Neutral Citation Number: [2020] EWHC 3297 (Ch)

Case No: PT-2020-000587

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**PROPERTY, TRUSTS AND PROBATE LIST (ChD)**

Rolls Building,
Fetter Lane,
London EC4A 1NL
Date: 2 December 2020

**Before** :

**MR JUSTICE SNOWDEN**

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**Between :**

**PDVSA SERVICIOS S.A.** **Claimant**

**and**

**(1) CLYDE & CO LLP** **Defendants**

**(2) PETROSAUDI OIL SERVICES (VENEZUELA) LIMITED**

**and**

**THE NATIONAL CRIME AGENCY** **Proposed Third Defendant**

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Written submissions were received from

**Gresham Legal** for the **Claimant**
**Mr. Luka Krsljanin** (instructed by **Clyde & Co LLP**) for the **First Defendant**
**Mr. David Allen QC, Mr. James Lewis QC, Mr. Michael Ryan and Mr. Robert Morris** (instructed by **Kerman & Co.**) for the **Second Defendant**
**Mr. Martin Evans QC** for the **National Crime Agency**

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# Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The deemed date and time for hand-down is 10 a.m. on 2 December 2020.

**MR JUSTICE SNOWDEN**

**MR JUSTICE SNOWDEN :**

Introduction

1. Following a remote hearing on Tuesday 18 August 2020 and a short resumption on Wednesday 19 August 2020 I decided that I would not accede to an application by the Second Defendant ("POS") to join the National Crime Agency (the "NCA") to these proceedings. I gave my reasons in a written judgment which I handed down on 26 August 2020: see [2020] EWHC 2322 (Ch).

2. I indicated at the end of that judgment that I would determine the question of costs of the joinder application on the basis of written submissions from the parties, which I shall now do. I shall use the same abbreviations as in my main judgment.

3. Unusually for a judgment on costs, but because of the complex facts and the very different positions taken by the parties, it is necessary for me to set out the background to the joinder application in a little detail.

The facts

4. These proceedings concern in excess of $300 million held in an Escrow Account under the control of the First Defendant ("Clyde & Co") as escrow agent. The Escrow Account was created pursuant to an UNCITRAL arbitration between PDVSA and POS in Paris.

5. At various stages during the arbitration proceedings between 2017 and 2020, the arbitral tribunal made orders permitting payments to POS from the Escrow Account of amounts needed by POS to meet its operating costs and legal expenses. Clyde & Co communicated with the NCA in relation to such payments and made a number of authorised disclosures to the NCA under Part 7 of POCA in relation to them.

6. I set out the relevant statutory background under POCA in my earlier judgment. For present purposes it suffices to say that Part 7 of POCA creates a number of offences of money laundering together with criminal penalties in sections 327 to 334. Part 7 then also creates, in sections 335 to 339ZG, a regime under which it is a defence to the principal money laundering offences (a so-called "DAML") if a person makes an "authorised disclosure" within the meaning of section 338 prior to the commission of an act which might otherwise amount to a money laundering offence, and then receives "appropriate consent" as defined in section 335. The NCA is one of the bodies to which authorised disclosures can be made and which can give appropriate consent.

7. Appropriate consent can be actual or deemed. Actual consent requires no further elaboration. Deemed consent can arise in the following ways (i) if no reply to an authorised disclosure is received by the disclosing party within seven days, or (ii) if consent is expressly refused within the notice period, a 31 day moratorium period commences on the date on which the disclosing party receives notice of refusal, and if the disclosing party does not receive notification within that 31 day moratorium period, consent is deemed to have been given.

8. Most recently, prior to the events with which this application was directly concerned, Clyde & Co made two disclosures to the NCA on 6 April 2020 seeking a DAML. The first disclosure concerned the regular payments of operating costs and legal expenses to POS pursuant to the tribunal's procedural order number 68, and the second concerned the potential transfer of the bulk of the monies in the Escrow Account in the event that POS was successful in the arbitration. The disclosures followed immediately after officers of the NCA had informed Clyde & Co on 3 April 2020 of their view that if the firm were to proceed with transferring monies held in the Escrow Account "it could render itself liable to a criminal investigation."

9. On 17 April 2020, the NCA granted consent to Clyde & Co to make payment of the costs and expenses pursuant to procedural order number 68, but refused consent to the second transaction involving transfer of other monies from the Escrow Account. The NCA also made an application to extend the moratorium period which had started to run in relation to the second disclosure. That was due to be heard at Southwark Crown Court on 9 June 2020, but after receipt of POS's evidence and argument in opposition, the NCA withdrew its application the day before the hearing.

10. On 16 July 2020, the day before the tribunal issued its Final Award, the public prosecutor in Malaysia obtained an order from the High Court of Kuala Lumpur in Malaysia purporting to freeze all of the monies in the Escrow Account on the basis that the monies were connected in some way to an alleged fraud involving a Malaysian state entity, 1MDB.

11. The arbitral tribunal issued its Final Award the following day, 17 July 2020, directing Clyde & Co to pay all of the monies in the Escrow Account to POS. At some point around this time, Clyde & Co made a further authorised disclosure to the NCA under Part 7 POCA seeking the NCA's consent to the firm making payment of the monies from the Escrow Account in accordance with the Final Award.

12. On 22 July 2020 PDVSA brought proceedings in the Cour d'Appel de Paris to annul the Final Award, indicating that it would contend that the monies in the Escrow Account were connected with contracts involving money laundering, bribery and corruption. That allegation had not been raised by PDVSA as an issue for decision in the arbitration and is strenuously disputed by POS, which contends that the monies in the Escrow Account are the product of its legitimate business activity.

13. Rather than make an application to the French courts to stay the Final Award, on 4 August 2020, PDVSA sought, without notice, and obtained, an injunction from Zacaroli J preventing any payment being made by Clyde & Co to POS from the Escrow Account. That UK Injunction did, however, permit the continued payment of up to $455,487 per month from the Escrow Account for POS's operating costs, as had been the case during the arbitration.

14. So far as the position under POCA was concerned, in a witness statement of 10 August 2020 prepared for the return date of the UK Injunction, the relevant partner at Clyde & Co explained that,

> "10. On 7th August 2020 the NCA gave me permission to refer to the fact that they had refused consent for Clyde & Co to make a payment of the escrow monies to POS in accordance

> with the Final Award and that a moratorium period is running in respect of this.
>
> 11. I notified both PDVSA and POS of this the same day. As a result of the NCA's refusal to give consent, my Firm is unable, and has not, paid out the escrow monies to POS (including the $455,487 permitted by the order of Zacaroli J)."

15. POS's response to the notification from Clyde & Co on 7 August 2020 was that they would be applying for the UK Injunction to be amended so as to require Clyde & Co to make payment of the $455,487 from the Escrow Account. In the firm's evidence dated 10 August 2020, Clyde & Co took the position that this would not be appropriate, because,

> "The proposed order could not be given effect. As I have set out above, the NCA has denied consent for payments to be made from the escrow account and a moratorium period is in place. As such, the proposed order would require [Clyde & Co] to risk committing a criminal offence."

16. At the return date on Tuesday 11 August 2020, the UK Injunction was varied by Trower J to permit payment from the Escrow Account of further specified sums to POS's solicitors for its ordinary business and legal expenses and in relation to these proceedings, and to enable POS to defend the French proceedings and to contest the grant of the injunction in Malaysia. Trower J adjourned the question of whether the order permitting payment of such business and legal costs and expenses from the Escrow Account should be in mandatory form. That application was subsequently listed to be heard on 21 August 2020.

17. In parallel with these proceedings in the Chancery Division, the NCA gave notice to POS on Friday 7 August 2020 that following a request from the Malaysian authorities, it intended to apply in the Queen's Bench Division on Monday 10 August 2020 for an order giving effect to the Malaysian Order by way of a "prohibition order" under Article 141D of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the "2005 Order"). Consistent with the terms of the Malaysian Order, the draft prohibition order served by the NCA covered the entirety of the monies in the Escrow Account and did not include any exception permitting payment of any operating costs or legal expenses.

18. On the morning of Monday 10 August 2020, POS served upon the NCA a lengthy skeleton argument and an affidavit in response, tracing the entire history of the matter and contending that the NCA's application for a prohibition order was unfounded because it was obvious that the sums in the Escrow Account due to be paid pursuant to the Final Award were not the proceeds of crime. It was further submitted that it was contrary to the principles set out in Bowman v Fels [2005] 1 WLR 3083 to characterise the payment of sums pursuant to an arbitral award as a money laundering arrangement. A draft consent order was supplied by POS to the NCA which permitted an interim prohibition order to be made, but subject to an exception for payment of its operating costs and legal expenses.

19. Later on Monday 10 August 2020, counsel for the NCA indicated to counsel for POS that the NCA was seeking to agree with the Malaysian authorities that any prohibition order should include a provision permitting POS's operating costs and legal expenses to be paid, and that a draft of such order would be available on 11 August 2020. The draft order did not, however, materialise on 11 or 12 August 2020. On Thursday 13 August 2020 the NCA's counsel notified POS's counsel that,

> "Regrettably, the NCA still does not have approval for the exceptions we have discussed so I am not yet in a position to circulate a revised draft order."

20. On Friday 14 August 2020, and plainly frustrated by the lack of progress, POS issued its application for joinder of the NCA to the proceedings. POS's evidence in support of the joinder application stated,

> "The NCA is responsible for reporting under POCA and is aware of this litigation and has in fact threatened to bring its own related action in the Queen's Bench Division but has not done so. Furthermore it has failed to give consent (without any basis) and failed to explain its dilatory conduct. The result is paralysis, with Clyde & Co failing to act without the NCA acting first, and the NCA refusing to do anything. The position of the NCA is directly relevant to POS's application for mandatory orders against Clyde & Co. The NCA needs to explain its position and how Clyde & Co could be at risk of committing any offence under POCA 2002 in making payments to POS which have already been permitted by the High Court."

The same day, Friday 14 August 2020, Trower J ordered POS's joinder application to be served and heard urgently by me in the interim applications court on Tuesday 18 August 2020.

21. The NCA was served with the joinder application on Friday 14 August 2020. It replied by email that evening, asserting that the application was inappropriate and misconceived. The email also indicated that the NCA expected to lodge its application for a prohibition order and send a revised draft order "early next week". The NCA's email then stated, without giving any further details, that,

> "The fact pattern on which your application is premised has significantly changed."

The email concluded by expressing the hope that "despite the robust nature of the application" counsel would continue to communicate directly to avoid a hearing of the joinder application.

22. POS's solicitors responded on Monday 17 August 2020 stating,

> "It is your inaction that prevents Clyde & Co making the payments to which our client is entitled. We fail to understand why you have not already made it clear to Clyde & Co, copied to our client, that there will be no sanction by the NCA for

> paying [operating costs and legal expenses] in accordance with [Trower J's] order. We therefore need the NCA to appear in Court to explain to the High Court Judge why it has not acted to facilitate these payments by agreeing the consent order, or giving permission to any DAML [a consent to carry out the activity referred to in an authorised disclosure] that may have been applied for…"

23. In response, during the evening of Monday 17 August 2020, the NCA wrote a short letter to POS stating,

> "We remain of the view that your application is inappropriate and misconceived.
>
> In relation to the third paragraph of your letter, the NCA has <u>not</u> prevented Clyde & Co from making payments to your client (as suggested by your letter and your application).
>
> We invite you to withdraw your application … to join the NCA as a party to these proceedings and to vacate the hearing tomorrow."

24. That letter from the NCA was copied by POS to Clyde & Co, who in turn responded to POS on the morning of the hearing before me on Tuesday 18 August 2020 as follows,

> "We have seen the NCA's letter to you of 17 August 2020, forwarded to us at 19.35 last night. This letter came as a surprise as we have repeatedly been seeking permission from the NCA (through correspondence, telephone calls and leading counsel) to update you and the court as to the position in relation to the POCA issues, with the latest position being that no permission has been given. Moreover, the NCA letter may, we consider, potentially be regarded as incomplete and therefore apt to mislead. We will be writing to the NCA in that regard, insofar as they may wish to correct the position.
>
> Nevertheless, we are content to proceed on the basis that the NCA has now openly confirmed that there are <u>no longer</u> any live POCA issues with regard to the payments sought pursuant to the Trower J order."
>
> (my emphasis)

25. When I put the uncertainties over the NCA's position to Mr. Evans QC at the hearing on 18 August 2020, his response was to say that the NCA had seen Clyde & Co's subsequent email, and that if his client disagreed with that interpretation of its letter of 17 August 2020, it had had the opportunity to say so, but had not done so.

26. Although this appeared to clear the way, so far as POCA was concerned, for Clyde & Co to make the payments of operating costs and legal expenses to POS from the

Escrow Account, I invited the NCA, if it thought appropriate to do so, to set out its position in writing. This it did by a letter which I received in the evening of 18 August 2020 which stated, in material part,

> "The NCA position is that the Part 7 regime under POCA is not engaged in relation to any of the payments under the [Order of Trower J]; and that there is no Part 7 obstacle to the payments permitted by Trower J in that Order.
>
> … the statement of [Clyde & Co in paragraph 10 of the witness statement set out in paragraph 8 above] was correct at the time; Clyde & Co previously submitted a [Suspicious Activity Report] and the NCA refused consent for that activity. Whilst this is a matter for Clyde & Co, to assist the Court, the NCA can confirm that with effect from midnight on 16 August 2020 that refusal is no longer extant. That SAR was in relation to the transactions identified in it. It does not relate to the transactions that are the subject of these proceedings (for which there is no obstacle under the Part 7 regime)."

27. When the hearing resumed the following morning, 19 August 2020, I was told that the Malaysian Order had been varied overnight to permit payment of costs and expenses, and that Clyde & Co had in fact already instructed the appropriate payments to be made from the Escrow Account to POS in accordance with the UK Injunction (as varied by Trower J). On that basis, it was obvious that there was no longer any issue to be resolved between POS and Clyde & Co which could conceivably make it desirable to join the NCA to the proceedings prior to the hearing of POS's application for a mandatory order. I therefore indicated that I did not intend to join the NCA to the proceedings. On the basis that the payments sought by POS had been made, I was also subsequently asked by the parties to vacate the hearing of POS's application for a mandatory order.

28. After a hearing in late September 2020, on 23 October 2020 Sir Alastair Norris gave a judgment in which he determined to discharge the UK Injunction and to grant summary judgment in favour of Clyde & Co and POS: see [2020] EWHC 2819 (Ch). In short, Sir Alastair found that the escrow arrangements under which Clyde & Co. held the funds that were the subject of the UK injunction did not create a trust of POS's money paid under a standby letter of credit, and hence PDVSA had not been entitled to invoke the inherent jurisdiction of the English court under CPR 64 in relation to the administration of trusts to found its claim for an injunction.

<u>The arguments</u>

29. The basic principles governing the award of costs are not in dispute. The court has a discretion as to whether costs should be paid by one party to another, the amount of those costs and when they are to be paid: CPR r.44.2(1). The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order: CPR r.44.2(2). In deciding what order to make about costs, the court will have regard to all the circumstances including conduct before, as well as during, the proceedings: CPR r.44.2(4)(a) and (5)(a).

30. The positions of the parties are as follows:-

    i) Although its application to join the NCA did not ultimately succeed, POS seeks payment of its costs from the NCA. POS argues that the application succeeded in establishing the NCA's position on whether Clyde & Co were able to make the payments from the Escrow Account as a result of the debate at the hearing before me on 18 and 19 August 2020. POS claims that the application was necessary because the NCA had previously refused to engage with it and Clyde & Co in relation to the position under POCA and had provided written communications that were (to quote Clyde & Co) "unclear, incomplete and apt to mislead." It is said that this was not appropriate conduct from a public body, and this should be reflected in an adverse costs order. POS's costs are claimed to be £81,877.50.

    ii) Clyde & Co contend that the firm's costs should be treated as costs of the applications by PDVSA to continue, and by POS and Clyde & Co to discharge, the UK Injunction. Clyde & Co contend that it took a neutral stance on the joinder application but attended court to assist and up-date the court on events including its communications with the NCA; and that but for the UK Injunction, Clyde & Co would not have been put into a position in which it would have had to address the court on such matters.

    iii) The NCA submits that the joinder application was misconceived and unsuccessful, and that POS should be ordered to pay its costs. The NCA submits that the legislative scheme requires that the reporting process under POCA should be confidential, and that a party which suspects that it has been the subject of a SAR should not be entitled to "drag the NCA into court" to explain itself.

       The NCA further submits that the hearings before me achieved nothing. It submits that "at no point did the NCA prevent the payments being made"; that "the only obstacle to Clyde & Co making the payments was the Malaysian Order [which] was not a matter for the NCA"; and that "had POS waited until after the decision of the High Court in Kuala Lumpur rather than acting so hastily … no application would have been required."

       The NCA contends that had it not been for the UK Injunction, POS would not have thought it necessary to bring matters before the court, or to seek to involve the NCA, so that POS's costs should be treated as part of its costs of the UK injunction.

    iv) PDVSA does not seek to recover any of its own costs because it attended the hearing of the joinder application on a watching brief and played no material part in it. PDVSA does, however, resist the suggestion that the costs of Clyde & Co should be treated as costs of the applications in relation to the UK Injunction, and it notes that POS does not ask for a similar order in respect of POS's own costs.

Analysis

31. I do not accept the NCA's submission that because POS's application did not result in joinder of the NCA to the proceedings, the NCA should be regarded as the successful party. In my view, and for the reasons set out below, that would over-simplify and not accurately represent the outcome of the application. I therefore do not consider that it would be appropriate to apply the general rule on costs. I must instead take account of a number of factors, including the conduct of the parties prior to and in relation to the application.

32. There were two potential obstacles to Clyde & Co making payments of costs and expenses in early August 2020, namely (i) the Malaysian Order, and (ii) the need to ensure that the firm did not commit a money laundering offence under Part 7 POCA in making such payments. As indicated above, POS relied upon the NCA's attitude to both matters in support of its application for joinder.

33. In my earlier judgment I accepted a number of the NCA's submissions, including, importantly, that it is not generally open to a party who believes that a payment to it might be being blocked by the operation of the DAML process under Part 7 POCA to apply for the NCA to be joined under CPR 19.2 simply so that the NCA should "explain itself" to the court. I indicated that there was no statutory requirement for the NCA to do that. In that regard, I also accept, at least in general terms, the NCA's further submission that the DAML process under POCA is designed to be confidential so as to enable the authorities to investigate suspected money laundering without the subject of those suspicions being alerted. The court would be obviously reluctant to do anything that might hamper the operations of the NCA in that regard.

34. However, in paragraphs 38-41 of my earlier judgment I held that it was possible for the NCA to be joined against its will to a payment application under CPR 19.2. Although the court would naturally be wary of making such an order, I considered that there might be circumstances in which it was desirable to join the NCA in order to ensure that the court understood the NCA's position and the ramifications of a payment order that it was being asked to make. One such possible circumstance was that identified by Hamblen LJ in N v RBS [2017] 1 WLR 3938 at [65]. Hamblen LJ gave, as an illustration of a case in which the court might be persuaded to interfere in the DAML process, a situation in which there was real urgency for a payment, but the NCA failed to determine whether to provide its consent promptly. Although Hamblen LJ envisaged a separate application for judicial review, I thought that in an appropriate case, joinder under CPR 19.2 might enable the court to achieve a similar result.

35. In this case, in my judgment POS was justified in its view that the NCA failed to act with appropriate urgency or to explain its delay in acting in relation to the prohibition order prior to issue of the joinder application on 14 August 2020.

36. By way of context, it should be borne in mind that from the outset, even though suggestions were being made that the monies in the Escrow Account were linked to criminal activity, there was never any suggestion in the arbitration or in the proceedings in this country that POS should not be paid the monies required to meet its operating costs and legal expenses. The evidence produced by POS on 10 August 2020 in opposition to the NCA's intended application for a prohibition order explained in detail, and in very clear terms, that as a result of a consent order made during the arbitration, all of POS's income had been paid into the Escrow Account on

the basis that sufficient sums would be paid to it on a regular basis to meet its operating costs and legal expenses, and that without payment from the Escrow Account, POS had no means of meeting such costs and expenses.

37. This regime must have been well known to the NCA, because it had previously given its consent to regular payments of POS's costs and expenses from the Escrow Account during the arbitration. It must also have been obvious to the NCA (and was explained in clear terms in POS's evidence served on 10 August 2020) that POS's need for funds to be able to pay its lawyers was particularly acute in August 2020. At that time, although POS was presumptively entitled to the monies in the Escrow Account under the Final Award, it had received no payments from the Escrow Account. In addition to meeting its operating expenses, it also faced having to deal in short order with the consequences of the Malaysian Order and the NCA's intended application for a prohibition order, PDVSA's challenge to the Final Award in Paris, and the UK Injunction. The need for expedition must have been obvious to the NCA.

38. The Malaysian Order purported to have been granted, without notice, against Clyde & Co and POS. The Malaysian court had no apparent *in personam* jurisdiction over Clyde & Co, but for obvious reasons the firm would have been anxious about the consequences of making payments from the Escrow Account in breach of the Malaysian Order of which it had notice. However, the mechanism for enforcement of the Malaysian Order against Clyde & Co in the UK was for the Malaysian authorities to make a request to the NCA that the NCA apply for a prohibition order under the 2005 Order.

39. It was also clear that once such request had been made, it was for the NCA to exercise its own discretion as to the terms upon which it would ask the court in the Queen's Bench Division to make such an order. Although the NCA was acting following a request from the Malaysian authorities and might naturally wish to consult them, the NCA was not bound to ask the court in England to give effect to the entirety of the Malaysian injunction. Specifically, it was open to the NCA to decide for itself to ask the court in England to incorporate an exception permitting payment of POS's operating costs and legal expenses, which should not have been contentious.

40. The reality, therefore, was that once the NCA indicated on 7 August 2020 that it intended to seek a prohibition order, the direct restriction upon what Clyde & Co could or could not do in the UK would depend on the terms in which the prohibition order would be made. It was also clear that in this respect, Clyde & Co and POS were dependent upon the NCA making its application for a prohibition order expeditiously and deciding whether it consented to an exception being included for payment of operating costs and legal expenses.

41. Accordingly, I reject the NCA's characterisation of the situation as one in which "the only obstacle to Clyde & Co making the payments was the Malaysian Order [which] was not a matter for the NCA". The effect which the Malaysian Order had in the UK had become a matter for the NCA once it indicated its intention to apply for a prohibition order on 7 August 2020.

42. Against that background, I consider that it was entirely reasonable for POS to be frustrated with the way in which the NCA dealt with its intended application for a prohibition order after 7 August 2020. For POS, obtaining payment of its operating

costs and legal expenses was genuinely urgent, but no explanation was given by the NCA for its delay of over a week in issuing such application, or for its apparent inability even to indicate whether it agreed to an exception in the prohibition order permitting payment of such costs and expenses.

43. However, as I held in paragraph [29] of my earlier judgment, the fundamental problem for POS in this respect was that joinder of the NCA under CPR 19.2 to the proceedings in the Chancery Division was not the method by which to address the delays in relation to agreeing the terms of the prohibition order to be granted by the Queen's Bench Division. There was simply no basis upon which a judge in the Chancery Division proceedings could resolve any issue in relation either to the Malaysian Order or the prohibition order. POS's only routes to resolve such issues were either to seek judicial review of the NCA's inaction, or (as it chose to do) to go to Malaysia and address the issue at source.

44. In short, while I have considerable sympathy for the position in which POS found itself in relation to the NCA's delay in dealing with the prohibition order, seeking joinder of the NCA to the proceedings in the Chancery Division was not the means by which to resolve the problem.

45. The second problem faced by POS related to the position taken by the NCA and Clyde & Co in relation to the impact of POCA.

46. The NCA's first contention in this respect, according to the first paragraph of its letter to me of 18 August 2020 quoted in paragraph 26 above (which was not further explained or withdrawn in its submissions on costs), was that,

> "The NCA position is that the Part 7 regime under POCA is not engaged in relation to any of the payments under the [Order of Trower J]; and that there is no Part 7 obstacle to the payments permitted by Trower J in that Order."

47. I reject that suggestion, which I simply cannot understand given the NCA's previous warnings to Clyde & Co and its operation of the DAML process for earlier payments from the Escrow Account. Part 7 POCA creates money laundering offences, including the transfer of criminal property. Following the allegations made by the prosecutor in Malaysia which supported the Malaysian Order, coupled with the NCA's stated intention to apply for a prohibition order under the 2005 Order, the money laundering regime under Part 7 POCA was quite clearly "engaged" by any proposed payment by Clyde & Co from the Escrow Account to POS. I also note that although POS asserted that such payments could not constitute money laundering offences as a matter of general principle given the decision in Bowman v Fels, the NCA did not accept that contention.

48. The second suggestion of the NCA appears to be based upon drawing a distinction between (i) the NCA's refusal of consent to the payment of the Final Award following the SAR that Clyde & Co submitted in July, and (ii) the payment of costs and expenses for which Clyde & Co made no separate authorised disclosure, and for which the NCA thus had not specifically refused its consent. In effect the NCA appears to be contending (though not explicitly) that POS's problems in relation to

POCA were the fault of Clyde & Co in not making a separate application for a DAML in relation to the payment of operating costs and legal expenses.

49. I recognise that the role of the NCA under the process for obtaining a DAML is tied to the specific transactions for which consent is sought. I also recognise that Clyde & Co had, in April 2020, made separate disclosures in relation to payments of operating costs and legal expenses on the one hand, and payment of the bulk of the monies in the Escrow Account pursuant to a final award on the other.

50. Nonetheless, the position of the NCA in this regard was very far from clear. On 7 August 2020 the NCA authorised Clyde & Co to tell the parties that they had refused consent for Clyde & Co to make a payment of the escrow monies to POS in accordance with the Final Award and that a moratorium period was running in respect of this. What is also readily apparent, however, from the evidence filed by Clyde & Co on 10 August 2020, is that Clyde & Co had interpreted this refusal of consent as preventing the firm from making payment of operating expenses and legal costs.

51. If and to the extent that this was a misapprehension on Clyde & Co's part, the NCA did nothing to assist the parties by correcting it. Instead, when the joinder application was issued, the NCA made a series of unexplained and ambiguous statements.

52. The NCA's first such statement after being served by the application was that,

> "The fact pattern on which your application is premised has significantly changed."

That statement remains unexplained.

53. The second statement of the NCA was in its letter of 17 August 2020 in response to POS's letter of the same date,

> "In relation to the third paragraph of your letter, the NCA has <u>not</u> prevented Clyde & Co from making payments to your client (as suggested by your letter and your application)."

That statement was at best ambiguous and unhelpful. It appeared to assert generally that the NCA had not prevented Clyde & Co "from making payments" to POS. That was inaccurate, since the NCA had prevented Clyde & Co making payment to POS in accordance with the Final Award. What the NCA did not make clear was that it had not separately prevented Clyde & Co from making payments of operating costs and legal expenses because Clyde & Co had not specifically sought a separate DAML in relation to those payments. It could easily have done so.

54. The third statement of the NCA was at the hearing before me. The distinction that the NCA now seeks to make did not appear in counsel's skeleton argument and was not made clear to me at the hearing. Instead the NCA appeared content not to disagree with Clyde & Co's interpretation of the NCA's letter, to the effect that,

> " … there are <u>no longer</u> any live POCA issues with regard to the payments sought pursuant to the Trower J order."

55. On the basis of the distinction that the NCA now seeks to draw, Clyde & Co's letter was not accurate. The only thing that was "no longer live" was the moratorium period in relation to the payment of the Final Award, which had expired. On the NCA's current logic, nothing had changed in relation to payment of operating costs and legal expenses, because no relevant request for a DAML had been made in that regard.

56. The fourth and final statement by the NCA was in the letter to me of 18 August 2020. It referred to Clyde & Co's earlier SAR in relation to payment of the Final Award, and then stated,

> "That SAR was in relation to the transactions identified in it. It does not relate to the transactions that are the subject of these proceedings (for which there is no obstacle under the Part 7 regime)."

That was the first express statement of which I am aware that the NCA regarded the earlier DAML process in relation to the Final Award as entirely distinct from the payments of operating costs and legal expenses in issue in the application brought by POS for a mandatory payment order. However, the NCA then explained or qualified that point by a statement that there was no obstacle under the Part 7 regime to such payments. For reasons that I have set out in paragraph 47 above, I simply do not understand or accept that statement. The money laundering regime under Part 7 POCA plainly presented an "obstacle" to Clyde & Co making payment of operating costs and legal expenses from the Escrow Account.

57. The final point made by the NCA in relation to costs as between itself and POS is that to order the NCA to pay any part of POS's costs would amount to encouragement to litigants who suspect that they may be the subject of SARs to seek to join the NCA in proceedings to find out if they are the subject of a SAR. I certainly accept that the court should do nothing to encourage a view that seeking to join the NCA to proceedings is a tactic that could be employed by persons who suspect they are subject to a SAR. But the facts of the instant case are very far removed from that type of situation. The applicant for joinder, POS, had previously resisted the NCA's aborted application to extend the moratorium period in June 2020 in which the NCA had disclosed the nature of its investigations, and it had been told, with the NCA's authority, that a SAR had been submitted by Clyde & Co in relation to proposed payments to it in July 2020.

58. Pulling these various threads together, I first give weight to the fact that although POS's joinder application was prompted by justified frustration over the NCA's delay in dealing with the prohibition order, the application under CPR 19.2 was not the appropriate route to address those concerns, and to that extent it failed.

59. Secondly, however, even if the NCA was technically correct to take a narrow view of its obligations under POCA in light of the fact that no separate request for a DAML had been made by Clyde & Co in relation to the payment of operating costs and legal expenses, once the NCA had permitted Clyde & Co to reveal that it had been refused consent for the payments pursuant to the Final Award, in my judgment the NCA could and should have made its position on the payments of costs and expenses much clearer to Clyde & Co and POS. Those parties were already well aware of the NCA's interest more generally, and there was no confidentiality concern or risk of tipping-off which would have prevented the NCA from being much clearer. Given the

complexity of the case and the ambiguity of the statements which the NCA had made, if the NCA had not clarified matters before me, it is quite possible that I might have joined it to the proceedings so that the judge hearing the application for a mandatory order would have been able to attempt to get to the bottom of what the NCA's position on the impact of POCA actually was.

60. In those circumstances, I consider that, as between them, neither POS nor the NCA can clearly be regarded as more at fault or more deserving of an award of costs than the other. In my judgment the justice of the case is therefore best met by there being no order for costs as between POS and the NCA.

61. I do not therefore need to consider the amount of the costs sought by POS. I would, however, observe that I regard POS's claim for £81,877.50 as wholly excessive. By contrast, the NCA's bill (albeit at public sector rates) was a very modest £9,065. The costs claimed by POS included fees of £56,450 for two leading counsel and two junior counsel advising and appearing at the hearing, and £25,172 for five fee earners at POS's solicitors, of whom three attended the hearing. The instruction of such a large number of counsel and solicitors was, in my judgment, unnecessary and disproportionate. If I had been minded to make a costs order in favour of POS, I would very substantially have reduced the amount claimed.

62. As to the costs of Clyde & Co, I do not think that the firm's involvement in the joinder application was an inevitable product of PDVSA's application for the UK Injunction or that the result in relation to the costs of that injunction should dictate the order that should be made in relation to Clyde & Co's participation in the joinder application. The reality is that POS attempted to use the joinder application as a convenient means of trying to resolve what it perceived as an impasse caused by (i) the Malaysian Injunction and the NCA's stated intention to apply for a prohibition order, and (ii) the POCA issues. But neither of those problems were caused PDVSA's application for the UK Injunction.

63. In these circumstances, I do not consider that it would be just if PDVSA was to end up paying Clyde & Co's costs of the joinder application, and I do not propose to order it to do so.

64. Further, if POS was to end up paying Clyde & Co's costs by reason of the indemnity which Clyde & Co has against the funds under its control in the Escrow Account, I would not regard that as an unjust result. As between POS and PDVSA, it was POS that decided to launch the joinder application, and Clyde & Co's participation in that application was essentially neutral in its capacity as escrow agent.

65. For that reason I think that the appropriate order to make in relation to Clyde & Co's participation in the joinder application is no order as to costs.

66. As none is sought, I shall also make no order in relation to PDVSA's costs.