Neutral Citation Number: [2023] EWHC 2419 (Ch)

Case No: BL-2020-0013xx

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

Royal Courts of Justice
Rolls Building
Fetter Lane,
London, EC4NA 1 NL

Date: 03/10/2023

Before :

MR JUSTICE MILES

- -

Between :

AB and ors	**Claimants**
- and -	
CD and ors	**Defendants**

- -
- -

Richard Slade of **Richard Slade & Company** for the **First Defendant**
Stephen Robins KC and **Daniel Judd** (instructed by **Mishcon de Reya**) for the **Claimants**

Hearing date: 19 September 2023

- -

Approved Judgment

.....

This judgment was handed down remotely at 10.30am on 3 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Miles :

Introduction

1. This judgment concerns the First Defendant's (**D1's**) application issued on 22 August 2023 and listed to be heard in the interim applications list on 19 September 2023.

2. This judgment has been anonymised because of concurrent investigations by the SFO and previous orders made by the court. I do not consider that this reduces the intelligibility of the judgment or the grounds on which the court has reached its decisions. The issue whether it is appropriate to continue that order is a matter to be determined at the PTR to be heard in the Michaelmas term.

3. D1 asks the court to vary a proprietary freezing order made on 13 July 2021 (**the PFO**) in order to permit D1 to realise the assets covered by it in order to pay those realisations to a firm of solicitors, Richard Slade and Company (**RS**) as legal fees. He also seeks a like variation of a non-proprietary worldwide freezing order made against him (**the WFO**). But this does not raise any separate issues so I shall concentrate on the PFO.

Facts

4. These proceedings concern a mini-bond investment scheme operated by C1, which sold bonds to thousands of bondholders, who collectively invested a total amount of £237m odd in the bonds.

5. The Cs allege that almost 60% of the sums raised by C1 by selling bonds were paid to D1 to D10. D1 received more than £5.2m such monies.

6. D1 denies the claims against him.

7. Some of the Cs (including C1) are now in administration.

8. The Cs' claims against D1 include proprietary claims to recover the traceable proceeds of £5.2m odd derived from bondholders. D1 has stated and the Cs have accepted that D1 does not have any property other than those traceable proceeds. This is recorded in the recitals to the PFO.

9. On 24 August 2020 Mr Edwin Johnson QC, sitting as a Deputy High Court Judge, granted the WFOs but declined to make PFOs against the same Ds at that time. He considered that the WFOs would sufficiently hold the ring until an inter partes hearing to consider the granting of PFOs.

10. On 7 September 2020 Meade J continued the WFOs. He adjourned the application for the PFOs whilst giving directions for the filing of evidence in that regard. Meade J's order contained an exception in standard terms:

> "this order does not prohibit [D1] from spending £8,531.28 a month towards his ordinary living expenses and also a reasonable sum on legal advice and representation. But before spending any money [D1] must tell the [Cs'] solicitors where the money is to come from."

11. The claim was issued on 27 August 2020. Particulars of Claim were served the next day.

12. On 8 December 2020 the deadlines for the filing of evidence in relation to the PFO were extended by consent. On the same date, the Cs served a draft PFO on D1.

13. On 14 December 2020 Mann J granted a further extension of the deadlines for the filing of evidence in relation to the PFO. The hearing of the PFO application against D1 was subsequently listed for 28 June 2021.

14. On 13 April 2021 Bivonas, the solicitors then acting for D1, wrote to the Cs' solicitors (**MdR**) to propose certain changes to the draft PFO served on 8 December 2020. Among these changes were the inclusion of exceptions to the PFO in relation to living expenses and legal expenses. This mirrored the existing exception contained in the WFO.

15. On 15 April 2021 MdR wrote to Bivonas explaining that the exceptions to the PFO were not agreed by the Cs. MdR referred to case law and stated that the applicable test for determining whether funds caught by a PFO ought to be released was the four-stage test set out in the case of *Marino v FM Capital Partners Ltd* [2016] EWCA 1301. The letter quoted paragraph 23 as follows:

> "Lewison J (as he then was) in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) helpfully summarised the proper approach at para. 6 by setting out the four questions which should be addressed: (1) does the claimant have an arguable proprietary claim to the funds in issue? (2) if yes, does the defendant have arguable grounds for denying that claim? (3) if yes, has the defendant demonstrated that without the release of the funds in issue he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)? (4) if yes, where does the balance of justice lie as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?"

16. MdR's letter asserted that D1 had not satisfied the second or third stages.

17. By 25 May 2021 the Cs had accepted, on the basis of evidence served by D1, that stages two and three of Marino had been satisfied. MdR wrote to Bivonas stating that:

> "these recent developments do now enable our clients to agree that the proprietary injunction include a carve out to allow for the living expenses and legal expenses which are allowed under the WFO. Our clients are accordingly now able to agree to the amended paragraph 5 and the inclusion of the new paragraph in your draft Consent Order."

18. Paragraph 5 was the same, word-for-word, as the exception to Meade J's order quoted at [10] above.

19. There was a hearing before me on 28 June 2021. There was a dispute about the quantum of living expenses which I decided in the Cs' favour.

20. I then made the PFO on 13 July 2021 on the papers, in the terms agreed by the parties.

21. At the hearing on 28 June 2021 I also resolved another issue. D1 and Bivonas had sought an order that if it received fees under the PFO it would be immune from future liability as a constructive trustee. I declined to make that order. Shortly afterwards Bivonas ceased to act for D1.

22. Until recently D1 has represented himself in these proceedings. He has appeared at various CMCs.

23. The trial of the proceedings is fixed to start in January 2023 and is listed for 22 weeks.

24. The events leading to this application are set out in the first statement of Mr Slade.

25. D1 met Mr Slade in July 2023 and on 28 July entered a retainer agreement with RS.

26. Mr Slade sought to obtain an estimate from counsel's clerks for a 22 week trial. Counsel's clerk gave an estimate for a silk and two juniors or for three juniors of £3.3m plus VAT and £2.273m plus VAT respectively. He noted that he had little detail about the case.

27. Mr Slade has asked RS's professional costs draftsman to provide a budget for the work from now until the end of the trial of some £7m including VAT.

28. Mr Slade has reviewed D1's assets with D1. The main assets are a house in Sussex (**the House**), two valuable watches (**the Watches**), and two valuable shotguns (**the Guns**) (together **the Relevant Property**).

29. There is a dispute about the value of these assets. D1 says that they are worth about £4m. Cs say they are worth less, perhaps £3.1m.

30. In addition to these assets D1 has other assets which may be worth around £500,000.

31. Mr Slade explains in his statement that the Relevant Property will take some time to realise. He also explains that it is unlikely that D1 will be able to raise money on the House while these proceedings are ongoing. As to a sale of the House there may be off-market buyers interested in it. As a backstop there could be a sale through Savills. At the hearing Mr Slade said that the first auction where this could take place was in November.

32. There was very little evidence before the court about the process by which a sale could take place, whether Savills would be the best auction house for the House and what marketing process would be expected to take place. Equally there was very little evidence about the best way of selling the Guns or Watches, were that to happen.

33. Mr Slade explains that, on D1's case, the realisable value of the Relevant Property is probably more than £3m but less than £4m. This is far less than the budgeted figure of £7m to the end of trial. Mr Slade has agreed with D1 the terms of a conditional fee agreement (the **CFA**) under which he and counsel would agree to take the case to the

end of trial for a fixed fee of the lesser of £4m and the net realisations from the Relevant Property. There would be an uplift of 100% in the event of success on the claim based on RS's hourly rates and counsel's fees. Mr Slade accepted that RS would be entitled to the full amount of the fixed fee if the case settles before trial or its conclusion. But Mr Slade also explained that this arrangement involved RS and counsel taking the risk of representing D1 for the fixed fee and the case running to its full length even if that meant in effect that RS would be working for less than it would otherwise have charged (as per the budget). As I understood it the figure agreed in the CFA was partly justified between the parties by reference to the time estimates in the budget.

34. D1 also agreed with RS to give it a first-ranking mortgage over the House in respect of the liabilities under the CFA and one of the heads of relief sought in the application was that D1 should have liberty to do this.

35. Mr Slade explained that the arrangements with D1 were conditional on the court making the variations now sought.

36. It is perhaps worth spelling out what these arrangements would mean. If the court were to make the orders now sought, the CFA would take effect so that D1 would become liable at once to pay the fixed fee to RS. This would be secured by a mortgage over the House. Steps would be taken to sell the Relevant Assets. The effect would be that the Relevant Property would in effect be removed from D1's estate and transferred to RS (immediately by way of the mortgage in respect of the House and at the time of the sale of the other assets). That would leave D1 with rump assets of perhaps £500,000. The proprietary claims of the Cs would come in practical terms to be extinguished save for the rump assets.

37. By his application notice D1 seeks orders for the sale of the Relevant Property and to enter a first mortgage over the House in respect of his liabilities to RS under the CFA. D1's case is that he requires these orders because nobody will buy the Relevant Property without further orders of the Court saying that the sales may be made; and in the case of the House because of entries on the Land Register recording the freezing orders.

Legal principles

38. Before considering the submissions it is helpful to set out the legal principles.

39. First there are cases concerning legal expenses under PFOs. There was no dispute between the parties as to the usual position.

40. As Sir Thomas Bingham MR explained in *Sundt Wrigley & Co Limited and Another v Wrigley* [1993] Lexis Citation 1664:

> "In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence. In the proprietary case, however, the judgment is a more difficult one because in the plaintiff's contention the money on which the

> defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money which is held on trust for the plaintiff. That, of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence. As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence."

41. I have already set out at [15] the four-stage summary given by Sales LJ in *Marino*.

42. As to the second stage, Millett LJ observed in *Ostrich Farming Corporation Ltd v Ketchell* [1997] Lexis Citation 5078:

> "A trustee has no right to have recourse to trust money to defend himself against a claim for breach of trust unless he has an arguable case for saying that he has a beneficial interest in the funds in question. No man has a right to use somebody else's money for the purpose of defending himself against legal proceedings. Just as the Court's jurisdiction to grant the injunction in the first place depended on the plaintiff's establishing an arguable case that the money belonged to it, so its willingness to permit the defendant to have re-course to the money depends upon his establishing an arguable claim to the money …"

43. As to the fourth stage, Bryan J recently reviewed the authorities and gave a helpful summary of some of the relevant considerations in *Skatteforvaltningen v Edo Barac* [2020] EWHC 377 (Comm) at [24] (omitting internal citations):

> "(1) The court must consider where the balance of justice lies as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it.
>
> (2) It does not automatically follow that a defendant should be entitled to draw on proprietary funds if he can show that he has no other funds with which to defend the action.
>
> (3) The court is required to come to a "careful and anxious judgment as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence". This balancing exercise should be carried out based on "all relevant circumstances".

> (4) There are less strong reasons to permit the payment of incurred legal fees rather than future legal expenses. The court is concerned with the interests of the parties and not the defendant's solicitors.
>
> (5) The court will "act cautiously so as to ensure that the funds are not wasted", which may be achieved by "limiting the amount ... even if that may cause a defendant to reassess how to pursue her case or to consider alternative funding models".
>
> (6) It is not conclusive that the defendant will have to act as litigant in person. The defendant may be able to receive a fair hearing through such representation.
>
> (7) A key factor in the granting of permission to use arguably proprietary funds is the court's interest in having parties professionally represented.
>
> (8) It will be relevant to consider what undertakings or offers are made by the defendant. For example a defendant may offer to replenish funds taken from proprietary assets with non-proprietary assets."

44. A second area of law concerns the interpretation of court orders. Again there was no dispute between the parties. I was taken to various authorities but it suffices to follow the guidance in *LLC Eurochem North-West-2 v Tecnimont* [2023] EWCA Civ 688 at [45]:

> "i) The terms of an injunction, given the penal consequences of breach, are to be construed strictly;
>
> ii) The words of the order are to be given their natural and ordinary meaning in their context, including their historical context and with regard to the object of the order. The proper construction depends on what the language of the order would convey, in the circumstances in which the court made it, so far as those circumstances were before the court and apparent to the parties;
>
> iii) Rather than looking for ambiguity, the real issue is whether the meaning of the language is open to question. There may be many reasons, not limited to cases of ambiguity, where that is the case;
>
> iv) The judgment leading to the order is admissible as an aid to construction, but will not necessarily be of assistance. A court's reasons may be used to interpret language, but not to contradict it. However, the parties' submissions are not a reliable or useful contextual source;

> v) The question is simply what the order means. If it is desirable to give it a broader or narrower meaning, the solution is to vary it for the future not to give it a different interpretation."

45. A third area of case law concerns the court's approach to legal expenses under non-proprietary freezing orders. I was referred to *Anglo-Eastern Trust v Kermanshahchi* [2002] EWHC 2938 (Ch); *Anglo Eastern Trust Limited v Kermanshahchi* [2002] EWHC 3152 (Ch); and *HMRC v Begum* [2010] EWHC 2186 (Ch). As the first two of these cases were considered and commented on in the third, it is sufficient here to refer to *Begum*.

46. In that case the claimants, HMRC, had initially made proprietary claims. They had later dropped those claims and asserted only personal ones. The question before the court was the appropriate proviso to enable the defendants to pay their legal fees. At paragraphs 33 to 47 David Richards J summarised the principles applicable to non-proprietary freezing orders. For present purposes the key points are these.

i) Paragraph 37 shows that he was addressing non-proprietary orders and referred to the protection that would "in general" be provided.

ii) Paragraph 38 explains that a number of propositions were established, at least in the absence of exceptional circumstances. Five propositions were then set out.

iii) First, neither the claimant nor the court is entitled to control the defendant's choice of solicitors and counsel and the payment of their proper costs or the way in which they conduct the case (paragraph 39).

iv) Second, the court will not give the claimant the right to require a solicitor and own client assessment of the defendant's cost or a right to such assessment (paragraph 40).

v) Third, the court will not itself perform the function of a provisional assessor of costs (paragraph 41).

vi) Fourth, the court will not in general impose a cap on the defendant's costs (paragraph 43). This was based in part on the Anglo-Eastern case at [14] where Neuberger J said that in that case he would not impose a cap. He did however go on to say, "albeit I accept that in an appropriate case, on special facts, it may be right to impose one".

vii) Fifth, the protection to which the claimant is entitled is in general that provided in the standard form of freezing order, which is to the effect that the defendant may use the frozen assets for the payment of his reasonable legal costs provided that he informs the claimant as to the source of those payments (paragraph 44). The word "reasonable" gives protection because the solicitor is an officer of the court and should know that only reasonable costs could be paid, the final sanction for breach being contempt proceedings (paragraphs 45-46).

47. At paragraphs 47 to 49 David Richards J said:

> "47. There are both principled and practical considerations running through the court's approach to the defendant's expenditure on legal costs. The frozen assets are his property, which he should be entitled to use to fund his own defence. Control by the claimant or the court of his expenditure on his defence is an interference with his right of defence and with the confidential relationship between his legal advisers and himself. It is difficult to see how control can be effectively exercised without the disclosure of privileged information which could, or certainly should, not in my judgment be required.
>
> 48. There are practical considerations too, well summed up by what Ferris J said in *Cala Cristal SA v Al Borno*: "The court can only do so much to protect the plaintiff's position." By creating the freezing order the courts have provided a very large measure of protection to claimants which was previously lacking. Save in exceptional circumstances the court cannot assume the burden of detailed and contentious applications on costs on a continuing basis. In cases where a freezing order is granted, there is a limit to the available time and resources, and the needs of other litigants must borne in mind.
>
> 49. It may be objected that in cases of freezing orders in aid of proprietary claims, there is an invasion of some, though not all, of these principles. But that is because the nature of a seriously arguably proprietary claim raises special features which require special treatment."

48. I shall return to these cases below.

Positions of the parties

49. Mr Slade on behalf of D1 submitted in outline as follows.

i) Paragraph 5 of the PFO contains an exception for reasonable legal fees. This is perhaps unusual but it was what the Cs agreed and it was what the court has ordered.

ii) This is not therefore a case where D1 has an onus under *Marino* to persuade the court to allow legal fees to be paid from a disputed fund. Nor is it a case where D1 is asking the court to exercise a *Marino* discretion in his favour.

iii) The meaning and effect of paragraph 5 (which is simply the standard exception for freezing orders) is well established – as summarised in *Begum*.

iv) Under those principles, the claimant and the court is not concerned with the reasonableness of the CFA. RS has satisfied itself of the reasonableness of the agreement.

v) There is no application by either party to vary the terms of paragraph 5 and it should be given effect.

vi) What D1 seeks are orders designed to give effect to the existing order by enabling him to sell and charge the Relevant Property.

vii) While the court is not strictly concerned with the reasonableness of the legal fees to be charged by RS, the CFA in fact represents a reasonable charge as it provides D1 with legal representation to the end of the trial, irrespective of the actual costs, against a budget of some £7m.

50. Mr Robins KC on behalf of the Cs submitted in outline as follows:

i) The wording of paragraph 5 of the PFOs leaves the amount of the "reasonable" expenses at large; and reasonableness in this context must be determined having regard to the Cs' proprietary claims against D1, which are recorded on the face of the PFO and constitute the legal basis on which the PFO was made by the court.

ii) The determination of a "reasonable" sum for legal expenses in the context of the PFO requires the court to apply the fourth stage of the *Marino* test and decide how much of the disputed fund (if any) should be released for D1's legal costs.

iii) The CFA and the orders now sought would lead to the exhaustion of almost the entirety of the assets covered by the PFO.

iv) Even if (contrary to Cs' submissions) the court is to be guided by the *Begum* case, that case and the other cases referred to in it show that there may be special or exceptional circumstances where the court may be required to review the reasonableness of any costs sought to be paid by a defendant under an exception to a freezing order. The special circumstances here are that there are proprietary claims in respect of the assets now sought to be realised and charged in the meantime to RS.

v) The court should not in the present case exercise its discretionary jurisdiction to make orders in favour of D1 unless it is satisfied that the costs are reasonable, and there is no proper evidential basis for concluding that the CFA is indeed reasonable. The Cs point out that other defendants who are represented in the proceedings are estimating that they will be able to complete the trial for far less than the fixed fee contained in the CFA. Unless the court is persuaded that the fixed fees contained in the CFA are reasonable it should not make an order which would have the effect of appropriating almost the entire remaining fund to RS for D1's costs.

vi) The Cs are content for the court to reach a determination of the amount under *Marino* principles. The Cs contend that having regard to the various factors identified in the case law this should be no more than £525,000 (including VAT) to the end of the trial. C contends that the amount should in particular be set so that the Cs' proprietary claims are not rendered nugatory.

vii) The Cs have not applied for a variation of paragraph 5 of the PFO but would, if the court were otherwise against them, seek a stay to enable them to apply for a variation.

Interpretation of paragraph 5 of the PFO

51. The first issue is the right interpretation of the exception in paragraph 5 of the PFO.

52. D1 says this is simple and straightforward. It uses the same words as the standard form exception found in the WFO ordered by Meade J.

53. The Cs contend that paragraph 5 falls to be interpreted differently. They rely on the following features of the PFO and its procedural context:

i) The correspondence leading up to it referred in terms to *Marino.*

ii) The order itself refers to it being a proprietary order. Its recitals refer to the proprietary claims of the Cs and to the fact that the entirety of D1's remaining assets were assets claimed by the Cs.

iii) There would have been no point in simply replicating the protection given by the WFO and the parties must reasonably have realised this.

54. The Cs contend that the reference to D1 being able to spend a reasonable sum on legal fees is to be read in context as being the sum that would have been released to D1 by the court under the principles in stage four of *Marino.* The Cs said that it was shorthand for such an amount. The Cs contended that stage four of *Marino* required the court to consider what amount was just and reasonable and that this helped to explain the reference to the reasonable sum in paragraph 5.

55. I am unable to accept this argument. In my judgment the meaning of paragraph 5 of the PFO is the same as the meaning of the exception to the WFO. The words are the same. There were two injunctions in place and I find it impossible to think that the identical words in the two orders should be read differently. Generally it seems to me that orders must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order. It would undermine certainty to give the words a different meaning in the two orders.

56. I do not accept Cs' argument that paragraph 5 must be interpreted differently because the order is expressed to be a proprietary and the parties recognised in the recitals that there were no free assets which were not subject to the claims. It is self-evident that the order is a proprietary one. But there is no inconsistency between paragraph 5 and the rest of the order. It may well be said that paragraph is highly unusual but it is not impossible for parties to agree, through their negotiations, such a regime.

57. Moreover I do not think it can be right to construe the words "reasonable sum" in paragraph 5 of the PFO as meaning something like such sum as the court would have ordered under its *Marino* discretion. As the caselaw shows stage four of *Marino* requires the court to consider a wide range of factors which go well beyond reasonableness as between the defendant and his solicitor. These include the competing rights of the claimant, the ability of the defendant to represent himself, the

possibility of the defendant being represented for some of the proceedings or on a much reduced basis, and the interests of the court itself. I do not think that the words "reasonable sum" (which appear to me to concern the reasonableness of the charges as between the party and his lawyers) can be read as shorthand for the *Marino* discretion. It is also too much of a stretch to regard the term "reasonable sum" as referring to an exercise of discretion by a court.

58. The unusual feature of this case, and which appears to distinguish it from all the cases I was shown on proprietary orders, is that the PFO contained an exception in the terms of the standard form freezing order. In all the cases to which I was referred there was no express exception to the proprietary order for legal fees and the defendant had to seek to persuade the court that disputed funds should be released. That is not this case. It seems to me that the Cs are effectively inviting the court to read the order as though paragraph 5 had been deleted and the order was silent on legal fees. Their problem is that the order is not silent and paragraph 5 was agreed.

59. For these reasons I do not accept the Cs' submission that paragraph 5 of the order is to be read as engaging stage four of *Marino*. I therefore reject the suggestion that the court should operate as though D1 was, by seeking to pay his lawyers, to be seen to invoking an exercise of that jurisdiction in his favour.

Exercise of discretion

60. That is not however the end of the analysis, for two reasons.

61. The first is that D1 is now seeking orders of the court to assist him in realising and charging assets in support of the CFA. He is therefore seeking the court's assistance by making variations to the PFO. Mr Slade submitted that the court need not be concerned with the consequences of the order sought. But I do not consider that the court can properly ignore them. The court is being asked to assist and it must do so with its eyes open and only if persuaded that the orders sought are just and proper.

62. Second, the case law summarised in *Begum* shows that there may be exceptional circumstances or special cases where the court will take a more interventionist approach to the respective rights of the parties. As David Richards J explained in paras 47 to 49 (see [47] above), the general approach was grounded in the fact that, ex hypothesi, the assets in play were the defendant's. The underlying principle of an ordinary, non-proprietary freezing order, which gives no security, is that the defendant should not be allowed to dissipate its assets – the payment of reasonable legal costs will not do this. For that reason, as well as the practical reasons explained by David Richards J, the court approaches the reasonableness of costs with a light touch. It will not generally get stuck into questions of reasonableness or impose a cap. But the formulations in the cases show that these are not hard and fast rules and that there may be cases where the court does need to engage with issues of reasonableness and a heavier or more robust touch is required.

63. In my judgment the present situation is an exceptional or special one, outside the general run of cases. All of the assets of D1 are subject to proprietary claims. They are therefore a disputed fund. D1 does not suggest that the claims of the Cs are unsustainable or even weak. This may therefore be a case like that described by Millett LJ in the *Ostrich* case of one man using another's property to defend himself.

The inescapable and startling suggestion is that D1 should be able to realise and charge the bulk of these assets in advance of the trial with the result that the Cs' claims to the fund will be snuffed out.

64. I do not think that it is sufficient answer to say that the Cs have themselves to blame by agreeing the terms of paragraph 5 of the PFO and cannot now complain. The relevant case law allows for a different treatment of the reasonableness of costs in special or exceptional cases and in my judgment a combination the proprietary claims overall all of D1's assets and the extinctive consequences of the order sought for this claims make this a special case - a case where the court should only exercise its discretion to make variations favourable to a defendant if reasonably satisfied on proper evidence that the costs sought to be spent are reasonable in amount. Hence though there is no difference of meaning between the exceptions in the PFO and the WFO, the approach of the court to disputes about the application of the concept of reasonableness depends on the particular circumstances. Those circumstances can in my judgment include the existence of the proprietary claims.

65. Mr Slade commenced his submissions by saying that he was not asking the court to decide that the CFA is reasonable or that the fixed fee in it is a reasonable sum. His submission (based on *Begum* and the other cases cited in it) was that it was no part of the court's task to determine the reasonableness of the costs as between a solicitor and his client.

66. There were a number of reasons why Mr Slade's concession that he was not seeking to establish that the fee was reasonable appears a sensible concession.

    i) He frankly accepted that he knows very little about the case. He has only recently been approached.

    ii) Mr Slade also accepted that the budget, which appears to have had some influence on the determination of the fixed sum in the CFA, was prepared by a costs draftsman who had very little information about the case. This is borne out by some of the entries in the budget where identical hours of work are estimated for completely different stages of the litigation. It is also clear that the estimate given by counsel's clerk was based on an exiguous understanding of the case.

    iii) Mr Slade did not address the fact that other defendants have estimated costs down to the end of the trial for amounts far lower than the fixed fee. For instance D5 and D6 have indicated that they expect their costs to be in the order of £2m. And D2 and D10 have been allowed about £2m for their costs (under the *Marino* jurisdiction) and are preparing to act for the full trial.

67. Moreover while the court has experience of considering the hourly rates of solicitors (by reference to guideline rates and its own experience) there is no evidence before the court about fixed fee agreements of the kind contained in the CFA. The court is not in a position (and in fairness Mr Slade did not suggest otherwise) to properly determine whether the immediate payment of sum of this magnitude (payable irrespective of settlement) is reasonable. That is a different form of payment and there is no evidence of comparable transactions or any other form of evidence about its reasonableness.

68. There were also some more detailed points which raised concerns about the reasonableness of the budget. The budget is very brief and does not contain the kind of detail one would find in, say, a costs management form. Mr Slade's rates in the budget were above the guideline hourly rates. Some of the estimated hours were arguably excessive.

69. The evidence also suggests that RS had agreed to pay a commission of 10% of its fees to a third party introducer. While no doubt that is a question of contract as between RS and the third party, it appears to me arguable that that amount is not a reasonable expense of D1. It is at least arguable that D1 could directly have approached another solicitor who would have charged 10% less than RS. The commission point (which is recorded in the retainer documents) was raised in the course of the hearing and RS did not respond to it.

70. Overall D1 has not satisfied me that the proposed arrangement, and in particular the fixed sum, is reasonable in amount. As I have said Mr Slade did not consider that he was required to do so. But for reasons I have explained, on the facts of this case, this is not a light touch case, and short of being satisfied that the amount which D1 proposes to pay RS is a reasonable one, I am not prepared in the exercise of my discretion to make the orders sought by D1.

71. There is a further concern about the orders sought by D1. There is no evidence explaining whether the particular steps being proposed by D1 to realise the Relevant Property are reasonable and appropriate to maximise the recoveries. Under the CFA this could be said to matter only if the realisations exceed £4m. But on D1's case the Relevant Property may be worth more than that amount. Mr Slade's evidence is that the House may be worth £4m. That is contested by the Cs but there is not much in the way of valuation evidence. There is no evidence about the best approach to marketing and sale of the House, or the Watches and Guns. I do not consider that the court has been given sufficient evidence concerning these issues.

Release of funds under *Marino* principles

72. Though the application was for the relief recorded above, at the hearing counsel for the Cs submitted that the PFO was shorthand for stage four of *Marino* and then went on to address the amount that the court would be justified in allowing under that test. Mr Slade also addressed the factors that arise under that test in his evidence and submissions. I have rejected the Cs' submission about the meaning of the order. However I asked the parties whether they wanted the court to rule on the amount that it would allow under the *Marino* principles in the event that the court did not grant the primary relief sought by D1. Mr Slade has invited the court to take that course and there has been no objection from the Cs.

73. I shall therefore rule on the amount that should be released on the assumption that the first three limbs of the *Marino* test have been satisfied (i.e. that both parties have arguable claims to ownership of the frozen funds and that D1 does not have assets).

74. D1 said that the amount released under *Marino* should approximate to the amounts agreed to be paid under the CFA.

75. D1 emphasised a number of particular features of the case:

i) The case is a large and complex one, involving serious allegations of fraud. There is indeed an ongoing SFO investigation. The stakes, financial and reputational, could not be higher for D1.

ii) There is a huge amount of documentation to be digested and analysed.

iii) D1 will require legal assistance in preparing witness statements, which may go beyond his own evidence. Likewise he may wish to submit expert evidence, whether alone or jointly with other defendants.

iv) Confidential psychiatrist's reports show that D1 has mental health issues. Without going into details these affect his ability to concentrate and perform under conditions of stress. The reports do not suggest that he would be unable to act without representation but they show that allowances will have to be made at the trial to accommodate his mental condition.

76. The Cs submitted that the amount should be restricted to £525,000 including VAT (and also including a sum of £120,000 recently agreed to be paid from the frozen assets). In summary they made the following points:

i) The pleadings closed long ago. D1 had the benefit of legal representation at that time and his defence set out the nature of his answer to the claim.

ii) The Cs have funded D1's disclosure process (at a cost of over £200,000). That part of the case is therefore complete.

iii) The remaining pre-trial stages were the service of witness statements and expert reports. Witness statements are already overdue. The preparation of witness statements should not involve extensive legal fees. They are required to be in the words of the witness and are not to consist of commentary on the documents.

iv) As to expert reports there have been a number of CMCs at which directions have been given. D1 has not indicated a wish to rely on expert evidence. In any event the court has ordered that the defendants should where possible avoid duplication. There is no evidence as to what if any expert evidence D1 now intends to serve. In any case it may be too late for D1 to serve expert evidence.

v) Each of the claims based on receipts of money by D1 overlaps with claims against other defendants who are represented by lawyers. He will therefore be able to take advantage of their arguments and analysis of the impugned transactions.

vi) The main role of lawyers at the trial would be to ensure that D1 is fairly cross-examined.

vii) The court should have in mind the proportion that any fees released bear to the funds frozen by the PFO. The court should seek to avoid a situation where the proprietary claims are rendered pointless because the assets have gone to pay fees.

77. I have weighed these points and the other elements of the case and have applied the principles set out in [43] above. The following points appear to me to be particularly significant.

78. First, there is clearly a potential prejudice to the Cs if and to the extent that D1 is allowed access to the funds. The claims are not speculative or merely tactical. To the extent that monies are released now and the Cs win at trial, their money will have been used to litigate at their own expense. There is no automatic right on the part of D1 to use frozen assets for the purpose of defending himself.

79. Second, I take account of the size and complexity of this litigation. Many thousands of documents have been disclosed. The trial has been listed for 80 court days. There is to be expert evidence. There are numerous parties in the litigation, with different interests and positions. The claims are framed in various ways and seek a number of kinds of relief.

80. Third, I accept that there is some force in the Cs' submissions about witness statements not being over-lawyered and the lateness of any attempt on the part of D1 to put in expert evidence (particularly given the extensive directions given at earlier CMCs and the imminence of the trial). There is also some force in Cs' submission that other defendants interested in defending the impugned transactions will have professional representation. I consider that D1 will to some extent be able to rely on the submissions of those other parties' forensic efforts. I consider that this point about overlapping claims is a factor of real weight to take into account when considering the amount to be released and it supports the Cs' submissions that the court should not simply allow the full amount that D1 seeks.

81. Fourth, on the other hand it appears to me that the Cs' submissions go rather too far when they suggest that there is no real need for D1 to have much separate representation. It would be a rare case where the lawyers did not have some input into witness statements. As for the trial, though the parties may have overlapping interests in some respects it cannot be guaranteed that they will not take different positions about their respective states of knowledge and mind when the full evidential picture emerges. It is conceivable that they will blame one another for some of the events. Moreover I consider there is force in D1's submission that a key stage of the trial is the preparation and presentation of closing submissions once all of the evidence has been adduced.

82. Fifth, while I consider that it would be possible if necessary for D1 to receive a fair hearing without representation I also think that he would be greatly assisted by instructing lawyers. Representing himself would be a very difficult task. Again I have taken into account the overlap between the claims against him and the other defendants. As just explained while that is true, the defendants had different roles and they may have understood things in different ways. Again I do not accept that the main purpose of legal representation will be to protect D1 during cross-examination and agree with Mr Slade that an important phase of the case is likely to be closing submissions. I think that the Cs have somewhat overstated his ability to represent himself and do justice to his defence.

83. Sixth, I take account of the seriousness of the allegations. There are allegations of fraud and dishonesty on the part of D1. They affect his reputation as well as his property. If successful the claims would wipe out his property.

84. Seventh, the Court has its own interests in having the parties professionally represented. There is no doubt in a case of the complexity and size of this one that the Court will be assisted by adversarial argument and by D1 being able fully to test any evidence adduced by the Claimants and to advance his case fully.

85. Eighth, in reaching an overall figure I shall take account of safeguards that can properly be imposed. Such safeguards (including about the staging of payments and the provision of certain information about the expected expenditure) were imposed on a like exercise in relation to the costs of D2 and D10 and I shall require similar ones here.

86. Ninth, the Court may – and in appropriate cases should – limit the amount to be spent. Simply because there are good grounds for some release of funds it does not follow that the Court will allow the full amount sought. The Court may impose such limits even if doing so would change the extent and nature of the representation that would otherwise be available to the defendant.

87. I have already commented on the budget prepared by RS. I have explained that it is based on very little knowledge about the case. It also assumes a three-counsel team. I have already explained that there are also real concerns about the cogency of the budget (including the same amounts of time being estimated for entirely different stages of the case).

88. I have also considered some other amounts as possible yardsticks.

89. In June 2023 the court ordered that £1.7m plus VAT could be released to D2 and D10 (see [2023] EWHC 2353 (Ch)). At that time D2 and D10 had not yet given disclosure. Their estimate also included substantial work to be done on expert reports. Though I cannot rule out a late application on expert evidence, I do not think that there is very much prospect, given the lateness of the present application and the extensive directions already given on expert evidence, of D1 being in a position to serve his own expert evidence or have much of a hand in any expert evidence served by others. Moreover several months in which fees will have been spent have passed since my order of June 2023. Moreover the disclosed assets of D2 and D10 are substantially higher than those of D1. While I do not think there can be a strict proportionate approach of assets to amounts released for costs, the impact of any such release on the remaining claims is a factor to be taken into account. I also give weight to the fact that D2/D10 offered security over other assets which fell outside the reach of the PFO; no such security is offered by D1.

90. D1 invited me to consider the administrators' progress reports in respect of the administration of C1 and C3 and the references to lawyers' fees. They showed that the Cs were spending many millions of pounds on legal fees and expected to spend several more million before the end of the trial. I did not receive much assistance from these. First, they cover all workstreams in relation to the administration and not just these proceedings. Second, the Cs are having to litigate against multiple parties and not surprisingly have a large team. Third, in any event, the present exercise arises

because the Cs have proprietary claims to the assets which D1 wishes to spend and the *Marino* discretion is therefore engaged. The court is required to take a restrictive approach even if it means reducing the cloth from which the defendant can cut his suit. There is no analogy when it comes to the Cs' own costs.

91. I have come to the conclusion in the light of the various factors set out above that it is right to allow the release of some of the disputed assets, but not the amounts sought by D1. I consider that the right amount to release to D1 under the *Marino* discretion is £1.2m plus VAT. This is in addition to the sum of £120,000 (being £100,000 plus VAT) already advanced to D1. This is significantly less than the amount D1 was seeking in his application. He will have to make decisions about how to allocate it to his best advantage.