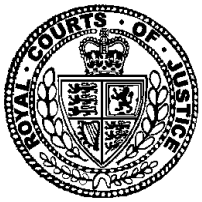

Neutral Citation Number: **[2020] EWHC 1658 (Comm)**

Case Nos: CL-2018-000297; CL-2018-000404; CL-2018-000590; CL-2019-000487

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2020

Before :

Mr Justice Foxton

- -

Between :

SKATTEFORVALTNINGEN	
(The Danish Customs and Tax Administration)	**Claimant**
- and -	
SANJAY SHAH	
PRIYAN SHAH	
GERARD O'CALLAGHAN	
And others	**Defendants**

- -
- -

Michael Fealy QC and **James Ruddell** (instructed by **Pinsent Masons LLP**) for the **Claimant**
Nigel Jones QC, Lisa Freeman and **Laurence Page** (instructed by **Meaby & Co**) for **Sanjay Shah**
Daniel Edmonds (instructed by **Stewarts Law LLP**) for **Priyan Shah** and **Gerard O'Callaghan**

Hearing date: 19 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

circulated: 22 June 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 24 June 2020 at 2.00pm.

Mr Justice Foxton

1. This judgment relates to two applications issued in the context of a very substantial and complex action commenced by the Danish tax authority, Skatteforvaltningen ("SKAT"), arising out of what SKAT alleges to be a substantial fraud relating to tax payable by Danish companies on shareholder dividends. Four actions – CL-2018-000297, CL-2018-000404, CL-2018-000950 and C-2019-000487 - have been consolidated into one set of proceedings ("the SKAT Proceedings"). Mr Justice Andrew Baker is the assigned judge for the SKAT Proceedings, and has heard a number of applications relating to them.

2. These particular applications concern what are said to be four loans granted by the 34th Defendant, Sanjay Shah, to the 21st and 22nd Defendants, Priyah Shah and Gerald O'Callaghan ("the Stakeholder Defendants") on 3 June 2015 ("the Loans") and which are said to have fallen due for payment on 3 June 2020 in the agreed net sum of £13,645,520 ("the Loan Proceeds").

    i) On 4 June 2020, Sanjay Shah and a group of Defendants for whom his solicitors also act (together "the Sanjay Shah Defendants") applied for an order requiring the Stakeholder Defendants to pay the Loan Proceeds to his solicitors, Meaby &Co, so that they could be used to meet their legal costs and expenses ("the Sanjay Shah Application").

    ii) On 5 June 2020, the Stakeholder Defendants applied under s.19 of the Senior Courts Act 1981, CPR r.3.1(2)(m), r.25 and/or r.86 for an order that the Loan Proceeds be paid into court ("the Stakeholder Application").

    In this judgment, I shall refer to the Loans and the Loan Proceeds, without making any findings on the issue (to the extent there is an issue) as to whether this was the actual or intended legal effect of the transactions.

3. The Sanjay Shah and Stakeholder Applications were made in circumstances in which SKAT has brought personal and proprietary claims against the Sanjay Shah and the Stakeholder Defendants, and obtained worldwide freezing orders and proprietary injunctions against them (collectively "the Injunctions"). In broad terms the Sanjay Shah Application is intended to ensure that the Sanjay Shah Defendants obtain the Loan Proceeds and can use them to meet their legal expenses, and the Stakeholder Application is intended to ensure that the Stakeholder Defendants are not at risk in repaying the Loans, and later finding themselves faced with a claim that they paid the wrong person or otherwise remain liable for the amount of the Loan Proceeds.

4. The Sanjay Shah and Stakeholder Applications were the subject of extensive correspondence between the parties. This achieved some narrowing of the issues, including agreement that the Loan Proceeds should initially be paid by the Stakeholder Defendants into court on a basis which preserves the claims of SKAT and the Sanjay Shah Defendants, while protecting the Stakeholder Defendants from the risk of "double jeopardy" in respect of the payment. The terms of that agreement were recorded in a consent order ("the Consent Order"). However, the status of that payment, and whether or not the Sanjay Shah Defendants are entitled to receive the Loan Proceeds and use them to pay legal expenses, remain very much in dispute.

5. The issues which arise for determination today are:

   i) Whether there are competing claims to the Loan Proceeds, such that the jurisdiction in CPR 86.1 or some similar jurisdiction is engaged?

   ii) Whether the Court can, and should now, determine any such claims?

   iii) Whether any orders should be made in relation to the funds to be paid into court today, and, if not, what is the appropriate method of resolving claims to the funds?

   iv) What costs orders should be made?

Preliminary matters

6. Pursuant to the Injunctions and for the purpose of the present applications, the Sanjay Shah Defendants have produced and referred to correspondence exchanged with SKAT's solicitors which addresses in detail matters relevant to their funding position, together with an affidavit filed in response to the Injunctions. This material was identified in a schedule to a draft order produced by the Sanjay Shah Defendants and for that reason I will refer to it as the "Schedule 1 Material". The Sanjay Shah Defendants say that the Schedule 1 Material is confidential, and for that reason sought an order that confidentiality in that material be preserved. The Sanjay Shah Defendants relied on CPR 39.2(3)(c), which allows a court to sit in private where the hearing "involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality".

7. In addition, SKAT has filed a witness statement which refers to material obtained under compulsion from the Stakeholder Defendants and which is said to contain confidential information ("the Stakeholder Material"). The material is substantial and describes in detail the personal and professional financial affairs of the Stakeholder Defendants over approximately 6 years. The Stakeholder Defendants requested that I conduct the hearing in private under CPR 39.2(3)(c) to the extent that this material is referred to, and that only a redacted copy of the witness statement referring to the Stakeholder Material be available on the court file.

8. I am satisfied that the Schedule 1 Material and the Stakeholder Material does contain confidential and personal financial material (together "the Confidential Information"), and that such confidentiality is likely to be damaged by reference to the material on the hearing of the applications if no further order is made. Further, the Confidential Information was of only very limited relevance to the issues to be determined at this hearing. In those circumstances I am satisfied that I should make an order for the purposes of this hearing to protect that confidentiality.

9. A similar application has already been made in a similar context in the SKAT Proceedings. It was determined by Mr Justice Bryan: Skattteforvaltningen v Edo Barac and others [2020] EWHC 377 (Comm) at [13]-[19]. Mr Justice Bryan set out the applicable legal principles, which rightly emphasise the importance of the principle of open justice. Balancing the competing considerations, Mr Justice Bryan held that the appropriate course in the application before him was for the hearing to proceed in public but he ordered that there should be no reporting of the financial

information and assets revealed during the course of the hearing. I gratefully adopt the reasoning of Mr Justice Bryan, with which I am in full agreement.

10. I decided that it was not necessary to sit in private at this hearing, on the basis that the hearing could be conducted without express reference to the Confidential Information. However:

    i) Like Mr Justice Bryan, I have made an order that there should be no reporting of the financial information and assets revealed during the course of the hearing.

    ii) Under CPR 5.4C, for the purpose of access to the court file or the hearing bundles and skeleton arguments, I have ordered that access should be limited to versions of those documents in which the Confidential Information has been redacted.

11. However this order is not intended to pre-judge any issues of privacy and confidentiality which may arise at any future hearing.

The relevant background

12. As I have stated, SKAT obtained both proprietary and freezing injunctions against the Sanjay Shah and Stakeholder Defendants. The order granted by Mr Justice Jacobs against the Sanjay Shah Defendants on the "without notice" application did not refer to the Loans (either as a specified asset for the purpose of the freezing order relief or as an asset which was subject to the proprietary injunction). The proprietary order made by Mr Justice Jacobs against the Stakeholder Defendants did extend to the payments advanced under the Loans, but was formulated in terms which reflected the fact that, at that stage, SKAT had not been able to trace those payments beyond the personal bank accounts of the Stakeholder Defendants. However the order required Stakeholder Defendants to disclose the "nature, extent, value, what has become of and who now holds all and any assets derived from (inter alia) the payments received from the Sanjay Shah Defendants".

13. When that disclosure was provided, it became apparent that the amounts paid to the Stakeholder Defendants pursuant to the Loans were now held by a company under the Stakeholder Defendants' control, which I shall call X Co. At the second return date for the freezing and proprietary injunction, which came before Cockerill J on 12 October 2018, the orders against the Stakeholder Defendants were discharged in return for various undertakings, including an undertaking that no payments above £20,000 would be made by X Co if SKAT objected to them.

14. So far as the Sanjay Shah Defendants are concerned, at the second return date applications were made to add certain assets to the scope of the proprietary injunction. Such an application succeeded in respect of another loan said to have been made by Sanjay Shah. No such application was pursued in respect of the Loans.

15. When the Loans fell due for renewal, there were a number of options open to the various parties against the background of the litigation, the freezing and proprietary injunctions and the undertakings. In practical terms, the Stakeholder Defendants could only repay the Loans from funds which were the subject of the undertakings, and

therefore required either SKAT's agreement or a court order to do so. SKAT could have invited the court to refuse permission for the funds to be so used, or only agreed on terms which preserved its own claims. The Sanjay Shah Defendants could have sought to enforce the Loans, and SKAT could have sought a proprietary injunction against any payment recovered by the Sanjay Shah Defendants as a result of such action. And the Stakeholder Defendants could have sought to resist any action by the Sanjay Shah Defendants on the basis that the status and beneficial ownership of the Loans was a matter in dispute.

16. In the event, these matters were short-circuited by the decision of the Stakeholder Defendants that they would not pay the money to the Sanjay Shah Defendants, but instead apply to pay it into court. The parties eventually responded to that dispute in a pragmatic way, through the terms of the Consent Order.

Whether there are competing claims to the Loan Proceeds, such that the jurisdiction in CPR 86.1 or some similar jurisdiction is engaged?

The arguments summarised

17. CPR 86.1 provides:

> "(1) This Part contains rules which apply where—
>
> (a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels; and
>
> (b) competing claims are made or expected to be made against that person in respect of that debt or money or for those goods or chattels by two or more persons".

18. SKAT, and the Stakeholder Defendants, contend that there are competing claims to the Loan Proceeds, those being the claim of the Sanjay Shah Defendants to repayment of the Loans, and the proprietary claims that SKAT have asserted against both sets of defendants.

19. The Sanjay Shah Defendants deny that there are competing claims for the purposes of CPR 86.1. Their argument, which they said gave rise to "the purely legal question as to what constitutes a 'competing claim'," had two strands.

20. The first is that SKAT does not assert a "competing" claim to the Loans. It was not enough, the Sanjay Shah Defendants submitted, that SKAT might assert a claim to beneficial ownership of the assets which the Stakeholder Defendants intended to use to repay the Loans, or to any amounts received by the Sanjay Shah Defendants. There was nothing in the terms of the Loans which required the Stakeholder Defendants to repay them from any particular asset. If the Stakeholder Defendants had no available assets of their own with which to re-pay the Loans because of SKAT's claims, this did not relieve them of the obligation to repay the Loans, or from the consequences of failing to do so.

21. The second argument was that, to the extent SKAT relied upon the proprietary claims it brought against the Stakeholder and Sanjay Shah Defendants, those were

"contingent" claims which did not constitute "competing claims" for the purposes of CPR 86.1, because SKAT's claim is "contingent on SKAT succeeding both on liability and tracing issues in its highly complex claim".

What claims is SKAT making or expected to make?

22. SKAT brings proprietary claims against the Sanjay Shah and Stakeholder Defendants (who fall within the definition of "the Alleged Fraud Defendants"). Paragraph 84 of the Re-Amended Particulars of Claim provides:

> "To the extent that the Alleged Fraud Defendants … retain traceable proceeds or products of the payments made by SKAT, they hold the said proceeds or product on constructive trust for SKAT".

Paragraph 85 asserts:

> "Alternatively SKAT is entitled to and claims an equitable charge and/or lien over the traceable proceeds or product of the payments made by SKAT".

23. Schedule 5E to the Re-Amended Particulars of Claim, at paragraphs 9(c) to (d), 11, 23(c) to (d) and 24, alleges against the Stakeholder Defendants that the amounts advanced to them under what are said to be the Loans represent the traceable proceeds of payments made by SKAT to the Sanjay Shah Defendants. At paragraph 23 of its Amended Reply, SKAT makes no admissions that the Loans reflected the legal obligations which the parties intended to create.

24. SKAT has served evidence for this hearing, referring to a report produced by Deloitte of 19 June 2018 and other material, which it is said shows:

    i) that the money advanced under the Loans came from Mr Sanjay Shah's Vanengold bank account, and can be traced to payments made into that account by SKAT; and

    ii) that the money which the Stakeholders are using to repay the Loans (namely sums in a bank account in the name of X Co) can also be traced to payments made by SKAT, and in respect of which payments and their proceeds SKAT brings a proprietary claim.

25. If the proceeds of payments by SKAT can be traced into the payments made to the Stakeholder Defendants under the Loans, then SKAT can argue that the rights under the Loans themselves (if they are genuine transactions) or any repayments of those monies (whatever the basis on which they were originally made) constitute the traceable proceeds of SKAT's payments. For those reasons, and the additional reason that the Loan Proceeds are coming from funds into which SKAT asserts a right to trace, SKAT can argue that the Loan Proceeds are an asset into which it can trace, and in which it has an equitable interest.

Analysis and conclusion

26. So far as the Sanjay Shah Defendants' first argument is concerned, CPR 86.1 refers to the stakeholder being under a liability "in respect of a debt or in respect of any money, goods or chattels". It requires that "competing claims are made or expected to

be made against that person in respect of that debt or money or for those goods or chattels by two or more persons". The words "in respect of" are generally regarded as wide in their effect (e.g. the words "in respect of a contract" in Practice Direction 6B para. 3.1(6) and the observations in Albon v Naza Motor Trading [2007] 1 WLR 2489 and Cherney v Deripaska [2009] 2 CLC 408, [67])), albeit the width of application they merit in any particular context will depend on the purpose and other terms of the provision in question. In this regard, it is noteworthy that the predecessor of CPR 86.1, RSC Order 17 rule 1, provided:

> "Where a person is under a liability in respect of a debt or in respect of any money, goods or chattels, and he is, or expects to be, sued *for or in respect of* that money or those goods or chattels by two or more persons making adverse claims thereto"

(emphasis added).

27. The disjunctive phrase "for or in respect of that money" suggests that the latter phrase was intended to have a wider meaning than simply a claim to recover the debt as creditor, and that it was not necessary for the two rival claims to be of the same nature. In my view, this is also true of CPR 86.1. For CPR 86.1 to apply, it is necessary that the claims of the two parties are inconsistent, in the sense that compliance with one claims exposes the stakeholder to the risk of liability to the other, and for that inconsistency to have arisen because of what is in substance a dispute between the rival claimants, rather than because the stakeholder has assumed or come under inconsistent legal liabilities. If, therefore, one claimant asserts an absolute entitlement to a debt as creditor, and another assets a proprietary or security interest either in the debt itself, or in any payment made in relation to it, which could be relied upon against the stakeholder, that meets the requirement of competing claims under CPR 86.1.

28. In this case, I have concluded that SKAT is asserting a proprietary claim to the Loans and Loan Proceeds. It is also asserting an equitable charge over the Loans and Loan Proceeds. In my view, these claims do "compete" with the Sanjay Shah Defendants' claims to be absolutely entitled to repayment of the Loans and ownership of the Loan Proceeds. If the Stakeholder Defendants were to pay the Loan Proceeds to the Sanjay Shah Defendants outright, as the Sanjay Shah Defendants originally contended, they would face the risk of being found liable to SKAT in respect of the Loans or Loan Proceeds.

29. So far as the second issue is concerned, the Sanjay Shah Defendants relied on the judgment of Teare J in ST Shipping and Transport Pte Ltd v Space Shipping Ltd CV (The Stealth) [2018] EWHC 156. In that case, the head owners under a bareboat charter had claims against the disponent owners under that charter. The disponent owners had claims against ST Shipping under a time charterparty. Both the head charters and disponent owners obtained arbitration awards for their respective claims. By way of enforcement of their award, the head owners obtained a Rule B attachment order from a US court (effectively a form of garnishee) in respect of the amount payable by ST Shipping to the disponent owners under the time charter award. The disponent owners asserted that the sum was payable by ST Shipping to them. In the US, the Rule B attachment was set aside for want of jurisdiction. The head owners

appealed against that order, but no stay was imposed on the order setting aside the Rule B attachment pending the appeal.

30. Against that background, ST Shipping sought relief from the Court under CPR 86.1, alleging that they were facing competing claims to the amount due from both the head owners and the disponent owners. Teare J held that the head owners' attempts to attach the debt did give rise to a competing claim for the purpose of CPR 86.1, even though the claim was being pursued in another jurisdiction. He also held that as a Rule B attachment was proprietary in effect, giving the beneficiary a proprietary claim to the payment of the attached debt, a claim of that type was capable of being a "competing claim" for CPR 86.1 purposes. By contrast, a freezing order or similar relief, which gave no proprietary claim against any particular asset of the respondent, could not provide a basis for interpleader relief merely because the beneficiary of the freezing order hoped in due course to execute its judgment against that asset (cf. the conclusion to the same effect in relation to CPR 25.1(1)(l) in Myers v Design Inc (International) Ltd [2003] EWHC 103 (Ch) at [10]).

31. Teare J held at [29]-[30]:

> "I accept that the Rule B attachment proceedings are a means by which assets are preserved so as to be available for future execution of a claim when that claim has been established. To that extent there is an analogy with a freezing order in this jurisdiction. However, the analogy cannot be taken too far. A freezing order operates *in personam* . By contrast there is evidence (in the reasoning of the Connecticut court when it discharged the Rule B attachment order) that the Rule B attachment order operates *quasi in rem*. The order purports to attach or garnish the debt due from the charterers to the disponent owners. It is described by Mr Miller, who has provided a Report on behalf of the head owners, as an 'attachment lien' which he says is a form of proprietary interest. This ought not to be a surprise because in English law a garnishee order (now known as a third party debt order) is a proprietary remedy which operates by way of attachment against the property of the judgment debtor (the property being the chose in action representing the third party's debt to the judgment debtor): see Société Eram Ltd v Cie Internationale de Navigation [2003] 1 CLC 1163; [2004] 1 AC 260 at [24] *per* Lord Bingham. A garnishee order is not a claim *in personam* made against a third party but is the enforcement of the judgment in rem against the debt: see Kuwait Oil Tanker Co SAK v Qabazard [2003] 1 CLC 1206; [2004] 1 AC 300 at [16] *per* Lord Hoffmann.
>
> I therefore accept Mr Southern's submission on behalf of the stakeholders that it is the nature and effect of the attachment which matters and which gives rise to the competing claim. A Rule B attachment can thus amount to a competing claim to the debt owed by the charterers notwithstanding that the order is intended to provide security for a claim by the head owners against the disponent owners".

32. However, Teare J held that ST Shipping should pay the disponent owners because, at the date of the application before the court, the head owners had no claim to the debt given that the Rule B Attachment had been discharged. He explained at [34]:

> "It seems to me, based upon Mr Miller's opinion, that at the present time there is no enforceable attachment of the debt owed by the charterers to the disponent

> owners. The attachment is contingent upon the appeal succeeding. That is of course what one would expect in circumstances where the attachment order has been discharged and where a stay of the order discharging or vacating the attachment order has been refused. Were it otherwise there would have been no need for the head owners to seek a stay of the order discharging or vacating the attachment order. Mr Miller says that the attachment remains 'viable' pending appeal but it is, he accepts, unenforceable. In those circumstances there is only one person with an existing enforceable claim to the debt owed by the charterers to the disponent owners and that is the disponent owners. That would suggest that the court should order that the sums in the stakeholder account should be paid out to the disponent owners".

33. Given the reliance Mr Jones QC for the Sanjay Shah Defendants places on this passage, it is important to identify precisely what the judge was deciding. This was not a case in which the head owners had anything other than a personal claim against the disponent owners – one for the amount due under an arbitration award. In those circumstances, the Rule B Attachment was not an order which gave effect to a pre-existing proprietary claim. Rather it was a court order which had the effect of creating a proprietary claim where no such claim previously existed. In that sense, the order was of the kind which has been described as "transformative" rather than "replicative" (being an order which does not restate or replicate substantive rights, in contrast to one which does: Rafal Zakrzewski, *Remedies Reclassified* (2009) pp.78-9). In circumstances in which the Rule B Attachment had been set aside, the head owners currently had no claim to the debt at all. It might in the future acquire such a claim, if the Rule B Attachment was re-imposed on appeal.

34. Teare J did not hold, and it is not the case, that there can be no competing claims for CPR 86.1 purposes when two parties assert an entitlement to a debt or asset, but the claim of one of them is a complex one which will need to be established at trial before the court will make orders giving effect to it. In Global Currency Exchange Network Limited v Osage I Limited [2019] 1 WLR 5868, Andrew Henshaw QC (sitting as a deputy High Court Judge) accepted that potential claims by investors to a fund, were they to establish and exercise an entitlement to rescind contracts under which they had paid monies for fraud, could constitute competing claims for CPR 86.1 purposes. In that case, the claims were subject to the contingency of the investors exercising their right to rescind (a matter which was entirely within their own control), but the judge held that this did not affect the position. He stated at [52]:

> "If investors do have a right to rescind, then they have prospective proprietary rights to the Funds contingent upon the exercise of the right to rescind. That is in my view sufficient—subject to the question I consider in section (E) below about whether there is a factual basis for expecting claims to be made—to satisfy the requirement of CPR Pt 86 or expected competing claims. A claim that can be brought provided that the claimant takes a prior legal step, here rescission, is still in my view a competing claim which may (depending on the facts) be expected to be made for CPR r 86.1(1)(b) purposes".

35. In this case, SKAT is asserting proprietary claims now to the Loans and the Loan Proceeds, and asking the Court for relief to replicate what it says are its existing substantive rights. The relief it claims is what is sometimes termed an "institutional"

constructive trust rather than a "remedial" constructive trust. As the editors of *Snell's Equity* (34th) note at [26-014]:

> "The commonly accepted distinction is that an institutional constructive trust arises independently of any court order, once the facts on which the creation of the trust depends have occurred. The function of the court is merely to declare its prior existence".

36. The fact that the dispute as to whether SKAT has a present entitlement to such relief will not be determined until the end of a long and complex trial does not make SKAT's competing claim conditional in the way the Rule B Attachment in ST Shipping was conditional. As Mr Fealy QC noted, the Sanjay Shah Defendants' argument on this issue proves rather too much. If SKAT does not have a competing claim for CPR 86.1 purposes until it has obtained judgment, it will never have such a claim because the effect of judgment in its favour would also preclude the application of CPR 86.1 (see H Stevenson & Son v Brownell [1912] 2 Ch 344). Accordingly I reject Mr Jones QC's second submission as well.

37. In conclusion, I am satisfied that this is a case in which there are competing claims to the Loans and the Loan Proceeds for the purposes of CPR 86.1. In relation to the Loan Proceeds, I am also satisfied that this is a case where is a dispute over "a party's right to the fund" for the purposes of CPR 25.1(1)(l).

Whether the Court can, and should now, determine any such claims?

38. The Sanjay Shah Defendants contend that the Court can and should now summarily determine the competing claims, and do so in its favour. They rightly do not contend that the Court is in a position now summarily to determine that SKAT's claims do not have a real prospect of success for CPR 24 purposes. Instead they make two points.

39. The first is to contend that SKAT has conceded the validity of the Loans by signing up to the Consent Order, because "by agreeing the payment into Court in discharge of the loans it has accepted that they are genuine". I do not accept that this is the effect of the Consent Order, which was agreed on a basis which was intended to preserve the parties' substantive positions and cannot be taken as admitting that which SKAT has expressly refused to admit in its Reply. The Consent Order ensures that the payment into Court discharges any liability the Stakeholder Defendants have "in respect of" the Loans and Loan Proceeds (which would include liabilities in relation to the amounts received by the Stakeholder Defendants whether the Loans were genuine transaction or not) but it does not decide matters in issue between the Sanjay Shah Defendants and SKAT. In any event, Mr Jones QC does not contend that the Consent Order resolved the issue of whether SKAT has a proprietary claim to or charge over the Loans or the Loan Proceeds, which I have held are the competing claims here.

40. The second is to say that SKAT's claim is "contingent on SKAT succeeding both on liability and tracing issues in its highly complex claim" such that "Mr Sanjay Shah has a better right to the Net Payment". I have already explained why I have concluded that SKAT's claim is not contingent in the relevant sense. The Court is not in a position to determine who has the better claim, but the mere fact that SKAT's claim will require a trial to determine its merits does not mean that the Sanjay Shah Defendants are entitled to summary determination in their favour. It is frequently the

case that the validity of a set-off which is relied upon as an answer to otherwise undisputed debt claim can only be determined at trial, but this does not entitle the creditor to summary judgment in its favour. Further, as I have noted, the validity of the Loans has not been admitted by SKAT, and remains in issue.

Whether any orders should be made in relation to the funds to be paid into court today, and, if not, what is the appropriate method of resolving claims to the funds?

41. In addition to arguing that the Court can summarily determine that SKAT does not have a competing claim for CPR 86.1 purposes, the Sanjay Shah Defendants also contend that, unless and until SKAT obtains a proprietary injunction in relation to the Loan Proceeds, the mere fact that SKAT asserts a proprietary claim to the Loan Proceeds does not provide a basis for denying the Sanjay Shah Defendants the right to spend those funds on legal expenses. In this connection, the Sanjay Shah Defendants suggest that it is now too late for SKAT to seek such a proprietary injunction because it has had ample opportunity to do so.

42. I do not accept that this argument provides a simple answer to the issue before the Court. If SKAT's proprietary claim to the Loan Proceeds is eventually upheld, then the use of that money by the Sanjay Shah Defendants to meet their legal expenses will have involved a civil wrong. This is not a case in which the Sanjay Shah Defendants are currently unfettered by any court order from using the Loan Proceeds to fund their legal expenses. The effect of the Consent Order and the payment of the Loan Proceeds into court is that the Loan Proceeds will remain there unless and until the Court makes an order for payment out. In considering such an application, the Court cannot ignore SKAT's proprietary claim, and the fact that granting the request will involve the Sanjay Shah Defendants spending for their own purposes a fund in which SKAT has (on the current hypothesis) an arguable claim to a proprietary interest.

43. So far as the suggestion that SKAT has delayed is concerned (which is strongly disputed), that is a matter which may be relevant to the Court's discretion in deciding what order to make on the application for payment out, and this is also true of the Sanjay Shah Defendant' reliance on communications from SKAT's solicitors in March 2020 which the Sanjay Shah Defendants say expressed support for the use of the Loan Proceeds (when paid) to meet their legal expenses. It is also true of what the Sanjay Shah Defendants say has been SKAT's failure to engage constructively with proposals they have made for funding their legal expenses from assets.

44. However, it is in the nature of a discretionary decision that it will fall to be made by weighing all of the relevant considerations. In particular, the question of whether the Loan Proceeds should be released to the Sanjay Shah Defendants to meet their legal expenses raises the question of what is to happen when a defendant faces proprietary claims, which it disputes, and says that it needs to use assets over which such claims are asserted to meet its legal expenses. The principles applicable in such a scenario were recently summarised by Nugee J in Kea Investments Ltd v Watson [2020] EWHC 472 (Ch) at [22] 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.'"

45. The existence of and weight to be accorded to the various factors relevant to the court's exercise of its discretion are best determined at a hearing at which there has been an opportunity to adduce evidence on all the relevant factors, and for that reason I do not propose to say anything more about any particular factor at this stage. I would be very surprised, however, if the procedural route by which this issue now comes before the court – an application for payment out of money paid into court by consent – left the parties in a different position than if (what is essentially) the same issue had come before the court by some other route, such as an application by SKAT for proprietary relief, an application by the Stakeholder Defendants for permission to pay the Sanjay Shah Defendants, or an application by the Sanjay Shah Defendants for permission to use the Loan Proceeds to meet their legal expenses.

46. In these circumstances, SKAT and the Sanjay Shah Defendants should seek to agree directions for a hearing on the Sanjay Shah Defendants' application for payment out to be heard, if possible, before the end of this term. To the extent that they are unable to reach agreement, the Court will give directions. However, I should record my hope that the Sanjay Shah Defendants' ability to prepare for and participate in that hearing, and for the CMC scheduled to be heard before Mr Justice Andrew Baker in July, will not be impacted by funding issues. I would ask the parties to explore whether agreement can be reached for some element of the Loan Proceeds to be released to the Sanjay Shah Defendants within a short period, to avoid that undesirable position.

Costs

47. It has been agreed that the Stakeholder Defendants should be able to deduct their costs from the payment being made into court, with the Court deciding the incidence of those costs in the litigation as between SKAT and the Sanjay Shah Defendants.

48. So far as the Stakeholder Defendants costs are concerned, the issue of who as between SKAT and the Sanjay Shah Defendants should meet those costs should await the determination of the competing claims to the Loan Proceeds. Accordingly liability for those costs as between SKAT and the Sanjay Shah Defendants is reserved.

49. So far as the costs of SKAT and the Sanjay Shah Defendants are concerned, the central issue at this hearing was whether the Loan Proceeds should be paid to the Sanjay Shah Defendants now, or whether there are competing claims to the Loan Proceeds such that the sums should be paid in court pending the resolution of those claims or some further order. The Sanjay Shah Defendants have failed in their argument on this issue. In those circumstances, if costs are to follow the event, the Sanjay Shah Defendants should pay SKAT's costs of the Applications. If the Sanjay Shah Defendants contend any different costs order is appropriate, or there are further consequential applications, I will deal with them on the basis of written submissions.