



Neutral Citation Number: [2022] EWHC 920 (Admin)

Case No: CO/4250/2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/04/2022

**Before :**

**MR JUSTICE GRIFFITHS**

**Between :**

**National Crime Agency**  
**- and -**  
**Petrosaudi Oil Services (Venezuela) Limited**

**Applicant**  
**Respondent**

**Martin Evans QC and Tom Rainsbury (instructed by Legal Department, National Crime Agency) for the Applicant**  
**James Lewis QC and Robert Morris (instructed by Armstrong Teasdale Ltd) for the Respondent**

Hearing date: 22 February 2022  
Further written submissions dated: 23-25 February and 12-13 April 2022

**Judgment Approved**

## **The Honourable Mr Justice Griffiths :**

1. This is an application by the National Crime Agency (“the NCA”) against Petrosaudi Oil Services (Venezuela) Ltd (“POSVL”) for a Prohibition Order in respect of funds previously held in an escrow account by POSVL’s solicitors, Clyde & Co, and now held in the Court Funds Office. I am told that the current value of these funds (“the Fund”) is about £240 million.
2. The issues are:
  - i) Should there be a Prohibition Order over the Fund and, if so, on what terms?
  - ii) Should the Fund be paid out of the Court Funds Office into the hands of a receiver?
  - iii) Should there be exclusions for legal and business expenses? If so, am I satisfied by the evidence and the amounts in question?

## **Facts**

### *The Request for Assistance*

3. The United Kingdom and the United States of America are parties to a Mutual Legal Assistance Treaty dated 1994 (“the Treaty”).
4. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (“the 2005 Order”) enables an enforcement authority (such as the NCA) to obtain from the High Court a Prohibition Order “in relation to relevant property in England and Wales... which is the subject of an external request” (Article 141A).
5. An external request has been made by the Central Authority of the United States (the Department of Justice) to the Central Authority of the United Kingdom under the Treaty (“the Request”), and this has been referred to the NCA. The NCA makes this application accordingly.
6. The terms of the Request are confidential but the essential elements are set out in the first witness statement of Daniel Byrne dated 15 December 2021 (“Byrne 1”), paras 4.6 – 4.10. It requests the assistance of the UK authorities  

“...in restraining or seizing any portion of the Defendant Assets that have been or may be released by the High Court of Justice and in preventing the further dissipation of the assets, thus ensuring their availability for forfeiture under US law and possible repatriation to the United States.”
7. It defines the Defendant Assets as the Fund (this is agreed), namely:  

“all funds constituting the arbitration award in the UNCITRAL arbitration between PetroSaudi Oil Services (Venezuela) Ltd (PetroSaudi) and PDVSA Servicios SA et al, with a value of \$379,843,732.60 plus interest at 12 percent beginning on 10 July

2020, the corpus of which is held in the Court Funds Office of the High Court of Justice in the United Kingdom”.

8. When requests for assistance are made by friendly, foreign countries with whom we have treaty or similar obligations of mutual co-operation, as in this case, “The expectation must... be that we will comply with the request unless there are compelling reasons for not doing so and that we will do so as quickly as possible”: *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC Admin 787 per Tuckey LJ at para 17.

### ***The US proceedings***

9. The US Request was made after the issue on 14 October 2021 of an *in rem* warrant (“the Warrant”) by a Federal Judge, the Honourable Dale S. Fischer (“Judge Fischer”), sitting in the United States District Court for the Central District of California. The Warrant was obtained by the United States of America as Plaintiff in an action against “All Funds Constituting Arbitration Award in *Petrosaudi v PDVSA UNCITRAL* arbitration” as Defendant *in rem*.
10. The Warrant was aimed directly at the Fund. The following terms of the Warrant (which is addressed to the US Attorney General and his representatives) are relevant:
  - i) “A Verified Third Amended Complaint for Forfeiture In Rem (“Verified Complaint”) was filed on July 6, 2021, in the United States District Court for the Central District of California by the United States of America, alleging that the assets – specifically: all funds constituting the arbitration award in the UNCITRAL arbitration between PetroSaudi Oil Services (Venezuela) Ltd. and PDVSA Servicios S.A. et al. (the “Defendant Assets”) are subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 981(a)(1)(A) and (C).”
  - ii) “The main corpus of the Defendant Assets is currently held in the Court Funds Office of the High Court of Justice in the United Kingdom. The High Court of Justice has released portions of the Defendant Assets as set forth in an order of that court dated March 23, 2021.” [This is a reference to an Order of Miles J, to which I will come in due course.]
  - iii) “The Court is satisfied that, based on the allegations of the Verified Complaint, there is probable cause to believe that the Defendant Assets are subject to forfeiture to the United States pursuant to 18 U.S.C. § 981(a)(1)(A) and (C).”
  - iv) “YOU ARE HEREBY COMMANDED pursuant to Supplemental Rule G(3)(c) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the “Supplemental Rules”), to arrest and seize any portions of the Defendant Assets that have been or may be released by the High Court of Justice. In accordance with Supplemental Rule G(3)(c)(iv), for property located outside the United States, this warrant may be executed by transmitting it to an appropriate authority for serving process where the property is located. You shall execute this warrant of arrest in rem as soon as practicable.”

- v) “This Warrant provides notice that the Defendant Assets are not to be dissipated without further order of the Court.”
  - vi) “This warrant provides notice that in order to avoid forfeiture of the Defendant Assets, any person claiming an interest in, or right against, the Defendant Assets must file a claim...”
11. The basis of the claim for forfeiture is an allegation by the US Department of Justice (“DoJ”), headed by the US Attorney General that POSVL was used as a vehicle for laundering money stolen from the Malaysian Sovereign Wealth Fund known as 1MDB. The case against POSVL is that its entire business was founded on the 1MDB fraud and its income represents the fruit of that wrongdoing.
12. Judge Fischer was not immediately convinced by this case. In September 2020, the DoJ first filed proceedings against the Fund. The Fund was at that time still held in escrow by Clyde & Co, not yet having been paid into the Court Funds Office. An initial *ex parte* application for an arrest warrant was unsuccessful on 21 September but on 14 October 2020 an arrest warrant was issued in the DoJ’s favour (not to be confused with the Warrant exactly a year later on 14 October 2021). However, on 9 March 2021, Judge Fischer dismissed the DoJ complaint and recalled (discharged) the warrant. On 6 July 2021, the DoJ filed an amended complaint seeking forfeiture of the Fund, which was by that time in the Court Funds Office.
13. It was this amended complaint which was approved by Judge Fischer in an interim ruling denying a motion by the defendant to the US proceedings “to dismiss the Third Amended Complaint”, i.e. the complaint filed on 6 July 2021. Having denied the motion to dismiss, she granted the Warrant on 14 October 2021 accordingly. Together with the Warrant itself, from which I have already quoted, Judge Fischer issued an Order (also dated 14 October 2021) in which she gave her reasons for denying the motion to dismiss (“the Fischer Ruling”). The following extracts from the Fischer Ruling are relevant:
- i) “Claimant PetroSaudi Oil Services (Venezuela) Ltd. (Claimant) has moved to dismiss the government’s third amended civil forfeiture complaint (TAC). The government seeks to forfeit funds formerly held in escrow at Clyde & Company in the United Kingdom that are subject to an arbitration award between Claimant and PDVSA Services S.A. The government has applied for an arrest warrant covering the funds, which are now held in an account of the High Court of England and Wales (UK Court), that might be released by that Court.”
  - ii) “...most importantly, the government does not technically seek to arrest any property in the possession of the UK Court. The proposed warrant seeks arrest of only those funds that have been released by the UK Court or will be released in the future. The funds remaining with the UK Court would be unaffected.”
  - iii) “...the proposed warrant is clear regarding the funds to which it applies. The warrant describes the generally affected funds – the arbitration award funds held by the UK Court – and orders arrest of “any portions of the Defendant Assets that have been or may be released by the High Court of Justice (i.e., the UK Court)”.”

- iv) Judge Fischer then went on to consider, in the alternative, whether the proposed Warrant was contrary to recognition of UK sovereign immunity in the US Foreign Immunities Act. She decided it was not, and observed: “In this case... the funds are held by the United Kingdom within the United Kingdom itself. The FSIA by its explicit terms does not bar attachment or arrest of foreign sovereign owned property outside of the United States, nor does it, by its terms, bar a United States court from issuing an arrest warrant for such property.”
- v) However, Judge Fischer made the following observation: “Of course, the foreign state may or may not give any significance to an extraterritorial arrest warrant from a United States court, but that is an issue to be dealt with in the relevant foreign state - in this case, the United Kingdom.”

14. Judge Fischer then addressed the merits of the DoJ claim in the following terms:

“To survive a motion to dismiss, the TAC [i.e. the US government’s third amended civil forfeiture complaint] must “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.” Fed. Suppl. R. Civ. P. G(2)(f). Issuance of an arrest warrant for the defendant *res* similarly requires that the government show probable cause to believe the *res* is subject to forfeiture. Probable cause is sufficient information to convince a “prudent person . . . that there was a fair probability” that the *res* is subject to forfeiture. *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).

In dismissing the Second Amended Complaint, the Court noted that a critical gap in the government’s pleading was the need for a connection between the purchase (and ownership) of the drillship *Saturn* and the funds at issue. The *res* funds derived from services provided by a separate company – namely, Claimant – using the *Saturn* pursuant to a lease agreement with the owner of the ship. The Court was skeptical that there was a sufficient connection between the 1MDB fraud scheme (or money laundering related to it) and the purchase of the *Saturn*. In addition, the government failed to explain adequately why funds owed to a third-party that merely leased the *Saturn* should be subject to forfeiture even if the *Saturn* itself was traceable to laundered funds.

The Court finds that – after four tries – the government has stated sufficient facts to support a reasonable belief that it will be able to prevail and established probable cause for arrest of the *res*.

There is no question that the TAC adequately traces the 1MDB funds through to the purchase of the drillship *Neptune Discoverer* by PetroSaudi Oil Services Ltd. (PSOSL) and to PSOSL’s guarantees associated with the related drilling project. See TAC ¶¶ 1082-86. The government has now also successfully linked the *Neptune Discoverer* with the *Saturn* by alleging that

\$13 million in proceeds from the *Neptune Discoverer* project were directly used to purchase the *Saturn*. TAC ¶¶ 1090-92.

The remaining question is whether the purchase and ownership of the *Saturn* can be adequately connected to the arbitral award at issue given that the arbitral award is in favor of Claimant [i.e. POSVL], a company that only leased the *Saturn* and was never in direct possession or control of any funds traceable to 1MDB.

The Court finds that the alleged control by Tarek Obaid of both PSOSL and Claimant's accounts is sufficient to allow the case to go forward and an arrest warrant to issue. Claimant argues that the government must show that Obaid, PSOSL, and Claimant are alter egos of each other. However, in the context of money laundering, the Court is not convinced that such a high standard must be met. Even if some corporate formalities might have been observed, among other things, the government has alleged that Obaid established Claimant for the purpose of receiving proceeds from the *Saturn* drilling project – in place of PSOSL which had been receiving the proceeds – and controlled the accounts of both Claimant and PSOSL. TAC ¶¶ 1096-99. To the degree that Obaid had control of the entities and directed the relationship between them, the fact that Claimant may have, e.g., held board meetings, is not enough to shield proceeds derived from fraudulently obtained funds. One of the hallmarks of money laundering is the interposing of various legally distinct entities within the flow of funds to obscure the origins of those funds and the proceeds derived from them. The important points are that Obaid is alleged to have had control of the accounts of PSOSL and Claimant, is alleged to have had effective control over their actions, and is alleged to have withdrawn enormous amounts of proceeds from the entities into his personal bank accounts. This is not to say that the government is sure to succeed in proving what it needs to prove, but it has alleged sufficient facts to proceed beyond the pleadings. And, in addition to a general defense to the government's claims, Claimant has resort to the "innocent owner" affirmative defense of 18 U.S.C. § 983(d) if it was actually an innocent lessee of the *Saturn* ignorant of the fraudulent source of the funds used to acquire the *Saturn*."

15. I have quoted her reasoning at length because POSVL submits to me that I cannot be satisfied to the requisite standard that the Fund is indeed the proceeds of crime and that this ruling should not be sufficient so to satisfy me. I will consider that argument in due course.
16. In her Ruling, Judge Fischer mentions Tarek Obaid ("Mr Obaid") as having (allegedly) controlled entities including POSVL and having (allegedly) established POSVL in order to receive or launder the proceeds of crime through it (see para 14 above). Mr Obaid is (on the evidence before me) the co-founder of the group of companies of which POSVL forms a part and is a former director of POSVL. He is the subject of pending criminal investigations and proceedings in Switzerland as well as Malaysia. At the

request of the Swiss authorities, a restraint order was made by HHJ Grieve QC sitting at Southwark Crown Court on 10 July 2020 over real property in central London allegedly acquired by Mr Obaid with some of the proceeds of the 1MDB fraud, and that order is still in force. There is evidence before me that, out of sums received by POSVL from PDVSA for drilling contracts relating to the *Discoverer* and the *Saturn* (sums totalling in excess of US\$1 billion), payments were made to Mr Obaid totalling just over US\$150 million (Byrne 1 para 3.42).

17. On 9 December 2021, Judge Fischer granted the DoJ’s application for a protective order (“the Protective Order”). This orders POSVL “and any agents” (which would include lawyers) to deposit any of the Fund “that might be released to them after the entry of this order” with the United States District Court, Central District of California. In giving her reasons for making this Protective Order, Judge Fischer said:

“The government has established a serious, immediate risk of dissipation of the *res*, and the Court finds that a protective order is necessary to preserve it during the pendency of this action. [POSVL] does not really deny that it intends to spend the portions of the *res* distributed by the UK Court – in fact that seems to be the entire point of the release of the funds in the first place. To the degree that the entire *res* should be preserved, a protective order is appropriate.”

#### ***Other overseas proceedings***

18. The US proceedings are not the only proceedings pursuing what are said to be the proceeds of a crime against the Malaysian sovereign wealth fund 1MDB.
19. On 16 July 2020, the Malaysian High Court made an interim order purporting to freeze the money in the Clyde & Co escrow account (i.e. the Fund) for a 12 month period, in order to allow time for investigation. This order was made after the Malaysian High Court had satisfied itself (as required by the applicable Malaysian law) that the Fund was the proceeds of unlawful activity. The Malaysian Order was varied on 19 August 2020 to allow Clyde & Co to make specified payments of legal and business expenses out of the Fund. Malaysia made a request for assistance to the UK which was initially taken up by the NCA: the NCA issued an on-notice application against POSVL for a Prohibition Order, but did not pursue it, and nothing came of it. POSVL had indicated it would not oppose a Prohibition Order at that time, as long as exclusions were made for the payment of general and legal expenses.

#### ***The Paris arbitration and the establishment of the Fund***

20. The origin of the Fund is an UNCITRAL arbitration seated in Paris between the Venezuelan state-owned oil company Petroleos de Venezuela S.A. (“PDVSA”) and POSVL. PDVSA alleged breaches of contract by POSVL for which it claimed damages of a little under \$1 billion. POSVL resisted the claim and counterclaimed for unpaid invoices in respect of the *Saturn* drilling contract between PDVSA and POSVL. Although it was an UNCITRAL arbitration in Paris, which was not subject to English law or jurisdiction, a number of the lawyers involved were, as it happens, English.

These included Clyde & Co who were at that time (although no longer) POSVL's solicitors.

21. On 31 March 2017, while the arbitration was pending, the arbitrators ordered that disputed sums representing the unpaid invoices should be paid into an escrow account operated by Clyde & Co. This is the origin of the Fund. The Fund was operated by Clyde & Co under a tri-partite escrow agreement. The agreement allowed for POSVL to receive sums from the Fund in respect of legal and other expenses.
22. The applicable law of this agreement was not specified but, although the applicable procedural law of the arbitration was French law, the parties proceeded on the basis that it was governed by English law, presumably because Clyde & Co is based in England (para 7 of the judgment of Sir Alastair Norris dated 23 October 2020). There was no other connection with England, so far as I have been told. It could be said that the Fund came into England in this way by chance. No English company has ever claimed the Fund, and no UK enforcement authority has ever become interested in the Fund apart from the NCA's actions pursuant to requests for assistance from Malaysia (which was not pursued) and from the USA (which is being pursued and which gives rise to the present application).
23. POSVL went on to win the lion's share of the arbitration. The final award, on 17 July 2020, was for PDVSA to pay POSVL just under \$380 million. Since the Fund in the escrow account with Clyde & Co at this point was rather less than this, at about \$329 million, the whole Fund became (so far as the arbitration award was concerned) beneficially owned by POSVL (and PDVSA was ordered to pay them the shortfall of about \$50 million). An appeal was lodged in the Paris Court of Appeal to set this award aside, but it has not yet been determined, and does not operate as a stay.

### ***The English proceedings***

#### *The First Chancery Action*

24. On 4 August 2020, PDVSA issued proceedings in the Chancery Division ("the First Chancery Action") against Clyde & Co. PDVSA applied *ex parte* to Zacaroli J who granted an interim injunction preventing any distribution from the Fund save in respect of legal fees and other payments which had been permitted under the arrangements in place before the final award.
25. On 10 August 2020, POSVL applied to be joined into the PDVSA action against Clyde & Co. On 11 August 2020 the interim injunction came back to Court before Trower J *inter partes*. Trower J put in place (on POSVL's application) more generous payments of legal fees and business expenses from the Fund. However, he did so by permitting Clyde & Co to make these payments, without requiring them to do so. Clyde & Co declined to make the payments, having formed the view that to do so would place them at risk of committing criminal offences under the Proceeds of Crime Act 2002.
26. On 14 August 2020, POSVL applied to join the NCA as a party to the First Chancery Action. At this point, the NCA's interest in the matter was the result of the request for assistance from the Malaysian authorities (which the NCA later decided not to pursue) rather than the request for assistance from the US authorities (which had not yet been received). The application was heard by Snowden J on 18 and 19 August 2020.



Snowden J did not join the NCA to the proceedings, but he noted in his judgment that the NCA (which was represented by Leading Counsel) confirmed to him in the course of the hearing (i) that the NCA did not act as the agent of the Malaysian authorities; (ii) that the NCA had a discretion as to the form in which it should seek a Prohibition Order in response to the Malaysian request for assistance; and (iii) that the NCA did not intend to seek an order which was more restrictive in terms of payment than the freezing order of Zacaroli J as varied by Trower J. Also, during the adjournment of the Snowden hearing between 18 and 19 August 2020, the NCA confirmed in writing that “The NCA’s position is that the Part 7 regime under POCA is not engaged in relation to any of the payments under the Trower Order (dated 11 August 2020); and that there is no Part 7 obstacle to the payments permitted by Trower J in that Order”.

27. On 23 October 2020, Sir Alastair Norris discharged the injunction, on the application of Clyde & Co, and granted summary judgment in their favour. He noted that the relief claimed by PDVSA when seeking the freezing order had been based on an argument that the Fund was held in trust, and he rejected that argument. He reasoned that the origin of the Fund, in money paid to POSVL under the drilling contract with PDVSA, meant that the money was, at that stage “undoubtedly the property of [POSVL] alone” and that any trust could only have been created by the escrow agreement under which the Fund came into the hands of Clyde & Co. Applying conventional English law principles, and as a matter of construction, Sir Alastair Norris decided that the escrow agreement (like other escrow agreements) did not create a trust. Therefore, the jurisdiction upon which the First Chancery Action had been based did not exist. He also decided that the final award in the arbitration had brought the escrow agreement to an end in accordance with its terms. The Fund was now held pursuant to the final award, which gave it to POSVL absolutely, notwithstanding the pending arbitration appeal. (Miles J later disagreed with Sir Alastair’s reasoning or, at least, put a gloss on it which preserved some of the effects of the escrow agreement after the arbitration award: paras 98-112 of his judgment dated 26 February 2021 in the Second Chancery Action, particularly at para 110).

#### *The Second Chancery Action*

28. However, notwithstanding the judgment of Sir Alastair Norris that the Fund belonged to POSVL absolutely, POSVL could still not get its hands on the money in the Fund. By this stage, the DoJ had begun its forfeiture proceedings in the District Court for the Central District of California and Judge Fischer had issued her first warrant (dated 14 October 2020) directing arrest and seizure of the Fund as proceeds of crime. Although Clyde & Co now had reassurance from the NCA and from the Chancery Division, it was not prepared to risk running foul of the criminal enforcement authorities in the United States. Clyde & Co has offices in the USA.
29. Faced with this risk, Clyde & Co refused to pay anything out of the Fund to POSVL.
30. POSVL therefore issued its own proceedings against Clyde & Co (“the Second Chancery Action”) in the Chancery Division of the High Court on 17 November 2020. There were no other parties (the NCA, for example, is not and never has been a party to the Second Chancery Action). Relying on the judgment of Sir Alastair Norris in the First Chancery Action, POSVL pleaded that the Fund belonged to POSVL, PDVSA had no interest in it, and, accordingly, the Fund was held on trust by Clyde & Co for POSVL (Details of Claim para 12).

31. POSVL did not, however, want Clyde & Co to pay it all the money, perhaps fearing that any money which came into its own hands would immediately be vulnerable to claims from the DoJ. Instead, it claimed only the following:

“16.1. An order pursuant to CPR 64.2(a) and CPR PD64 para 1(2)(a)(iii) that Clyde & Co pay on demand to POS or its appointed agents from the [Fund]

(a) USD442,487 per month for POS’s ordinary business and legal expenses; and

(b) A sum not exceeding USD600,000 per month in respect of legal costs and expenses in connection with the following proceedings:

(i) these proceedings;

(ii) the appeal in the Court d’Appel de Paris seeking annulment of a Final Arbitration Award dated 17 July 2020 arising from arbitral proceedings between PDVSA Servicios SA. (“PDVSA”) and POS

(iii) the proceedings between PDVSA and POS in [the First Chancery Action] and any appeal...

(iv) the proceedings in the High Court of Malaya at Kuala Lumpur in the Federal Territory of Kuala Lumpur between the Malaysian Public Prosecutor and POS (the “Malaysian Proceedings”)

(c) The payments referred to at paragraph 16.2(b) are conditional upon production of a certificate signed by a partner and solicitor of Kerman & Co [POSVL’s solicitors, now incorporated into their present solicitors, Armstrong Teasdale Ltd] confirming that the sums so demanded will be paid out from Kerman & Co’s accounts only in respect of legal costs and business expenses properly incurred.”

32. So far as the balance of the Fund was concerned, POSVL sought only the ability to draw down from it “on demand”, either in its own favour, or in favour of “its appointed agents” (Details of Claim para 16.2).
33. POSVL also put forward an alternative. This was that Clyde & Co should pay the Fund “into Court, to be held on trust for [POSVL]” pursuant to CPR 64(2)(a) (the Court’s jurisdiction over “the execution of a trust”).
34. I emphasise this point because POSVL’s submission to me is that the Fund in Court is not subject to a trust at all, citing *W A Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] 1 QB 1038 declining to follow the reasoning of the Court of Appeal in *Peal Furniture Co Ltd v Adrian Share (Interiors) Ltd* [1977] 1 WLR 464. Per Oliver LJ (with whom Sir John Donaldson MR and Goff LJ agreed) in *W A Sherratt* at 1056-1057:

“The *Peal Furniture* case [1977] 1 WLR 464 proceeds upon two propositions which, if I may respectfully say so, appear to me to be open to doubt. The first is that in exercising the discretion as to payment out to a defendant it is right to have regard to matters occurring right outside and having no connection with the litigation, that is to say the interests of some person who is a stranger to the litigation and whose relationship with the defendant in no way affects the dispute between plaintiff and defendant. The second is that the money in court remains, as it were, an asset of the defendant which, on his bankruptcy, forms part of his property available for distribution. Speaking entirely for myself, I question this approach. That the money in court may become such an asset is unquestionable if an order is made for payment out. But in my judgment a defendant paying into court under R.S.C., Ord. 22, r. 1, parts outright with his money. I doubt whether it can be said that the Accountant-General is a trustee in whose hands his money can be traced. Nor is there a "debt" or chose in action in the accepted sense of the word. The money becomes subject entirely to whatever order the court may see fit to make and to treat it as the defendant's property available for distribution in his bankruptcy is to assume, for the purposes of exercising the court's discretion, the very situation which will only arise if the court exercises its discretion in a particular way.”

35. The matter came before Miles J and he gave judgment (“the First Miles Judgment”) on 26 February 2021. By that stage, POSVL had abandoned its primary claim and sought only the payment of the Fund into Court, in accordance with its alternative claim.
36. Clyde & Co remained anxious that even paying the Fund into Court would expose it to “a real and material risk of criminal prosecution or civil liability in the US” (judgment of Miles J, para 11).
37. Miles J emphasised that the warrant of Judge Fischer dated 14 October 2020 (which she did not recall until 9 March 2021, shortly after the First Miles Judgment) had “no legal effect under English law” unless and until it had been domesticated (which has never been proposed). He mentioned that it was open to the United States authorities to request assistance and for the NCA, based upon that request, to apply for a Prohibition Order, and for the English court, in its discretion, to grant such an order. He stressed that there had been no such request as matters stood before him (para 47 of the First Miles Judgment). That position has now changed, and the NCA is by the application to me seeking a Prohibition Order in response to an external request.
38. Miles J found that there was a real risk that the DoJ would prosecute Clyde & Co if it parted with the Fund even by paying it into Court pursuant to a Court order (para 85). He refused to make the order for payment into Court, or any of the orders sought by POSVL (paras 137-138).
39. That seems to have been the end of the Second Chancery Action.

*The Third Chancery Action*

40. At this point, Judge Fischer recalled her warrant of 14 October 2020. She did this, as I have mentioned, on 9 March 2021.
41. POSVL then issued new proceedings in the Chancery Division (“the Third Chancery Action”) in which the parties were, again, POSVL as claimant and Clyde & Co as defendant. The NCA was not and is not a party to these proceedings.
42. In this window of time (as it turned out to be) between Judge Fischer’s recall of her original warrant on 9 March 2021, and the date when she issued the current Warrant on 21 October 2021, Clyde & Co’s fears were, naturally, assuaged, and they no longer opposed an order for payment of the Fund into Court. Since there was no extant US warrant, there was not yet any mutual assistance request from the US to the UK, and no NCA application for a Prohibition Order was on the horizon. The way forward seemed to be clear for POSVL to apply, as it did, for the Fund to be paid by Clyde & Co into the Court Funds Office.
43. The matter came straight back before Miles J, and he gave a short *ex tempore* judgment on POSVL’s application on 23 March 2021 (“the Second Miles Judgment”). He said that Judge Fischer’s recall of her original warrant was “a crucial change in the factual landscape”. He noted that Clyde & Co now adopted a neutral stance. He no longer had to consider the US proceedings.
44. He did mention the Malaysian proceedings, and the Malaysian order, which he had summarised in paras 21 and 29 of the First Miles Judgment. That order had been issued by the High Court of Kuala Lumpur on 16 July 2020 and varied on 19 August 2020 to mirror the provisions for payment out of the Fund for legal and business expenses in the Trower J order in the First Chancery Action (differing from the Trower Order only in that it required Clyde & Co to make these payments, rather than merely permitting them). He noted that POSVL was “not seeking payment in full from the monies in court at this stage as a voluntary decision to respect the order of the Malaysian court without in any way accepting that the order is applicable or enforceable. That is a matter for the claimant.” (para 7 of the Second Miles Judgment).
45. Miles J then made, without opposition, an order dated 23 March 2021, essentially in the terms of the draft placed before him by POSVL (“the Miles Order”). Clyde & Co was ordered to convert the Fund from US dollars into pounds sterling and transfer it to the Court Funds Office, subject to its own rights of indemnity and payment of costs and charges due under the escrow agreement (paras 1 and 2). Paras 3-4 of the order then provided as follows (emphasis in the original):

**“Cessation of Trust and the Defendant’s Escrow Management”**

3. Upon the transfer of the GBP POS fund [i.e. the Fund] to the Court Funds Office referred to in paragraph 1 above, the Defendant will cease to be the trustee and escrow manager of the POS fund and save as set out below, the POS fund and any interest accrued on the fund will be held by the Court Funds

Office subject to the Orders below and further Orders of this Court with permission to the Claimant to apply.

**Payment of funds out of the Court Funds Office**

4. The Court Funds Office will pay to Armstrong Teasdale Ltd the following sums on the following dates:

The Claimant's Ordinary Business Expenses

a. **The sum of GBP319,225.61** (being the equivalent of USD442,487.00 in respect of the Claimant's ordinary business expenses (previously permitted as a monthly payment for ordinary business expenses by Trower J on 11 August 2020)) **on 1 April 2021 and thereafter on the first banking day of every month until further Order of this Court.**

The Claimant's Legal Expenses

b. **The sum of GBP432,861.00** (being the equivalent of USD600,000.00) **on 1 April 2021 and thereafter on the first banking day of every month until further Order of this Court** (in respect of the Claimant's legal fees and expenses in this and foreign jurisdictions as permitted as the facility Ordered by Trower J on 11 August 2020), only to be paid to the creditors of the Claimant in respect of payable legal expenses and subject to the solicitor's undertaking referred to in the recital above provided by Mr Anthony David Kerman by his first witness statement in this action dated 22 March 2021."

46. The undertaking referred to in sub-para b. was from POSVL's solicitor. He undertook "(i) only to pay sums referred to in paragraph 3(b) below to creditors of the Claimant claiming payable legal fees and expenses in this and foreign jurisdictions; and (ii) to hold all monies received from the Court Funds Office pursuant to paragraph 3(b) below not paid to the Claimant's creditors as aforesaid to the further Order or Orders of this Court". There was no para 3(b) and so these references are obviously meant to be references to para 4.b. as quoted above.
47. Thus, the Miles Order mandates, and continues to mandate, payment of over £750,000 out of the Fund every month in respect of POSVL's legal and business expenses.

*Reaction to the US Protective Order of 9 December 2021*

48. When Judge Fischer issued the Protective Order (para 17 above), POSVL's new solicitors in England (Armstrong Teasdale Ltd), became concerned (like their predecessors Clyde & Co) about receiving money from the Fund - even in payment of their legal fees and even in accordance with the Miles Order. Armstrong Teasdale Ltd is the London office of the US law firm Armstrong Teasdale LLP.
49. I was told at the hearing that Armstrong Teasdale at that point stopped taking any money and that, since then, no POSVL legal fees or other expenses have been taken

from the Fund. However, when this judgment was circulated in draft for corrections, I was told:

“Although these monies were still being received by POSVL’s new solicitors [presumably Armstrong Teasdale] under the Miles Order, they stopped paying these monies out and since then no POSVL legal fees or expenses have been paid out from funds received from the Court Funds Office after 9 December 2021”.

50. This does not make much sense because, on the face of it, release of monies from the Court Funds Office into the hands of an agent of POSVL (its solicitors, Armstrong Teasdale) brought them within the terms of the Protective Order, which I understood from submissions at the hearing was precisely the risk which concerned them and which they wished to avoid. If money received by Armstrong Teasdale was within the terms of the Protective Order, and if Armstrong Teasdale wished to avoid breach of that order (because of their connections with the USA, and notwithstanding the order not being issued by a court within the jurisdiction of England and Wales), compliance with the Protective Order would have involved them depositing any money they received from the Fund with the United States District Court of California (see the terms of the Protective Order which I have summarised in para 17 above).

*Pending proceedings in the Third Chancery Action*

51. On 4 November 2021, POSVL issued an application in the Third Chancery Action “For an interim declaration under CPR 25(1)(b) and pursuant to paragraph 5 of the order of Miles J of the 23 March 2021 that the Claimants legal representatives, Armstrong Teasdale, have lawful authority under the laws of England and Wales to continue to comply with the order of Miles J dated the 23 March 2021.”
52. In a Statement of Case in support of the application for interim declaratory relief, POSVL amended the terms of the declaration being sought, to read as follows (with my emphasis added):

“Under English law, and pursuant to the order of Mr Justice Miles dated the 23 March 2021 the Claimant and the Claimant’s legal advisers have lawful authority under the laws of English and Wales to make payment to the Claimant’s creditors to meet its ordinary business expenses and legal expenses until the High Court orders otherwise. This is so notwithstanding the arrest warrant which has been issued in the United States District Court for the Central District of California on the 14 October 2021. That warrant is not enforceable in this jurisdiction and of no legal effect **unless and until the National Crime Agency makes an application under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.**”

53. This formulation was, obviously, overtaken by the event of the NCA issuing its application to me, which it did on 15 December 2021.

54. POSVL had by then proposed the following alternative wording (third witness statement of Mr Kerman in the Third Chancery Action dated 23 November 2021, para 4):-

“The arrest warrant issued in the District Court of the Central District of California on the 14 October 2021 is not enforceable and of no legal effect in this jurisdiction and has no legal effect on the terms and directions contained in the Order of Miles J. dated 23 March 2021 which remain extant.”

55. The NCA is not party to POSVL’s application in the Third Chancery Action. The parties to the Third Chancery Action remain POSVL as Claimant and Clyde & Co as the sole Defendant. The Third Chancery Action is not, therefore, a very suitable forum for deciding any question which may affect the NCA or the DoJ which has made the mutual assistance Request to the UK Central Authority, now taken up by the NCA. The only party to the Third Chancery Action other than POSVL itself is Clyde & Co, which has no interest in the matter now that the Fund has been paid out of their escrow account and into the Court Funds Office.
56. Trower J gave the NCA and the DoJ permission to file and serve evidence or written representations, but the NCA responded by letter dated 29 November 2021 drawing attention to the Request for assistance it had recently received from the DoJ and stating its intention to apply for a Prohibition Order under Part 4A of the Proceeds of Crime Act 2002 (External Requests and Order) Order 2005. It pointed out that this application had to be made in the Administrative Court. I understand that the application in the Third Chancery Action has been adjourned to await the outcome of the application before me, which was issued by the NCA (as I have said) on 15 December 2021.

**ISSUE 1 – SHOULD THERE BE A PROHIBITION ORDER OVER THE FUND AND, IF SO, ON WHAT TERMS?**

57. The first issue is whether there should there be a Prohibition Order over the Fund and, if so, on what terms. POSVL argues that there is no risk of dissipation and that such an order is wrong in principle. The Prohibition Order is sought by the NCA whether the Fund stays in the Court Funds Office (as POSVL wishes) or whether it is paid out to a receiver (which is the next issue).

*The statutory regime*

58. The NCA application for a Prohibition Order is made under Part 4A of the 2005 Order. I have already set out the essentials of that application (paras 3 to 7 above). Part 4A was inserted by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013/2604. The background to that amendment was explained in paras 4 and 7 of the accompanying Explanatory Memorandum when the Amendment Order was laid before Parliament as follows:

**“4. Legislative Context**

4.1 This Order is made in exercise of the powers conferred under sections 444 and 459(2) of the Proceeds of Crime Act 2002. It sets out how the United Kingdom may assist an overseas

authority by freezing property which may become the subject of an external (recovery) order in that country.

4.2 The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005 No. 3181) (the 2005 order) provides for the deprivation of property in cases following a criminal conviction and for the deprivation of property in civil cases. However, there is no mechanism in the 2005 Order for the United Kingdom to freeze property on an interim basis in civil cases in the absence of a final (recovery) order. Internationally such civil cases are known as NCB (non conviction based) confiscation cases. The United Kingdom has NCB under Part 5 of the Proceeds of Crime Act 2002; this is known as civil recovery.

...

## **7. Policy background**

7.1 Part 5 of the Proceeds of Crime Act 2002 provides the power to freeze and remove the proceeds of unlawful conduct.

7.2 The purpose behind the Order is to ensure that the United Kingdom can, as an interim measure, freeze property which relates to an ongoing civil investigation or proceedings by an overseas authority. The Secretary of State would receive the request for assistance from the overseas authority and may refer the request to an enforcement authority to process it.

7.3 Such an interim mechanism was not needed under the 2005 Order but a growing number of international partners are now seeking an interim prohibition on dealing with property whilst they investigate and obtain a final order to remove the proceeds of criminal conduct. This alternative civil form of deprivation of assets may be necessary where, for example the person is dead or missing. In order to be able to fully assist in these cases, the 2005 Order requires amendment.

7.4 Government policy is that we should be able to assist overseas authorities in freezing and recovering the proceeds of criminal conduct and that this should be streamlined. Section 444 of the Proceeds of Crime Act 2002 and this Order delivers that policy aim in respect of freezing assets as an interim measure in civil cases.”

59. Per Gloster LJ in *USA v Abacha* [2015] 1 WLR 1917 at para 85:

“POCA and the 2005 Order provide a comprehensive regime for the application by UK enforcement authorities for prohibition and recovery orders to give effect to external requests by foreign authorities to secure the recovery of assets located in the UK



necessary to implement foreign forfeiture, confiscation and other orders made in foreign proceedings in relation to the recovery of proceeds of crime. This statutory scheme overrides, or provides an exception to, the well-established common law rules that overseas orders or judgments of a penal or confiscatory nature are not enforceable in this jurisdiction. As Mr Butcher submitted, the statutory scheme provides for extensive safeguards to protect the position of persons and assets affected by any order sought. The applicant for a prohibition or a recovery order can only be a UK enforcement authority, which has a discretion as to whether to make any such application, and, if so, in what terms: see for example article 141E of Part 4A of the 2005 Order. The mere fact that an external request has been made by a foreign authority does not predicate that any such application will in fact be made by a UK enforcement authority. The High Court itself has a broad discretion as to whether to make a prohibition order: see articles 141C and 141D.”

60. I will consider specific provisions of the Order itself below.

*Relevant property*

61. It is argued that all the requirements of the 2005 Order (leaving aside the question of discretion) are met in this case, with the possible exception of whether the Fund falls within the definition of “relevant property”. An application has been made by an enforcement authority. The property subject to the application (the Fund) is located in England and Wales and the enforcement authority reasonably believes (as is undoubtedly the case, given the value of the Fund) that the aggregate value of the property is not less than £10,000. The Fund is identified in an external request (i.e. “a request by an overseas authority to prohibit dealing with the relevant property which is identified in request”). Proceedings have not been taken in relation to the Fund under Chapter 2 of Part 5 of the 2005 Order. None of the exceptions listed in Article 141F apply in respect of the Fund.
62. There is a dispute about whether the Fund is “relevant property”. It is a requirement of Article 141D(1) that I should be “satisfied” that the Fund is “relevant property” if I am to have jurisdiction to make a Prohibition Order.
63. Section 447(7) of the Proceeds of Crime Act 2002 defines “relevant property” as follows:
- “Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made.”
64. The words “may be needed” and “which may be made” are important, as is the requirement only that there should be “reasonable grounds” to believe that it “may” be needed to satisfy an external order which “may be made”, even if it has not been made. As Gross LJ observed in *NCA v Abacha* [2016] 1 WLR 4375 at para 56(iii), section 447(7) imposes a “fairly low threshold for the making of a prohibition order”.

65. Section 447(2) of the Proceeds of Crime Act 2002 completes the definition of “relevant property” by defining “an external order” as follows:

“An external order is an order which—

(a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and

(b) is for the recovery of specified property or a specified sum of money.”

66. Again, the words “believed to have been obtained” as a result of or “in connection with criminal conduct” keep the threshold for meeting this definition lower than it might have been. On the argument accepted by Judge Fischer in her Ruling of 14 October 2021, the Fund has been obtained “in connection with criminal conduct”.

67. In *Assets Recovery Agency (Jamaica)* [2015] UKPC 1, the Privy Council was considering the phrase “reasonable grounds for believing” in the Jamaican Proceeds of Crime Act 2007. It seems obvious that “reasonable grounds for believing” is the same concept as “reasonable grounds to believe” in section 447(7) of POCA. Per Lord Hughes at para 19:

“Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for ‘reasonable grounds’ some different expression such as ‘strong grounds’ or ‘good arguable case’.”

68. I am quite satisfied that the Fund is relevant property. There is every prospect that the proceedings now pending before Judge Fischer will result in a final order for forfeiture of the assets represented by the Fund. Judge Fischer has shown herself to be a careful and impartial judge, who has not been easily convinced that a warrant is appropriate or that the DoJ has sufficient prospects of success at trial to justify a warrant. For that reason, she is on record as having discharged a previous warrant obtained by the DoJ in this dispute (para 12 above). She has, however, now found (as she puts it, “after four tries”) in the Fischer Ruling on 14 October 2021 that “the government has stated sufficient facts to support a reasonable belief that it will be able to prevail” (para 14 above). In so doing, she has applied the following tests, all of which she has found to be satisfied:

“To survive a motion to dismiss, the TAC [i.e. the US government’s third amended civil forfeiture complaint] must “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.” Fed. Suppl. R. Civ. P. G(2)(f). Issuance of an arrest warrant for the defendant *res* similarly requires that the government show probable cause to believe the *res* is subject to forfeiture. Probable cause is sufficient information to convince a “prudent person . . . that there was a fair probability” that the *res* is subject to forfeiture. *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).”

69. POSVL argues that the Fischer Ruling has taken the DoJ’s pleadings entirely at face value, and not subjected them to any level of scrutiny sufficient to provide me with “reasonable grounds to believe that [the Fund] may be needed to satisfy an external order which has been or which may be made”, as required by section 447(7). I do not agree. Judge Fischer did not accept the pleadings only at face value; she conducted a detailed and reasoned scrutiny of the DoJ’s case after an *inter partes* hearing, and she decided that it passed muster: see the full extent of her examination, consideration and conclusions in this respect, which I have quoted at some length, in para 14 above.
70. I consider that the Fischer Ruling provides me with reasonable grounds to believe that the Fund *may* be needed to satisfy an external order which *may* be made by Judge Fischer or one of her colleagues in the US federal judiciary in due course. I find that the Fund is relevant property. I am satisfied that I have jurisdiction to make a Prohibition Order in this case accordingly.

*Property “subject of an external request”, and other requirements for making a Prohibition Order*

71. By Article 141A, a Prohibition Order has to be “in relation to relevant property in England and Wales or Northern Ireland which is the subject of an external request.”
72. I have already decided that the Fund is relevant property. POSVL however does not accept that it is “the subject of an external request”. It argues that the Request from the DoJ is for assistance “in restraining or seizing any portion of [the Fund] that have been or may be released by the High Court of Justice...” and that, since the Fund is not being released, except in respect of maintenance and legal expenses, it is with the exception of those expenses not covered by the Request.
73. The Request, however, covers any portion of the Fund that “may” be released by the High Court and, in the absence of a Prohibition Order, there is no part of the Fund which is not subject to release, given the voluntary basis upon which it is currently held in the Court Funds Office. In my judgment, the Fund is within the Request description of “any portion of the Defendant Assets that... may be released by the High Court of Justice”. Consequently, I am satisfied that the whole of the Fund falls within the terms of the Request and the requirements of Article 141A.
74. Article 141B permits the Secretary of State to refer the Request to the NCA, as she has done, for action under the 2005 Order, which this application is.

75. Article 141C provides that the High Court in England and Wales “may” exercise the powers conferred by this Part if the relevant property identified in the external request is in England and Wales. The Fund is, I have decided, both relevant property and identified in the external request. There is no doubt that it is in England and Wales. The word “may” demonstrates that the exercise of the powers remains a matter of discretion.
76. Article 141D provides that the High Court “may” make a Prohibition Order if satisfied that it is relevant property identified in an external request (and I have decided that it is) and that proceedings have not been taken in relation to the property under Chapter 2 of Part 5 of the 2005 Order (which, it is common ground, they have not).
77. I am, therefore, satisfied that all the requirements of the 2005 Order have been met. There is then the question of my discretion.

*Risk of dissipation*

78. POSVL submits that even if I have jurisdiction to make the Prohibition Order, I should not exercise my discretion in favour of doing so because there is no risk of dissipation, given that the Fund is held in the Court Funds Office.
79. The Prohibition Order sought is in the following terms:

“Save as otherwise provided in this Order, the Respondent [i.e. POSVL] must not, individually or collectively, until further Order of this Court, in any way dispose of (including part of or granting an interest in) or deal with or diminish the value of or take possession of or remove from the jurisdiction or cause or permit any other person or entity to dispose of (including part of or granting an interest in) or deal with or diminish the value of or take possession of or remove from the jurisdiction any of the Funds, whether such property is held in its own name or not and whether solely or jointly owned.”
80. This is an order made against POSVL, and not against the Court Funds Office or the Court itself, which might be inappropriate.
81. As matters stand, the Fund is held in the Court Funds Office solely as a consequence of the Third Chancery Action in which Miles J is on record as saying that POSVL is not seeking payment in full “as a voluntary decision” (para 44 above). Payment out cannot be obtained without application to the Court, presumably in the Third Chancery Action, as to which para 3 of the Miles Order gives permission to apply (para 45 above), but there is nothing in the Second Miles Judgment (which is the most recent judgment in the Third Chancery Action) to prevent POSVL from making such an application and, since there is no reason for Clyde & Co to oppose it, some other body would have to make the running in explaining to the Court why they should not be allowed to renege on their “voluntary decision” to forego full access to the Fund. No such body is currently a party to the Third Chancery Action.
82. The main reason why it might be said that POSVL should not have full access to the Fund is the existence of Judge Fischer’s Warrant of 14 October 2021. But POSVL’s current position, notwithstanding the DoJ’s request to the NCA for assistance under the

Treaty, and in full knowledge of that request, is that the Warrant is “not enforceable and of no legal effect in this jurisdiction” and “has no legal effect on the terms and directions contained in the Order of Miles J” (their current claim for a declaration in the Third Chancery Action, quoted in para 54 above).

83. I am satisfied that there are compelling reasons for me, the case having so far been dealt with a piecemeal and *ad hoc* fashion against a fast-moving background of events which have changed the context in which earlier decisions were made, without those decisions having been set aside, to draw the threads together and to make a determination, now, about what restrictions should be placed, if any, on POSVL’s access to and use of the Fund. I do not think it is right for POSVL to be allowed a free hand as to when and in what forum it applies (if it chooses) to vary the current arrangements, which, as matters stand, are said to be “a voluntary decision” and “a matter for the claimant” (para 7 of the Second Miles Judgment, para 44 above).
84. I am also concerned by the absence of the NCA as a party to the current proceedings in the Chancery Division (the Third Chancery Action). It is submitted to me on behalf of POSVL that I should allow the Third Chancery Action to remain the lead forum for determination of the impact on the Fund of the US proceedings (which in those proceedings they argue should have no effect on the English courts, even now when a Treaty request has been made), and that the absence of the NCA as a party to those proceedings should be solved by them joining as a party, as POSVL at one time suggested in the First Chancery Action (para 26 above). While that might be theoretically possible, I see no good reason for that course to be adopted. The correct forum for determination of the NCA application pursuant to the DoJ’s Treaty request is the Administrative Court, and the present application seeks that determination. The matter has been fully argued before me, as it has never been fully argued in any other court. There is no reason to shuffle it off to another court now.
85. It was argued that this application is a collateral attack on the existing regime for payments of £750,000 per month approved in the Miles Order (para 45 above). That seems to me to put the cart before the horse. There is no magic in the Miles Order, which was put in place in circumstances very different from those now prevailing, before the Fischer Ruling of 14 October 2021, before Judge Fischer’s *in rem* Warrant of the same date, before her issue of the Protective Order on 9 December 2021, and before the Treaty request by the DoJ which has prompted the NCA’s application to me. The Miles Order was made without opposition and without the NCA being a party or represented. A subsequent order made in different circumstances is not a collateral attack on an existing order. It is, or may be, a proper response to altered circumstances.
86. I am satisfied that POSVL should not be allowed free and unfettered access to the Fund. I am satisfied that the existing state of affairs does not make this clear, and that I should make it clear.
87. It is argued on behalf of POSVL that there is no risk of dissipation, given that the Fund is in the Court Funds Office and cannot be removed without an application. I am referred to *Jennings v Crown Prosecution Service* [2006] 1 WLR 182, [2005] EWCA Civ 746 per Longmore LJ at para 61, in support of a submission that a risk of dissipation is essential if I am to make a Prohibition Order, although that was a case about a restraint order under section 77 of the Criminal Justice Act 1988, rather than a Prohibition Order under the 2005 Order.

88. The conditions for making a Prohibition Order are set out in Articles 141A and 141D of the 2005 Order. Risk of dissipation is not one of those conditions. If there is no risk of dissipation, that might be a good reason to exercise the residual discretion given to the court not to make the Prohibition Order. But it will all depend on the circumstances of the case.
89. In the present case, I am satisfied that in the absence of a Prohibition Order there is a risk of dissipation by POSVL. It is clear that POSVL has by its various proceedings in the Chancery Division established a position whereby the Fund is sheltered from the DoJ by being in the Court Funds Office and POSVL are apparently keen to retain that protection by leaving it there so long as it suits their purposes. But it is also clear that they currently retain freedom of action, and have the Fund in the Court Funds Office on the basis of an undertaking which has been said by Miles J to be a “voluntary decision”. They are actively pursuing an action for a declaration that the Warrant “is not enforceable and has no legal effect in this jurisdiction” and the only reason for that can be to retain freedom of action which is inconsistent with the Warrant and inconsistent, therefore, with the Request. A Prohibition Order would prevent that freedom of action and comply with the Request.
90. Moreover, the Prohibition Order is not limited to preventing POSVL from taking money out of the Fund. It also prevents POSVL from diminishing its value or granting an interest in it, which might be done without removing it at all and without any need to involve the Court at all.
91. It is also striking that POSVL could not, when I put the question to Counsel in the course of the argument, give any practical reason for objecting to a Prohibition Order. The resistance to the Prohibition Order, without being able to explain how such an order could cause any inconvenience or difficulty, provides an additional basis for concluding that POSVL is seeking to retain a freer hand than it ought to have and that there is a serious risk of the Fund being extracted and dissipated before the resolution of the US proceedings if a Prohibition Order is not made against POSVL. For these purposes, I set to one side the question of allowances for legal and other expenses, which I will be considering as a separate issue.
92. POSVL has not offered an undertaking in these proceedings (save in respect of exclusions, if I were to grant exclusions), and its forbearance in taking funds out of Court in the Third Chancery Action is characterised in those proceedings as a voluntary act which cannot, given the relief it seeks by way of declaration in that action, be relied upon to continue.
93. There is in my judgment a risk of dissipation as long as POSVL is able to argue for withdrawal of the Fund in the Third Chancery Action without the NCA being represented there, and there is also a risk of encumbrance (which is a form of dissipation) even without any application to the Court for physical withdrawal.
94. Furthermore, risk of dissipation is something which is normally required as a practical matter in the exercise of the Court’s discretion; it is not a formal requirement of the statutory regime governing Prohibition Orders. In the unusual circumstances of the present case, where the Fund is in Court by a succession of improvised events and *ad hoc* Court orders, I am not convinced that it is the essential question. The essential questions are whether the statutory requirements are met and whether in my discretion

I consider it appropriate to grant a Prohibition Order on the application of the NCA in response to a treaty Request for assistance.

95. The conditions for making a Prohibition Order are met. For the reasons just discussed, I am satisfied that I should in my discretion grant the Prohibition Order, subject to the question of exclusions for legal or other legitimate expenses, to which I will turn in due course, and to arguments about abuse of process, which I will consider next.

*Abuse of process*

96. POSVL submits that I should consider the NCA's application as an abuse of process.
97. First, it is pointed out that the NCA is not seeking, and has never sought, to domesticate the Warrant by making an application to this court for a recovery order under Article 177 of the 2005 Order and registering an external order of the US courts within the meaning of section 447(2) of the Proceeds of Crime Act 2002. It is argued that more stringent tests would have to be satisfied if that course were to be followed, and that the NCA should not be permitted to take the route of applying for a Prohibition Order but that it should be forced to rely on the Article 177 procedure alone.
98. This does not appear to be a very logical argument. I am only required to adjudicate on the application which has been made to me, and it is not a very powerful objection to the course adopted by the NCA that it might have made things more difficult for itself by pursuing a different route. I do not consider that, in making the present application, it is guilty of abuse of process.
99. Second, it is argued that it is inconsistent for the NCA to act on the Request from the DoJ when it has previously decided not to pursue any action on the earlier request from the Malaysian authorities. It is pointed out that the Malaysian authorities always allowed for exceptions to be made for legal and operational expenses but the US authorities have not allowed for this. It is suggested that the NCA's decision not to pursue action on the Malaysian request should be construed as an acceptance by the NCA that the Fund did not represent the proceeds of crime, and that it should not now be allowed to resile from that position.
100. I accept from para 2.7 of the third witness statement of Mr Byrne that the NCA has never accepted or agreed that the Fund is not the proceeds of crime. No determination has been made against the NCA or in favour of POSVL on this point in any court and I do not accept that the decision simply not to pursue action on the Malaysian request to a conclusion prejudices its position now, or makes the present application an abuse of process.
101. Third, POSVL complains that the DoJ, unlike the Malaysian authorities, and the various orders made in the Chancery Division, has refused to agree that any exception should be made for the payment of legal or other expenses. This is relied upon as showing that the DoJ, which stands behind the NCA in this application insofar as it is based upon a DoJ Request, is making an exorbitant or abusive Request which should not be accepted or implemented by this court in the exercise of the discretion which it has.
102. POSVL has filed evidence from Brian Linder, a US attorney, challenging the contention of the NCA that it is open to POSVL to apply to the US court for the same exclusions

as have been or may be permitted in the UK. The NCA has filed evidence in response from Joshua L Sohn, another US attorney, arguing that he is wrong. Mr Linder, replying to the evidence of Mr Sohn, says that the doctrine of constructive seizure upon which Mr Sohn relies “has never been applied by a Court to order release of currency to a business that has not itself actually been seized.” I am prepared to accept from Mr Linder’s evidence that there is at least a real risk that POSVL would not be able to persuade a US court to permit payments from the Fund for legal expenses because of the DoJ’s contention that the Fund represents criminal property.

103. On 4 January 2022, POSVL wrote to the NCA and the DoJ asking them to make their intentions clear by answering the following question:

“If the High Court makes an order for exclusions pursuant to section 141G of the 2005 Order or under its inherent discretion will the recipients of those legal and business expenses remain liable to remit them to the DCCDC [i.e. the United States District Court for the Central District of California]? And will the DOJ take any enforcement action (anywhere in the world) against the recipients of those legal and business expenses as permitted by the High Court?”

104. The DoJ replied on 11 January 2022 as follows:

“The United States expects that POS will comply with the US Court’s orders. If POS and its agents choose not to comply with the US Court’s orders, the United States reserves its right to take such action as may be necessary to protect its interests and maintain the US Court’s orders. Should POS disagree with the US Court’s orders, it should petition for relief from the US Court.”

105. Whilst this response is not a direct “yes or no” answer to the question, and is to that extent non-committal, I do not read it as indicating that the DoJ will not give appropriate respect to orders of this court. In any event, any orders will not be made by the DoJ but by a Federal judge, and Judge Fischer has shown herself both to be sceptical and impartial, when initially discharging the relief obtained by the DoJ, and to be respectful of the jurisdiction of this court, for example when stating in the Fischer Ruling of 14 October 2021 “Of course, the foreign state may or may not give any significance to an extraterritorial arrest warrant from a United States court, but that is an issue to be dealt with in the relevant foreign state – in this case, the United Kingdom.”
106. The stance taken by the DoJ, and the expert evidence before me about the approach that might be adopted in a US Court to allowances for legal or other expenses out of a fund against which a proprietary claim is made, do not in my judgment tip the balance against the exercise of discretion in favour of the grant of the Prohibition Order sought by the NCA in accordance with the Request.
107. It also seems to me that POSVL’s anxiety is somewhat beside the point when it comes to the NCA’s application for a Prohibition Order. Either money paid out of the Fund for legal or other expenses will be claimed by the DoJ or it will not. The presence or absence of a Prohibition Order will make no difference. This has already been



demonstrated in the Chancery actions. Although allowances were made in favour of payment of legal expenses in the First Chancery Action, the lawyers did not take the money, because they still recognised a risk of enforcement action from the US (para 25 above). When Sir Alastair Norris discharged the injunction entirely, Clyde & Co refused to pass the Fund to POSVL, because of the warrant from Judge Fischer (para 30 above). When POSVL sought to override the effect of Judge Fischer's warrant by applying to Miles J for an order in the Second Chancery Action, Miles J refused to grant it (paras 35 to 39 above).

108. It is futile and inappropriate for me to second guess what a US judge may or may not do in the future, when deciding what I ought to do now. It makes no difference. If I do not grant a Prohibition Order, POSVL will still be exposed to risk when directing payments of legal and other expenses out of the Fund in accordance with the provisions of the Miles Order. Indeed, although the Miles Order actually mandates those payments, rather than merely permitting them, I was told at the hearing that they are not being made at the moment because of Armstrong Teasdale's reaction to Judge Fischer's Protective Order of 9 December 2021, although since the hearing the position has appeared somewhat more nuanced (paras 49 to 50 above). Equally, if I do grant a Prohibition Order, and if I do think that there should be exceptions and allowances for legal and other expenses, I will include them as I am empowered to by Article 141D(2)(b) and Article 141G(2) of the 2005 Order. POSVL will then be no worse off than it is now. To the extent that I do not think there should be exceptions and allowances, the point falls away entirely.

109. I will therefore make a Prohibition Order.

## **ISSUE 2 - SHOULD THE FUND BE PAID OUT OF THE COURT FUNDS OFFICE INTO THE HANDS OF A RECEIVER?**

110. The next issue is whether the Fund should be paid out of the Court Funds Office into the hands of a receiver. The NCA applies for this and POSVL opposes it. If a receiver is to be appointed, there is no objection to it being the candidate proposed by the NCA, who is Mr Adam Ewart, an NCA employee. There is uncontested evidence that Mr Ewart regularly acts as the trustee for civil recovery on behalf of the NCA, securing, managing and realising property recovered under the Proceeds of Crime Act 2002.

111. Where the High Court makes a Prohibition Order and the enforcement authority makes a request for the appointment of a receiver, the court may by order appoint a receiver in respect of any property to which the Prohibition Order applies: Article 141I(1) and (2) of the 2005 Order.

112. Article 141I(4) requires the enforcement authority to nominate a suitably qualified person for appointment as the receiver, and Article 141I(5) says in terms that "Such a person may be a member of staff of the enforcement authority".

113. The NCA submits that there is no good reason why the Fund should be held in the Court Funds Office and it also suggests that a more flexible investment regime might, advantageously and possibly by agreement between the parties, be applied to what is, on any view, a vast sum of money, if it is not held within the Court Funds Office. In the Court Funds Office a low fixed interest rate is applied. Moreover, the Fund has been converted into pounds sterling pursuant to an unopposed provision in the Miles Order

of 23 March 2021 (see para 45 above) for reasons which are not clear from the order itself or from the short *ex tempore* judgment of Miles J on that occasion. The Fund had never previously been denominated in pounds sterling. Although whether the Fund represents criminal property by way of theft from the Malaysian Sovereign Wealth Fund known as 1MDB is disputed, and whether it has been subject to a process of money laundering is also disputed, at no point in the Fund's history, on anyone's case, has it ever been linked to UK currency or the UK economy before it was converted into sterling and placed in the Court Funds Office by the Miles Order of 23 March 2021. There is no good reason for it to be tied to UK interest rates, as it has to be as long as it is in the Court Funds Office, particularly when they are at historically low levels.

114. However, I am not directing that the Fund should be converted out of pounds sterling or invested in any particular way. The NCA told me that, if I order payment into the hands of a receiver, it will at least initially be paid into an interest bearing account so as essentially to continue the present investment regime. I simply observe that greater possibilities emerge if it is in the hands of a receiver, which may be explored between the parties if they wish, or presented to the court if anyone chooses to do so in the absence of agreement. Given the very large amount, the very low level of current return, and the lack of any good reason for the Fund to be denominated or invested as it now is in the Court Funds Office, opening up those possibilities by placing the Fund in the hands of a receiver appears to me to be desirable.
115. During oral submissions, Counsel for POSVL said in passing that, until the DoJ stepped in, the Fund had "nothing to do with America, except that it was denominated in dollars." It may be that the conversion into pounds sterling was designed to distance the Fund from the USA by taking it out of US currency. If so, that was not stated in evidence or in argument as a reason for retaining it in the Court Funds Office or in pounds sterling. Since the DoJ has succeeded in obtaining the Warrant from Judge Fischer when the Fund was already in the Court Funds Office and in pounds sterling, that hope, if hope it was, has not been fulfilled. I do not think, in any event, that this court should seek actively to protect the Fund from friendly foreign authorities with whom this country has a Treaty obligation of mutual assistance and from which a Request in proper form has been received.
116. The NCA's submission and intention is that the Fund should be as secure from direct seizure by the DoJ in the hands of the receiver as it presently is in the hands of the Court Funds Office. POSVL said in argument that, if that is achieved, its objection to the appointment of a receiver would fall away, subject to a concern about whether application to the receiver rather than the court for payment of legal fees and expenses might involve a breach of privilege.
117. The concern about legal privilege is that (POSVL argues) distribution of funds on account of legal fees would require the receiver to enquire into and form an understanding of the nature of the legal advice being sought. That is not correct. Any exclusions will be decided by the court. Information required for that purpose will be no different in nature or extent whether the Fund is in the hands of the receiver or remains in the Court Funds Office. In neither case is the decision being made by the receiver or, as the case may be, the Court Funds Office. If exclusions are granted, the NCA has offered an undertaking that no material supplied by POSVL to the NCA in respect of exclusions will be communicated to the DoJ or its servants or agents.

118. Article 141K of the 2005 Order provides for supervision of the receiver by the court, and envisages applications being made to and directions being given from time to time by the court.
119. I will order that the receiver holds the Fund, and the order will make this clear, as agent for the Court Funds Office and not as agent for POSVL and the Fund is to be administered by the receiver pursuant to the orders and directions of the court from time to time or, in the event of agreement in writing between the parties (that is, between the NCA and POSVL) on any point from time to time, in accordance with that agreement. There will be liberty to apply. The Fund is not being paid to the receiver by way of release from the High Court. The Fund remains in the control of the High Court and the receiver will be subject to the orders and directions of the court, as I have said, and in accordance with Article 141K of the 2005 Order.
120. The first paragraph of the Protective Order of Judge Fischer dated 9 December 2021 requires “**Claimant PetroSaudi Oil Services (Venezuela) Ltd.** to deposit with this Court any of the Defendant *res* that is released by the High Court of England and Wales” (emphasis added). The last paragraph of the Protective Order is addressed to POSVL “and any agents of Claimant”, i.e. any agents of POSVL. Since the Fund is being released to the receiver, and the receiver is not an agent of POSVL, no change in the application of the Protective Order to the Fund in accordance with its terms (and leaving aside questions of jurisdiction and reach) is made.
121. The NCA did not suggest that the receiver should be the agent of the NCA, such that the Fund would pass out of the control of the court altogether.
122. In a case where there is a substantial claim for exclusions for legal fees and business expenses, it seems to be right that the court should retain its control over the Fund, at least for the time being, and without prejudice to the outcome of any future application which may be made.
123. I therefore exercise my discretion to appoint a receiver.

### **ISSUE 3 – SHOULD THERE BE EXCLUSIONS FOR LEGAL AND BUSINESS EXPENSES?**

124. The third and final issue is whether there should be exclusions for legal and business expenses and, if so, to what extent and in what amounts.
125. The NCA agrees in principle to exclusions for reasonable legal expenses (which are, strictly speaking, legal expenses incurred in the present proceedings) and for business expenses to the extent that they are limited to reasonable legal expenses incurred in other actions in other jurisdictions, but maintains that POSVL’s current proposals are excessive and opposes any other exclusion for business expenses.
126. Although this is a case of a Prohibition Order, the observations in *Serious Organised Crime Agency v Azam* [2013] 1 WLR 3800, [2013] EWCA Civ 970 at para 66 in relation to property freezing orders seem to me to be apt and on point. It is for POSVL to show that, in all the circumstances, it is just to permit it to use the Fund in order to pay its legal or other expenses. If on the evidence the court is satisfied that there are other available assets which may be used for this purpose, “to whomsoever they may belong”,

it will not allow the affected assets to be used: *Serious Organised Crime Agency v Azam* at para 66. If the evidence leaves the court in doubt, but with specific grounds for suspicion that the applicant has not disclosed all that he could and should about his assets, then it may resolve that doubt against the applicant, as happened in *Director of the Serious Fraud Office v X* [2005] EWCA Civ 1564, cited in *Azam* at para 66(3).

127. The nature of exclusions to a Prohibition Order which may be appropriate is suggested by Article 141G of the 2005 Order, which refers, for example, to “reasonable legal expenses in connection with the prohibition order” or exclusions to allow any person “to carry on any... business”.
128. It must be right that, even if an exclusion appears to be appropriate in principle, the amount must be examined and found to be reasonable before it is actually allowed. The larger the amount claimed, the more careful the scrutiny will be, and the more evidence is likely to be required in order to satisfy the court. It is true that the Fund in this case is very large. The legal and other expenses presently allowed by the Miles Order in excess of £750,000 per month would take over 25 years to exhaust the Fund (ignoring the effects of growth and inflation). That is not, however, relevant. The Fund is not a resource to be squandered, however large it is. It is a disputed asset, which it is alleged POSVL should not be allowed to keep. The level of scrutiny depends on the nature and level of the exclusions claimed, and not on the size of the Fund from which they would be drawn.
129. I am willing in principle for exclusions for legal and business expenses to be considered. It does seem right in principle that POSVL should be able to defend itself and protect its interests, and that it should not be denied justice by losing its ability to fund legal representation, provided that it can legitimately claim access to funds for that purpose. But I see no reason to assume that the very large sums provided for on a monthly basis by Miles J - when there was no party represented before him with an interest in challenging the figures - remain the appropriate sums. Nor am I minded mechanically to continue them by way of exclusion from the Prohibition Order. This is of no practical effect because the payments envisaged by the Miles Order are not being taken in settlement of legal fees now and have not been for some time. This is because of the reluctance of POSVL’s present lawyers, Armstrong Teasdale, to place themselves at risk vis-a-vis the US authorities by accepting them in payment of fees (see paras 49 to 50 above). Future applications for exclusions should be made in these proceedings pursuant to the order I am making and in accordance with Article 141G of the 2005 Order.
130. The amount of any exclusions from the Prohibition Order to allow for release from the Fund to pay POSVL’s legal and business expenses must depend on full disclosure, both of the other sources of finance for POSVL’s legal fees (which might come from other related companies, and need not be limited to assets already in POSVL’s own hands) and of the current justification for the level of fees now claimed. Such fees must be reasonable, particularly given that they are to come out of a Fund against which a proprietary claim is made.
131. I am not satisfied by the current state of the evidence on either point.
132. So far as assets are concerned, both the statements made about them in the first and fourth witness statements of Mr Kerman, and the supporting evidence offered, appear

to me to be inadequate. Even taken at face value, there is over £1.5 million in the Armstrong Teasdale client account which has not yet been earmarked for legal fees (unlike a further £2,346,790 in the account which has been earmarked in that way). There is also just under £600,000 currently held for POSVL's benefit in an intermediary account of Temple Fiduciary Services Ltd at Barclays Bank. It is said that the Protective Order seeks to restrict POSVL's access to the Armstrong Teasdale client account funds, and that POSVL is voluntarily choosing not to access or otherwise deal with the funds in the Barclays Bank account in deference to an order of the High Court of Malaya in Malaysia dated 16 July 2020. However, the same constraints, certainly so far as the Protective Order is concerned, would presumably apply to any exclusions that I might order allowing payment out to POSVL or its agents from the Fund. Those constraints do not, therefore, justify drawing on the Fund in preference to these other sources.

133. The evidence of assets also fails to deal with the US\$50 million which PDVSA was ordered to pay POSVL in the arbitration (see para 23 above). This has never been part of the Fund, because it represents the shortfall due to POSVL after the Fund has been taken into account. By the time of the hearing before Sir Alastair Norris in the First Chancery Action, the balance owed to POSVL was said to be some US\$88 million and Sir Alastair specifically noted that PDVSA had made no application to stay execution of this payment due to POSVL from PDSVA under the arbitration award (para 14 of his judgment on 23 October 2020). The evidence of POSVL's assets to me does not mention this sum, or indicate what has happened to it or why it cannot be used to finance legal fees or other expenses before POSVL draws on the Fund. The wording of Judge Fischer's Warrant (which refers to assets "that have been or may be released by the High Court of Justice") does not appear to cover it. Her Protective Order, also, refers only to "any of the Defendant *res* that is released by the High Court of England and Wales".
134. So far as legal expenses are concerned, I am not satisfied that sufficient explanation has been given to justify the large sums claimed by way of exclusions from the Prohibition Order. These claims should be examined by a costs judge who will be able to give directions for what is, effectively, a costs budget to be submitted, evidenced and, if appropriate, approved. There should also be provision for it to come back to court after a suitable period of time, rather than running indefinitely.
135. I will not make any order in that respect at present. It will be for POSVL to make an application, supported by evidence addressing the deficiencies I have mentioned. I envisage that this application should be listed before a costs judge. Article 141G of the 2005, which provides for exclusions, gives powers to the court. The Practice Direction – Civil Recovery Proceedings applies (by para 1) to proceedings in relation to a Prohibition Order. Para 7H.8 provides that an exclusion made for the purposes of enabling a person to meet their reasonable legal costs will specify the maximum amount which may be released in respect of legal costs. Para 7H.6 says that "The court will normally refer to a costs judge any question relating to the amount which an exclusion should allow for reasonable legal costs in respect of proceedings or a stage in proceedings".
136. There is also a claim for business expenses, which may perhaps not be limited to legal expenses incurred in other actions. However, POSVL's evidence is that the PetroSaudi group of companies (of which POSVL is a part) "is no longer trading in the sense of currently selling goods and services to third parties" (Kerman 1 para 13). The

subsequent references to non-legal expenses said to be required to stop the group sliding into insolvency and to maintain its ability to pursue debts and legal actions do not distinguish the position of POSVL in particular from the other companies in the group. They are also pitched at a high level of generality which is difficult to assess and which fails to convince. I am not persuaded that there should be any exclusion for business expenses.

137. For these reasons, there will be no exclusions in the Prohibition Order at this stage, but an application may be made for them in future, if better evidence can be produced in support of them for particular purposes and in particular amounts, and if a clearer picture of POSVL's other sources of funding can be presented.