proposes to sell the Property for some £2.25 million. The claimants have agreed to the withdrawal of the unilateral notice on the condition that a proprietary freezing order is granted. The fifth defendant does not oppose in principle the grant of a proprietary freezing order, but there is a very important difference between the parties about what should happen to the proceeds of sale. The claimants say that net proceeds should be preserved pending judgment. The fifth defendant says he should be permitted to use the net proceeds to pay his legal fees and living expenses.

8. The evidence suggests that the maximum net proceeds of sale will be in the order of £2.175 million. The fifth defendant's solicitors have explained that there are accrued legal fees to the date of their evidence of approximately £2 million and some additional fees that had not accrued or been billed at the time of the evidence, which would take the total fees to date to about £2.16 million. The fifth defendant contends that there should be permission within any proprietary freezing order to enable the full amount of those fees to be paid. That would mean that over 99 per cent of the net proceeds of sale, on current calculations, would be paid to the fifth defendant's lawyers. The fifth defendant also seeks a proviso for his living expenses of some £8,500 per month, so that the small remaining amount would soon be paid out.

The nature of the litigation

9. The claimants contend that there was a substantial fraud conducted through LCF. The LCF was in the business of issuing what are called "minibonds" – a form of unregulated securities - to members of the public. The directors of LCF promoted its business on the basis that monies raised would be advanced to the UK SME market by making commercial loans, and that the interest and principal payable by such borrowers would be used to repay the principal and interest owing to bondholders. More than £230 million was raised from bondholders. The claimants (now in administration) allege that the business of LCF was conducted fraudulently and that the first defendant, a director of LCF, acted in breach of his fiduciary duties to it. They say that LCF made a series of fundamental misrepresentations about its business and operations; that there were no commercial loans to SMEs; that a large portion of the money raised from bondholders was paid to a small group of connected borrowers, in which the first defendant was interested; and that the funds raised from bondholders were paid through a series of uncommercial transactions to a small group of associated individuals. The claimants allege that the business of LCF was a Ponzi scheme, with funds raised from new investors being used to pay liabilities to earlier investors, and that its operation was bound at eventually to fail.

10. LCF was raided by the FCA at the end of 2018 and subsequently went into administration. There is a substantial shortfall for the creditors.

11. The sixth defendant, Surge, acted as a marketing and digital services supplier for LCF and charged a commission of 25 per cent of gross receipts raised from bondholders. The fifth defendant was the majority beneficial owner of Surge and was one of its directors. The evidence shows that he was the driving force behind Surge. The claimants allege that some £11.9 million of the money which was paid by LCF to Surge (about £60m) was paid the fifth defendant or to others for his benefit.

12. The claimants bring various claims against D5, including for participation in fraudulent trading; dishonest assistance in breaches of fiduciary duty by the first defendant as a director of LCF; and, most relevantly for present purposes,

proprietary claims. As to the last, the claimants allege that the first defendant caused LCF to make payments to (amongst others) Surge in breach of his fiduciary duties owed to LCF. The claimants allege that Surge, through the fifth defendant, knew, or was on notice of, the impropriety in these payments being made by the first defendant and that Surge, therefore, received the payments subject to the equitable proprietary claims of LCF or as a constructive trustee for LCF. The claimants contend that the fifth defendant, in turn, received money from Surge deriving from LCF's property, with knowledge or notice of the first defendant's breaches of duty.

13. The fifth defendant and Surge deny every element of these claims. They say that they provided a commercial service to LCF and had no knowledge or notice of any impropriety. They say that they were bona fide purchasers of the money they received without notice of any of LCF's claims.

14. As I have explained, I have reserved judgment. I was not invited by either party on the current applications to reach even a provisional view about the merits of the claims. More specifically, both parties invited me to operate on the basis that the claimants have a proper claim in the sense that there is a serious issue to be tried; and that the fifth defendant has an arguable defence to the claims. I shall follow that course.

15. As I have already said, the fifth defendant does not object in principle to the imposition of a proprietary freezing order but says that it should contain the provisos for legal costs and living expenses already outlined. The fifth defendant says that, in reaching a view on these provisos, the court should pay very close attention, first, to the delay of the claimants in making the injunction application, and, second, to the conduct of the claimants in wrongfully applying for the unilateral notice in respect of the Property in December 2023. The fifth defendant says that the injunction sought is an equitable remedy and that the delay and conduct of the claimants should tell in favour of the inclusion of the provisos. The claimants say that any delay is irrelevant and that there is nothing in their conduct which should dissuade the court from making the proprietary freezing injunction in the terms they propose.

16. So there is no dispute about the imposition of a proprietary freezing order. The battle ground is about the provisos for the use of the property covered by the order.

Principles about the use of property subject to proprietary freezing orders

17. There was no dispute about the general principles concerning the release of funds subject to proprietary freezing orders. The court applies a staged approach: see *Marino v FM Capital Partners Limited* [2016] EWCA Civ 1301 at paragraphs 18 to 23. There is a helpful summary of these principles in paragraph 22 of *Kea Investments v Watson* [2020] EWHC 472 (Ch):

"In the case of proprietary injunctions, however, the position is different: see Grant and Mumford, Civil Fraud (1st edn) at §32-059 to §32-068. Here the principles are as follows:

(1) Since the basis of the proprietary claim is that the particular asset in question is said to belong to the claimant, the question is not whether the defendant should be able to use his own assets, but whether he should be permitted to use assets which may turn out to be the claimant's. There is therefore no presumption in favour of his being able to do so.

(2) There are four questions which fall to be answered: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) ("*ITS*") at [6] per Lewison J. The first is whether the claimant has an arguable proprietary claim to the money.

(3) The second is whether the defendant has arguable grounds for claiming the money himself; as Millett LJ said in *The Ostrich Farming Corp Ltd v Ketchell* (unrepd, 10 Dec 1997):

> "No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings."

(4) The third is whether the defendant has shown that he has no other funds available to him for this purpose.

(5) But even if the defendant gets over this hurdle then the Court has a discretion: *Sundt Wrigley*, where Sir Thomas Bingham referred to the Court having to make a:

> "careful and anxious judgment … as to whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may, in course, turn out to be a successful defence."

(I have not seen a transcript of this judgment but only quotations from it, and in some of these the words "what may, in course, turn out" appear as "what may of course turn out", but nothing of course turns on this.) See also *Xylas v Khanna* (unrepd, 4 Nov 1992) where Hoffmann LJ referred to the decision requiring the balancing of the risks of injustice and to it being very much a matter of discretion."

Positions of the parties

18. The position of the claimants is that the court should proceed on the basis that the first and second questions identified in *Marino* have been satisfied. The claimants say the third condition has not been satisfied as that the defendant has not discharged the burden on him of showing that he has no other funds available for the purpose of paying legal expenses.

19. The claimants submit that the analysis should stop at that stage, but that, if the fourth question arises, the court should refuse to allow any release of funds in respect of the legal expenses. They say, in this context, that any delay in applying for an injunction is irrelevant. They also say that they were justified in waiting to make their application until the fifth defendant had applied for the withdrawal of the unilateral notice.

20. The claimants also say that the question about the validity or otherwise of the unilateral notice is now of no practical relevance because the fifth defendant has agreed in principle to a proprietary freezing order and the only debate is about the inclusion or otherwise of the provisos, and other detailed points about the terms of the order.

21. The position of the fifth defendant is that the court should conclude that there was never a proper application for a unilateral notice. While the fifth defendant does not oppose the making of a proprietary freezing order, the delay that has occurred and the conduct of the claimants in seeking the unilateral notice are material, both to the grant of the order (though this is not now opposed) and the court's discretion in deciding whether there should be a release of funds. There has been delay on the part of the claimants since December 2023, and possibly earlier. The fifth defendant says that this has caused prejudice in relation to the release of funds. The fifth defendant also contends that the claimants were never entitled to a unilateral notice, that the application by them for the notice was unreasonable, and that this conduct should be taken into account in deciding the terms of any injunction.

22. As to the *Marino* criteria, the fifth defendant says that there is no dispute as to questions one and two; that the fifth defendant has satisfied the burden on him under question three; and that the court should order the release of funds as a matter of discretion under question four. The fifth defendant particularly emphasises the claimants' delay in applying and contends that the claimants should not be in a better position now than they would have been in, say, January or February 2024, had they applied then.

The application for the unilateral notice

23. The basis of the fifth defendant's arguments about the unilateral notice turns on the provisions of sections 34 and 33 of the Land Registration Act 2002.

24. Section 34 allows a person who claims to be entitled to the benefit of an interest affecting a registered estate or charge, if the interest is not excluded by section 33, to apply to the registrar for the entry in the register of a notice in respect of the interest.

25. Section 33 provides that no notice may be entered in the register in respect of any (inter alia): "(a) an interest under (i) a trust of land."

26. For the purposes of section 33, the expression "trust of land" has the same meaning as in the Trusts of Land and Appointments of Trustees Act 1996.

27. Section 1 of the 1996 Act defines "trust of land" as a trust which has the following characteristics: it is a trust of any kind, and whether express, implied, constructive or resulting (see section 1(2)), and where the subject matter of the trust is, or includes, land (section 1(1)) and does not fall within certain exclusions which do not apply in the present case.

28. The reference in section 33 to an interest under such a trust is to be construed in the light of section 87 of the 2002 Act, which expands the meaning of the word "interest" so as to include, among other things, a pending land action, i.e., litigation in relation to an interest in land.

29. The fifth defendant submits the claimants are claiming an interest under a trust of law within this definition. He says that the concept of an "interest" under a trust of land for the purposes of section 33 has the same scope as the concept of an "interest" affecting a registered estate for the purposes of section 34. If the concept of an "interest" affecting a registered estate is given a more expansive reading by virtue of section 87 of the 2002 Act so as to include pending land action, by the same logic, the concept of an interest under a trust of land for the purposes of section 33 of the 2002 Act must be given a similarly expansive reading.

30. Counsel for the fifth defendant bolsters this argument by observing that it is open to a person who claims an interest in land in legal proceedings (i.e. a pending land action) to seek a proprietary freezing order and, if it is granted, apply for a restriction on the land register. And a claimant who, at trial, establishes a proprietary claim in respect of land may seek a restriction. However, what a claimant to a proprietary claim in land may not do is place a notice on the land to support a pending land action, since this is a claim to an interest under a trust of land within the definition contained in section 1 of the 1996 Act. The fifth defendant relies on Ruoff & Roper, at paragraph 37.004, where it is stated: "... it is a paramount principle of the land registration system that the equitable interests arising by way of trust are kept off the title register."

31. Counsel for the fifth defendant emphasises the distinction under the 2002 Act between a restriction, which does not confer priority over a purchaser but provides the person claiming the interest with practical protection in relation to any dealings

with the land, and a notice which (if valid) confers priority on the person who has registered the notice.

32. Counsel for the claimants contends that the expansive definition of an "interest" given by section 87 of the 2002 Act indicates that a notice may be given in respect of a pending land action and that it would be inconsistent or incoherent if, on the one hand, under that definition notice could be given in respect of a proprietary claim to land but, on the other hand, section 33 ruled out an application for such a notice.

33. The claimants accepted that a notice could not be given in respect of a final judgment establishing a proprietary interest as that would amounts to asserting an interest under a trust of land (and there would not be a pending land action), but he contended that the final order could be protected by a restriction (rather than a notice).

34. The claimants also relied upon the decision of *Godfrey v Torpey* [2006] EWHC 1423 (Ch) where Mr Justice Peter Smith refused an application to require the withdrawal of a unilateral notice in respect of a proprietary claim that had not yet been determined by the court.

35. I prefer the submissions of the fifth defendant on this point. It seems to me that their claim is to a trust in land. And if the concept of an interest is to be given an expansive definition to section 34 by reason of section 87 of the 2002 Act, the same expansive definition must be given for the purposes of both section 33, where the same concept is used.

36. Moreover, in my judgment it would be anomalous if a notice of a proprietary claim could be given before judgment was obtained in proceedings (by virtue of the claim amounting to a pending land action) but could not be protected by notice in the event that the claim was established by a final judgment given at trial. That would seem incoherent, as it would mean that a notice could be entered before the proprietary right had been established, but not afterwards. That indeed seems the wrong way round: one would expect the position of the claimant to the interest to be stronger after judgment than it is before. It does not seem to me an adequate answer to say that, in that event, the final judgment can be protected by a restriction.

37. I agree with the submission of counsel for the fifth defendant that there is a difference under the 2002 Act between notices (which confer priority) and restrictions (which do not confer priority). It seems to me a more natural and coherent reading of the statute to say that a proprietary claim can be protected by a restriction if the court has made an appropriate interim order before trial and can continue to be protected by a restriction where the court has made an appropriate declaratory order at trial. The case of *Godfrey* does not help, as there was apparently no argument about the interplay of sections 33 and 34.

38. I therefore decide that the application for the unilateral notice was not permissible.

39. The fifth defendant relies next on section 77 of the 2002 Act, which imposes a duty to act reasonably. It provides so far as relevant that:

> "(1) A person must not exercise any of the following rights without reasonable cause ... (b) the right to apply for the entry of a notice or restriction.
>
> (2) The duty under this section is owed to any person who suffers damage in consequence of its breach.

40. I was not taken to any authority about the nature of the duty to act reasonably and, in particular, going to the question whether a person has acted without reasonable cause in a case where he or she has bona fide applied but it turns out that, as a matter of law, the application was not permissible. It may be that, in such circumstances, the application could be seen as being made without reasonable cause. I can see arguments the other way. In any event, it does not appear to me, for reasons that I will address below, that section 77 has any bearing on the question that I have to decide on the claimants' application for proprietary freezing relief.

The proprietary freezing injunction

41. There is no dispute about the first and second questions under the *Marino* case. As to the third, it is common ground that the burden is on the defendant to demonstrate that he has no other assets which are available for the purposes of paying the legal fees.

42. The claimants say that the fifth defendant has not discharged this burden. To summarise they make the following points.

43. First, there was a disclosure issue in the proceedings for the fifth defendant to disclose documents showing what had become of the claimants' monies being claimed in these proceedings. The claimants say that that disclosure has not been given.

44. Secondly, that the evidence given at trial supports the conclusion that some £11.9 million of funds were received by the fifth defendant out of the £60 million or so of funds received by Surge from LCF. In addition, some £8 million or so was paid to Surge by Blackmore, another issuer of bonds, which had a separate contractual arrangement with Surge. If one takes a broadbrush approach, the evidence suggests that in the region of 20 per cent was paid by Surge to the fifth defendant from the monies that Surge received from LCF. Applying the same percentage to the monies received from Blackmore by Surge would suggest that another £1.6 million or so would have been received by the fifth defendant. That is

a rough and ready or broadbrush approach, and there is no real science to it. But it seems to me a reasonable working assumption.

45. Thirdly, the fifth defendant has not said in his evidence what has become of those monies he received from Surge which derived from LCF or the monies which he is likely to have received from Blackmore. There is some evidence that he has disposed of some assets since the proceedings started. This has been covered in correspondence between the parties, including a letter of 4 January 2024, where it seems that there have been disposals of assets amounting to about £3.5 million, but there is very little explanation of what has eventually become of those funds.

46. Fourthly, the asset disclosure that has been given by the fifth defendant is inadequate to meet the burden on him.

47. It is helpful here to summarise it. In a letter dated 29 January 2024, the fifth defendant's solicitors provided a schedule of the fifth defendant's assets. The schedule refers to the Property. It also refers to another house in Cheltenham said to have a current value of some £415,000. There is a car with a value given of £42,000 (which later evidence shows has been sold). There are shares in a number of companies. One of these is a company called Service Box Group Limited, which was incorporated on 10 March 2017. The schedule refers to 35,000 shares held by the fifth defendant. I was informed that that represents 50 per cent of the issued share capital. The schedule says, "current company value £100,000". There is a list of a number of watches, worth between £40,000 and £50,000. There are some bank accounts, the total balance of which is somewhere over £20,000.

48. The schedule then refers to "Loans to individuals", which amount to about £620,000. No details are given about the terms of those loans, including any interest rates and whether the amounts of the loans include unpaid and accrued interest. There is some evidence in the fifth defendant's sixth witness statement that these loans have not been repaid as quickly as anticipated. The notes to the schedule say that none of the individuals are connected to the litigation in any way, that all had signed loan agreements and all were confidential. The schedule finally refers to two paintings with a total value said to be £10,000.

49. The covering letter said, "[o]ur client makes no admissions as to whether these were acquired with funds traceable back to LCF. This exercise is one of the issues in the proceedings which your clients have to prove."

50. As to Service Box, the trial witness statement served by the fifth defendant said that it had an annual turnover of about £4 million. The statement also said that the profits were modest, but no further evidence was given about that.

51. In his sixth witness statement, the fifth defendant said:

> "I had and have no other source of liquid funds over which I have any control. I attach at pages 49 to 51 of PC 3 a schedule of my assets. This was provided to Mishcon de Reya, as I describe further below, on 29 January 2024. All of these assets have been derived, at least in part, from money which came from Surge's contract with LCF. I have no assets which are not derived at least in part from this source. There has been no suggestion that this list is somehow incomplete or inaccurate. My house is the only substantial asset that I can sell in order to fund my defence. At no time during these proceedings until 4 January, as I describe further below, have Mishcon De Reya suggested that their clients should be entitled to a proprietary injunction against me, or sought undertakings as to my assets. They have not suggested that there should be any restriction on my using what I consider to be my assets in order to fund my legal fees. In fact, quite the opposite."

52. The claimants contend that the paragraph is deliberately carefully worded, in that it says that the assets have been derived "at least in part" from money which came from Surge's contract with LCF and that the fifth defendant has no assets which are not derived "at least in part" from this source.

53. The claimants also emphasise particularly that the witness statement does not give any explanation of what has happened to the £11.9 million of assets which the fifth defendant derived from the £60 million paid by LCF to Surge or the monies it is likely the fifth defendant derived from Surge under its arrangements with Blackmore.

54. Counsel for the fifth defendant submits that the burden on the fifth defendant under the third *Marino* limb had been discharged. The witness statement says in terms that the schedule sets out his assets, and it gives values for those assets which the court should not go behind.

55. The fifth defendant also submits that the proprietary freezing order being sought by the claimants extends beyond the Property, to all assets deriving from LCF which passed via Surge, and that, at the conclusion of the trial, the claimants submitted that all the remaining assets in the hands of the fifth defendant are assets to which the claimants have proprietary claims. He submits that, in these circumstances, there are no free assets available to the fifth defendant to enable him to meet his legal expenses which are not subject to the proprietary claims.

56. I am not satisfied that the fifth defendant has properly discharged the burden on him of establishing that he has no assets other than the Property from which to meet his legal costs.

    a. His witness statement is qualified in an important sense, in that he says that the assets which he has referred to derive "at least in part" from monies to which LCF lays claim. Moreover, in the letter of 29 January he made it clear that he

did not accept that the assets were subject to those proprietary claims. He does not say that the listed assets are subject in their entirety to the claims or identify the extent to which he contends that they are not so subject.

b. There was no dispute at the trial about the very large amounts of money received by the fifth defendant from Surge deriving from LCF and the large amounts earned by Surge from Blackmore which it is reasonable to suppose led to further payments to the fifth defendant. It is striking that the fifth defendant has disclosed such a limited pool of assets, given the very substantial amounts he received in the period up to the end of 2018. He has not disclosed how it is that he has quite such a limited pool of assets as he now contends. He has not explained even in broad terms what has happened to the many millions of pounds he had at the end of 2018.

c. He has not provided details of the loans set out in the schedule, which amount to over £600,000.

d. He has not provided any evidential basis to allow the court to assess the reality of the £100,000 valuation in relation to Service Box.

57. In my judgment, on an application of this kind far more is required than the very brief and limited information the fifth defendant has chosen to put before the court. The cases show that the burden is firmly on the respondent and this requires comprehensive disclosure.

58. Thia conclusion is sufficient to dispose of the application, but I go on to consider the fourth question of the *Marino* test, in case I am wrong.

59. The principles relating to the fourth stage of the Marino test were reviewed by Mr Justice Bryan in *Skatteforvaltningen v Edo Barac* [2020] EWHC 377 (Comm) at paragraph 24:

> "If a defendant can establish that he has no assets unaffected by proprietary claims against him on which he can draw to meet his living and legal expenses, then the court should balance considerations of justice on both sides [The Third Stage]:
>
> (1) The court must consider where the balance of justice lies as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it: see *Marino* at [23].
>
> (2) It does not automatically follow that a defendant should be entitled to draw on proprietary funds if he can show that he has no other funds with which to defend the action; see *Ostrich Farming* at p. 7 (per Millett LJ).

> (3) The court is required to come to a "careful and anxious judgment as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence": *Marino* at [19]. This balancing exercise should be carried out based on "all relevant circumstances": see *Ostrich Farming* at p.10, per Roche LJ.
>
> (4) There are less strong reasons to permit the payment of incurred legal fees rather than future legal expenses. The court is concerned with the interests of the parties and not the defendant's solicitors: see *Angel Group Ltd v Davey* (unrep, Ch D, 21 February 2018) ("*Angel Group Ltd*") at [46].
>
> (5) The court will "act cautiously so as to ensure that the funds are not wasted", which may be achieved by "limiting the amount ... even if that may cause a defendant to reassess how to pursue her case or to consider alternative funding models": see *Angel Group Ltd* at [44] to [45].
>
> (6) It is not conclusive that the defendant will have to act as litigant in person. The defendant may be able to receive a fair hearing through such representation; *Marino* at [31].
>
> (7) A key factor in the granting of permission to use arguably proprietary funds is the court's interest in having parties professionally represented; see *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 3624 (Comm), per Popplewell J as he then was, at [11] and [29] to [33].
>
> (8) It will be relevant to consider what undertakings or offers are made by the defendant. For example a defendant may offer to replenish funds taken from proprietary assets with non-proprietary assets; see *Marino* at [19].”

60. In *AB v CD* [2023] EWHC 2353 (Ch), I applied these principles in a dispute between the claimants and other parties in the current litigation. I specifically considered the fourth factor, the distinction between accrued costs and future costs. I concluded that the summary given by Mr Justice Bryan was correct. That is not to say that there can never be a release of funds for accrued costs, but there are likely to be significantly stronger reasons for a release of funds for future costs than past ones, as the trigger for an application of this kind is whether the party seeking the release has a sufficient case to seek that to happen to be represented professionally in the ongoing proceedings.

61. Counsel for the fifth defendant accepted that the principles were correctly stated by Mr Justice Bryan but emphasised forcefully that they needed to be applied taking into account (a) the delay which he contends has happened in this case and (b) the conduct of the claimants, including the improper application for the unilateral notice.

62. For his part, counsel for the claimants submitted that delay was an irrelevant consideration: in the case of a proprietary freezing order there was no requirement to show that there was a risk of dissipation of assets and that delay in this kind of context only goes logically to that issue. He relied on the decision of Mr Justice Flaux in *Madoff Securities International Limited v Raven* [2011] EWHC 3102 (Comm) at paragraph 128. He also drew the analogy with post-judgment *Mareva* orders where delay is not a significant factor.

63. As a matter of general approach, it seems to me that the court should at give weight to the conduct of the parties and specifically to any delay and any prejudicial consequences it has brought about. This reflects the equitable nature of the jurisdiction to grant an injunction.

64. In the present case I think there is force in the submission of the fifth defendant that the claimants could have applied for a proprietary freezing order earlier than they have. It is not an answer to say that it was only when the fifth defendant applied for the withdrawal of the unilateral notice that the claimant had good reason to apply for an injunction. It seems to me that the claimants could have applied shortly after learning of the intended disposal of the property (in late 2023) and that there has therefore been delay.

65. However, it seems to me that the relevance question here is whether the delay has led to prejudice to the fifth defendant. Counsel for the fifth defendant contended that, in essence, the claimants should not be in a better position than they would have been had they applied earlier. But I do not think that is the right approach to the issue of delay. In my judgment the exercise is not about removing from the claimants some notional benefit that they may have gained by delaying. The question is whether the respondents to the order can be said to have suffered prejudice by reason of the delay.

66. Where a respondent has suffered prejudice by reason of delay, it is likely to be a powerful factor against the exercise of discretion in favour of the claimants. But where the delay has caused no such prejudice it is unlikely to be of great relevance, as the ultimate question for the court under the fourth *Marino* factor concerns the balance of potential prejudice (or injustice) to the parties. Where the delay of the claimant for the relief has led to a greater risk of injustice to the respondent the court will doubtless accommodate this in the exercise of its discretion.

67. The purpose of allowing the defendant to have access to funds which are subject to a proprietary order is to avoid the possible injustice to the defendant of being denied the opportunity of advancing what may turn out to be a successful defence, in other words, of having professional representation. The balancing exercise is concerned with the interests of the parties and not those of the respondent's solicitors or, indeed, other unsecured creditors. The principle underlying the discretion in the fourth *Marino* factor is that a party should not be unjustly deprived of professional representation, as that may be unfair. The question is about the balance of justice

between the claimant and the respondent. The interests of the respondent's creditors, including his solicitors, should carry little or no weight.

68. The position now is that the trial has taken place and the fifth defendant has had professional representation. As between the claimant and the fifth defendant, in my judgment the fifth defendant has suffered no prejudice by reason of the claimants' delay in making the application. He has, indeed, possibly had fuller representation than he would have done had the application been made earlier and the court had chosen to trim the amount available to him. There is no risk of the kind identified in the caselaw of his being deprived of presenting what may turn out to be a good defence. Any prejudice arising from the delay is to his solicitors, who have agreed to act on credit and now find themselves in the unfortunate position of not being able to be paid.

69. I have seen nothing to suggest that the claimants lulled the fifth defendant or his solicitors into supposing that they would be paid. The negotiations that took place were just that, and were for a wider package, which would have included intensive disclosure obligations which the fifth defendant was not prepared to agree. The parties were simply unable to agree. The claimants did not commit themselves to any agreement that the solicitors would be paid.

70. For these reasons, I would not have exercised my discretion in the fifth defendant's favour. He has had professional representation and the trial has completed. There is therefore no risk that his defence will not be properly presented; that has already happened. Nor, given this conclusion, would it be right to ask, retrospectively, what the court would have done had the application been made earlier. Nor is my conclusion affected by the conduct of the claimants in applying for the unilateral notice. Though I have decided that they were mistaken in law in applying for it, there is nothing to suggest that they acted otherwise than in good faith. Moreover it was open to the fifth defendant to apply earlier to have the notice withdrawn. Counsel for the fifth defendant disavowed any allegation of dishonesty and I find that there is nothing in the claimants conduct which could amount to a lack of clean hands. For reasons already given, the existence of the unilateral notice has not had any prejudicial impact on the ability of the defendant to obtain professional representation, the material issue under *Marino* stage four.

71. It seems to me that there may have been a case for a comparatively small release of funds to cover any further steps in the proceedings. There are likely to be arguments about the terms of any order which the court may make after judgment is given, and it is possible that there will also be further steps after that, depending on the outcome of my judgment. However, for the reasons I have already given, I was not satisfied at the third stage of the *Marino* test, so that question does not arise.

72. This outcome may be thought tough for the fifth defendant's solicitors. But they have run the risk of continuing to supply legal services to the fifth defendant on credit. As already explained, the reason a defendant is allowed to use money to

which a claimant asserts ownership is to obtain representation, and that has happened. The court is not in the exercise of its discretion under *Marino* concerned with protecting the defendant's unsecured creditors using property which may turn out to belong to the claimant.

Conclusion

73. In the circumstances, the application for a proprietary freezing order is granted in the terms sought by the claimants (but subject to some other small differences between the parties which I will decide if they cannot be agreed).