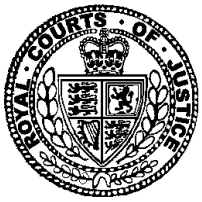

Neutral Citation Number: [2023] EWHC 2353 (Ch)

Case No: BL-2020-00xxxx

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

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: Tuesday, 20 June 2023

**Before**:

**THE HONOURABLE MR JUSTICE MILES**

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**Between:**

| | |
|---|---|
| **AB** | **Claimants/ Respondents** |
| **- and –** | |
| **CD** | **Defendants/ Applicants** |

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**MR STEPHEN ROBINS KC, ANDREW SHAW, DANIEL JUDD** (instructed by **Mishcon de Reya**) appeared for the **Claimants / Respondents**
**CALEY WRIGHT** (instructed by **Crowell & Moring**) appeared for the **Second & Tenth Defendants / Applicants**

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# APPROVED JUDGMENT

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## MR JUSTICE MILES:

1. This is an application by the Second and Tenth Defendants (D2 and D10 respectively) for the release of specific funds, which are currently subject to proprietary injunctions, to allow them to pay their legal fees. D2 and D10 are married. They are represented by the same legal team.

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. In the underlying proceedings, the Claimants, which are companies in administration, bring claims against a number of Defendants.

4. In brief summary, the Claimants say that the First Claimant (C1) raised sums of over £230m from retail investors, on the basis that those sums would be invested in small and medium UK companies with a track record, following due diligence into their trading prospects and with security. The Claimants allege that around 60% of the monies raised by C1 were paid directly, or indirectly, to the First to Tenth Defendants.

5. Specifically, they say that D2 and D10, between them, received over £23m of funds raised by C1 from investors. The claims brought by the Claimants include claims that C1, and various other companies, were engaged in fraudulent trading, that the directors of C1 acted in breach of fiduciary duty, that others dishonestly assisted those breaches, and that there was knowing receipt of trust property. They also seek to trace the funds they say were wrongly removed from the Claimants.

6. The claims against D2 include allegations of dishonesty. The claims against D10 are only to recover the traceable proceeds of some of the monies.

### Procedural history

7. In March 2019, on the application of the SFO, the Southwark Crown Court made Criminal Restraint Orders against both D2 and D10. These orders (the CROs) covered all of the assets of D2 and D10 and made no exceptions for legal fees.

8. On 24 August 2020 Mr Edwin Johnson QC granted Worldwide Freezing Orders against certain Defendants, including D2 and D10 (the WFOs). He adjourned the Claimants' application for proprietary freezing injunctions.

9. On 7 September 2020 Meade J continued the WFOs. Those orders, as continued by Meade J, allowed the Defendants to spend a reasonable sum on legal advice and representation in the usual terms. He further adjourned the application of the Claimants for proprietary freezing orders.

10. The present claim was issued on 27 August 2020, and the Particulars of Claim were served on 28 August 2020. The Claimants' application for Proprietary Freezing Orders was relisted to come on, on the date of the first CMC, 8 February 2021. On that date proprietary freezing orders (the PFOs) were made against D2 and D10, who consented to the making of an injunction, expressly restraining them from dissipating or dealing with certain specified assets. These were essentially defined as any property derived from or representing the series of specific payments received by D2 and D10 from one or other of the Claimants, directly or indirectly. Those payments were listed in a schedule to the PFOs. There was no exception permitting them to use those assets to pay legal expenses.

11. At that time D2 and D10 were the beneficiaries of a directors and officers (D&O) insurance policy. It had a coverage limit of £10m. A number of the other Defendants, and at least one other person, were also beneficiaries of the policy. It was available to be drawn on for legal proceedings, including, but not limited to, the present case.

12. In July 2021 D10 applied to discharge the WFO against her. She did not apply to discharge the PFO. She argued that the WFO had been obtained on the basis of an allegation which had since been deleted, that she was personally involved in wrongdoing. By the time of the hearing of the application, the Claimants had accepted that the only claims against her were tracing claims.

13. I heard the application. I accepted D10's argument that the WFO had been wrongly obtained. However, I also acceded to the Claimants' submission, that the WFO was independently justifiable, on the basis of the *Chabra* jurisdiction, in respect of two specific assets, namely the shares in the company, called WEL and a basement flat at 58 EP.

14. In her evidence in support of that application, D10 said that she was not a single financial unit with her husband, and was instead an independent businesswoman, running a profitable hospitality business, and that she was not a nominee for her husband.

15. The skeleton argument of her counsel for that application said that the WFO should not have been made, and that it impacted on D10's own assets, over which no proprietary claim was asserted. In a subsequent application she made for permission to appeal my order regarding costs, her skeleton argument said that, she has successfully had the WFO discharged, and replaced by a narrow order, which freed up the entirety of her estate save her shareholding in WEL.

16. It is right to say, however, that the evidence and submissions did not identify specific assets, which were not covered by the PIO, other than (it appears) WEL.

17. On 14 October 2022 D2 and D10's then solicitors, Grosvenor Law, wrote to the Claimants regarding a variation of the PFOs and specifically sought access to £250,000 from one of D2's bank accounts, for the purposes of carrying out disclosure.

18. On 19 October 2022 the Claimants indicated their consent to access to that amount from that bank account, assuming similar consent was obtained from the SFO. However, Grosvenor Law subsequently withdrew from their representation and the matter was not then pursued.

19. On 20 February 2023 D2 and D10's current solicitors, Crowell and Moring (C&M) wrote to the Claimants, to request the release of a fund of £876,000-odd, held on behalf of D10 in a Grosvenor Law client account, to be used to fund D2 and D10's legal representation. In parallel C&M entered correspondence with the SFO, regarding a variation of the CROs.

20. On 20 March 2023 at the request of the SFO, witness statements were provided on behalf of D2 and D10 to support the request for a variation of the CROs for reasonable legal expenses. The evidence included the projected legal fees and expenses to fund the defence of this matter through to trial. These came to a total of some £3.7m-odd plus VAT. The SFO ultimately agreed to the proposed variation to the CROs, and consent orders were sealed by the Southwark Crown Court on 18 April 2023.

21. These orders related to two specific assets: the sum of £876,000 held for D10 in the Grosvenor Law client account; and the credit balance of a specific account of D2 at Barclays Bank in the name of D2.

22. As conditions to the funds being made available under the CRO variations, D2 and D10 agreed: (a) to provide evidence of C&M's invoicing to the Claimants' solicitors, Mishcon de Reya (MDR), and the SFO, 14 days in advance of any transfers of funds to pay legal expenses to C&M; (b) after initial transfers to pay for already incurred expenses, any transfer from D2's Barclays Bank account to C&M's client account would be limited to tranches of a maximum of £100,000, as needed, to meet invoicing of legal expenses going forward; (c) the SFO would have a right to require a detailed cost assessment under the CPR; and (d) transfers to C&M, while such assessment was ongoing would in the interim be limited to 65% of the invoiced sums.

23. On 21 April 2023 C&M wrote to MDR, to request the Claimants' consent to a variation of the PFOs. There was no immediate response. On 27 April 2023 this application was issued.

24. The matter first came before the Court on 4 May 2023, when there was another hearing listed before it. The Court did not have time to hear this application and it was adjourned.

25. On 9 May 2023 MDR wrote to C&M, referring to D10's discharge application in 2021, and saying that D10 had appeared to assert that the shares of WEL, and possibly the flat at 58 EP, fell outside the PFO. MDR also explained that if any non-proprietary assets of D2 and D10 were illiquid, they were willing to consider accepting security, up to a pre-agreed amount, in return for agreeing to release liquid funds from the PFOs in the same amount. By "non-proprietary assets", they meant assets which were not covered by the terms of the PFOs.

26. On 9 June 2023 the Claimants provided a substantive response to the application in the form of a letter. On 13 June 2023, Mr Davies, of MDR, filed an eighth statement, in opposition to the application, which heavily relied on the 9 June 2023 letter.

27. I should mention here that WEL is the registered owner of the property called, "HH", which is a rental property. The 9 June letter explained that MDR had investigated whether payments listed in the PFOs had been used to fund the investment of D10 in WEL and/or HH. The letter set out a provisional conclusion, that a sum of about £1.53m, deriving from the First Claimant, is traceable into HH and/or WEL. MDR explained that the Claimants' investigations remained ongoing and that it may transpire that additional amounts are so traceable. The letter also said that the value of HH had not been established, but noted that D2 and D10 have asserted that it is worth around £2m. MDR said that, on this basis, it is possible that approximately £470,000 of equity in HH belongs to D10 and is not proprietary in nature - in the sense of falling outside the scope of the relevant PFO.

28. The 9 June 2023 letter said that while it would involve the Claimants taking a risk, they would be willing to release funds up to £470,000 from the PFOs, for the purpose of meeting future legal costs of these Defendants, in return for a first ranking security over HH. This offer was expressed to be subject to satisfactory answers to the Claimants' information requests and other protections. That offer did not satisfy D2 and D10, who said that the suggested sum of £470,000 would fall far short of their existing projected cost to take the case to the end of trial. Hence this application came before me.

## Legal principles

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

> "22. In the case of proprietary injunctions, however, the position is different: see *Grant and Mumford, Civil Fraud* (1st edn) at §32-059 to §32-068. Here the principles are as follows:
>
> (1) Since the basis of the proprietary claim is that the particular asset in question is said to belong to the claimant, the question is not whether the defendant should be able to use his own assets, but whether he should be permitted to use assets which may turn out to be the claimant's. There is therefore no presumption in favour of his being able to do so.
>
> (2) There are four questions which fall to be answered: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) ("ITS") at [6] per Lewison J. The first is whether the claimant has an arguable proprietary claim to the money.

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

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

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

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

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

30. As to the third stage, the burden is on the party seeking a release of funds. This was explained in *Marino*, at paragraph 20, by Sales J, who said that there is obvious justice in adopting such approach, as the Defendant has full knowledge of his assets and financial position, whereas the Claimant does not.

31. 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 paragraph 24:

“(1) The court must consider where the balance of justice lies as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it: see *Marino* at [23].

(2) It does not automatically follow that a defendant should be entitled to draw on proprietary funds if he can show that he has no other funds with which to defend the action; see *Ostrich Farming* at p. 7 (per Millett LJ).

(3) The court is required to come to a "careful and anxious judgment as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence": *Marino* at [19]. This balancing exercise should be carried out based on "all relevant circumstances": see *Ostrich Farming* at p.10, per Roche LJ.

(4) There are less strong reasons to permit the payment of incurred legal fees rather than future legal expenses. The court is concerned with the interests of the parties and not the defendant's solicitors: see *Angel Group Ltd v Davey* … at [46].

(5) The court will "act cautiously so as to ensure that the funds are not wasted", which may be achieved by "limiting the amount ... even if that may cause a defendant to reassess how to pursue her case or to consider alternative funding models": see *Angel Group Ltd* at [44] to [45].

(6) It is not conclusive that the defendant will have to act as litigant in person. The defendant may be able to receive a fair hearing through such representation; *Marino* at [31].

(7) A key factor in the granting of permission to use arguably proprietary funds is the court's interest in having parties professionally represented; see *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 3624 (Comm), per Popplewell J as he then was, at [11] and [29] to [33].

(8) It will be relevant to consider what undertakings or offers are made by the defendant. For example a defendant may offer to replenish funds taken from proprietary assets with non-proprietary assets; see *Marino* at [19]."

32. There was some debate before me about some of these points.

33. The Claimants accepted point (7) but said that it should be given only limited weight, when set against other factors, including the potential prejudice to the Claimants. In my judgment, the Court should not approach this factor with any particular predisposition as to its weight. It will depend on all the circumstances, including the nature, complexity and scale of the case, and the extent to which other Defendants in the case may be represented professionally.

34. The Defendants took issue with point (4). They argued that there was no justification for distinguishing accrued costs from future costs and said that in the case cited – the *Angel Group* case – the judge did not base himself on any authority. On this point, I have concluded that the summary given by Bryan J is correct. It does not say that there can never be a release of funds for accrued costs. It seems to me however, in agreement with Bryan J, that there are likely to be significantly stronger reasons for a release of funds for future costs than past ones, as the trigger for an application of this kind is whether the party seeking the release has a sufficient case to seek a release of funds to be represented professionally in the ongoing proceedings.

35. The PFOs were made by consent. It was accepted by D2 and D10 that they are required to show a change of circumstances, justifying a departure from the PFOs, which, as already explained, can take no exceptions for legal fees. There was some debate about the principles.

36. In my judgment, the relevant principles here are those derived from *Chanel v Woolworth* [1981] 1WLR 485 and subsequent cases. *Chanel* itself concerned a consent order for the continuation of an injunction to trial. It established that a party is not free to fight over again interlocutory battles which are fought and lost, and that the principle applies to orders made by consent, as it does to contested hearings.

37. The cases were reviewed by Nugee J in *Kea Investments*, at paragraphs 48 and following. The underlying principle is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances, or it becoming aware of facts which it did not know, and could not reasonably have discovered, at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining finality.

38. The Claimants relied on the statement of Potter LJ in *Placito v Slater* [2004] 1WLR 1605 at 31:

> "I prefer the phrase 'special circumstances' because, in my view, it is more apt to emphasise that the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given."

39. It should be noted that that was not a case, such as those considered in *Chanel*, of an attempt to go behind the result of an earlier interlocutory order. It concerned settlement proceedings, which included an undertaking by one party that it would not bring certain specified probate proceedings after a certain date. When that party tried to do so, the other party applied to strike it out, as an abuse of process, and succeeded. The Court held that there was no proper basis for releasing the undertaking. That was the context in which Potter LJ referred to the need for special circumstances.

40. It appears to me that the line of authority more directly relevant to the present case is the *Chanel v Woolworth* line, as analysed in *Kea*. It seems to me that the Applicants need to show a significant and material change of circumstances, justifying a departure from the PFOs, which were made by consent.

41. On the other hand, I accept the submission of the Claimants that the shorthand tag "material change of circumstances" can sometimes be a misleading shortcut at least insofar if it is taken as a sufficient test. It seems to me that when approaching an application of this kind, it is important to keep in kind two points. First, that it is abusive to refight interlocutory battles which could, and should, have been fought, if at all, at the earlier hearing. Second, where a party consents to an order, the court should – other things being equal – give weight to the bargain and the public interest in compromising litigation, and that this applies to interlocutory hearings, as well as final settlements. The Court should, therefore, be careful to ensure not only that there has been a material and significant change in circumstances, but also that justifies the making of the application, to vary an earlier consent order.

**Has there been a material change of circumstances?**

42. The Defendants submitted that there have been two relevant material changes to the circumstances. The CROs have now been varied by consent and the D&O policy has been exhausted. The CROs were imposed before the application for the PFOs was launched. Under the CROs, the Defendants were prevented from spending any of their assets on legal costs. They say that this fact was relevant to their decision to submit to the PFOs without any exceptions. Indeed, in correspondence at the time, their lawyer said that they were prepared to agree to submit to the PFOs, partly because they were restrained in any event by the CROs.

43. Counsel for the Defendants submits that the position is now materially different. The SFO has now agreed to a variation of the CROs in respect of specific assets, for the purposes of allowing D2 and D10 to meet their reasonable legal fees in the proceedings. Counsel argues that against the background of the CROs, D2 and D10 had no realistic reason in 2021 to contest the PFOs.

44. For reasons advanced by counsel for the Claimants, I do not consider that this is a material change of circumstances. I agree with the Claimants that it was always open to the Defendants to apply for a variation of the CROs, as they have now done. The Defendants have now removed a separate impediment to seeking the release of funds, but the Defendants have not shown that they could not have obtained the same consent from the SFO, had they sought it in February 2021.

45. What about the D&O policy? The Defendants observe that in February 2021, they were the beneficiaries of a policy, along with a number of others. The limit was £10m. They say that this was exhausted in mid-2022, and that, since then, they have not had available funds to defend themselves. They say that this was a material and significant change of circumstances.

46. The Claimants submit that there has been no relevant change of circumstances. They say it was always foreseeable that the D&O policy would be exhausted before these proceedings were completed. Where an outcome of that kind is foreseeable in that sense, it cannot be regarded as a change of circumstances, when the foreseeable thing eventuates. The Claimants say that the position is like that of any litigant, who has a fund of money which then runs out. Unless the litigant can show that there were unanticipated costs, which have gone above budget, they cannot rely on the money running out, to say that things have materially changed.

47. The Claimants relied on *Kingsley Healthcare Limited* [2001] WL1040201, where Neuberger J said that the mere fact that the case takes longer than expected to come on for hearing does not, of itself, represent a change of circumstances, or even a relevant change of circumstance.

48. They also relied on *Angel Group*, at paragraph 31, where the judge said:

> "It is insufficient merely to show that some unforeseeable event has occurred, resulting in an unexpected funding shortfall … In order for a change of circumstances to be relevant, the applicant must show that had

> costs not been increased recourse to the frozen funds would not have been required."

49. The Claimants also complained that there has been no evidence from the Defendants, explaining what their expectations about funding were, in February 2021; nor, they say, have the Defendants explained how much they spent under the D&O policy, or on what they have spent it. The Claimants say they have sought this information in correspondence, and it has not been provided.

50. On balance, I prefer the submissions of the Defendants on this point. This is not a case where there is simply a fund available to D2 and D10 which they have exhausted. The D&O policy was available to a number of parties, including, but not limited to, the Defendants in these proceedings. It was also available to the relevant beneficiaries for other legal proceedings and investigations, including criminal ones. The limit of £10m was a total for all of those parties in all proceedings. This was not, therefore, a simple case of a fund over which these Defendants had control. Its continuing availability for their costs depended on the actions of other parties and their lawyers. No reason has been given why these Defendants should not have supposed - at the relatively early stage in the proceedings when the PFOs were made - that the D&O policy would not be enough to cover their costs of these proceedings.

51. The Claimants may be right to say that there was always the possibility that the D&O policy would come to be exhausted before the completion of the proceedings, even a real possibility, but I do not think there is a safe evidential basis for concluding that what has happened now should have been anticipated in February 2021. In that regard, I note that in the *Kingsley Healthcare Limited* case, Neuberger J held that there had been a change of circumstances where the reason for the inability of the Defendant to fund himself was that an asset, which had been anticipated would raise a certain sum of money had, in the event, been sold for a significantly lower net sum. In a sense it was always to be anticipated that that might happen. But Neuberger J considered that what had happened (getting less than hoped for) was a sufficient change of circumstances.

52. It seems to me that a helpful approach to the *Chanel* question in the present case is to ask whether it would realistically have been open to the Defendants to argue for an exception to the PFOs when they were imposed in February 2021. It appears to me highly likely that the Claimants would have been able to argue decisively that applying the *Marino* test, the Court should not release any of the frozen assets on the basis that the Defendants had the benefit of the D&O policy.

53. It seems to me that would have been a compelling answer to any such application at the time. I do not think it is realistically conceivable that a Court would have made an anticipatory order, for some of the frozen assets to be released in the event – but only in the event – that the D&O limit was reached. It seems to me the Court would almost certainly have said at that stage that it would be for the Defendants to apply for a variation if and when the limit was going to be reached.

54. Given this, I do not think it would be realistically open to the Defendants to obtain a release of frozen funds in February 2021, and I do not think it can now

be said that they are seeking to rerun a battle which they could have fought at the time but agreed not to. There was it seems to me no realistic fight then to be heard.

55. So I do not think there is anything abusive about the current application. Nor do I think that by entertaining the application the Court is now undermining the importance of the bargain contained in the consent orders. It was always implicit in that bargain that it would be possible for the Defendants to seek a variation of the present kind, in the event that they could show a sufficient change of circumstances.

**Application of the *Marino* test**

56. I turn then to the application of the *Marino* test. The Defendants accept for the purposes of the present application that the Claimants have a proprietary claim in respect of the relevant assets. The Claimants, for their part, accept – for present purposes – that the Defendants have a claim to the same assets.

57. The Claimants invited me to conclude, however, for the purposes of the fourth stage of the *Marino* test (if that is reached) that the Defendants' claim is a very weak one. They argued that the Defendants accept that they received more than £23m from the Claimants, which the Defendants seek to justify, by reference to a number of transactions, including asset sales and share transactions. The Claimants argued that there is evidence of valuations of assets being adjusted upwards, repeatedly, to match the amounts said to be outstanding to the Claimants, from time-to-time, from various borrower companies. They also point to evidence, which they say shows the backdating of documents.

58. It may be the case that there will be some force in these points at trial. But I am unable on this application to reach any reliable view about the merits of the respective claims of the Claimants and these Defendants to the relevant assets. The merits were not subject of the evidence before the Court, and the submissions about them were pitched at a very high level of generality. The underlying transactions are complex and numerous, and, in my judgment, it is simply impossible for the Court to reach even a provisional view of the merits at this stage.

59. I turn to stage three. As already explained, it is for the Defendants to show that they do not have other available assets to fund their legal representation. The evidence before the Court, on the application itself, consists of the fourth statement of Mr Weekes, of C&M. He exhibits a statement of D2, which was given to the SFO in March 2023 as a condition of their consent to the variation of the CROs. There is no separate statement from D10.

60. In addition to this material, D2 and D10 gave disclosure of assets on affidavit in response to WFOs in 2020 and the PFOs in 2021. The Claimants have not suggested that the Defendants failed to give proper asset disclosure in response to those orders, nor have they asserted that there are significant gaps, in the sense of missing assets.

61. Mr Weekes said in paragraph 10 of his fourth statement, that D2 has explained in his witness statement provided to the SFO that D2 and D10 have no access to assets that fall outside the CROs or PFOs. In paragraph 10 of his statement that was provided to the SFO, D2 says:

> "All of my assets are, therefore, subject to the [PFOs], as well as the CROs. [D10] similarly has no liquid assets available to her to fund her legal expenses."

62. In subsequent correspondence, C&M has explained that D2's witness statement was saying that he has no assets outside the PFO, but it was not to be read as saying that D10 did not have any assets not covered by the PFO. C&M went on to say that HH is outside scope of the PFO. In the course of the hearing, counsel for D2 and D10 said that that could be considered an overstatement and that it was more accurate to say that HH is partly outside the PFO.

63. The Defendants submitted that the Court should consider all of the evidence, including the asset disclosure given on affidavit. There has been no application to challenge that disclosure, which was given in 2020 and 2021. This is not a case where there are said to be serious gaps in the disclosure.

64. Counsel for the Defendants said that the Defendants are not taking a different stance now from that taken in earlier stages of the case. D10 never identified substantial other assets when she applied to discharge the WFO, with the possible exception of HH. She said she was entitled to apply to set aside that order, because it was granted on a false basis. D2 has not changed his position either. He accepts that he has no non-proprietary assets. He made the point in his defence that he has had a successful business career, but the reason for this was to support his case that he had no motive to the defraud the Claimants. The disclosure shows that large parts of the £23m received from the Claimants, directly or indirectly, were loaned on by these Defendants, to companies which are now insolvent, or to individuals who are themselves party to these proceedings and subject to freezing orders. There is no gap in that disclosure.

65. The Defendants also made an overarching submission that none of the assets, other than those that are subject of a recent consent from the SFO, are available to them to pay the costs of these proceedings, because of the all-embracing nature of the CROs.

66. The Claimants submit that the Defendants have failed to satisfy the burden of showing that they have no other available assets to meet their legal costs, including for the following reasons:

    i) The evidence is insufficient because there is no witness statement from D10.

    ii) As accepted by C&M, D10 says that she has possible assets outside the PFO but does not specify them fully.

    iii) The Defendants' assertions of lack of other assets must be contrasted with the position that D10 took when she sought to discharge the WFO.

That was premised on the basis that she an independent estate outside the scope of the PFO.

iv) D2's assertions that he has no other assets, other than those derived from the payments traceable to the Claimants, are to be contrasted with the position taken in his defence, that he was a successful businessman before he had any dealings with the Claimants. More generally, the position taken by the Defendants varies, according to what suits them at the time.

v) The evidence shows that D2 and D10 received some £23m-odd, traceable to the Claimants' assets, whereas, according to the Defendants' assets disclosure, they retained only some £12.4m, traceable to those funds.

vi) There appear to be some assets listed in the asset disclosure, which may be available, which have not been expressly dealt with, such as jewellery and chattels.

vii) As to the Defendants' overarching submission, the Claimants say that the Defendants have not sought consent to the release of other funds from the SFO and, therefore, cannot say that the CRO prevents them, in the relevant sense, from using other assets. The SFO does not have a proprietary claim and is, therefore, indifferent to which assets may be released.

67. On balance, I prefer the submissions of the Defendants on these points. I consider that I should take into account the totality of the evidence, including the asset disclosure given in 2020 and 2021. Having done so, I am satisfied, first, that D2 has no significant assets which are not subject to the PFO and the CRO. As I say, there has been no serious challenge to the asset disclosure given by D2.

68. As to D10, I do not think there is a fundamental inconsistency between the position now taken and that taken on the application to discharge the WFO. D10 took the point of principle that the WFO should not have been granted. I accept that some of the statements made on her behalf at the time may have suggested that she had other substantial assets, but they did not actually identify any, other than her interest in HH. Her position has been confirmed in recent correspondence.

69. As to the position in relation to HH and/or the shares in WEL, I have already summarised the position taken by the Claimants in relation to that asset. As I have already said, the Claimants say that there is evidence that sums in excess of £1.5m may well be traceable to the Claimants' assets. D10 accepts for the purposes of this application that the Claimants are justified in saying that, and does not seek to argue otherwise.

70. The Claimants explained in correspondence that although there was no valuation evidence they were prepared, at least as an offer, to take the risk that

the value might be less than the £2m asserted by D2 and D10, and to take the risk that their traceable claim may be greater than that they have yet asserted.

71. So it appears that there may be some equity in HH, and I will proceed for present purposes on the footing that it is perhaps in the order of about £470,000.

72. I also think there is some force in the submission of the Defendants' counsel, that the CRO means that the funds, other than those covered by the SFO's specific consent, are not available to these Defendants. I do not think it is an complete answer to this point to say that the Defendants have not sought the release of more funds. While the SFO may be indifferent, as to the specific assets released, it is clearly interested in maintaining the maximum overall amount preserved by the CROs: i.e. it has an incentive to minimise the amount of any releases it consents to. It seems to me reasonable to suppose on the evidence before the Court, that the SFO is only prepared to consent up to a certain extent; or putting it another way, there is no reason, on the evidence before me, to think that it would be prepared to agree releases of further amounts.

73. As to the various other items of jewellery and other chattels listed by D10, I think there is some force in the points made by the Claimants that the evidence on this is not as clear or full as it ought to be. However, these amounts are comparatively small in the context of the sums being argued about, and to the extent relevant, it seems to me, that they are best addressed in relation to the fourth stage of the *Marino* test, when it comes to the exercise of discretion: further protections may be available in relation to those assets.

74. Overall on the evidence before me I am satisfied that these Defendants do not have significant other available assets.

75. The fourth stage requires a careful and anxious judgement, of the kind described by Sir Thomas Bingham MR in the passages I have cited. The Court is faced with balancing the risks of injustice to the two sides in conditions of uncertainty about the outcome at trial.

76. It seems to me that the following factors are of particular importance on the facts of this case.

77. First, there is potential prejudice to the Claimants if the Defendants are allowed access to the funds. The Claimants bring proprietary claims. As they rightly observe, they do so on the basis of being able to prove the receipts of monies by the Second and Tenth Defendants. This is not a case where it can be said that the proprietary claims appear speculative or merely tactical. If the Claimants are successful in their claims, and funds are now released, in effect the Defendants will have been allowed to litigate at the expense of the Claimants. The cases show that even where the Defendants can show that they have no other available assets, there is no automatic right to use frozen assets for the purpose of defending themselves.

78. Second, I take account of the size and complexity of this litigation. Hundreds of thousands of documents have been disclosed. The trial has been listed for 80

court days. The Court has given directions for expert evidence in various fields, including valuation. The valuation evidence relates to the value of various assets, which were the subject of sale agreements, which the Defendants contend explain the reasons for the various payments, which are now complained of. 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. I have already referred to the variety of claims, including for fraudulent trading, breach of fiduciary duty, dishonest assistance, constructive trust and tracing claims. Some of the claims seek proprietary relief. Others seek various forms of personal relief. There have been regular CMCs in these proceedings. There is another indeed listed for tomorrow.

79. The Claimants submitted that the Defendants are able properly to represent themselves, without professional assistance. They say that the proceedings have come on a long way, that these Defendants have put in long and detailed pleadings, which set out the principal elements of their defence. Disclosure has already happened. As to trial, the Claimants say that there is unlikely to be any substantial dispute about the legal principles. The Claimants are unlikely to be relying upon particularly contentious witness evidence, so that factual cross-examination by the Defendants is likely to be limited. They also contend that when it comes to closing argument, the Defendants will be able to make use of their pleadings, as a framework for their submissions.

80. The Claimants rely on a comment of Sales LJ in the *Marino* case that it may well be possible for a self-represented party to receive a fair hearing.

81. I note however that that comment was made in relation to an interlocutory application, and Sales LJ expressly said that he was not considering the question of how things would apply to the trial process itself.

82. The Defendants submit that the Claimants' position is unrealistic and that it misses out various key stages in the trial and pretrial process. They point out that the Claimants have ignored the expert evidence stages, both pretrial and at trial itself. The Defendants submit that very often the key question at trial is not the legal principles but the application of the law to the facts, and what conclusions of fact and on expert evidence the Court should reach. The Defendants submitted that the closing submissions in this case are likely to be of great importance.

83. I have concluded that, while it would no doubt be possible for these Defendants to represent themselves, it would be a very difficult task, and that they would be much assisted by professional legal representation. I think that the Claimants' submissions significantly overstate the ability of these Defendants fully to represent themselves and do justice to their defence. I agree with the submission of the Defendants, that their ability to represent themselves is likely greatly to be enhanced by professional representation.

84. The third factor is the seriousness of the allegations. I have already referred to these. There are serious allegations of fraud and dishonesty on the part of the Second Defendant. If successful, the claims would appear to amount to the entirety of D2's assets and to a large part if not all of D10's assets.

85. Fourth, I give weight to the Court's own interests in having the parties professionally represented: see *Dos Santos*. 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 the Defendants being able fully to test any evidence adduced by the Claimants. In this regard, I also note that other Defendants in this litigation are representing themselves. So this is not a case in which it is clear that other legal representatives will be able to carry the burden of advancing the arguments that D2 and D10 will wish to advance.

86. Fifth, I take into account the undertakings offered by D10 regarding HH. D10 accepted that it would be appropriate for her to provide a first-ranking charge in respect of any equity she may have in HH. It seems to me this is likely to provide some protection for the Claimants in respect of that amount. On the other hand, I agree with the submission of these Defendants that the sum of £470,000 is not going to go far enough in providing these Defendants with legal representation. I will come back to questions of the amount to be released in a moment.

87. It also seems to me, that the Court should require further safeguards in relation to D10's chattels, including jewellery, and that suitable charges should be provided in respect of those.

88. Sixth, I have taken into account the safeguards concerning the amount of the costs which have already been built into the CROs. D2 and D10 have offered to extend these also to MDR, as solicitors for the Claimants. This gives an enhanced degree of control with the ongoing payment of costs.

89. Seventh, in relation to the amounts being claimed, as I have already explained, 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 to be released by Defendants in a position of these applicants. It is clear from the authorities, that the Court may impose limits even if this would change the extent and nature of the representation that would otherwise be available to defendants in the position of these Defendants.

90. Mr Weekes has given an estimate of costs to the end of the trial, which comes to some £3.75m. This includes very substantial sums for giving disclosure by D2 and D10 (more than £670,000). That has already happened. He estimates the costs of considering the disclosure of the Claimants and other parties at the sum of £575,000. There are then a number of costs covering further stages, including the sum for trial preparation, of £40,000, and costs of attending trial by solicitors of over £378,000. Disbursements are set at £1.5m - £1.75m for counsel from the end of March 2023 until the end of trial, and up to £100,000 for experts. There are also outstanding fees of just under £100,000 for counsel, which date back to the period when they were instructed by Grosvenor Law, which have not been paid. Including VAT the total is more than £4.4m.

91. I have come to the conclusion in the light of the various factors listed above that it is right to allow the release of some sums, but not of the amounts sought by Mr Weekes. My conclusions about the right amount are as follows:

i) I am not persuaded, on the present facts, that there should be any release from the frozen assets for accrued fees. I have already referred to the relevant principles. It seems to me that the Court, on the facts of this case, should limit any release, as far as possible, so as to protect the Claimants from undue prejudice. It may be considered hard for those lawyers, who have incurred fees without protection of an order, but they have done so on risk. The justification for the order in the present case seems to me to relate to the future, not the past. I have not been given a clear breakdown of accrued amounts, as compared with future costs. As I have said, some of counsel's fees include accrued amounts. This is as a result of the way that the Defendants have presented the evidence. Inevitably, therefore, it has to be approached with a broad brush.

ii) Second, the hourly rates of solicitors at C&M are above the guideline rates for a London City firm. Counsel for the Claimants also observe that they are well above the guideline hourly rates for a firm outside of London. However, I think there is some force in the Defendants' submissions that it would be very difficult if not impossible for these Defendants now to change firm again. But nonetheless it does seem to me that, in assessing the overall amount that should be released, the Court should take into account the guideline rates for London City firms.

iii) Third, as already explained the cases show that the Court does not simply ask what amounts the Defendants would spend if they were freely using their own assets, as might be the case in a non-proprietary freezing order. The amount allowed by the Court may well not be ideal for the Defendants in the sense that it constrains and limits what they would otherwise spend. This may mean that the service they receive is less perfect than that which would otherwise be available. It seems to me that in striking a balance it may mean that the Defendants and their lawyers will have to cut their suit to match the cloth available.

iv) What Mr Weekes has done, understandably, is provide an estimate of the amounts he would normally expect to see incurred. But that is not the amount which, in my view, the Court should order.

v) Again, it seems to me that the Court has to approach things with a relatively broad brush and cannot carry out anything approaching a scientific analysis of the costs. This is because it is seeking to balance the interests of the Defendants in obtaining as much representation as they can against the interests of the Claimants in seeking to protect as much of the funds as they can, so that they are available if their claims succeed.

vi) A further factor I take into account is in relation to the amount of any release is the security offered by the Defendants, including that over HH. Again, for similar reasons to those already given, it is impossible to be scientific about this but the protection may be in the order of £475,000.

92. Addressing matters with a fairly broad brush and taking into account all of the factors which I have weighed above, I have come to the conclusion that the amount that I should allow to be released is £1.7m plus VAT.

93. This is in respect of costs since the date of the Application Notice, but not in respect of costs accrued before that. This sum is intended to cover the period until the end of trial.

**(This Judgment has been approved by Mr Justice Miles.)**

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