Neutral citation number: [2024] EWHC 2315 (Ch)

Case No: BL-2023-001416

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS & PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice,
Rolls Building,
Fetter Lane,
London
EC4A 1NL

Date: Tuesday 2 July 2024

Before:

HIS HONOUR JUDGE HODGE KC

Sitting as a Judge of the High Court

Between:

L & S ACCOUNTING FIRM UMBRELLA LIMITED
(In Liquidation)

Claimant

- v -

(1) IDUSOGIE LAUREL ORONSAYE
(also known as **LAUREL STEPHEN** and **LAUREL ORONSAYE**)
(2) STEPHEN TAIWO ORONSAYE
(3) L & S FINANCIALS LIMITED
(4) L & S ACCOUNTING FIRM LIMITED
(5) MIMSHACH MANAGEMENT SERVICES LIMITED

Defendants

MR CHRISTOPHER BROCKMAN and **MS ANNA LINTNER** (instructed by **Wedlake Bell LLP**) for the **Claimant**
MR RICHARD CLAYTON KC and **MR KARTIK SHARMA** (instructed by **KC Law Chambers Solicitors Limited**) for the **Defendants**

APPROVED JUDGMENT

JUDGE HODGE KC:

1. This is my extemporary judgment on a preliminary application made by the defendants for an adjournment of the hearing of this summary judgment application, which has been brought against them by the claimant, L & S Accounting Firm Umbrella Limited (in liquidation).

2. The defendants are husband and wife and have three limited liability companies in which they have controlling interests. The claimant (and applicant) is represented by Mr Christopher Brockman, leading Ms Anna Lintner (both of counsel). The defendants (and respondents) are represented by Mr Richard Clayton KC and Mr Kartik Sharma (also of counsel).

3. The claim form in this matter was issued on 24 October 2023. Essentially, the claimant operated as an umbrella company and, so the claimant asserts, was involved in a large scale, labour supply fraud. Its clients were primarily labour staffing agencies. It would act as the employer for agency staff placed by those agencies, largely within the health care sector. The company administered the payroll functions for the employees, and paid them their wages.

4. Following an investigation carried out by HMRC, it is said that the claimant company was involved in a large scale, labour supply fraud. Essentially, it is said that, having deducted PAYE and national insurance contributions from employees' wages, the company failed to account for those deductions to HMRC. In addition, the company charged VAT to its customers for the services it provided, but it then failed to account to HMRC for the VAT received, disguising the position by either failing to file, or by filing false, VAT returns. It is said that in excess of £25 million has not been declared, and has been misapplied, or extracted, by the first and second defendants. It is also said that the three corporate defendants have knowingly received funds when they were fully aware of the first and

second defendants' breaches of duty. In addition, it is said that the claimant has claims for dishonest assistance against each of the corporate defendants.

5. At an early stage of the proceedings, freezing injunctions, and proprietary freezing injunctions, were obtained against the defendants. There were also the usual requirements for full disclosure of what has become of the claimant company's assets. It is said by the claimant that those disclosure requirements have not been complied with. There has, however - as Mr Clayton has emphasised - been no application to commit any of the defendants for breach of those disclosure requirements. Had there been such an application for committal, of course civil legal aid would have been available to defend the application. There have been no defences filed; and, in due course, the claimant will need to obtain the court's permission to bring this summary judgment application pursuant to CPR 24.4(1)(a).

6. The summary judgment application was the subject of listing directions by Master McQuail in an order made on 25 April, and sealed on the following day (26 April 2024). By that time, the application had been listed for hearing in a three-day window opening on 1 July (yesterday). Directions were given for the filing and service of evidence from the defendants (in answer) and from the claimant (in reply). Skeleton arguments, and bundles of photocopied legal authorities, were to be filed not less than three clear days before the listing window opened on Monday of this week. Paragraph 5 of the order provided that:

> *"Any party affected might apply to set aside, vary or stay the order within seven days within the date of service."*

No such application has been made.

7. The evidence in support of the application consists of the first witness statement of one of the joint liquidators, Mr Andrew McTear, dated 5 April 2024. The two individual defendants filed evidence in answer in the form of witness statements dated 31 May and 2 June 2024. Both witness statements are in similar terms, and each extends to some 27 pages. The witness statements explain that they have been prepared for each of the defendants by their solicitors (KC Law Chambers Solicitors), based upon instructions provided by each defendant by way of email, telephone, and in-person meetings. Each witness statement records that it has been carefully checked and amended by each defendant before finalising it.

8. The claimant (and applicant) has served and filed evidence in reply in the form of Mr McTear's second witness statement, dated 24 June 2024. The claimant's counsel produced a detailed skeleton argument on 26 June which extends to some 31 pages.

9. Yesterday was set aside for my preliminary reading. The principal hearing bundle comprises four densely packed, lever arch files, extending to no less than 3,650 pages. There have also been two supplemental bundles, the second of which itself adds a further 533 pages to the body of the documentation before the court.

10. The individual defendants have also made further witness statements, dated 27 June and 1 July 2024. The more recent of the witness statements have not been signed but, during the course of this hearing, Mr Clayton gave an undertaking that the witness statements of 1 July would be signed by each defendant.

11. By an application notice, dated 26 June 2024 and submitted on CE File on 28 June, the defendants applied for the release of funds pursuant to the proprietary freezing injunctions, for an adjournment of the summary judgment hearing, and for any necessary validation orders under section 127 of the Insolvency Act 1986. (I am told that the third and fourth defendant companies are the subject of pending winding up petitions, although the claimant did not know the identities of the petitioning creditors, and the petitions are not before this court.) It is in relation to that application that the most recent series of witness statements has been filed and served by the individual defendants.

12. I am told by the claimant that the application notice seeking the release of funds and the adjournment of this hearing was served at shortly before 10 pm on the evening of Friday, 28 June.

13. Mr Clayton tells me that he was first instructed in this matter on Friday, and that he has had to get to grips with the matter over the weekend. He has produced a detailed skeleton argument, extending to some 19 pages, and dated 1 July 2024. That skeleton argument includes a document of some 44 pages setting out the responses of the individual defendants to the claimant's skeleton argument. Apart from that, Mr Clayton's skeleton (co-authored with Mr Sharma) does not address the substantive merits of the summary judgment application.

14. Mr Brockman and Ms Lintner have, in their turn, produced a more modest skeleton argument addressing the adjournment application which extends to some six pages.

15. In essence, Mr Clayton submits that the court should vary the freezing and proprietary injunctions to allow the defendants a reasonable sum to spend on legal advice and representation, and should adjourn the hearing for summary judgment to the first open day, with a time estimate of two days. Alternatively, and for the same reasons, the court should refuse the application for summary judgment.

16. In support of his application, Mr Clayton submits that, despite including the usual provision for the defendants to receive reasonable funding to secure legal advice, the claimants have unlawfully prevented the defendants from obtaining access to such advice in proceedings which, on any view, are complex and require a detailed analysis of the facts.

17. The focus of Mr Clayton's submissions has been that that constitutes a breach of the defendants' rights to obtain legal advice and representation, contrary to article 6 of Schedule 1 to the Human Rights Act 1998, headed *'Right to a fair trial'*, although, in the present context, one is really considering the right to a fair hearing of this summary judgment application. Mr Clayton says that, as a result, the defendants have been disabled from responding effectively to the summary judgment application.

18. In his skeleton argument, Mr Clayton sets out in detail the requests that have been made for funds to obtain legal advice. He addresses the standard principles which are to be applied to the release of funds in the case of proprietary injunctions; whether the claimant is entitled to refuse access to legal funds to enforce the defendants' disclosure obligations; and the impact of the right to legal representation, and access to the court, in accordance with article 6. It is common ground that the standard principles to be applied to the release of funds which are the subject of a proprietary freezing injunction are to be found in the judgment of Sales LJ in the case of *Marino v FM Capital Partners Limited* [2016] EWCA Civ 1301. Mr Clayton has set out the full discussion of those principles, as set out at paragraphs 18-31 of Sales LJ's judgment.

19. At paragraph 22 Sales LJ sets out a two-stage approach: At the first stage, the onus is on the defendant to establish that he has no assets unaffected by proprietary claims against him on which he can draw to meet his living and legal expenses. Only if he can show that does the second stage arise, in which the court has to balance considerations of justice on both sides in making the *'careful and anxious judgment'* as to whether, notwithstanding that there is a good arguable proprietary claim to the funds in issue, those funds should nevertheless be released for payment of legal fees by the party enjoined. The second stage involves determining 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, refusing to allow the defendant to expend funds which might belong to them. It is common ground that that is the two-stage test that I must apply.

20. Mr Clayton accepts that the claimant clearly has an arguable proprietary claim to the funds in issue. Since I must not prejudge the summary judgment application, for the purposes of this adjournment application I must proceed on the footing that the defendants have arguable grounds for denying that proprietary claim; but I emphasise that I am simply making that assumption, and am not determining the issue.

21. On that footing, I need to consider: (1) whether the defendants have demonstrated that, without the release of the funds, they cannot effectively defend the proceedings. If so, I must then go on to determine where the balance of justice lies between, on the one hand, permitting the defendants to expend funds which might belong to the claimant and, on the other hand, refusing the allow the defendants to expend funds which might belong to them.

22. That is the standard approach, as set out in the *Marino* case; but Mr Clayton emphasises that in *Marino* the court did not consider the effect of article 6. That, he says, is made clear by paragraph 31 of Sales LJ's judgment, which I need to set out in full, as Mr Clayton did in his skeleton argument:

> *"There are two additional matters which deserve comment. First, Mr McDonnell submitted that the refusal of Mr Marino's application was unlawful under section 6 of the Human Rights Act 1998 because it would involve a violation of Mr Marino's rights under Article 6 (right to a fair trial). It does not appear that this was a submission made to the judge. Nor is it one of the grounds of appeal, and Mr McDonnell did not seek and was not granted permission to amend those grounds. In any event,*

> *it is an unsustainable submission because: (i) on the judge's assessment of the evidence, Mr Marino is in fact able to raise funds to meet his legal expenses and so can in reality employ lawyers to represent him (in that regard, it is also striking that at various times three different firms of lawyers had been prepared to act for him and he was represented by leading counsel at the hearing before the judge); and in any event (ii) it has not been shown that, even if Mr Marino had to appear at the case management conference as a litigant in person, he would not receive a fair hearing, since judges are familiar with dealing with litigants in person and seek to ensure that despite the disadvantages they may under through not being represented by lawyers they do in fact have a fair and effective opportunity to present their case. It is unnecessary to consider what might be the position if Mr Marino faced a final trial without legal representation, since he is seeking to sell the house and it was not suggested that he would have failed in that endeavour before the final trial of the claims against him takes place."*

23. I bear in mind that this case is very different to the *Marino* case, in that that concerned representation for a case management hearing whereas the present case involves an application for summary judgment finally determining the claim against the defendants, which extends to many millions of pounds. Mr Clayton submits that the defendants have very limited financial means (as they set out at paragraphs 7 and 8 of their most recent statements, of 1 July 2024).

24. At paragraph 9 the defendants explain that they have borrowed over £100,000 from friends, relatives, and people from both sides of their family in order to finance their monthly expenditure, which they itemise at paragraph 10, and which they say totals at least £6,000 per month approximately.

25. At paragraph 11 the defendants say this:

> *"As stated above, our monthly expenditure is currently being met by borrowed funds from our relatives. We do not have any funds at all to meet our day-to-day expenses as a family as they are all currently frozen. The claimants have unreasonably refused to let our family have access to funds for our medical and daily expenses, let alone legal representation."*

26. The defendants ask the court to allow their application for a release of funds, and for an adjournment so that they can plead their case with legal representation.

27. Mr Clayton submits that the balance of justice favours permitting the defendants to expend monies on legal advice since otherwise they cannot respond effectively to serious allegations of fraud in really complicated litigation which demands a close examination of the facts.

28. Mr Clayton points to the fact that Mr McTear's first witness statement extends to some 55 pages, comprising 206 paragraphs; and the exhibits run to over 2,800 pages. He says that the amount of time and trouble taken by claimant's counsel and solicitors to draft the documents is, self-evidently, very substantial.

29. There is no indication as to the amount of time expended by the claimant's solicitors from any statement of costs because none has been served by the claimant (since this hearing is estimated to last more than two days). However, Mr Clayton submits that the time required by the first and second defendants to obtain disclosure from the claimants of the very large number of relevant documents, then to assimilate that documentation, then to draft a defence, then to consider how to secure a report from an appropriate expert, and, finally, to finalise a witness statement for a summary judgment application, is difficult to estimate. Counsel's best endeavours for the exercise are about 100 hours for leading and junior counsel – and, in submissions, Mr Clayton made it clear that he was talking about 100 hours for each - together with 50 hours for solicitors, to include the costs of obtaining an expert's report.

30. When asked to put a figure upon that, Mr Clayton produced figures that resulted in a total of some £85,000. He submits that this heavy application amply justifies the defendants in having legal assistance because the court should be astute to avoid the risk of any miscarriage of justice. Mr Clayton submits that it is quite unacceptable, and wrong in principle, for the claimant to refuse to give the defendants access to legal advice so as to address alleged breaches of the defendants' duty to disclose assets in accordance with the freezing orders. He says that it is trite law that if a claimant is seeking to enforce the breach of a disclosure order, it must do so by bringing an application for contempt of court.

31. Mr Clayton referred me to the principles that would apply to such a committal application, as set out by Sir Anthony Mann in his recent judgment in *Isbilen v Turk* [2024] EWHC 505 (Ch), at paragraph 22. He says that it is obvious that the claimant's refusal to

afford the defendants legal assistance is self-defeating as a means of facilitating the disclosure it seeks. It would be wrong in principle for the claimant to seek an adventitious benefit by refusing requests to provide funds for legal advice on the grounds of a breach of disclosure orders so as to secure to itself a forensic advantage in progressing its application for summary judgment.

32. Mr Clayton founds his application principle upon the impact of the right to access to legal advice in accordance with article 6 of the Human Rights Act. He has referred me to a number of authorities. First, the speech of Lord Bingham in *South Buckinghamshire District Council v Porter* [2003] UKHL 26, reported at [2003] 2 AC 558. He referred me to paragraphs 34-37. Next, I was taken to pages 694, letter D, to page 695, letter D, of Lord Bingham's opinion in *Brown v Stott* [2003] 1 AC 681. Thirdly, I was taken to Lord Sumption's discussion of the proportionality principle at paragraph 20 of his judgment in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, reported at [2014] AC 700. I was then taken to decisions of the European Court of Human Rights in, first, *Airey v Ireland* (1979-1980) 2 EHRR 305, in particular at paragraph 24; and also to *Steel v The United Kingdom* (2005) 41 EHRR 22, in particular at paragraphs 61-63.

33. Mr Clayton summarised his case in three important submissions: (1) The effect of section 6 (3) (a) of the Human Rights Act is that the court is required, in mandatory terms, to bow to the principles set out in the European Convention. The *Marino* case did not address this point; and, in that sense, the issue that he now raises is said to have quite wide implications. (2) The obligation from *Airey* and *Steel* is to secure practical, and effective, access to legal representation. That is to be distinguished from the principle of the first stage in *Marino*, which involves no more than the requirement to produce an arguable case. Even if a litigant fails to produce an arguable case, the court cannot deny access to legal advice. (3) The overarching requirement to have regard to the right to a fair hearing requires the court to consider whether any interference with that right is proportionate. That requires a close, and exacting, analysis of the facts of the particular application.

34. In the present case, the court must consider whether the blanket refusal of funds by the claimant is proportionate as to such funds that have been requested to obtain legal advice. Mr Clayton submits that there is obviously a disproportionate interference with the right of access to legal advice and representation here. A *'reasonable sum'* should be available to the

defendants to enable them to obtain advice to mount a proper and effective defence. He submits that to bulldoze the case through with an application for summary judgment is contrary to the express requirements of article 6. He notes that that article 6 is not even addressed in the claimant's supplementary skeleton.

35. In his skeleton, Mr Brockman explains that the reason why the claimant has failed to release any funds to the defendants for the payment of their legal fees is because the defendants have not taken the simple, but necessary, preliminary step of showing that there are no non-proprietary funds from which legal fees could be paid (the first part of the two-stage test set out in *Marino*).

36. Mr Brockman reminds the court of the legal principles applicable to late adjournment applications. He submits that the principles applicable to an application to adjourn a trial should apply equally to the adjournment of the hearing of a summary judgment application given that, if successful, that application will dispose of the claim.

37. He emphasises the guidance in the *White Book* and the *Chancery Guide* that where a trial date has already been fixed, the court will make an order disposing of that date only as a last resort. The Chancery Guide states that:

> *"Once a trial date has been fixed it will rarely be adjourned. An application for adjournment should only be made where there has been a change of circumstances not known at the time the trial was fixed. The application should be made as soon as possible and never, unless unavoidable, immediately before the start of a trial."*

38. Mr Brockman also emphasises the guidance that:

> *"An application which, if granted, will lead to the loss of a fixed trial date requires exceptionally strong justification."*

39. He refers to observations in one Court of Appeal case where it was said that:

> *"The courts are now much more conscious that in assessing the justice of a particular case, the disruption caused to other litigants by last-minute adjournments and last-minute applications have also to be brought into the scales, and that*

costs may no longer adequately compensate a party for being totally mucked around at the last moment."

40. Mr Brockman has referred the court to evidence of a payment of £2 million from the claimant to Mr Oronsaye of which the destination of some £1.38 million is still wholly unexplained in paragraph 13 of an affidavit sworn by Mr Oronsaye on 16 November 2023. There Mr Oronsaye explains what happened to some of the money but the whereabouts of some £1.38 million is wholly unexplained. Mr Brockman describes that as *"the most stark example of failure to explain where monies had gone*".

41. Pursuant to the provision of information requirements in the court's orders, the defendants are required to tell the claimant the whereabouts of those proprietary assets and they have failed to do so. Mr Brockman has taken the court to letters where the claimant has repeatedly explained to the defendants what is required of them. He says that there is no question of any unfairness to the defendants: If they complied with their disclosure obligations by explaining the whereabouts of proprietary assets, and providing proper disclosure of their personal assets, then the claimant would have been in a position to consider whether funds should be released to them for the payment of legal fees. However, the defendants have chosen not to comply.

42. As regards the adjournment application, Mr Brockman submits that this is made far too late. The defendants have been on notice of the hearing since 26 April 2024. They have had solicitors acting for them since 18 April. The delay in making the present application, and securing the services of leading counsel, is said to have been entirely of the defendants' own making. The making of this application, at the beginning of a three-day hearing, is inexcusable. Significant costs have inevitably been incurred in preparing for this hearing; and the interests of the claimant's creditors would prejudiced by the delay in the court determining the application for summary judgment. Such prejudice will not be compensated by any adverse costs order since, on the defendants' case, the only source of payment of such costs would be out of the liquidation estate, thus reducing the funds available for distribution to creditors.

43. Mr Brockman also points to the significant prejudice which would be caused to other court users by a three-day listing being adjourned partway through and being re-listed. He makes the point that the court's reading time yesterday will have been wasted.

44. In his oral submissions, Mr Brockman emphasised that no one is denying the defendants access to the court or to legal representation. He says that the defendants fail at the first stage of the two-stage process in *Marino*. This is not a case where the claimant is seeking to punish the defendants for non-disclosure. Disclosure is simply a process which enables the claimant, and the court, to see whether there are funds available from which the defendants can pay the legal fees.

45. This is not an application to enforce disclosure; rather, the defendants, in bringing this application, have to satisfy the two-stage test in *Marino*. They have adduced no evidence showing that no other assets are available to the defendants to pay their legal expenses. No bank statements have been produced. These have been requested by the claimant in correspondence, and they have been refused.

46. The two most recent witness statements are said to raise more questions than they answer. One still does not know where the money in issue in this litigation has gone.

47. Mr Brockman took me to evidence that documents have been falsified by the defendants. He directed me to evidence showing that an application for registration of the fourth defendant (L & S Accounting Firm Limited) for VAT purposes had been made on 11 August 2021. That company had been registered for VAT purposes with effect from 1 September 2021; and yet invoices have been issued from 3 April 2017 bearing that VAT number. He said that there were £9.7 million worth of invoices claiming VAT, and bearing a VAT number which pre-dated the registration for VAT. It would have been impossible to have predicted the VAT number that would be granted on registration, and therefore these invoices had clearly been falsified. Mr Brockman relies upon this as emphasising the need for any assertions made by the defendants to be underscored by cogent evidence; and he says that this applies in particular with regard to the defendants' assertions that they have no funds available.

48. Mr Brockman submits that *Marino* is fully compliant with the requirements of article 6: the onus is on the applicant seeking the release of funds to show that they have no assets other than those affected by proprietary claims.

49. Mr Clayton's submissions were said to amount to effectively requiring a private litigant in the position of the claimant to fund the defence out of monies to which it has an arguable proprietary claim before the defendant has shown that they have exhausted any funds of their own. Mr Brockman submits that the *Marino* test is fully compliant with article 6. What it amounts to is that if you have funds not subject to proprietary claims, you should spend those first.

50. Mr Brockman submits that no explanation has been provided as to why this application for an adjournment had not been issued until the very eve of the summary judgment hearing. The solicitors on the record had been on notice of this hearing window since 13 April 2024. Mr Brockman characterised this as a *"tactical application"*. Any disadvantage asserted by the defendants is one entirely of their own making. There have to be very, very good reasons to adjourn an application in the list where that listing has existed for a very long time. The defendants do not get over the first hurdle of the two-stage *Marino* test.

51. Mr Brockman also points to the fact that the defendants had been able to file extensive evidence in answer to this to this application. They have not identified what further evidence they need to produce. In answer, he referred me to paragraph 3 of the defendant's witness statements, to which I have already referred. He emphasised that it was clear from those paragraphs that the defendants are quite able to instruct solicitors.

52. Mr Clayton submitted in reply that all of Mr Brockman's submissions were incoherent. Article 6 was not simply about legal representation, but the right of access to legal advice. In *Marino*, the article 6 point had not been argued and therefore that authority did not address the point that Mr Clayton was now advancing. Mr Brockman asserts that *Marino* was article 6 compliant, but Mr Clayton poses the question: how and why is *Marino* Human Rights Act compliant?

53. Article 6 requires practical, and effective, legal advice and assistance to be available. That is not the case in the present circumstances. This whole adjournment application is based on non-compliance with article 6. Everything pointed to an adjournment, and there was nothing on the other side of the balance. It was not appropriate simply to refuse to make funds available for legal advice and assistance because there had been non-disclosure of

funds. The problem here was that no effective legal advice had been given to identify what defence or defences might be available. The adjournment sought is to secure compliance with article 6 and to secure the right to effective legal advice and representation.

54. Mr Clayton accepts that there are points that could be made against the defendants, and that since Friday he has been seeking to advance matters. Yesterday, it had been unrealistic to provide bank statements, although Mr Clayton indicated that the court could make it a condition of doing so if an adjournment were granted. He characterised the claimant's submissions as *"devoid of merit"*. He accepted that there would be an unavoidable loss of court time, but the fairness of trial was fundamental.

55. At the end of Mr Clayton's submissions, I posed two questions to him. I asked: *"Why is there no explanation as to why this application has been made now, rather than earlier?"* Mr Clayton's answer was that: *"The client had borrowed for this hearing. The summary judgment application was really important and therefore the defendants had made a substantial investment, through their family and friends, in securing sufficient funds to make the present application."* That was the only explanation that Mr Clayton could give.

56. My second question was to inquire: *"What would happen if the adjournment application were refused?"* Mr Clayton indicated that: *"There is nothing for me to soldier on with and little more that I could say."* He confessed that he did not know what this case was all about. He indicated that: *"I would not walk out on the defendants, but I could not really assist the court. That ..."* he said *"... is the conundrum."*

57. I have all of those submissions firmly in mind. I am entirely satisfied that the principles established in the *Marino* case are article 6 compliant. Essentially, that case establishes a two-stage test. The first stage requires the defendant (on whom the onus lies) to establish that he has no assets unaffected by proprietary claims against him on which he can draw to meet his living and legal expenses. In my judgment, that requirement is entirely article 6 compliant.

58. Indeed, although no reference was made to it, one must, of course, bear in mind the rights of property conferred by article 1 of the first protocol. Clearly, in a case such as the present, where it is accepted that a claimant can establish an arguable claim to the proprietary

funds in issue, recourse should only properly be made to those funds if a party seeking to access them has established that he has no other assets, unaffected by those proprietary claims against him, on which he can draw to meet his living and legal expenses.

59. Bearing in mind the whole history of the matter - the apparent falsification of invoices, and the failure to respond positively to requests for production of bank statements - I am entirely satisfied that the defendants have not established that which is required at the first stage of pointing to no other assets unaffected by proprietary claims on which they can draw to meet their legal expenses.

60. I am troubled by the fact that this application has been made at this very late stage. Further, I am troubled by the fact that the statement of costs for this hearing - produced during the course of the hearing this morning - points to costs, verified by a partner in the firm of the defendants' solicitors, totalling £149,700. I am also troubled by the fact that the schedule of work done on the documents refers to no less than 64 hours' work done, apparently, by a Grade A fee earner or earners. Clearly, substantial time and costs have been incurred in connection with this adjournment application. There is no explanation as to how that has been done when it is said that there are no funds available for defending the substantive summary judgment application.

61. As I say, I am satisfied that the *Marino* test is article 6 compliant because it does not seem to me that article 6 comes into play until a defendant has established that they need to have recourse to funds covered by a proprietary injunction in order to access legal advice and representation. It is only where that has been established, as it seems to me, that article 6 is engaged, at which point the court has to balance considerations of justice on both sides in deciding whether a defendant should be permitted to expend funds to which the claimant has an arguable proprietary claim. It is at that second stage that article 6 is engaged. That clearly appears to have been the view of Sales LJ when addressing the article 6 point at paragraph 31 of his judgment in *Marino*.

62. Considering the application for an adjournment, I am satisfied that no good explanation has been put forward as to why this application is being made at this very late stage. The defendants have had legal representation since before they knew of the date of this hearing window. They had instructed solicitors by 18 April, and they knew of this

hearing window on the 26th or shortly thereafter. There is no explanation - still less any satisfactory explanation - as to why this application was not drafted until 26 June, and then only submitted and served on Friday of last week.

63. I do have to consider the overriding objective of dealing with the case justly and at proportionate cost. I acknowledge that the claimant has had considerable time and legal input in advancing the application. It does, however, bear the burden inherent in any summary judgment application of establishing that the defendant has no real prospect of successfully defending the claim, and also that there is no other compelling reason why the case should be disposed of at trial.

64. It is clear that the defendants have been able to produce witness statements - albeit in similar terms - of some 27 pages. They have also produced the 44-page response attached to Mr Clayton's skeleton argument. I acknowledge that it would be difficult for the defendants to defend this application if they were to be acting as litigants in person but, as Mr Brockman has said, they have brought that upon themselves by waiting to make this application until the twelfth hour. They have given no explanation for that. They have given no explanation as to how they have apparently been able to instruct solicitors and counsel (at a total cost of almost £150,000) and yet they say that they are in no position to defend this summary judgment application. I am not satisfied of that.

65. I have to consider the inconvenience to other court users, and the costs that would be thrown away by an adjournment of this application. This application has been made far too late. The background to the lateness of the application has not been fully explained to the court.

66. In the exercise of the court's case management powers, I am entirely satisfied that it would be wrong to adjourn this summary judgment application. And so, for those reasons, I dismiss the defendants' application, and the hearing will proceed; although since it is now just after 4 o'clock, I fear that that will be for tomorrow rather than today.

(Following further submissions)

JUDGE HODGE KC:

1. I am going to refuse you permission to appeal. This was a case management decision. I am satisfied that there is no real prospect of an appeal succeeding and there is no other reason - still less any compelling reason - why an appeal should be heard.

2. Since this is a case management decision, I also have to bear in mind the consequences of giving permission to appeal; and if the appeal were to have any practical effect, it would achieve the adjournment which I have already refused; and that is an added reason - although quite separate from the other reasons I have given - for refusing permission.

(Following further submissions)

JUDGE HODGE KC:

1. In the present case there is no reason why costs should not follow the event in the usual way. Therefore I will order that the defendants are to pay the claimant's (the respondent's) costs of the defendants' application, presumably to be assessed on the standard basis if not agreed.
