



Neutral Citation Number: [2021] EWHC 1833 (Ch)

Case No: BL-2020-001343

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/07/2021

Before :

MR JUSTICE MILES

Between :

XX & Others

Claimants

- and -

YY & Others

Defendants

Stephen Robins & Andrew Shaw (instructed by **Mishcon de Reya LLP**) for the **Claimants**
Iain Quirk QC (instructed by **Bivonas Law LLP**) for the **First Defendant**

Hearing dates: 28 June 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 2 July 2021.

Mr Justice Miles:

Introduction

1. Reporting restrictions have previously been imposed in relation to these proceedings. This version of the judgment of the court has been prepared for publication, in a form to prevent identification of the parties. Any publication of the identity of the parties, or publication of information likely to lead to their identification, remains subject to those restrictions.

The applications

2. The first defendant applies for an order that the claimants are not entitled to pursue legal action against his lawyers in respect of funds over which the claimants claim a proprietary interest and paid to the first defendant's lawyers as legal fees in defence of the claim ("the legal expenses application").
3. The first defendant also seeks an extension of time for service of his defence and an increase of the amount of the living expenses permitted under an existing freezing order.

The claims

4. The claimants are two companies and their respective administrators. They allege in these proceedings that substantial sums have been misappropriated, by or for the benefit of the defendants or otherwise in circumstances giving rise to liability on the part of the defendants.
5. The claims against the first defendant comprise (i) a proprietary claim by the first claimant to recover the traceable proceeds of funds which the first defendant is alleged to hold on constructive trust for the first claimant; (ii) a claim by the administrators of the first and/or third claimant for damages for fraudulent trading pursuant to section 246ZA of the Insolvency Act 1986; and (iii) a claim by the first claimant for damages for breach of the duties that the first defendant owed as a director pursuant to sections 171 to 177 of the Companies Act 2006.

Procedural history

6. On 20 August 2020 the claimants applied *ex parte* without notice for worldwide freezing injunctions and proprietary injunctions against the first to fourth and tenth defendants. Mr Edwin Johnson QC (sitting as a Deputy Judge of the High Court) made worldwide freezing orders against the first to fourth and tenth defendants but adjourned the claimants' application for proprietary injunctions to an *inter partes* hearing on the basis that the claimants would be adequately protected by the freezing orders in the meantime.
7. On 27 August 2020 the claimants commenced proceedings against the defendants and served the Claim Form and Particulars of Claim on the first defendant.

8. On 7 September 2020 the *inter partes* hearing came before Meade J. The first defendant was represented by counsel who submitted that the first defendant had difficulties in respect of the funding of legal fees due to a criminal restraint order that had been made against him in the Southwark Crown Court under the Proceeds of Crime legislation (the “CRO”); that the first defendant needed further time to apply for the CRO to be varied in order to release monies to enable him to fund his legal fees; and that the first defendant could not prepare his defence until the CRO variation application had been resolved. Meade J continued the freezing orders, directed that a CMC should take place on the first available date after 1 December 2020, adjourned the claimants’ application for proprietary injunctions to the CMC, ordered that the deadline for the filing and service of the defences of the first to fourth and tenth defendants be considered at that CMC (and extended until further order in the meantime), and set a deadline for any applications to discharge the freezing orders.
9. The CMC was subsequently listed to take place in a window commencing on 4 February 2021. On 7 December 2020 the first and fourth defendant applied for an adjournment of the CMC until (at the earliest) June 2021 and an extension of the deadlines for the filing and service of their applications to discharge the freezing orders and their responsive evidence to the claimants’ proprietary injunction applications.
10. The hearing of those applications took place before Mann J on 11 December 2020, with judgment on 14 December 2020. Mann J granted extensions of time in relation to the applications to discharge the freezing orders and their responsive evidence to the claimants’ proprietary injunction applications but refused to adjourn the CMC. Mann J observed that the first and fourth defendants were proposing that the deadline for defences should be considered at a CMC in June 2021. He said that that would be highly undesirable as by then it would be almost 10 months since the proceedings had started. He said that if the defendants were unable to fund their representation by February 2021 they would have to do the best they could in providing their defences.
11. On 2 February 2021 the claimants circulated a draft order to the defendants which provided that the time for the filing of all outstanding defences by 25 March 2021. All the defendants except the first and fourth defendant agreed this. The first and fourth defendant proposed that they should have until 7 June 2021 on the basis that: (i) they could not begin work on their defences until the CRO variation applications had been determined; (ii) the length of the Particulars of Claim necessitated more time; and (iii) they would not be working during the Easter period. On 3 February 2021 the claimants rejected that but proposed that the deadline be extended to 28 April 2021. The first and fourth defendant did not agree to this proposal.
12. Mann J heard the first CMC on 8 February 2021. As to the timing of defences, Mann J underlined the need to keep the proceedings on track and inject further momentum into the proceedings. He considered that a period of approximately 6 weeks from the anticipated date of the determination of the CRO variation application would allow the first and fourth defendant to prepare their defences. He therefore ordered them to file and serve their defences by 14 May 2021.
13. In the event the variation of the CRO was resolved by agreement between the first defendant and the SFO on 11 March 2021, approved by the Court in a consent order

dated 15 March 2021. The first defendant therefore had a period of some two months from then in which to prepare his defence.

14. The first defendant's solicitors wrote on 14 April 2021 requesting the claimants' agreement to an extension of time for serving the defence to 4 June 2021. This was not agreed and the first defendant issued an application seeking an extension of time. He also issued the legal expenses application. The two applications are closely linked, as the reason given for the requested extension of time for service of the defence is that the first defendant's lawyers are unable to provide him with assistance on his defence while they remain at risk in respect of the legal expenses. I shall return to the first defendant's submissions about the timing of the defence once I have addressed the legal expenses application.
15. By the time of the hearing before me the first defendant had agreed not to oppose the claimants' application for a proprietary injunction in respect of his assets, subject to the dispute about the exception for living expenses, to which I shall also return later.

The legal expenses application

16. The first defendant's solicitors and counsel are concerned that if the claimants succeed in their claims against the first defendant they will contend that the lawyers are accountable as constructive trustees for any fees they have received in defending the claims. The claimants' solicitors have written a number of letters saying that the claimants reserve their right to make such claims in the future. In the evidence in support of the application the first defendant says that he has no assets other than the assets to which the claimants make proprietary claims and that he has no other source of funding. This evidence is not contested. Mr Ellis of his solicitors, Bivonas Law LLP, indicates that his firm and counsel will be unable to continue to act for the first defendant unless the Court makes an order in the terms sought to eliminate the risk of the claimants pursuing legal action against them in respect of any monies which the claimants would otherwise be able to recover from them on a proprietary basis.
17. Counsel for the first defendant submits that the court has jurisdiction to make an order prohibiting the claimants from seeking to claim any sums paid to his lawyers under the exception for legal fees covered by the freezing order or proprietary injunction. He submits that the court has power to make this order under its power to make such ancillary orders as are appropriate to give effect to the freezing or proprietary injunctions, and should do so in the exercise of its discretion. Before addressing these submissions in more detail it is helpful to explain the legal framework, under a number of headings.
 - (i) ***Constructive trust claims against solicitors who act in the defence of proprietary claims***
18. Where a claimant brings a proprietary claim against a defendant and the defendant uses the claimed assets to pay a solicitor to defend the claim, the solicitor will be a purchaser for value. (When referring below to solicitors I should also be taken to include counsel also instructed in the defence of the claims.) It is possible that the claimant will nonetheless seek to maintain a claim against the solicitors in respect of the fees as a knowing recipient of the claimed assets.

19. The Court of Appeal considered such a claim in the famous case of *Carl Zeiss Stiftung v Herbert Smith & Co (No.2)* [1969] 2 Ch 276 (“*Carl Zeiss*”). There had been long running disputes between the plaintiffs and a defendant in which the plaintiffs claimed that all of the defendant’s assets were held for the plaintiffs on trust. Before those claims had been resolved the plaintiff brought a separate claim against the defendant’s solicitors, Herbert Smith, contending that they were liable to account to the claimant for the fees paid by the defendant from the trust assets. The solicitors applied to strike out the claims and succeeded. At first instance Pennycuik J decided that the proceedings were contrary to public policy in that they obstructed the due administration of justice. The Court of Appeal upheld his order but did so on the basis that the claims did not give rise to a reasonably arguable claim that the solicitors were constructive trustees under the relevant legal tests. The Court of Appeal did not need to address the public policy argument, though it expressed some sympathy for the judge’s decision.
20. Danckwerts LJ said at 290 that “knowledge of a claim being made against the solicitor’s client by the other party is not sufficient to amount to notice of a trust or notice of misapplication of the moneys”.
21. He said at 293:

“[Counsel for the plaintiff’s] contention was that the defendant solicitors knew where the moneys that they received came from and knew that the source was trust funds. In my view this contention fails at the outset. What the defendant solicitors knew was that the moneys came from the West German foundation and they knew of the allegations contained in the proceedings brought against that foundation by the plaintiffs in which they were instructed to act as solicitors for the West German foundation. They knew that claims were being made against the West German foundation that all their property and assets belonged to the plaintiffs or were held on trust for them. But claims are not the same thing as facts. [The plaintiffs’ counsel] contended that for the purposes of the present issue all the allegations contained in the statements of claim in both the actions must be taken as true. That will not do. What we have to deal with is the state of the defendant solicitors’ knowledge (actual or imputed) at the date when they received payments of their costs and disbursements. At that date they cannot have had more than knowledge of the claims above mentioned. It was not possible for them to know whether they were well-founded or not. The claims depended upon most complicated facts still to be proved or disproved, and very difficult questions of German and English law. It is not a case where the West German foundation were holding property upon any express trust. They were denying the existence of any trust or any right of property in the assets claimed by the plaintiffs. Why should the solicitors of the West German foundation assume anything against their clients?”
22. Sachs LJ agreed, saying 296:

“Firstly, and to my mind decisively, whatever be the nature of the knowledge or notice required, cognisance of what has been termed ‘a

doubtful equity' is not enough. This phrase is to be found in Lewin on Trusts, 16th ed. (1964), p. 658, and Underhill's Law Relating to Trusts and Trustees 11th ed (1959) p. 606: it appears first to have been used by Lord Grant M.R. in *Parker v. Brooke* (1804) 9 Ves. 583, 588. The rule, as I understand it, is that no stranger can become a constructive trustee merely because he is made aware of a disputed claim the validity of which he cannot properly assess. Here it has been rightly conceded that no one can foretell the result of the litigation even if the plaintiffs were to prove all the facts they allege."

23. Sachs LJ continued at 297C:

"As to facts alleged in a statement of claim, [counsel for the defendants] was, to my mind, correct in submitting that a defendant's solicitor is under no duty to the plaintiffs to inquire into their accuracy for the purposes urged by [counsel for the plaintiff], nor, where there is a likelihood of a conflict of evidence between his client's witnesses and those of the plaintiffs is he under any such duty to assess the result. In coming to this conclusion, I am content to adopt the approach, albeit obiter, of Lush J in *La Roche v Armstrong* [1922] 1 KB 485, 491, where he said:

"Here the solicitor has received a sum of money from his client for the purpose of his resisting on her behalf a claim by A, who says it is trust money and that the client is under a duty to return it. Under such circumstances I should be very loath to say that the solicitor, who cannot know the real truth of the matter, inasmuch as he hears one story from his client and another from A, is bound to hold the money, not for his client, but for A whose claim is not yet established."

That approach was correct, because the solicitor was under no duty to A either to make inquiries or to assess the results of them".

24. Edmund Davies LJ agreed. At 304 he said,

"The law being reluctant to make a mere agent a constructive trustee, as Lord Selborne L.C put in in *Barnes v. Addy*, 9 Ch. App. 244, 251-252, mere notice of a claim asserted by a third party is insufficient to render the agent guilty of a wrongful act in dealing with property derived from his principal in accordance with the latter's instructions unless the agent knows that the third party's claim is well-founded and that the principal accordingly had no authority to give such instructions".

25. The decision of the Court of Appeal in *Carl Zeiss* has been applied in many later cases. In *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2012] Ch 453 Lord Neuberger MR said at [108] that *Carl Zeiss* "supports the proposition that notice of a claim is not the same as notice of a right". It was recently applied in *In Re Smith; Serious Fraud Office v Litigation Capital Limited* [2021] EWHC 1272 (Comm) by Foxton J at [468].

26. Counsel for the first defendant suggested that *Carl Zeiss* may no longer represent the relevant law. He refers to the broad statement of principle by the Court of Appeal in *BCCI v Akindele* [2001] Ch 437 at 455 that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt. Counsel submits that this is a potentially lower test than that propounded in *Carl Zeiss*. He also points out that since *Carl Zeiss* solicitors have become subject to regulatory duties to inquire about the source of monies, including money laundering obligations, and that this may be said to affect the reasoning of the Court of Appeal in *Carl Zeiss*.
27. In my judgment *Carl Zeiss* continues to represent the law concerning claims against solicitors who act for a party defending a proprietary claim. First, there appears to me to be no tension between *Carl Zeiss* and *Akindele*. The general principle that a defendant must be shown to have knowledge which would make it unconscionable to retain the receipt falls to be applied under the principles in the *Carl Zeiss* case to a solicitor being paid in the defence of a proprietary claim against its client. If the defence is genuine, it will not be unconscionable for the solicitor to retain the fees he has earned in acting in the defence of the claim.
28. Second, as already mentioned, there have been numerous cases since *Akindele* which treat *Carl Zeiss* as good law. In *Smith* for instance, Foxton J referred to the general rule to be taken from *Akindele*, but at [468] applied *Carl Zeiss* in the specific context of a claim against a purchaser from the defendants where the claim in question had not been established and was only arguable.
29. Third, I note that Lewin on Trusts (20th edn.), after setting out the general statement of principle from *Akindele*, cites *Carl Zeiss* at para 42-084 for the propositions that a distinction must be drawn between knowledge of facts and knowledge of claims, and that a creditor who in good faith receives payment of a liability due to him from his debtor out of money which he knows to be subject to a proprietary trust claim from a third party will not be liable for knowing receipt by reason of that knowledge alone, even if the claim subsequently turns out to be well founded.
30. Fourth, I do not see why regulatory obligations placed on solicitors concerning the source of their fees should affect the reasoning in *Carl Zeiss*. The principle to be taken from that case is that there is a difference between notice of claims and notice of facts and that a solicitor will be protected from liability unless he knows that the claimant's proprietary claim is well-founded. The fact that a solicitor may be subject to regulatory duties concerning the source of its fees is not a reason for diluting the tests a claimant would have to overcome. Moreover, the passages I have cited above from *Carl Zeiss* concerning the duties of inquiry are concerned with the absence of any duty on a solicitor owed to the claimant to inquire into its trust claims. The regulations imposed on solicitors since that case do not create duties for the benefit of claimants; they are to do with money laundering and the proceeds of crime.
31. In any event in the present case the claimants' solicitors have confirmed that they accept that the law is as stated in *Carl Zeiss* and that they will not seek to contend that a different test should be applied in the event that they seek to bring against the first defendant's solicitors. They acknowledge that they will be estopped by convention from contending that the solicitors should be held to any standard other than that

stated in *Carl Zeiss*. In my judgment this is sufficient to create an effective and binding estoppel.

(ii) *Exceptions in freezing and proprietary injunctions for legal fees*

32. A freezing injunction based on the existence of a real risk of dissipation will ordinarily permit the defendant to spend reasonable sums to pay legal fees. The relevant principles were explained by Males J in *Tidewater Marine International Inc v Phoenixide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm).
33. The principles applicable to proprietary injunctions (based on a claimant's proprietary claim to the assets in question) are different, as Sir Thomas Bingham MR explained in *Sundt Wrigley & Co Limited and Another v Wrigley* [1993] Lexis Citation 1664:

“In the *Mareva* case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence. In the proprietary case, however, the judgment is a more difficult one because in the plaintiff's contention the money on which the defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money which is held on trust for the plaintiff. That, of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence. As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence”.

34. As that passage shows, for proprietary injunctions the courts impose a stricter test on defendants wishing to use assets falling within the scope of the injunction to pay legal fees. The test was set out in *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301 at [23]:

“Lewison J (as he then was) in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) helpfully summarised the proper approach at para. 6 by setting out the four questions which should be addressed:

(1) does the claimant have an arguable proprietary claim to the funds in issue?

(2) if yes, does the defendant have arguable grounds for denying that claim?

(3) if yes, has the defendant demonstrated that without the release of the funds in issue he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)?

(4) if yes, where does the balance of justice lie as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?”

35. On the second of these questions, Millett LJ observed in *Ostrich Farming Corporation Ltd v Ketchell* [1997] Lexis Citation 5078—

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

(iii) ***United Mizrahi Bank Ltd v Doherty* [1998] 1 WLR 435 (“United Mizrahi”).**

36. This authority was the focus of much of the argument and therefore should be set out in some detail. It was a decision of Mr Michael Burton QC (as he then was), sitting as a Deputy Judge of the Chancery Division. The plaintiff brought a proprietary claim against the defendant to recover assets which were said to belong to the claimant. The defendant was subject to a proprietary injunction which contained wording in the standard form permitting the defendant to spend monies on legal expenses. The defendant was concerned that this wording did not eliminate the possibility of the claimant subsequently seeking to recover those monies from the defendant’s solicitors, Lewis Silkin. The defendant therefore applied for an order confirming that he could pay legal fees that he owed to Lewis Silkin. His application was heard initially by Mr Justice Rattee. As Mr Burton QC explained at 437:

“The hearing before Rattee J ended very abruptly because the plaintiff pointed out that it had no objection to the use of the assets in question for the purpose of legal costs so far as there could be any suggestion that there was a breach of the *Mareva* order because it asserted that, as there was a specific proviso allowing the expenditure of legal costs, there could not be a breach of the order in the defendants so doing. Consequently, Rattee J was persuaded to make an order that Mr and Mrs Doherty should not be in breach of the order of Robert Walker J dated 8 November 1996 by utilising certain assets held by them to fund their reasonable legal expenses of defending the action. But he added the proviso that nothing in that order should deprive the plaintiff of any proprietary claim it might have to those assets. That, of course, did not satisfy the needs and concerns of Mr and Mrs Doherty and Lewis Silkin, but it was all they could obtain on the basis of the notice of motion before Rattee J. Consequently, they have issued this fresh notice of motion which has come on before me today, effectively seeking the court’s determination that the expenditure of such costs thus allowed by the order should deprive the plaintiff of such claim”.

37. Mr Burton QC said at 441 that the question could arise in the case of any proprietary claim, with or without an injunction:

“the question that [counsel for the defendant] is here raising is not one which is even limited to cases where there are injunctions either with or without provisos, but could and would apply in any case in which there is a claim by a plaintiff against the defendant, based on constructive trust or equivalent, that the defendant is holding its property ... [Such] a question has nothing, or at any rate nothing necessarily, to do with the fact that there happen to be injunctions claimed in these proceedings. The situation would be exactly the same if a plaintiff brought an action against a defendant without seeking an injunction, based upon the assertion that funds which the defendants were in possession of were the plaintiff’s property; and the solicitors of the defendants were concerned that the moneys that they were being paid by the defendants might be moneys which would turn out at the end of the day to be the plaintiff’s moneys”.

38. He identified the relevant issue as follows:

“The issue is ... not whether the defendants are permitted to use moneys to spend on legal costs, for they are so permitted so far as the order is concerned, but whether in so doing they are to have the court’s sanction that such an act of disposal of the costs cannot hereafter be complained of either against them or against the recipient as being a continuation or perpetuation of a breach of trust or constructive trust as against the plaintiff ... I am satisfied that in none of the cases to which reference has been made to me has there been any express consideration of ... the question as to whether there was to be an exemption from the provisions of the law of constructive trust, as opposed to a sanctioning of what would otherwise have been contempt for breach of the order”.

39. He said at 442:

“[Counsel for the defendant] tells me that his present instructions are that unless Lewis Silkin obtain from the court today the sanction that is sought in the notice of motion they would, or at any rate may, feel obliged to come off the record, thus leaving the defendants without legal representation when, on the face of the order, they are permitted to incur legal costs out of moneys which are otherwise covered by the order and which may otherwise turn out to be the plaintiff’s”.

40. Mr Burton QC referred to the limited ambit of the Court’s jurisdiction to make pre-emptive costs orders for payment of costs from trust property in advance of a trial, noting (by reference to *Re Westdock Realisations Ltd* [1988] BCLC 354) that the Court will not make such an order in hostile claims in which one or more parties are in dispute as to the ownership of property. He held at 443 that the defendant’s submissions were contrary to the limited ambit of this jurisdiction:

“If [counsel for the defendant] be right, then this would not be a limited jurisdiction, and indeed what I referred to perhaps frivolously in the

course of the hearing as a *United Mizrahi Bank* order would become common practice. It would be the case that in many cases where claims were brought by a plaintiff against a defendant in constructive trust, or conversion or if some proprietary claim were made, and the defendant were concerned, or more likely his solicitors were concerned, that the moneys with which he was paying his solicitor could turn out to be the plaintiff's moneys, a pre-emptive *United Mizrahi Bank* order could be applied for. That has never happened yet ... As I have indicated, I do not see any stopping point between on the one hand cases of injunctions or particular kinds of injunctions, applications for provisos, or applications for permissions to extend provisos, or clarify provisos, and on the other hand every case where a solicitor and/or a defendant is concerned that he may be putting the solicitor at risk of a claim in constructive trust”.

41. As regards the defendant's counsel's submission that Lewis Silkin would decline to act unless they could be granted immunity from suit, Mr Burton QC said:

“That, of course, would be extremely regrettable in relation to a case two months away from trial, but analysed by me as it has been I do not consider the situation to be different in this case, as I have indicated, from that in any other case. I hope that solicitors do not have to worry about a claim in constructive trust in any case, or certainly only in a rare one ... But, if that is a worry that solicitors have, it is a worry that they will have in all such cases, and not simply in cases where there are injunctions. In this case, as I have indicated, the defendants are permitted to expend money on legal costs even if it should turn out that the assets belong to the plaintiff so far as being in contempt is concerned, and therefore the question of whether there might be some claim in constructive trust will be no different in this case from that in any other similar case where there is no injunction”.

42. Mr Burton QC also observed that the question of the defendant's solicitor's potential liability to the plaintiff could not be dealt with by way of an interlocutory application *inter partes* between the plaintiff and the defendant,

“in which the court, if I may say so with respect entirely rightly, has emphasised that the merits should not be gone into in great detail, or indeed in any detail, unless it is for the purpose of showing that, for example, the defence is virtually non-existent, and that the balance of justice should be considered rather than the merits, as in any injunctive situation”.

43. He observed at 444-445 that there may be cases in which “a solicitor, who is concerned that he may be at risk of constructive trust liability, might wish to make application as a trustee or potential trustee for directions from the court as to whether he can go on acting” and that, in such a case, “the court would have to make specific provision for it, perhaps in circumstances in which the opposing litigant is not present, rather as in applications to go off the record, although that in itself would obviously raise its own difficulties ...”

44. He said at 445:

“there may well be a difference between a solicitor who is simply finding it difficult to be confident that his client will succeed, perhaps even beginning to think that his client is going to lose on the one hand (situation A) and a solicitor who has information in his possession, which perhaps he is under no obligation to disclose, but which nevertheless leads him to conclude that his client is certain to lose (situation B). It seems to me wrong that the court should sanction blind in advance the conduct of the solicitor in situation B in the same way as the solicitor in situation A. But all that, of course, would come out in the wash afterwards, if the plaintiff were unsuccessful in recovering money in execution and wanted to seek to pursue a solicitor as a third party, as an extra defendant after judgment”.

45. Mr Burton QC dismissed the defendant’s application, saying at 445:

“If there be jurisdiction for a solicitor to have that cleared up pre-emptively then it may well be there can be such cases. But in my view this is not such a case, namely a case in which the court has no idea whether there is any conceivable risk for the solicitors for the defendant. I could have no idea whether there is any danger such that it would be positively wrong to exempt that liability. In those circumstances I come to the conclusion that, sympathetic though I am in the particular facts of this case both to the solicitors and to the defendants (and, knowing, as I do, the solicitors in question, such as to believe that there is no possible risk of situation B in this case), and keen as I am that this action should go ahead in two months’ time with legal representation on the part of the defendants, I am satisfied that it is not a case where I can or should say, in advance, that there would be no breach of trust by the expenditure of these moneys, and I content myself with saying, as Rattee J did, that so far as the existence of the injunction is concerned, it can be disregarded. The defendants can act as they would have done if there had been no injunction against expending legal costs on their defence to this action which will come to trial very shortly.”

46. The decision may be summarised as follows. The defendant had obtained leave to use disputed funds to meet its legal costs. It sought an order (in the nature of a declaration) that such use of the funds would not make them constructive trustees. Mr Burton QC held that where leave is given to a defendant to use funds that are subject to a restraining order for his legal costs, such use is not contempt of court. But such leave does not affect a claimant's substantive rights in the property. A claimant who subsequently obtains a judgment that he is entitled to the property may seek to trace the funds and claim them from recipients, including (potentially) the defendant's solicitors. The judge recognised that the prospect of such claims might inhibit solicitors from acting for a defendant but noted that this is also the case where there is no interim injunction at all. Whether a tracing action would be possible would depend on the state of mind of the solicitors and that question could not be resolved on an interlocutory application for leave to use frozen funds for funding the defence of proceedings.

47. The *United Mizrahi* case is well-known. Lewin summarises it at [42-084]: “In a case where the claimant obtains a freezing order in relation to funds held by the defendant, the fact that the order contains the usual proviso allowing the defendant to spend money on legal fees does not mean that the order operates by itself to discharge the defendant’s solicitors from potential liability for knowing receipt”. The decision is also summarised in [15-73] of Civil Procedure, with the conclusion that “the legal expenses exemption in the freezing order provided no guarantee for the recipients of the [claimed assets] (including D’s solicitors) that they would be protected from a possible claim in constructive trust should C establish their claim.”

(iv) ***The court’s power to grant ancillary orders***

48. Section 37(1) of the Senior Courts Act 1981 provides that the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

49. It is well established that the court also has a power to make such orders as it considers just and convenient to give effect to its own orders.

50. In *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286, Kerr LJ said at p.303F, citing *AJ Bekhor v Bilton* [1981] QB 923(CA): “there is an inherent power under what is now section 37(1) to make any ancillary order, including an order for discovery, to ensure the effectiveness of any other order made by the court.”

51. The court may for instance order ancillary disclosure to ensure a freezing injunction is effective, and to order disclosure after judgment in order to render a judgment or arbitration award effective, arise under s.37.

52. In respect of a freezing injunction, the Court’s powers encompass, per Cumming-Bruce L.J. in *House of Spring Gardens Ltd. v Waite* [1985] F.S.R. 173, 183 “such steps . . . as will enable the order to have effect as completely and successfully as the powers of the court can procure.”

53. In *Bayer v Winter* [1986] 1 WLR 497 (CA), Fox LJ said at 502D:

“Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink if it is of the opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms, be of a novel character.”

54. Fox LJ also cited from Sir George Jessel MR in *Smith v Peters* (1875):

“I have no hesitation in saying that there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause.”

The parties’ submissions

55. Counsel for the first defendant submitted (in outline) as follows. The court has power to make the order sought under its power to make ancillary orders to render its orders effective. The first defendant has established that he is entitled under the freezing order and the proprietary order that he shall not be prohibited from paying a reasonable sum on legal advice and representation. In doing so he has had to show that he has an arguable defence to the proprietary claims and that he has no other assets available to pay his legal fees. The order sought in this application is necessary to make effective the Court's orders as to the legal expenses exception. The exception will be wholly ineffective to fulfil its purpose - allowing the defendant to be legally represented - if the first defendant's lawyers cannot actually be paid and retain those funds as fees. To allow the claimants to be able to bring claims in the future would be inconsistent with the purpose of the exception.
56. This is a large and complex case and, unless the order is made there is a real risk that the first defendant will be unrepresented. That would seriously prejudice the first defendant's ability to present his case effectively. The court must also, in the exercise of its powers, give full force and effect to the overriding objective and the requirements of Art 6 of the ECHR, including the importance of equality of arms. These will be undermined if the first defendant is unable to obtain legal representation; and the court should do what it can to promote his ability to be represented. The court should also follow the first instance decision in *Carl Zeiss* that tracing claims against solicitors obstruct the due administration of justice and are contrary to public policy.
57. In the course of his oral submissions counsel for the first defendant made or clarified the following points. First, that the order sought was in the nature of an injunction restraining the claimants from bringing claims against the first defendant's lawyers. The first defendant was not seeking a declaration as to the rights of the parties. Second, once it was satisfied that the case was a proper one to allow the payment of legal expenses by way of an exception to a proprietary freezing order the court should in general make an order of the kind now sought. Third, the order was sought only on the basis that it was ancillary to the existing orders. It was not suggested that a free-standing order would generally be available to defendants where there was no asset freezing order with an exception for legal expenses. Fourth, the order could be made on terms that would be open to the claimants at a later date to seek to lift or vary the order.
58. Counsel for the claimants submitted (in outline) as follows. The claimants accepted that it would be regrettable and might well disrupt the conduct of the proceedings if the first defendant were to be unrepresented. But there is no jurisdictional or discretionary basis for the orders sought. The exception to the freezing and proprietary orders permitting the first defendant to pay legal expenses merely stated that payment by him from the claimed assets would not constitute a breach of the order. This exception had no impact on any potential claims against the solicitors in the future (see *United Mizrahi*). The orders were therefore perfectly effective in accordance with their terms and no ancillary orders were required to give them effect. Moreover, any claims against the lawyers would depend on their state of mind at the date they receive payments from the first defendant. The court has no evidence about their present state of mind and is not in a proper position to make any binding decisions about their future knowledge. The order sought would operate to extinguish,

in advance, the claimants' potential substantive causes of action, and the court either lacks power to do this or in any case should not do so. The risk to the first defendant's solicitors should not be overstated. They are able to rely on the standard spelt out in the *Carl Zeiss* case and the claimants have confirmed that they will not seek to hold them to any lower standard. The lawyers are in the same position as any lawyers defending a constructive claim and if the first defendant's existing lawyers decline to act there may be others who are willing to do so. The suggestion that the claimants could later apply to vary the order makes little sense.

Analysis

59. I start with some general observations about the nature of the relief being sought. As counsel for the first defendant accepted, the order sought is in the nature of an injunction prohibiting the claimants from asserting any claim against the first defendant's lawyers in respect of any fees paid under the legal expenses exceptions to the orders. It would be in the nature of a permanent injunction preventing the claimants bringing a claim against the solicitors. So the claimants would be prevented (in advance) from asserting their actual or potential legal rights. That would not be an order merely holding the ring pending the determination of the parties' rights at trial. It would in practice extinguish the claimants' substantive rights, including rights arising from future events, which are unknown and unknowable.
60. Counsel for the first defendant suggested that any order could be made subject to a proviso that the claimants could apply to lift it. I found that hard to follow. Such a regime would undermine the protection the first defendant's lawyers say they need, as they would remain vulnerable to an application to remove it.
61. There is of course no application before the court for the present determination of the claimants' substantive rights (as might arise on a summary judgment application or a preliminary point). There is only an application for an order based on the ancillary jurisdiction to make orders to give effect to earlier orders. There is no evidence about the present state of mind of the first defendant's solicitors; and, of necessity, there can be no evidence about their future states of mind. The court is therefore in no position to make any determinations of the parties' substantive rights. As Michael Burton QC said in *United Mizrahi*, the court on a hearing such as the present has no idea whether a claimant might at some point have a proper basis to claim.
62. This consideration brings me to the submission of counsel for the first defendant that the court should approach the relief sought by using the same criteria as apply when the court has to decide whether to permit the payment of legal expenses in a case where there is a proprietary injunction and there are no assets to which a proprietary claim is not made. I have set out the principles in [37] to [39] above. Counsel for the first defendant submits that in a case where the court is satisfied that it should make an exception for the payment of legal fees, it should also make an order protecting the lawyers from future liabilities.
63. I cannot accept this submission. The two questions are not the same. When deciding whether to allow the payment of legal expenses the court has to balance the risks of irremediable injustice in conditions of uncertainty about the outcome of the proprietary claim. The court does not know whether the claimant or defendant will end up owning the assets. It seeks to weigh the risk of the claimant's property being

(wrongly) spent by the defendant against that of the defendant being (wrongly) enjoined from using its property to defend itself. The court does the best it can to balance the risks of irremediable harm. But the order now sought is of an entirely different character: it would have the practical effect of extinguishing the claimants' claims. The claimants would be prevented from asserting a cause of action, whatever the circumstances. The court would not be deciding how to hold the ring pending the determination of the parties' rights; it would be making a proleptic determination of the claimants' substantive rights. The interlocutory considerations set out in cases like *Ostrich Farming* and *Marino* are not to my mind apt to justify a determination of that kind.

64. I turn next to consider the related submission that the order sought is ancillary to the freezing order or proprietary injunction. As already explained this was advanced as the sole basis for saying that the court had jurisdiction to make the order sought.
65. Counsel for the first defendant contends that the purpose of the exceptions for legal fees is to enable the fees to be paid. He says that that purpose would be undermined if the lawyers were exposed to the risk of future claims to repay the fees they receive and were therefore not prepared to carry on acting. The first defendant would not therefore be able to receive the legal representation which the exception is intended to achieve. He submits that the order sought would be an effective means of ensuring that the first defendant was able to obtain legal representation. The order sought would therefore be an effective way of ensuring that the legal expenses exception was properly effective.
66. The court has a well-established jurisdiction to make ancillary orders to render its existing orders effective. The principle is that where the court has enjoined a party to do something or refrain from doing something it can make further orders to seek to procure that the enjoined party does or refrains from doing that thing. Where a freezing order is made, ancillary orders may, e.g., be made to require disclosure of information or documents, not to leave the jurisdiction, or to attend at court for cross-examination.
67. I consider that the order being sought on this application cannot be regarded as ancillary to the freezing order or proprietary injunction or the exceptions contained in them. Those orders prohibit the first defendant (as the enjoined party) from disposing of the assets covered by them. The exceptions for legal fees define the limits of those orders: they say that payments made for legal fees will not breach the orders. The exceptions say nothing about the underlying claims the claimants may have now or in the future against the solicitors, as *United Mizrahi* establishes.
68. It follows that an order containing the standard legal fees exception is effective in accordance with its terms without the need for any ancillary or further orders. The exception does just what it is meant to do: it says that payments to lawyers made under it are not caught by the order and are therefore not a contempt of court. No further order is needed.
69. A way of testing the argument is to ask whether the legal expenses exception to the order requires the claimants to do or refrain from doing something and whether further relief is needed to require the claimants to do or refrain from doing that thing. The answer is no. The exception does not require the claimants to do or refrain from

doing anything and nothing more is required to give effect to the exception. On the contrary, the enjoined party is the first defendant. The exceptions to the orders limit his obligations but they do not impose any obligation on the claimants to act or refrain from acting (other than perhaps in the trivial sense of preventing them ever saying that the payment of the fees is a breach of the order).

70. It follows in my view that the purpose and effect of the standard exception is to delimit the extent of the prohibition but is not to provide a respondent's lawyers with protection from a possible claim in constructive trust. That was decided by *United Mizrahi* and I see no reason to depart from that decision.
71. But the order now being sought is not merely intended to give effect to the existing exception (which works according to its terms). It would instead transform it from a limitation on the prohibitions in the order into an order giving the defendant's lawyers immunity from claims.
72. I also agree with the observation of the Michael Burton QC in *United Mizrahi* that, if such orders were justified, they should in principle be available whether or not the claimant had obtained an injunction over the assets. There is no significant difference between the two cases; in each case the threat of a tracing remedy against the lawyers arises from the underlying proprietary claims and not from the existence or otherwise of an interim injunction concerning the assets. This bolsters the view that the order being sought is not ancillary to the existing orders.
73. I therefore conclude that the application is not for an order ancillary to the existing orders. As this is the only basis on which counsel for the first defendant contended that the court has jurisdiction to make the order sought, this conclusion is enough to dispose of the application.
74. I shall however go on consider the exercise of the court's discretion on the alternative assumption that the application is properly to be regarded for an order ancillary to the existing orders of the court.
75. Counsel for the first defendant submitted that the exercise of discretion should follow the same course as the exercise of the court's discretion to include an exception for legal expenses. He said that in practice two questions should go hand-in-hand. I disagree with this submission for the reasons I have given at [67] above. The present application is for an order which would effectively extinguish the claimants' potential tracing claims, and I do not think it could properly be determined simply by balancing the risks of irremediable injustice to the claimants and the first defendant. I agree with the observation of Mr Burton QC in *United Mizrahi* that, in effect, the court is being asked to sanction the conduct of the solicitor blind in advance. This is a powerful reason against making such an order.
76. I accept the submission that it would be very unfortunate if the claimants' reservation of their rights to pursue the first defendant's lawyers meant that he was left without legal representation. These are heavy and complex proceedings. They will involve a careful examination of many transactions. There may also be complicated case management issues. Any trial will be long and will place a particularly heavy burden on unrepresented parties. There is also a possible interplay between these proceedings and the ongoing criminal investigations. For these reasons it will undoubtedly be far

harder for the first defendant to conduct his defence without proper legal representation. If he is not represented this will also potentially have an impact on the ability of the claimants and other parties to conduct the case efficiently. I also bear in mind the evidence adduced by the first defendant (which he has asked to remain confidential) concerning his mental health: this shows that he will face a particularly heavy burden in conducting the case without legal representation and serves to underline the conclusion I have already reached that it would be very regrettable were he to be unrepresented.

77. I also have regard to the provisions of Art. 6 of the ECHR, the overriding objective and the desirability of equality of arms. I note that the claimants have a large and well-funded legal team. Having said that I do not consider that this would be a case in which it will not be possible for the first defendant to have a fair trial (in which I include all interlocutory steps) if he is not able to obtain representation. The court is well used to cases involving unrepresented parties and to making allowances for such parties to ensure that the process is fair.
78. Moreover, the requirements of fairness arising from Art. 6 and the overriding objective apply both ways and to all parties. The relevant claim here is a possible one by the claimants against the solicitors for knowing receipt. It seems to me that to make the order sought would in effect be to deprive the claimants of potential claims without a proper determination of their substantive rights (whether by trial or summary procedures). It is very hard to see how that could be compliant with Art. 6 or the overriding objective.
79. I also take into account the stringency of the test set out by the Court of Appeal in *Carl Zeiss*. It places a high hurdle in front of any claimant seeking to bring a tracing claim against solicitors. Solicitors are protected from claims unless they know that the claim is well founded. That may be expressed negatively by saying that the solicitors will not be liable unless they know that their client has no defence. It is not enough that they have doubts about their own client's case. It will moreover be difficult in practice for a claimant to obtain evidence that the lawyers have the requisite state of knowledge. Any party making such a claim will therefore face an uphill struggle. As already indicated, the claimants have undertaken not to contend for a lower test than that set out in *Carl Zeiss*.
80. As counsel for the claimants submitted the risks to the solicitors therefore need to be kept in perspective. It is possible that even if the first defendant's current lawyers are not prepared to carry on acting, other lawyers may be prepared to do so. There are many cases of proprietary claims in the Business and Property courts where defendants are legally represented throughout the proceedings and solicitors are prepared to act despite the possible risk of tracing claims being brought against them. It is reasonable to suppose that they are aware of the *United Mizrahi* case. I agree with counsel for the claimants that the risks to the solicitors should not be overstated and that there is a realistic possibility of the first defendant being able to obtain legal representation in the absence of the order now sought.
81. Counsel for the first defendant relied on the first instance decision of Pennycuick J in *Carl Zeiss* and submitted that a tracing claim against lawyers would operate to obstruct the administration of justice and infringe the public policy of the court. Counsel said that this was relevant to the exercise of the court's discretion. I do not

consider that the argument carries much weight for present purposes. First, the point was left open in the Court of Appeal in *Carl Zeiss*. Second, in that case the plaintiffs brought the action against the solicitors while the main proceedings were still on foot and it is easy to see why it may have been seen as a spoiling tactic. That may be a distinguishing factor, and there may be others too. Third, the application before the court in *Carl Zeiss* was to strike out the proceedings and the result was the dismissal of the action. The current application is for an injunction to restrain proceedings being brought (including claims arising under facts that may occur in the future).

82. I have carefully considered the various factors enumerated above. I do not consider it would be appropriate for the court (supposing it to have the necessary power) to make the order sought. There is real force in submission that the first defendant will be prejudiced if he cannot be represented. It is indeed likely to be prejudicial to all the parties to the litigation, including the claimants if he is not represented. But I return to the point that in substance the order being sought is an injunction to prevent the claimants from bringing tracing claims against the first defendant's lawyers. I do not consider that the court is in a proper position on this application to make an order extinguishing the claimants' potential claims against the first defendant's lawyers. I also consider that the claimants would have to overcome serious legal and evidential obstacles to bring such claims and there is no present prospect of them doing so; indeed they have so far done no more than reserved their rights. I consider there to be a reasonable prospect that there will be lawyers who are willing to act for the first defendant in the defence of the claims even if his current ones will not. In the end I do not think that the position is materially different from that faced by Michael Burton QC in *United Mizrahi*. As he said, the court is being asked to sanction the conduct of the solicitors blind, come what may. I do not think that the court should do that.
83. For these reasons to the legal expenses application is dismissed.

The living expenses exception

84. As already mentioned the first defendant is subject to the CRO and the existing freezing order. These both contain a proviso in respect of his living expenses. He has also agreed to submit to a proprietary order which will contain the same exception.
85. The SFO has agreed that the first defendant is entitled to expend a monthly sum of some £8,531.28 under the exception contained in the CRO. That sum was reached after the provision of information by the first defendant to the SFO. The claimants' solicitors agreed to the same amount for the purposes of the freezing order and propose the same for the proprietary injunction.
86. The first defendant wishes to increase his living expenses under the freezing order (and prospective proprietary injunction) to £9,831.28, an increase of £1,300 per month. If the court were to accede to this application the first defendant would no doubt have to apply for a similar increase to the CRO.
87. There are two specific areas where the first defendant contends that the monthly amount should be increased. He seeks to increase the amount for groceries etc. by £1,000 a month (from £1,500 to £2,500) and, as a new item, to add the costs of maintaining his swimming pool, of £300 a month. The claimants say that the first defendant has failed to provide sufficient evidence to justify the increases.

88. As to the costs of groceries etc., the description also includes an unspecified amount for the general upkeep and maintenance of Mr Thomson's property and land, including the running costs, maintenance and repairs of garden tools. The existing monthly allowance under this head is £1,500. There is no further breakdown. The first defendant's solicitors have said that the current figure is insufficient. But, despite requests from the claimants' solicitors, nothing more has been provided. The claimants and the court do not know how much has been spent on groceries etc. since the imposition of the freezing order. There has been no attempt to explain how much of the overall sum is for food and other household items, and how much is for the other things. Moreover, there is no record of what has been spent since September 2020 last year. The existing sum of £1,500 a month is already substantial. The only evidence provided by the first defendant to support the increase is some general data about family expenses from the Office of National Statistics, but that provides no evidence as to the outgoings of the first defendant and his family and is of no assistance to the court. It also appears that the first defendant's wife is now in paid employment (earning some £800 a month) but there is no evidence about her contribution (if any) to the family's spending. I do not consider that the current state of the evidence enables the court properly to assess whether the increase sought of £1,000 a month is justified.
89. As to the costs of maintaining the swimming pool, the evidence consists of a Google search which suggests that the average daily cost of maintaining and heating a swimming pool is about £10 a day. I agree with claimants that the evidence served so far does not justify the increase. It should be possible to provide better evidence (such as the cost of chemicals and other costs of maintenance). No breakdown is provided in the Google figures between maintenance and heating and the first defendant has not suggested that the court should sanction the costs of heating the pool.
90. The claimants accept that the first defendant will not be shut out from seeking a further variation of the living expenses allowance if it is properly evidenced. I would indeed expect the claimants and their solicitors to take a reasonable approach to any such application. But I am not prepared on the basis of the present evidence to increase the monthly living allowance.

Extension of time for the first defendant's defence

91. I have already set out the procedural history.
92. The first defendant seeks a further four weeks if the legal expenses application succeeded. His counsel said he was not in a position to make submissions about how long he would need if the legal expenses application was refused, but said that the first defendant would require longer than four weeks.
93. In considering this issue I take account of the following factors.
94. First, the proceedings are on a very large scale, are complex, and include very serious allegations against the first defendant.
95. Second, the proceedings have been on foot since late August 2020 and the first defendant and his lawyers have been able to consider the details of the claims since then. A defence is a vital step in assisting to define the issues between the parties.

96. Third, as Mann J explained at the two previous hearings, it is essential to maintain momentum in the proceedings. As he explained, this also applies where parties are unrepresented because of difficulties over funding. The order he made at the CMC envisaged that the first defendant might not be able to obtain the release of funds to prepare his defence. Mann J explained very clearly that if there was a problem about legal representation the first defendant would still have to do the best he could to provide a defence. The first defendant and his legal team must have realised that there was a prospect that the legal expenses application would fail and they should have been planning for that event.
97. Fourth, all of the other defendants have served defences. This includes the eighth defendant, who is unrepresented.
98. Fifth, there is a CMC listed before me for the last week of July 2021. The parties are currently engaged in considering disclosure issues and may require rulings from the court. It would obviously assist the effective and efficient case management of the case for the first defendant to provide his defence before then.
99. Sixth, the first defendant has set out in a witness statement the broad outline of his defence. While this is not the same as a detailed pleading it shows that he and his lawyers have been considering the elements of his defence to the claims.
100. Seventh, I have taken account of the fact that because of my ruling on the legal expenses application there is a risk that the first defendant will be unrepresented, at least in the immediate future.
101. Eighth, I have also taken into account the evidence (which I do not reproduce here as he has asked it to remain confidential) about the first defendant's mental health and the impact it will have on his ability to act in person.
102. Ninth, the evidence shows that the first defendant is an experienced banker and businessman. There is no reason to think that he will not be able to understand the allegations against him or the steps he is required to take in the legal proceedings.
103. In these circumstances I have decided to grant the first defendant a further extension until 21 July 2021 to provide his defence. It is vital to maintain momentum and important that all the defendants have served a defence before the forthcoming CMC. The first defendant has known the case against him since late August 2020 and has therefore already had much time to consider the substance of his answer. The defence should to my mind have been served already but I am willing to give the first defendant a further extension of time. The claimants have invited me to make an unless order. I shall not do that, but the extension is to be regarded as a final one.

Result

104. The legal expenses application is dismissed. The application to increase the allowance for living expenses is dismissed. The date for service of the first defendant's defence is extended to 21 July 2021.