Neutral Citation Number: [2022] EWHC 1166 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 20 May 2022

Before:

MRS JUSTICE FALK DBE
- -

BUSINESS LIST (ChD) Case No: BL-2018-002691

Between:

VNESHPROMBANK LLC **Claimant**
- and -
GEORGY IVANOVICH BEDZHAMOV **First Defendant**

INSOLVENCY AND COMPANIES LIST (ChD) Case No: BR-2021-000044

Between:

LYUBOV KIREEVA
(as bankruptcy trustee of Georgy Bedzhamov) **Applicant**
- and -
GEORGY BEDZHAMOV **Respondent**

- -
- -

Stephen Davies QC & William Willson (instructed by **DCQ Legal**) for the **Applicant**
Justin Fenwick QC & Mark Cullen (instructed by **Greenberg Traurig LLP**) for the **First Defendant/Respondent**

Hearing dates: 27 & 28 April 2022
- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10.00 am Friday 20 May 2022.

Mrs Justice Falk:

Introduction and background

1. This is my decision on an application made on 23 February 2022 by the First Defendant and Respondent, Georgy Bedzhamov, to vary a worldwide freezing order (the "WFO") obtained by Vneshprombank LLC ("VPB"). The variation would permit Mr Bedzhamov to sell or raise funds against property at 17 Belgrave Square and 17 Belgrave Mews West, London ("the Property") to pay legal costs and living expenses (the "Variation Application").

2. My decision follows a two day hearing at which I also granted security for costs in connection with the remittal from the Court of Appeal referred to below. My *ex tempore* judgment on the principle for security for costs can be found at [2022] EWHC 1047 (Ch) (the "Costs Judgment"). The quantum of security was determined following submissions made immediately after that ruling. I am very grateful for the assistance of Master Kaye, who sat with me to hear those submissions and helped to enable quantum to be determined in the most efficient manner possible.

3. The background can be summarised briefly as follows. The underlying claim brought by VPB in case reference BL-2018-002691 (the "Bank Proceedings") relates to what VPB alleges is a massive fraud carried out by Mr Bedzhamov along with his sister Larisa Markus, who was President of VPB. VPB was declared bankrupt on 14 March 2016, and a Russian state corporation, the Deposit Insurance Agency ("DIA"), was appointed to act as its liquidator. Mr Bedzhamov resists the claim, and denies his participation in any fraud. The claim was originally issued in December 2018, although the court file was sealed pending an application for interim relief, which was granted on 27 March 2019 in the form of the WFO and a search order.

4. Before the claim was brought there were bankruptcy proceedings against Mr Bedzhamov in Russia. Details are set out in the judgment of Snowden J in *Kireeva v Bedzhamov* [2021] EWHC 2281 (Ch). They culminated in the appointment on 2 July 2018 of Ms Lyubov Kireeva, a Russian insolvency practitioner (the "Trustee"), for the purpose of realising and liquidating Mr Bedzhamov's assets (the "Bankruptcy Order"). The Trustee's position is that the effect of the Bankruptcy Order is that all of Mr Bedzhamov's assets worldwide vested in her automatically under Russian law.

5. While VPB is the majority creditor in Mr Bedzhamov's bankruptcy, its own petition, founded on a claim for unjust enrichment of around £40m, was not the basis on which Mr Bedzhamov was declared bankrupt: see Snowden J's judgment at [15]. The successful petitioning creditor was another bank, VTB 24 Bank ("VTB 24"). VPB's claim in the bankruptcy has since been increased by around £12m, but it remains relatively small compared to the c.£1.34bn that it has claimed in the Bank Proceedings and which is subject to the WFO.

6. VPB's evidence in support of its application for the WFO stated among other things that the prospects of the Trustee seeking recognition in England and Wales appeared "very low indeed", but that she would be informed if the WFO was

granted. In the event the Trustee took no steps in this jurisdiction until 19 February 2021, when she applied for common law recognition (the "Recognition Application") in proceedings under case reference BR-2021-000044 (the "Recognition Proceedings"). The Recognition Proceedings were brought with funding from A1 LLC, which is the same entity as is funding VPB in the Bank Proceedings, very shortly after VPB was notified of Mr Bedzhamov's intention to seek approval to sell the Property to fund his legal costs and living expenses.

7. Shortly thereafter, on 16 March 2021, the Trustee applied to set aside my order of 5 March 2021 which had varied the terms of the WFO to permit a sale of the Property for not less than £35m with a view to enabling the proceeds to be used to fund legal and living expenses in accordance with the terms of the WFO (the "Set Aside Application"). The Trustee's position is that she is entitled to all of Mr Bedzhamov's assets, including funds that would otherwise be spent in accordance with the WFO. I ordered an expedited hearing of both the Recognition Application and Set Aside Application.

8. Snowden J's judgment in respect of the Recognition Application and Set Aside Application was handed down on 13 August 2021. He recognised the Bankruptcy Order but dismissed the Set Aside Application and refused assistance in relation to the Property, on the basis that there was no general power at common law to make an order vesting immovables in the Trustee or otherwise conferring possession or control on her (in contrast to movable property).

9. Both the Trustee and Mr Bedzhamov appealed. By an order dated 20 September 2021 the Bank Proceedings were stayed pending resolution of the appeals, a stay which remains in place. In the meantime (having not raised the issue until the consequentials hearing before Snowden J on 25 August 2021), the Trustee made a further application in the Bankruptcy Proceedings on 13 September 2021. This application sought a declaration that, on sale of the Property, the net proceeds of sale would be movables and thus vest automatically in the Trustee (the "Proceeds Application"). That application has also been stayed pending resolution of the appeals.

10. In the Court of Appeal ([2022] EWCA Civ 35) Mr Bedzhamov's appeal against recognition was allowed and the Recognition Application was remitted to the High Court to determine Mr Bedzhamov's allegation that VTB 24's petition debt was vitiated by fraud. The Trustee's appeal for assistance in respect of the Property was unsuccessful. The current position is that the Trustee has sought permission to appeal from the Supreme Court in respect of her request for assistance in respect of the Property (an application which has not yet been determined), and the remittal is due to be heard in a two-day trial in early October.

11. Mr Bedzhamov owes his previous solicitors Mishcon de Reya over £5m. £5m of that is secured by a first charge on the Property. This was granted pursuant to my order of 5 March 2021 to enable that firm to continue acting pending sale, which at that time was obviously hoped would occur within a relatively short time frame. Following a move of the relevant legal team from Mishcon de Reya to Greenberg Traurig, the latter firm has now run up fees and disbursements in excess of £500,000. Significant further sums will be required to prepare for the remittal hearing. The figures were considered at the hearing in connection with security

for costs in respect of the remittal. In summary, Mr Bedzhamov sought security in respect of a total of around £1m and was granted security in respect of £458,824.00 plus VAT of £91,764.80, including previously incurred costs of £60,000 plus VAT.

12. The position of Mr Bedzhamov's legal team is that they will not be able to continue to represent him if his funding position is not urgently resolved.

13. The charge granted in favour of Mishcon de Reya gave that firm priority over a charge in favour of an entity called Clement Glory Limited ("CGL") which secures a debt of around £38m. The position of the Trustee and VPB is that the CGL debt and charge are a sham, and/or (what now appears to be the primary allegation) that Mr Bedzhamov is the beneficial owner of CGL. The Trustee has sought to bring a claim against CGL to make good its sham allegation, and to join VPB to it. Its initial attempt has fallen away due to the dismissal by Master Kaye of an application for an extension of time to serve the claim form, but the Trustee's stated intention is to reissue it.

14. At the hearing of the Recognition Application and Set Aside Application before Snowden J it was confirmed, following a question from the judge, that VPB would remit any sums it recovers in the Bank Proceedings to the Trustee. This is discussed in Snowden J's judgment at [99]-[102], where the judge also commented that that position must have been accepted by A1.

15. The Variation Application also sought a declaration that the Trustee does not have any proprietary rights prior to recognition and assistance, and therefore could not seek to claw back amounts paid to Mr Bedzhamov's lawyers from the proceeds of sale or any loan as reasonable legal expenses, even if the Trustee obtained recognition and/or her appeal to the Supreme Court succeeded.

16. VPB chose not to participate in the hearing and made no written submissions. It therefore must be taken not to object to the variation of the WFO that Mr Bedzhamov seeks.

The Property

17. Mr Bedzhamov's interest in the Property comprises a short lease expiring on 20 September 2034, plus a contractual right to a 129 year lease upon completion of development works. It had previously been Mr Bedzhamov's intention to develop the Property himself (as is clear from the asset disclosure made in response to the WFO), but he has so far been unable to do so. He has however obtained planning permission and listed building consent.

18. At the date of my order of 5 March 2021, Mr Bedzhamov had reached an in principle agreement for the sale of the Property to a Saudi Arabian purchaser. That sale fell through in May 2021, blamed by Mr Bedzhamov on the Trustee's actions. Further attempts to obtain the Trustee's consent to a sale during July and August 2021 also failed. The window permitted by my order of 5 March 2021 for selling or charging the property expired on 5 September 2021.

19. One of the issues has been that the Trustee has registered two unilateral notices against the Property at the Land Registry. The first was lodged in March 2021 in connection with the Set Aside Application. The second was lodged in August 2021, after Snowden J's judgment dismissing the Set Aside Application was handed down, in respect of the Trustee's claim against CGL. The first should have been removed following the Court of Appeal decision, and Master Kaye ordered the removal of the second when she refused to extend time.

20. The evidence of Mr Bedzhamov's solicitor, Mr Shobbrook, is that Mr Bedzhamov's estate agents have confirmed that the unilateral notices act as a "commercially insurmountable barrier" to sale, at least without a very significant discount, unless removed prior to exchange. Although Mr Davies criticised the absence of direct evidence from estate agents, I have no reason to doubt what Mr Shobbrook says. I made it clear at the hearing that, if the court does approve a sale of the Property, it would expect no further unilateral notice to be lodged, whether in connection with a claim against CGL or otherwise, that could frustrate the transaction.

21. The order of 20 September 2021 staying the Bank Proceedings permitted Mr Bedzhamov to continue to market the property for sale at a price generating net proceeds of not less than £35m (with provision for Mr Bedzhamov to apply to the court for sanction of any sale, and for the proceeds to be held in Mishcon de Reya's client account pending further order). The order also provided for the Trustee and her appointed valuer to have access to the Property to ascertain its value, and she was given until 8 October 2021 to object to the £35m figure. No objection was received. Mr Davies confirmed at the hearing that the Trustee did not object to a sale on the open market for at least that sum. Bearing in mind that the previous order had sanctioned only marketing and not sale, it is fair to say that that point had not previously been positively confirmed.

22. One of the difficulties with marketing the Property or raising funds against it has been the unusual nature of Mr Bedzhamov's interest in it. For example, the agreement for lease is not assignable on its terms. An approach was therefore made to the freeholder, the Grosvenor Estate, seeking its agreement to accelerate the grant of the longer lease, such that that lease could be sold. Grosvenor initially agreed to this in principle but the proposal was not consented to by the Trustee, who was not prepared to agree to the expenditure of legal fees on it. Mr Shobbrook's evidence was that further difficulties have been caused by a reaction in respect of Russians with property in London following the invasion of Ukraine in February 2022, both in marketing the property and in an indication from Grosvenor that it would not be willing to grant the proposed lease at this time. Although there were a number of third parties interested in providing funding for the development, all the proposals that Mr Bedzhamov had been considering at that stage had been contingent on the grant of the longer lease.

The Proposal

23. Mr Bedzhamov has now negotiated a different deal with a third-party property development company, which would purchase and develop the Property through a special purpose vehicle ("SPV"). The SPV would be funded by a third-party lender, and there would be a target price of between £75m and £85m on sale of

the developed property (the "Proposal"). The Proposal is set out in brief heads of terms. The key elements are:

a) an agreed price of £35m;

b) CGL would reduce its charge to £23m (representing a further £7m reduction below the restriction to £30m proposed at the time of the 5 March 2021 order), and that charge would remain in place;

c) £12m (representing the difference between the agreed price of £35m and the CGL charge of £23m) would be paid in cash. This sum would be applied as to £5m to discharge outstanding fees of Mishcon de Reya (satisfying its charge), and a minimum of £5 million to Greenberg Traurig's client account to be held and utilised subject to the terms of the WFO, along with the balance remaining after paying around £1.2m to the developer for its fees and in respect of the fees and disbursements that the developer incurs to third parties;

d) as well as funding the £12m, the third-party lender would fund the SPV to undertake construction and development work, at an estimated cost estimated of around £18m (excluding interest, which will be rolled up);

e) upon sale of the developed property the proceeds would be distributed as follows:

   i) repayment to the senior lender in the amount of around £30m plus interest estimated at around £7m;

   ii) discharge of CGL's £23m charge;

   iii) the balance to be split 80:20 between Mr Bedzhamov and the developer, subject to a minimum of £2m to the developer. At the minimum target price of £75m the profit is estimated at £15m, of which Mr Bedzhamov would receive £12m (to be shared with CGL: see below); and

f) Mr Bedzhamov would have a right of first refusal to acquire the Property.

24. The reduction in CGL's charge is said to reflect its commercial assessment that the current value of the Property would not allow it to redeem its charge (the short lease having an estimated value of only around £6m), together with an agreement that it will receive a 5% return on the £23m for the life of the project and that it will receive £7m from Mr Bedzhamov's share of the development profit.

Should the Proposal proceed to the next stage?

25. Mr Davies, for the Trustee, submitted that there was no real evidence of marketing, and the Proposal was far from a sale on the open market. The Proposal was different to that contemplated by the application made in February and was wholly lacking in detail. The Trustee was extremely distrustful of Mr Bedzhamov and concerned that his proposed continued involvement could frustrate recovery, for example by the development not being proceeded with.

26. Mr Davies further submitted that, in contrast, the Trustee would have been content with a sale in the open market at or above £35m. At that level the first £5m would have been allocated to Mishcon de Reya, but that was subject to the Trustee's continued attempt to set aside the charge granted in its favour via her appeal to the Supreme Court. The balance of £30m would be held for CGL. Bearing in mind that CGL has so far accepted that those proceeds should be retained in a solicitor's client account and not paid out to it, and that the Trustee claims that she is entitled to any amount to which CGL is entitled, the effect from the Trustee's perspective would be that the full £30m was protected until her claims were resolved. The same could apply to any excess of the CGL debt above £30m that is in fact currently secured by the CGL charge (the CGL debt totals around £38m), in the event that the net sale proceeds exceeded £35m.

27. There are aspects of the Trustee's position that I have to say appear unattractive. Apart from the fact that no positive indication was given until the hearing that the Trustee would not in fact object to a sale for at least £35m, it is not apparent that there has been a real indication of constructive engagement with a view to ensuring that the value of the asset is preserved and maximised. In particular, whilst it is obviously appropriate for the Trustee to expect to see a significant amount of further detail before formally agreeing to any transaction, it is commercially unrealistic to expect the provision of full details of the legal transactions that would be required, with draft documents, before any substantive comment is made. The unsurprising reality is that the lender and developer require some indication in principle from the court and/or the Trustee to justify incurring the expense of pursuing the Proposal to the next stage.

28. More importantly, it became apparent – although not put in this way in terms until I raised a number of questions at the hearing – that the Trustee would prefer to see a sale at £35m than the implementation of a development arrangement that is forecast to net substantially more for Mr Bedzhamov. This is because of what from the Trustee's perspective is, in this particular context, the fortuitous happenstance of the CGL charge over the Property. Essentially, the Trustee seeks to benefit from the fact that whilst she claims all that CGL itself claims, Mr Bedzhamov does not because his position is that he does not own CGL and that the charge granted in its favour is valid. As a result he has no access to those funds to meet his legal and living expenses. From the Trustee's perspective anything that accrues to CGL is therefore effectively ring-fenced from the provisions of the WFO that continue to permit Mr Bedzhamov to pay reasonable legal and living expenses.

29. I believe that I made it clear at the hearing that, whilst the position I have just described may reflect economic reality, the court must approach the matter on a principled basis. The first plank of that must be the key priority of seeking to ensure that, so far as possible, Mr Bedzhamov's estate is preserved and the value obtainable from it is maximised for the benefit of whichever person(s) are properly entitled to claim the Property or its proceeds.

30. The Property is obviously in material disrepair. Delays to its development or sale raise material difficulties not only as a result of the reducing unexpired term of Mr Bedzhamov's short lease, but also because of the risk of forfeiture for non-repair and, perhaps most immediately, because planning permission will lapse on

13 December 2022 if work has not been commenced and an infrastructure levy payment has not been made.

31. There is no good basis to reject Mr Shobbrook's unchallenged evidence about the sale to the Saudi Arabian purchaser having fallen through, subsequent proposals before the invasion of Ukraine having failed to proceed because the longer lease was not granted, and the difficulties caused by that invasion. The Trustee obviously does not like the Proposal, but (aside from what may happen to the proceeds) that is really because of (a) the loss of priority for CGL associated with the reduction of the charge to £23m from the previously contemplated minimum of £30m; and (b) suspicions about Mr Bedzhamov's continued involvement. The Trustee has adduced no evidence about the price that could currently be achieved in the open market, but it can reasonably be inferred that she has not been advised that £35m is an undervalue.

32. The reality is that, whilst the Trustee would have liked to have control of the Property now, she does not and has been denied it both by this court and by the Court of Appeal. She has sought no interim relief in the Recognition Proceedings or any expedition of her appeal to the Supreme Court (albeit that I appreciate that without resolution of the remittal in the Trustee's favour the appeal would be pointless). She has also not, so far, successfully initiated any claim against CGL. In the meantime, and despite the stay of the Bank Proceedings that I ordered, significant legal fees continue to be incurred that are largely associated with the Trustee's actions, and the WFO remains in place.

33. I have concluded that the right approach is to indicate that, in principle, and subject to it being satisfied about the detailed terms of the transaction and the identity of the participants, the court would be prepared to entertain and approve a transaction with a third-party lender and developer along the lines of the Proposal (I deal separately below with the application of the proceeds). That appears to be the best, and indeed only, option on the table for maximising value overall, in circumstances of relative urgency, and where there appears to me to be a real risk that substantial value would otherwise be lost irretrievably.

34. It seems to me that the Trustee's concerns about the continued involvement of Mr Bedzhamov ought to be capable of being addressed by a proper understanding of the identity and credentials of the developer and lender. In particular, I consider it highly unlikely that a genuine third-party lender risking a considerable amount of its own funds would be prepared to countenance doing so in a way that would permit Mr Bedzhamov to frustrate the development, in the unlikely event that he wished to do so. I also understand that, prior to the hearing of the Variation Application, Mr Bedzhamov proposed that the names of the lender and developer could be provided to the Trustee's legal team on the provision of suitable confidentiality undertakings. This approach was agreed by the Trustee's solicitors, DCQ Legal, and the revised undertakings were sent to DCQ Legal shortly before the hearing. However, those undertakings have yet to be signed and returned.

35. I also wish to make it very clear, as I indicated at the hearing, that I would expect all parties to adopt a collaborative and realistic approach in seeking to maximise value from the Property, and therefore in the approach taken to proposing and

reviewing detailed terms. The court would be concerned about any indication that any party's actions are impeding sensible progress.

Use of the proceeds: proprietary approach?

36. A core battleground at the hearing was over whether the court should treat the Trustee as being in the position of a third party with a proprietary interest in the Property. Mr Davies contended that the Trustee has a prospective proprietary interest, pending determination of the remittal, the appeal to the Supreme Court and the Proceeds Application. As such, the principles relating to proprietary injunctions should apply by analogy. Mr Davies placed particular reliance on *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch) ("*Kea*"), a judgment of Nugee J. Mr Davies also referred to *Re Derev* [2021] BCC 615, where in the context of an application by a Russian trustee in bankruptcy for recognition under the CBIR, Adam Johnson J referred at [8] to an earlier comment by Zacaroli J that the trustee's claim "has all the hallmarks of a proprietary claim".

37. Mr Fenwick disagreed. Both the High Court and the Court of Appeal had found that the Trustee has no current proprietary interest in the Property under English law. Further, that particular conclusion would not be disturbed by the Trustee's appeal to the Supreme Court, even if it proceeded and the Trustee succeeded. If the Trustee had wished to assert a proprietary claim then she should have sought a proprietary injunction on a timely basis, subject to the usual cross-undertaking, which in this case would require the provision of security (noting that VPB has provided security for its cross-undertaking in damages in the Bank Proceedings). The Trustee should not be able to obtain the effective benefit of proprietary relief by a different route.

38. The facts of *Kea* were that the claimant, Kea, had obtained a money judgment against Mr Watson, in the form of equitable compensation. An accountant who had worked for Mr Watson, a Mr Gibson, appeared to Kea to have access to valuable assets, including as settlor and beneficiary of a trust owning a corporate vehicle, Ivory Castle. Kea alleged that assets held by Ivory Castle were held for Mr Watson as bare trustee or nominee. It sought relief which included the appointment of a receiver over Ivory Castle's assets by way of equitable execution of the judgment debt, and interim injunctive relief. Nugee J had to decide whether Ivory Castle and Mr Gibson were obliged to resort to Mr Gibson's own assets before resorting to Ivory Castle's assets for payment of their legal costs.

39. It is worth setting out in full the uncontroversial principles summarised by Nugee J at [19]-[22]:

> "19. Certain points are clear from the authorities. First, there is a well-established distinction between the case of an ordinary (non-proprietary) freezing injunction, based on what could still be described in 1993 as the "relatively modern" Mareva jurisdiction, and the case of a proprietary injunction based on the much older Chancery jurisdiction to preserve a disputed fund: see *Sundt, Wrigley & Co Ltd*

v Wrigley (unrepd, 23 June 1993) ("*Sundt Wrigley*") per Sir Thomas Bingham MR, cited by David Richards J in *Begum*[1] at [35].

20. In the former case, the position is as follows:

(1) The "ordinary rule" is that since the money is the defendant's own money, he is entitled, subject to his demonstrating that he has no other assets with which to fund the litigation, to have resort to the frozen assets in order to finance his defence: *Sundt Wrigley* per Sir Thomas Bingham MR.

(2) This is, as Sir Thomas Bingham says, subject to the defendant demonstrating that he has no other available assets: *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm) ("*Tidewater*") at [37]-[43] per Males J, *Halifax plc v Chandler* [2001] EWCA Civ 1750 at [17] per Clarke LJ, *Serious Fraud Office v X* [2005] EWCA Civ 1564 at [35], [43], [46]-[47] per Clarke LJ, referring to the "burden of persuasion" on the defendant, and the need to adduce "credible evidence" about his other assets. Judges are entitled to have a "very healthy scepticism" about unsupported assertions made by a defendant about the absence of assets: *Tidewater* at [40].

(3) It is relevant to consider not only the defendant's own assets but whether there are others who may be willing to assist: *Tidewater* at [41]-[42].

(4) The correct test is to consider objectively the overall justice of allowing the payment to be made, bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim: *Tidewater* at [45], citing *Gee on Commercial Injunctions*.

(5) In most cases the absence of other assets or alternative sources of funding is likely to be decisive, as justice will require that such assets as there are should be available to fund the defendant's defence. But in what is likely to be an exceptional case, this is capable of being outweighed by other considerations. Ultimately it is the interests of justice which must be decisive: *Tidewater* at [37], [46].

21. As an example of a case where the Court refused to allow a defendant to spend frozen funds on its legal costs, Ms Jones referred me to *Atlas Maritime Co SA v Avalon Maritime Ltd (No 3)* [1991] 1 WLR 917 where the defendant (Avalon) applied for permission to spend frozen funds on its legal costs on the grounds that it had no other assets, but the Court of Appeal declined to allow it to, on the basis that its parent company (Marc Rich) exercised financial control over its affairs and had chosen to leave it without other funds. Lord Donaldson MR said at 926B that he was satisfied that Marc Rich would make money available to enable Avalon to defend the claim, unless the view were taken that it would simply be throwing good money after bad. Nicholls LJ, to similar effect, said at 929E-H that Marc Rich had chosen to operate the purse-strings so as to leave Avalon with no other money, and that Marc Rich should be left to finance Avalon's defence if it considered it worth doing, adding that

[1] *HMRC v Begum* [2010] EWHC 2186 (Ch)

> otherwise Avalon's defence would be conducted at the expense of Atlas (the claimant).
> 22. In the case of proprietary injunctions, however, the position is different: see *Grant and Mumford, Civil Fraud* (1st edn) at §32-059 to §32-068. Here the principles are as follows:
> (1) Since the basis of the proprietary claim is that the particular asset in question is said to belong to the claimant, the question is not whether the defendant should be able to use his own assets, but whether he should be permitted to use assets which may turn out to be the claimant's. There is therefore no presumption in favour of his being able to do so.
> (2) There are four questions which fall to be answered: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) ("*ITS*") at [6] per Lewison J. The first is whether the claimant has an arguable proprietary claim to the money.
> (3) The second is whether the defendant has arguable grounds for claiming the money himself; as Millett LJ said in *The Ostrich Farming Corp Ltd v Ketchell* (unrepd, 10 Dec 1997) :
> "No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings."
> (4) The third is whether the defendant has shown that he has no other funds available to him for this purpose.
> (5) But even if the defendant gets over this hurdle then the Court has a discretion: *Sundt Wrigley*, where Sir Thomas Bingham referred to the Court having to make a:
> "careful and anxious judgment … as to whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may, in course, turn out to be a successful defence."
> …"

40. I pause at this stage to add that the same principles apply to the use of funds the subject of a proprietary claim for living expenses: *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301 ("*Marino*") at [19]-[23], per Sales LJ.

41. In *Kea*, Nugee J went on to find at [30] that there was an exact parallel on the facts with *JSC BTA Bank v Ablyazov* [2015] EWHC 3871 (Comm) ("*Ablyazov*"). In that case a receivership order was also sought by way of equitable execution against assets in respect of which it was alleged that the ostensible owner was acting as nominee for the judgment debtor. Popplewell J had preferred the submissions for the claimant bank that the approach applicable to proprietary relief should be applied, even though the bank did not advance a case that it had a proprietary interest in the funds.

42. At [35] Nugee J explained that *Begum* concerned a purely personal claim, such that the defendant was entitled to spend his own monies defending himself. At [36] he said this:

> "36. The position of a claimant such as the Bank in *Ablyazov* or Kea in the present case seems to me to be materially different. In such a

> case the frozen assets are not the undisputed property of the ostensible owner (there Madiyah, here Ivory Castle), but are assets the beneficial ownership in which is actively disputed. If the claimant wins the action, it will become apparent that the assets were not the ostensible owner's at all, and he therefore will be shown to have had no right to spend them, either on his legal expenses or his living expenses or anything else. In fact he will be shown to have been a trustee of them, and it will have been a breach of trust to spend the monies for his own benefit. Now of course the claimant does not in such a case have a present beneficial interest in the fund - that is indeed why it is not a simple case of a straightforward proprietary claim - but this is just as much a case of a disputed fund as the case of a proprietary claim, and it seems to me that the principle is that whereas a defendant cannot generally be prevented from spending his own money on defending himself, it is very different if the money that he proposes to spend arguably belongs to someone else. Why should he be at liberty to spend what may be someone else's money on defending himself? Long before the *Mareva* injunction existed, the Chancery courts were very ready to intervene to preserve a disputed fund pending litigation to resolve entitlement to it. And although the claimant does not have a present beneficial interest in the money, if it is in truth held for the benefit of the judgment debtor (there Mukhtar, here Mr Watson), the claimant as a judgment creditor of that debtor has a much better claim to it than the ostensible owner who has no claim to it at all. Moreover the claimant (in both *Ablyazov* and the present case) not only brings a claim designed to resolve the ownership of the disputed fund, but also claims in the action the appointment of a receiver by way of equitable execution over the fund. That means that if the claim is successful, the claimant will not just obtain relief in the form of a simple money judgment (indeed he may not be entitled to a simple money judgment as such) but will obtain actual possession of the fund (through the medium of the receiver). That may not strictly be a present proprietary claim, but it is very close to one, as the very gist of the action is to assert a right to possession of the disputed fund."

43. It can be seen from this that a key part of Nugee J's reasoning related to the fact that in both *Kea* and *Ablyazov* it was alleged that the ostensible owner did not own the relevant property at all, such that *that owner* should not be entitled to spend funds to which the claimant would, if the allegation was made out, have a much better claim. In contrast, the present claim involves no such allegation, so *Kea* and *Ablyazov* could be distinguished on the facts on that basis. However, the Trustee does seek a form of equitable execution by virtue of her own alleged interest in the Property.

44. As regards *Re Derev*, I would observe that Zacaroli J was not addressing the issues relating to immovables that have been raised in these proceedings.

45. I have not found this issue to be straightforward. As Mr Fenwick says, the Trustee has at no stage sought interim proprietary relief. The Court of Appeal has found that the Trustee has "not acquired any interest, legal or equitable", in the Property

(Newey LJ's judgment at [73]). Arnold LJ's dissenting judgment confirmed at [112] that the English courts will not recognise any title the Trustee has under Russian law, and instead concluded that the court had and should exercise a power to make an order *in personam* to provide assistance in the form of the appointment of a receiver.

46. The grounds of appeal to the Supreme Court do not, on my reading of them, seek to disturb the conclusion that the Trustee has no automatic or *ipso facto* proprietary interest in the Property under English law. They state that the Trustee "both acknowledges and accepts" the immovables rule. Rather, the grounds of appeal maintain that the Trustee has a right to apply for assistance in realising assets for the benefit of creditors, such as to warrant the appointment of a receiver. This would not be a case, or certainly not clearly a case, where the effect of an order of the court in the Trustee's favour would be to vindicate or establish a pre-existing proprietary interest.

47. Further, Arnold LJ also recognised that the power to appoint a receiver was a discretionary one. He referred at [122] to the need for a further hearing to determine how the discretion to appoint a receiver should be exercised, and made specific reference at [126] to the fact that it might be concluded, having regard to the delay in the Trustee's application, that it might be the proper course to appoint a receiver on terms that:

> "… preserved Mr Bedzhamov's ability to fund his legal costs, and perhaps his living expenses, from the proceeds of sale of the Belgrade Square Property until judgment on VPB's claim. That might be regarded as achieving practical justice."

I note that Snowden J also discussed the question of discretion in his judgment at [269]-[271].

48. This is not a case, therefore, where the Trustee's claim for assistance would be resolved simply by deciding that the majority of the Court of Appeal were wrong in their conclusions about the effect of the immovables rule. The Trustee would have to get over the substantial additional hurdle of persuading the court to exercise its discretion in a manner which would not make an allowance for Mr Bedzhamov to fund his defence. That is a material additional step.

49. A further point to bear in mind is that the Trustee claims to be entitled to all of Mr Bedzhamov's assets. This is not a case where there is any prospect of the Trustee agreeing that there are, or may even in theory be, alternative assets owned by Mr Bedzhamov or that he could acquire, being assets that he should use to fund his living and legal expenses because they are not or would not be affected by a proprietary claim. If any such assets were identified then the Trustee would undoubtedly wish to claim them.

50. It was made clear in the Proceeds Application, and in a slightly earlier application in respect of movable property, that the Trustee's claim extends not only to assets held at the date of the bankruptcy but to after-acquired property generally. It must follow that the Trustee would also claim any gifts or other funds Mr Bedzhamov received, and I can see no reason why the same would not also apply to the

proceeds of any loan that he managed to secure. The Trustee's advisers have even stated that her claim will extend to amounts paid under costs orders in Mr Bedzhamov's favour, including amounts that the Trustee herself has been ordered to pay.

51. It was suggested by Mr Davies at the hearing that the Trustee would prefer that expenses were funded from another asset frozen by the WFO, an Italian villa called Villa Nicolini. Villa Nicolini is held by an English company, Basel Properties Ltd, that Mr Bedzhamov says is owned by his long-term partner. However, the Trustee's preference relates to unspecified difficulties that she is said to be having in enforcing against that asset, rather than to the Trustee having no claim it. On the contrary, the Trustee maintains that Villa Nicolini is a bankruptcy asset.

52. Nevertheless, it is undoubtedly the case that the Trustee is claiming equitable execution in respect of the Property. Based on the permission given to appeal to the Court of Appeal and the dissenting judgment of Arnold LJ, it might also be said that the Trustee has an arguable case in that respect. However, this is subject to the further argument that the court's discretion is engaged: see [47] and [48] above.

53. Further, the Proceeds Application is outstanding. Whilst success in that application would appear to undermine the effect of the existing judgments of both the High Court and Court of Appeal on the immovables rule, the application cannot simply be dismissed as unarguable. As Arnold LJ recognised at [123] of his judgment, it is arguable both that the proceeds of sale of immovables are not caught by the immovables rule, and that they are so caught.

54. Ultimately, I have concluded that the better approach at this stage, having regard in particular to the extant Proceeds Application, is to proceed on the basis that the Trustee would have an arguable proprietary claim to the proceeds of sale. However, as I will discuss below there are a number of factors that affect the proper exercise of the court's discretion in this case.

Absence of other funds

55. As set out by Nugee J in *Kea* at [22] (see above), four questions must be answered before a respondent to a proprietary injunction may be permitted to use funds the subject of the proprietary claim. The first, which is whether the claimant has an arguable proprietary claim, has already been addressed. The second, whether the defendant has arguable grounds for claiming the money himself, is clearly satisfied in this case.

56. The Trustee disputed the third requirement, which is whether Mr Bedzhamov has shown that he has no other funds available. I note that this issue also arises where there is no proprietary claim: *Kea* at [20(2)], although in the context of a proprietary claim it will, for obvious reasons, receive particular attention. In *Ablyazov* Popplewell J referred at [11] to the burden being on the defendant to show by "full and frank evidence" that he does not have or have access to other funds. In *Marino* Sales LJ explained at [20] to [23], by reference to judgments of Sir Thomas Bingham MR and Lewison J, that the onus is on the defendant to

persuade the court that he has no or inadequate assets unaffected by proprietary claims.

57. Based on the evidence currently available I am satisfied that this requirement is met. I note that in *Vneshprombank v Bedzhamov* [2019] EWCA Civ 1992 at [87]-[88], which concerned the amounts permitted for living expenses under the WFO, Males LJ considered an assertion that Mr Bedzhamov must have undisclosed assets. He found that whilst the possibility could not be excluded there was no evidence to support it, and the fact that Mr Bedzhamov's papers and computers had been seized without evidence of hidden assets coming to light made it "relatively unlikely" that there were any, such that no weight should be put on the possibility. I would respectfully agree. I would add that no hidden assets have in fact come to light since that judgment in November 2019, and I am not aware of any challenge by VPB to the asset disclosure made by Mr Bedzhamov under the terms of the WFO. A possible exception might be said to be CGL, but in respect of that VPB made an application as early as September 2019 to join it to the Bank Proceedings on the basis that the CGL charge was a sham, with draft particulars of claim traversing similar ground to the claim that the Trustee now wishes to pursue against CGL. (The September 2019 application was not pursued.) Mr Bedzhamov also denies that he is the true owner of CGL.

58. One of the Trustee's questions relates to how Mr Bedzhamov continues to meet his living expenses, which remain by any normal standard very high, and the allocation of funds apparently raised from others for that purpose rather than to pay legal costs.

59. I would make the following comments. First, Mr Bedzhamov provided a relatively detailed witness statement in November 2021 updating the court about how he had been funding his living expenses, initially mainly from the substantial proceeds of sale of his interest in a hotel, Badrutt's Palace, and then from, in particular, a number of different loans from friends and former business associates. I would observe that, if friends or associates are prepared to make loans for specific purposes such as school fees, it does not necessarily follow that they would be prepared to make the same loan for a different purpose. Equally, however, it does not mean that Mr Bedzhamov is not required to satisfy the court that he has sought and failed to obtain such assistance.

60. Secondly, I note that details have since been provided to the court of very substantial rent arrears on the home that Mr Bedzhamov shares with his partner and their children, and the receipt of an eviction notice. This appears to be indicative of genuine financial difficulties (albeit by reference to historic spending levels that Males LJ described as "quite extraordinary": [2019] EWCA Civ 1992 at [1]).

61. Thirdly, and as I explain further below, the introduction of a potential proprietary claim affects the considerations that apply in determining an appropriate level of living expenses. However, no application has yet been made to make any downwards adjustment to the amounts available for living expenses under the WFO.

62. In response to a question from the court, Mr Fenwick confirmed that there would be no objection to the provision of a further update from Mr Bedzhamov about his financial position, before permitting the use of proceeds of sale of the Property. In my view that is both appropriate and required. I would expect that update to include a clear explanation of the position in respect of Villa Nicolini, and whether it can be used as a source of funds, as well as any other potential sources of funds for legal fees or living expenses, or (if that is genuinely the case) an explanation that they do not exist. If it is indeed Mr Bedzhamov's position that no funds can be made available apart from funds that can be raised from the Property, then that should be made explicit.

The court's discretion

63. The remaining issue is the careful judgment that the court must make as to whether the injustice of permitting the use by Mr Bedzhamov of funds to which the Trustee is arguably entitled is outweighed by the possible injustice to Mr Bedzhamov of refusing to allow him to expend funds to which he may be entitled.

64. I should emphasise that I am deciding this matter as an issue of principle at this stage. The detail will remain subject to the approval of the court in due course, following consideration among other things of Mr Bedzhamov's up-to-date financial position and his ability to obtain funds from elsewhere. As regards Villa Nicolini in particular (and its owner Basel Properties Ltd), this would include a better understanding of the potential availability of those assets both to Mr Bedzhamov and to the Trustee. If it is the case, for example, that funds could be raised from those assets that would be available to Mr Bedzhamov but not to the Trustee (and whether for legal expenses or for the family's living expenses), then that could affect the exercise of the court's discretion.

65. In reaching my decision on this issue, I have taken into account the history of the proceedings (I have been the docketed judge since July 2020) and the Trustee's intervention. The details are only briefly summarised in this decision, but have been set out in more detail in other decisions, including Snowden J's judgment.

66. In principle, I have concluded that it would be unjust not to make provision allowing Mr Bedzhamov to spend at least some proceeds from a disposal of the Property in accordance with the terms of the WFO, that is, a reasonable sum on legal advice and representation, and on living expenses within the limits set by the WFO (as modified by the Court of Appeal in its order dated 19 November 2019). In reaching that conclusion I have taken into account the factors set out below.

The Trustee's intervention: timing and circumstances

67. The timing and circumstances of the Trustee's intervention, described in some detail in Snowden J's judgment at [71] to [92] in particular, are significant factors. In very brief summary, the court granted the WFO having been led to understand that the prospects of the Trustee seeking recognition appeared "very low indeed", and apparently on the basis that it was Mr Bedzhamov's assets that were being protected from dissipation, rather than assets held by the Trustee. Mr Bedzhamov and his advisers then spent approaching two years working on the understanding

that he would be able, subject to permission from the court, to use his assets to finance his living expenses and fund his defence. This was in circumstances where Snowden J found that the Trustee was aware of the Bank Proceedings in March 2019, and further that she or her advisers received a copy of Mr Bedzhamov's asset disclosure letter in March 2020: see his judgment at [78] and [84]. If Arnold J had understood that the Trustee was likely to seek recognition, that would clearly have been a relevant factor in determining whether to grant the WFO, and if so on what terms.

68. The Trustee's intervention in February 2021, in the form of the Recognition Application, came very shortly after VPB was notified of Mr Bedzhamov's intention to sell the Property to fund his living and legal expenses. It is clear from the Trustee's own evidence that her intervention was possible only because of A1's willingness to fund it: Snowden J's judgment at [80]. I have commented on more than one occasion about A1's role extending beyond that of a normal litigation funder: see most recently the Costs Judgment at [19].

69. It was also only at the hearing before Snowden J that it was confirmed, in response to a question from the court, that VPB would remit any sums recovered in the Bank Proceedings to the Trustee: Snowden J's judgment at [99]-[102].

70. I am driven to the conclusion that the Trustee's intervention was funded by A1 with a view to denying access to assets that Mr Bedzhamov (and through him his legal advisers) might otherwise reasonably have expected to have available for reasonable legal and living expenses under the WFO. I can see no other rational explanation. The fact that his applications to do so have not been actively opposed by VPB – also funded by A1 – in the ordinary course of the Bank Proceedings rather underlines that it was considered that such opposition would not prove fruitful. That is unsurprising.

Conduct and resolution of the Recognition Application

71. A further relevant factor is that the Recognition Application has taken much longer to resolve than had been hoped at the date of my order of 5 March 2021. Although the Trustee would point to the remittal as resulting in a delay that she says has been improperly caused by Mr Bedzhamov, the position is not that straightforward. As I explained in the Costs Judgment at [36]-[39], the expedited hearing before Snowden J allowed points of principle to be determined. If they had been determined in favour of Mr Bedzhamov that would have avoided the need for the fact-finding trial that the remittal will involve, and which the Court of Appeal has made clear is required before the Recognition Application can be finally determined.

72. Further, it is the Trustee who seeks to elongate the process further by an appeal to the Supreme Court. Moreover, and importantly, it is the Trustee who only raised the claim the subject of the Proceeds Application after Snowden J's judgment was handed down. In the result it was not possible to hear that application before the appeal to the Court of Appeal was heard (an appeal which was itself expedited), despite the fact that the issues raised by it appear to be of very significant relevance to the practical relevance of the appeals, and indeed to the practical relevance of Snowden J's judgment (see further below).

73. In the meantime the Trustee's interventions have resulted in the sale that had been contemplated at the time of my order of 5 March 2021 being lost, and based on the evidence available have also contributed to the frustration of further attempts to deal with the Property: see above. Further, considerable legal expenses have continued to be incurred and remain unpaid.

The Trustee's position in the Bank Proceedings/interim relief

74. As explained in the Costs Judgment at [24], Mr Davies submitted that the Trustee would have preferred that the Bank Proceedings had not been brought, because of the depletion of the estate as a result of the costs incurred. Apart from that appearing somewhat at odds with Snowden J's observation at [78] of his judgment that the Trustee had suggested that she would have supported the Bank Proceedings if funds had been available, in reality it demonstrates the unfairness of the position that Mr Bedzhamov has been placed in.

75. At the stage of the Trustee's intervention Mr Bedzhamov had spent some two years, and very substantial funds – being funds to which the Trustee would also doubtless have claimed an entitlement – defending a claim that the Trustee now indicates she would prefer not to have been brought, but which she took no steps to prevent, or it seems even to indicate what her views were, and being a claim which it is now confirmed is being bought for her benefit. The fact that she may not have had funding to intervene would not have prevented her raising the issue, including with VPB, and in any event is of limited relevance to the position from Mr Bedzhamov's perspective.

76. In particular, the Trustee complains that allowing Mr Bedzhamov to spend the proceeds of sale of the Property would cause irremediable harm and render the proceedings she has brought in this jurisdiction nugatory. But if that is the result it is to a substantial extent attributable to the Trustee's delay. An earlier, successful, intervention by the Trustee would in reality be highly likely to have resulted in the Bank Proceedings either not being taken forward or not being defended, since if the Trustee is correct in her claims then Mr Bedzhamov would have no assets, or prospect of obtaining assets, that would mean that it was in his interests to defend the Bank Proceedings, even as a litigant in person.

77. The Trustee also seeks to benefit from the WFO by resisting an application to vary it, in circumstances where she has not sought any interim relief in the Recognition Proceedings. The effect of success on her part would be akin to the grant of a form of proprietary injunction in her favour. However, she has at no stage prior to the Recognition Application sought any such relief, and even now does not do so in terms. If she had, the question whether any cross-undertaking should be given would have been raised and addressed.

The Trustee's approach to the Property

78. I have already described my concern about an apparent lack of constructive engagement by the Trustee in respect of the Property with a view to ensuring that value is maximised and preserved: see in particular [27]-[31] above. I consider that this, together with other aspects of the conduct of the Trustee's case to which

I have already referred, is also relevant to take into account in determining where the overall balance of justice lies.

Not a "standard" proprietary claim

79. I have also already explained that the Trustee's claim extends to all of Mr Bedzhamov's assets, including after-acquired property. This is a point of distinction from the usual situation where proprietary relief is sought. This is not a case where Mr Bedzhamov could, even theoretically, identify either existing or future assets that he could use to fund his expenses and that the Trustee would not claim. Again, I think this is of some relevance in determining where the balance of justice lies.

80. A further distinction from the usual situation where proprietary relief is sought is the point made at [47] and [48] above about the court's discretion to determine what assistance should be given in respect of the Property. In this case the grant of relief to the Trustee in respect of the Property would be wholly dependent on the exercise of the court's discretion. It is not simply a case of recognising an existing proprietary interest. I recognise that the position is potentially different in respect of the proceeds of sale, but the Proceeds Application has been made very late, rather than at a time when Snowden J could have determined it: see further below.

Legal expenses: different categories and periods

81. It is unsurprising that Mr Bedzhamov's legal team have made clear that they will not be able to continue to represent him if his funding position is not urgently resolved. The remittal will on any basis involve additional material costs.

82. I have carefully considered whether and to what extent to draw a distinction between different legal expenses, and in particular between expenditure incurred in different periods.

83. As regards future expenditure, the immediate priority is the remittal of the Recognition Application. Taking account of all the factors already discussed, I am satisfied that the injustice to Mr Bedzhamov of denying him access to legal representation in respect of the remittal outweighs any injustice to the Trustee. Other future costs are discussed below.

84. As Mr Fenwick rightly submitted, the analysis is not the same for all the costs already incurred.

85. There is much to be said for the argument that reasonable sums incurred in respect of legal costs prior to the Trustee's intervention were incurred on the reasonable understanding that the WFO was in place and permitted such expenditure. Overall, and taking the factors already discussed into account, in my view the balance of justice is in favour of permitting those sums to be disbursed from the proceeds of sale. This would cover costs incurred prior to the date of the Recognition Application on 19 February 2021.

86. In addition, I consider that it would be unfair not to take the same approach in respect of at least some costs incurred during a period after that application was made. This recognises the need for costs to be incurred to assess the impact of the Trustee's intervention, in circumstances where Mr Bedzhamov and his advisers had previously been proceeding on the reasonable basis (given what was said when the WFO was obtained) that no such intervention was likely to occur. Adopting a pragmatic approach, this would cover reasonable sums incurred up to and including the date of the hearing on 5 March 2021, at least insofar as they were incurred in connection with assessing the impact of the Trustee's intervention. Other costs would need to be considered separately, but as indicated below in respect of the following period it may also cover costs in respect of ongoing trial preparation in the Bank Proceedings.

87. Thereafter, it could be argued that the interests of justice do not compel the conclusion that legal costs incurred should be paid while the Trustee's Recognition Application remains outstanding and, if that is determined in her favour, while the Proceeds Application remains outstanding. This arguably applies to costs incurred between 5 March 2021 and 28 April 2022 (the last day of the hearing to which this judgment relates). While I understand Mr Fenwick's submission that the order of 5 March 2021 contemplated a sale of the Property at any point up to 5 September 2021 and use of the proceeds for living and legal expenses, there was an active dispute with the Trustee throughout the period. The same point can be made in respect of the court's order of 20 September 2021, which permitted the Property to continue to be marketed (see [21] above).

88. However, on careful consideration I have determined that a cut-off in or around March 2021 would be the wrong approach. Both the High Court and the Court of Appeal have determined that the Trustee has no interest in the Property and that assistance should not be granted, notwithstanding the proposed sale. No permission has yet been granted by the Supreme Court. Even if it were, the court would have a discretion which it could exercise to permit the payment of legal and/or living expenses: see above.

89. As already indicated, the Proceeds Application has been a particular feature of my decision that it is appropriate to proceed on the basis that the Trustee has an arguable proprietary interest. I have already referred to my concerns about the timing of that application, the effect of which has been to elongate an already lengthy process and, potentially, leave the position uncertain irrespective of the outcome of an appeal to the Supreme Court. I do not consider that it would be just to take it into account in determining that the Trustee has an arguable proprietary claim but then to ignore its procedural impact.

90. The Trustee's claim to the proceeds of sale, irrespective of the court's decision on the immovables issue, was first intimated before Snowden J on 25 August 2021. The transcript of the relevant exchange makes clear Snowden J's view that the point had not previously been raised. Among other things, he said this:

> "… it does come as something of a surprise to me that you are going to be contending that the consequence of sale is to render irrelevant the debate that took place in front of me in relation to interests in

> immovable property and would allow the trustee automatically to claim the entire proceeds of sale."

91. Mr Davies is recorded as responding that what was in issue before Snowden J had been the question of control of the Property, rather than the characterisation of the proceeds. I am not persuaded of that, and based on his judgment and the transcript I do not understand Snowden J to have been either. It is not as if the point was a theoretical one at the time of the hearing before Snowden J in April 2021. It must not be forgotten that the Trustee's intervention in February 2021 was triggered by the proposal to sell the Property *and use the proceeds*.

92. The Proceeds Application was formally made on 13 September 2021. I have concluded that, taking into account the delay in raising the issue as well as the other factors I have discussed, the balance of justice is likely to favour granting permission to Mr Bedzhamov to pay at least some of the reasonable legal costs accrued up to that point.

93. Precisely which costs would be covered by this would (in the absence of agreement) be subject to the consideration of a breakdown of what they relate to as well as their quantum. In particular, it may be appropriate to draw a distinction between costs incurred in necessary trial preparation in the Bank Proceedings and certain other costs, with permission being granted in respect of the former. In that context, I am conscious that the Bank Proceedings were not stayed until September 2021.

94. In respect of costs accrued between 13 September 2021 and the date of the hearing, I have determined that the just approach would also be a more granular one in which, in default of agreement, the court would consider a breakdown of the fees and expenses and the purposes for which they were incurred in more detail. The court would also consider any impact of non-payment of costs. In respect of some costs the factors set out above may mean that it is just to permit payment, but that will not necessarily be the case.

95. Account will also need to be taken of the fact that some of the costs in question are or may be covered by costs orders. Mr Bedzhamov will need to give an appropriate credit in respect of costs awards in his favour in determining the amounts that may now be spent.

96. The position in respect of future costs in respect of the remittal is as set out above. As regards other future costs I propose that they are considered on a case by case basis, as and when the issue arises. However, both with this category and costs incurred since February 2021 I urge the parties to take a collaborative approach and to seek to agree the position so far as possible.

Mishcon de Reya's charge and the position of CGL

97. There is a specific issue that I need to clarify in respect of the charge granted to Mishcon de Reya and the position of CGL.

98. I agree with Mr Fenwick that the purpose of the charge granted to Mishcon de Reya was to give that firm priority over CGL. It does not have a greater

significance than that. In particular, it is important not to mischaracterise the right to apply to set aside conferred by my order of 5 March 2021. Consistently with CPR 40.9, that order made it clear that the order was not intended to prejudice the Trustee's right to apply to challenge the validity of any charge granted pursuant to the order, and the priority it confers. The order did not affect the basic provisions of the WFO which permit money to be spent on legal and living expenses.

99. The Set Aside Application is obviously the subject of an outstanding appeal to the Supreme Court. It is also fair to say that the validity of the charge has been clearly in issue since the date it was granted (and indeed before that, to the extent that the Trustee made her challenge to it clear at an earlier date). Until the appeal is determined it would not be appropriate for any order that I make to confer a level of priority on Mishcon de Reya that it would not have had absent the charge and which is not, like the charge, exposed to being set aside.

100. However, if Mr Bedzhamov is right that CGL is a third-party entity and the charge in CGL's favour is valid, then the Trustee could not legitimately complain about CGL's agreement to confer priority on Mishcon de Reya, insofar as it harms only CGL. In that scenario, if CGL's actions mean that sufficient funds are available from a sale of the Property to pay amounts permitted to be paid under the WFO, and the court in its discretion is prepared to permit those funds to be paid despite an arguable proprietary claim, then the Trustee has no proper cause for complaint.

101. If in contrast CGL is beneficially owned by Mr Bedzhamov, or the charge in its favour is invalid, then the effect of the arrangement is that in reality Mr Bedzhamov himself has conferred priority on Mishcon de Reya. Whilst, again, it would not be appropriate for any order that I make to confer a level of priority on Mishcon de Reya that is not, like the existing charge in its favour, liable to be set aside, if sufficient funds are available from a sale of the Property to pay amounts permitted to be paid under the WFO, and the court in its discretion is prepared to permit those funds to be paid despite an arguable proprietary claim, then again the Trustee has no proper cause for complaint.

102. Put another way, the priority conferred by the Mishcon de Reya charge is only relevant to the extent that it actually makes a difference to the amount of funds it receives, or that it receives without risk of clawback in the event that the Trustee succeeds in setting aside the charge in its favour.

103. A further point to bear in mind, however, is that as at the date of the hearing the Trustee has no extant claim in respect of CGL, and has also not sought interim relief. It would not be right to proceed at this stage on the basis that she has established an arguable proprietary claim in respect of CGL.

Living expenses

104. The focus of the submissions at the hearing was legal rather than living expenses. Adopting a consistent approach, I would again draw a distinction between expenses incurred before and after the Trustee's intervention, for the reasons already given. Living expenses incurred prior to the Trustee's intervention should

therefore not be affected. Thereafter, the position should be considered in more granular detail.

105. In particular, Mr Bedzhamov should be mindful of the fact that the existence of a form of proprietary claim may affect the court's approach to the appropriate level of expenses. The principles applicable to freezing orders were explained by Males LJ in *Vneshprombank v Bedzhamov* [2019] EWCA Civ 1992 at [68]. As he said, the basis of those principles is that the freezing jurisdiction is not intended to confer security for costs but to prevent dissipation, such that a defendant is not prevented from spending his own money in a way that he was genuinely accustomed to do before the order was made. The position is different where a proprietary claim is made.

106. However, as with legal expenses the timing and procedural impact of the Proceeds Application may be relevant: see [89]-[92] above.

107. I also consider that a nuanced approach is likely to be required, the details of which will need to be worked out in due course. To take an example, allowance may need to be made for the practical difficulties that Mr Bedzhamov or his partner have in extricating themselves from rental or other commitments.

Declaration

108. The Variation Application also sought a declaration that the Trustee does not have any proprietary rights before recognition and assistance, and therefore could not assert a proprietary claim to the proceeds of sale or loan spent on reasonable legal expenses or reasonable living expenses notified in accordance with the WFO before any assistance was granted, and could not seek to claw back any proceeds paid to Mr Bedzhamov's lawyers even if the Trustee was subsequently recognised and/or her appeal to the Supreme Court succeeded.

109. I explained at the hearing that, even if I found in favour of Mr Bedzhamov, I was not inclined to exercise any power that I might have to make a declaration, and instead would to the extent appropriate address the issue in my judgment. Mr Fenwick confirmed at the hearing that there was no objection to this.

110. The relevant principles were set out in *Carl Zeiss Stiftung v Herbert Smith & Co (No. 2)* [1969] 2 Ch 276 ("*Carl Zeiss*"), where it was held that solicitors acting honestly were not to be imputed with knowledge of a proprietary interest (in that case a trust) merely because they knew of the existence of a claim to that effect against their client, being a claim which was disputed, and therefore that the solicitors were not accountable for monies received. As Danckwerts LJ held at p.290:

> "… 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".

More pithily, he said at p.293 that:

> "… claims are not the same thing as facts".

111. *Carl Zeiss* was considered in some detail by Miles J in *AA v BB* [2021] EWHC 1833 (Ch), who concluded at [31] that it continues to represent the law. He drew a distinction at [34] between notice of claims and notice of facts, and said that a solicitor will be protected from liability "unless he knows that the claimant's proprietary claim is well-founded".

112. In *AA v BB*, Miles J had to consider an application for an order that the claimants were not entitled to pursue legal action against the first defendant's lawyers in respect of fees paid to them from funds over which a proprietary interest was claimed. He refused the application. In doing so he considered the earlier decision in *United Mizrahi Bank v Doherty* [1998] 1 WLR 435. Miles J commented at [63] that the relief being sought would be in the nature of a permanent injunction, going beyond holding the ring and extinguishing the claimants' substantive rights, and at [65] that he had no evidence about the state of mind of the solicitors. At [67] he distinguished the balancing exercise involved in permitting the payment of legal expenses, in circumstances where the court does not know who will end up owning the assets, and making a determination which would prevent the claimants asserting a cause of action, whatever the circumstances. I respectfully agree.

113. In his oral submissions Mr Fenwick clarified, and substantially narrowed, what was being sought. The particular concern that he wished to address related to comments on behalf of the Trustee which had been read as an assertion that, *simply by reference to knowledge of the Trustee's claims*, Mr Bedzhamov's lawyers currently have a level of knowledge that would make them liable for knowing receipt if they received payment for fees and the Trustee's claims to have a proprietary interest ultimately succeed. He did not seek relief of the kind that Miles J had refused to grant in *AA v BB*.

114. Although Mr Davies sought to disagree, the concern raised by Mr Fenwick has a foundation not only in the *inter partes* correspondence but in the Trustee's skeleton argument for this hearing, which submitted that should the Supreme Court or this court find in due course that the Trustee has the requisite interest in the Property or its proceeds, then it was "obvious" that the legal team had "all the requisite knowledge to make [it] liable to disgorge".

115. I agree that this submission does not accurately represent the law. The Trustee's claims to have any form of proprietary interest are clearly the subject of dispute. That dispute extends to (a) whether the Trustee should be recognised in this jurisdiction at all; (b) whether any form of assistance can be provided in respect of the Property; (c) if so, whether such assistance should be provided in the court's discretion, and the form of any such assistance; and (d) whether the Trustee has any interest in the proceeds of sale of the Property. The knowledge that Mr Bedzhamov's legal team have of the existence and nature of the Trustee's disputed claims, to the extent that knowledge is based on the Trustee's own stated position and assertions, cannot by itself amount to more than knowledge of a claim.

116. The position is likely to be different if Mr Bedzhamov's legal advisers were in the possession of, or obtain, additional information which enabled them to

determine that the Trustee's claims were well-founded. As in *AA v BB*, the court is in no position to determine that issue now.

Conclusions

117. In conclusion:

a) In principle, and subject to it being satisfied about the detailed terms of the transaction and the identity of the participants, the court would be prepared to entertain and approve a transaction with a third-party lender and developer along the lines of the Proposal.

b) The better approach at this stage, having regard in particular to the extant Proceeds Application, is to proceed on the basis that the Trustee would have an arguable proprietary claim to the proceeds of sale of the Property.

c) Subject to further evidence confirming the non-availability of other resources, reasonable sums in respect of legal advice and representation, and in respect of living expenses to the extent permitted by the WFO, may be spent from the proceeds of sale, insofar as they were incurred in the period up to the Trustee's intervention or relate to the legal expenses of the remittal. In other respects a more granular approach should be adopted.