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

No. CL-2021-000412

[2023] EWHC 3350 (Comm)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Wednesday, 15 November 2023

Before:

MRS JUSTICE DIAS

B E T W E E N :

INVEST BANK PSC — Claimant

- and -

(1) AHMAD MOHAMMAD EL-HUSSEINI
(2) MOHAMMED AHMAD EL-HUSSEINY
(3) ALEXANDER AHMAD EL-HUSSEINY
(4) ZIAD AHMAD EL-HUSSEINY
(5) RAMZY AHMAD EL-HUSSEINY
(6) JOAN EVA HENRY
(7) VIRTUE TRUSTEES (SWITZERLAND) A.G.
(8) GLOBAL GREEN DEVELOPMENT LIMITED — Defendants

MR T PENNY KC (instructed by PCB Byrne LLP) appeared on behalf of the Claimant.

MR N VENKATESAN and MS C FRASER (instructed by Debenhams Ottaway LLP) appeared on behalf of the Sixth Defendant.

J U D G M E N T

(via Microsoft Teams)

MRS JUSTICE DIAS:

1 This is an application by the Claimant bank against the Sixth Defendant, to whom I shall refer as "Joan".

2 In the interests of time, I do not propose to go into the details of the underlying action which are well-known to both parties. Suffice it to say that the bank applied for a freezing order against Joan on the grounds that she was the recipient of assets directly or indirectly derived from assets transferred by her former husband in fraud of his creditors. The bank seeks to reverse those transactions and, to that end, commenced proceedings in 2021 against the husband (the First Defendant), four of their sons (the Second to Fifth Defendants) and his former wife (the Sixth Defendant) under section 423 of the Insolvency Act 1986. Default judgment has been obtained against the First Defendant but the action remains live against the other defendants and a trial is due to take place next summer. The only relief sought is under section 423; no allegations of wrongdoing are made against Joan.

3 Meanwhile, the bank applied to freeze the assets in question (or their proceeds) pending trial. However, no determination was ever made on the freezing order application because Joan offered undertakings which were accepted by the ban and the court not to dissipate stipulated alleged proceeds. This is important, because it means that, unlike in the usual freezing order case, the court has not made any determination that there is a good arguable case against Joan. Nor has it determined that there is any real risk of dissipation.

4 The undertakings offered by Joan were incorporated in the court's order. The order also included the standard provision whereby Joan was not prohibited from spending £2000 per week towards her living expenses and also a reasonable sum on legal advice and representation out of the frozen funds *"but only where she has no other means to pay for the same"*.

5 Joan initially met her expenses from unfrozen funds but in October last year she gave notice that she had exhausted here available non-frozen funds and would start drawing on frozen funds. The bank objected on the grounds that she had funds available in Lebanon, alternatively that she could obtain funds from her sons. Lebanon is, of course, in the grip of a well-publicised economic and banking collapse, as a result of which Joan claimed that she could not get her money out of the country. In those circumstances, she applied to the court for a declaration that she had no other means available and could therefore drawn down on the frozen funds. She also served evidence to the effect that her sons were unable and unwilling to fund her living expenses or her legal fees.

6 This application was due to be heard on 31 January 2023 before Mr Ali Malek KC. In its skeleton argument for the hearing, the bank argued as a primary case that the court should not make a declaration in the nature of a final finding of fact where there had been no disclosure or cross-examination and where the extent of Joan's means was entirely within her own knowledge and not that of the bank. It argued that it was for Joan to take a view whether she was entitled to draw on the frozen funds or not and to assume the risk of contempt proceedings if she got it wrong. In other words, it was unnecessary to make the declaration and would be unjust to do so because it would prevent the bank from arguing thereafter that Joan did in fact have access to other funds.

7 In the light of this *volte face* by the bank, Joan abandoned her application (save in one respect which is not material).

8 The bank's position was accepted by Mr Malek KC who agreed that it would be inappropriate to make any final determination and that it was for Joan to form her own view. He stated that *"It would also be wrong to grant declaratory relief in interlocutory proceedings which purport to be final and binding on the parties, particularly as all the facts are within the knowledge of [Joan]."* Mr Malek pointed out that the undertakings did not require Joan to seek the bank's permission to draw on the frozen funds. It was for her to determine whether she could and to take the risk of a possible contempt application. He referred to the decision of Males J (as he then was) in *Tidewater* and said that if she went ahead, it would then be for the bank to decide whether it wished to stop her and to bring the matter to the attention of the court at that stage.

9 In these circumstances, it was unnecessary to consider the bank's alternative case that Joan's evidence did not in any event establish that she had no other means to pay. The bank argued that she had a right to require the Lebanese banks to make an international transfer which she could enforce by action. Furthermore, it submitted that the evidence that her sons would not support her if necessary was implausible and should be treated with caution.

10 Ten months is clearly a long time in the Commercial Court. Notwithstanding its submissions to Mr Malek KC, the bank has come full circle and now applies for effectively a mirror-image determination of its own, namely that Joan does have access to other funds from one of two sources: either her funds in Lebanon or funds from her sons, in particular the Second Defendant.

11 In these circumstances, it has applied for an order which (so far as presently relevant):

> (a) effectively determines (albeit by way of recital) that Joan has failed to satisfy the court that she has no other means;
>
> (b) prohibits access to the frozen funds without a prior court determination that she has no other means, such determination being made after a full-blown application on notice;
>
> (c) incorporates an obligation to replenish any frozen funds used for legal fees from non-frozen funds by 5 December 2023 (which presumably applies both to frozen funds used to date and in the future).

12 It is immediately apparent that there are certain difficulties about proceeding in this manner. First, the undertakings given by Joan do not in terms require any determination that she does not have other means before she can draw on the frozen funds. On the face of it, that is a matter for her. If she gets it wrong, the sanction is by way of contempt proceedings with all the safeguards that a contempt application entails regarding service, criminal standard of proof etc. By contrast, in asking for a determination now, the bank would be able to circumvent the contempt jurisdiction and effectively obtain a finding of breach by the back door.

13 Second, the utility of any such determination would also have to be questioned, given that the factual position could change from day to day. It is therefore unclear how this would work in practice. There are obvious objections to the court being required to devote precious time and resources to making determinations as to the availability of means every time Joan wants to buy new shoes or pay her legal bills.

14 Faced with these and other objections advanced in Mr Venkatesan's skeleton argument, the bank's position underwent some modification, with the result that in opening the case Mr

Penny KC for the bank made clear that he was not seeking an expanded freezing order or to vary any undertaking. He argued that he was simply asking the court to exercise its jurisdiction to make ancillary orders and grant declaratory relief by carrying out a factual analysis of the current situation and determining that the justice of the case required that Joan should not, in today's circumstances, be regarded as having no other means to pay. He also offered an undertaking not to bring committal proceedings as regards the use of frozen funds to date. He accepted that the burden of proof was on the bank as applicant, but argued that Joan nonetheless bore an evidential burden, which he submitted had not been discharged.

15 Of course, even this slightly modified position did not really meet the point that the court would not willingly assume the burden of having to make fresh determinations every time Joan sought to use funds.

16 On behalf of Joan, Mr Venkatesan raised a number of objections to the application, both in its original and modified form. As it seems to me, these give rise to the following issues. First is what I call the "halfway house" point. At the forefront of Mr Venkatesan's case was a submission that the bank is not entitled to ask for the determination that it seeks because that would effectively circumvent the law on contempt and, furthermore, would be an abuse of process in breach of the *Chanel* principle.

17 As to contempt, he submitted that Joan either does have other means to pay, or she does not. That is a binary question. A finding that she does have other means to pay necessarily, on these facts, entails that she has been in breach of the undertaking since at least February 2023 and this would be a step along the road to a finding of contempt. However, he submitted, such a finding would be being made in circumstances where Joan did not have any of the usual protections applicable to proceedings for contempt, such as the criminal standard of proof and the fact that the court should not make any finding as to an essential element of contempt based on inference, unless that inference was so compelling that no reasonable person could fail to draw it (see *Navigator Equities Ltd v Deripaska* [2023] EWHC 788 (Comm), referring to *dicta* of Christopher Clarke J (as he then was) in *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1024 (Comm)).

18 Mr Venkatesan also relied on the case of *Bank St Petersburg v Arkhangelsky* [2014] EWHC 574 (Ch), where the defendant had drawn down on frozen funds and the claimant had alleged that it was in breach of the order, but had not applied to commit for contempt. Instead, it had sought a declaration that the defendant was in breach and asked for a further order restraining it from using those funds pending disclosure as to alternative funds which it suspected were available. Hildyard J accepted that he had jurisdiction to grant declaratory relief against another party, but was concerned at the possible injustice to the defendant if he made a declaration which could then be treated as if it were a finding of contempt. In particular, he disparaged the suggestion that *"a claim should proceed by incremental steps towards a committal application which they have disavowed"*, that being what he termed a game of "grandmother's footsteps". He pointed out that it was always open to the claimant in that case to establish contempt and seek committal.

19 Mr Venkatesan says that exactly the same situation pertains here. The fact that the bank has undertaken not to apply in respect of past contempt is irrelevant. The effect of the order would still be that Joan was historically in contempt and that, in itself, was prejudicial.

20 In relation to abuse, Mr Venkatesan's essential point was that nothing had changed since the application before Mr Malek KC. The bank could have sought a finding in January that funds were available on either of the grounds it put forward, but it had not. Nothing had

materially altered since then in terms of evidence. The bank was making exactly the same points as to the alleged inadequacy of Joan's evidence now as it had raised back in January. Therefore, he said, on the grounds of the principle in *Chanel*, the court should not entertain the application.

21 In response to these points, Mr Penny made the following submissions. He said the bank was not seeking to bypass the law of contempt. He said a determination based on the civil standard of proof could not possibly prejudice Joan in relation to any potential contempt proceedings, particularly if it was incorporated only in a recital as proposed. He further said that there was no abuse. All that the bank wanted to do was to clarify what exactly was meant by the undertaking. This, he submitted, was squarely within the court's ancillary jurisdiction and it was unattractive to argue that the bank had not been entitled to bring the matter back to court when this was precisely what Mr Malek KC had contemplated should happen. Inevitably things change, he said, and it cannot have been intended that the bank should be precluded from returning to seek clarity.

22 On this point, I am quite clear that it would not be appropriate for me to make any determination one way or the other as to whether Joan does or does not presently have other means to pay, still less any determination which purports to be final. I say that for the following reasons. First, it seems to me that I am in precisely the same position as Mr Malek KC was in January. The evidence before me is substantially identical to the evidence that was before him. There has been no disclosure and no cross-examinations. For the reasons he gave, it would be wholly inappropriate in these circumstances to attempt to make any finding.

23 Secondly, this would be exactly the sort of halfway house deprecated by Hildyard J in the *St Petersburg* case, which is capable of causing prejudice to Joan. Even if I only made a determination on a civil standard of proof, I would effectively be making a finding on untested evidence in circumstances where the primary sanction for breach of a voluntary undertaking is an application to commit with all the concomitant safeguards that that entails. In my judgment, it would be wrong in principle to do that without giving both sides an opportunity to test the evidence by cross-examination in the light of disclosure.

24 Thirdly, in any event, such a determination would be of no practical utility whatsoever. The bank has said that it would undertake not to apply to commit for past contempt, but in that case, what is the purpose of the proposed determination? Any determination I made could only apply to the situation as it exists today. That might change tomorrow or next week. It might change back again thereafter. The prospect of precious Commercial Court time and resources being taken up with serial applications to determine the position every time Joan wished to spend money is not one which can be countenanced consistently with the overriding objective of allocating court resources fairly and dealing with cases at proportionate cost; a view I note was also articulated by David Richards J in *HMRC v Begum* [2010] EWHC 2186 (Ch).

25 Furthermore, this was an undertaking freely offered by Joan and freely accepted by the bank *in the terms in which it was given*, which do not require any prior determination as to availability of other means. The bank clearly had concerns about the adequacy of Joan's evidence regarding the non-availability of other funds and could have refused the undertaking unless it were phrased in different terms. If it had been unable to get the wording it wanted, it could, if necessary, have renewed its original application for freezing order relief and asked the court to impose such qualifications on the spending exception as it thought appropriate. It did not do so, and it seems to me that both parties now have to live with the consequences of that, whatever they may be. On Joan's side, she has to take the

risk that if she draws down on frozen funds, she may hereafter find herself being committed for contempt. On the bank's side, it must decide for itself whether it feels that any drawdown was unjustified. If it believes it was, then it must put its money where its mouth is and either apply to commit her for contempt or bring some other freestanding application.

26 I note that Mr Malek KC, relying on *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm), contemplated that the claimant could come back to court if it was unhappy about what the defendant was doing. Both he and Males J in *Tidewater* were somewhat vague about the appropriate procedural vehicle for doing this, but given that this is a voluntary undertaking, which it is common ground the court has no power to vary, it seems to me that that would have to be either by way of application to commit or by way of freestanding application for freezing order relief or some other form of prohibitory injunction to prevent draw down.

27 These, therefore, are the reasons why I decline to make any such determination. Nor am I prepared to make any order in the terms of paragraphs 2 and 3 of the draft order. It seems to me that this would be wholly inappropriate on a practical level for the reasons I have already given. Furthermore, in circumstances where permission is not required on the present terms of the undertaking and the court has no power to vary that undertaking, it could not conceivably be right, even in principle, to make such an order in the absence of a freestanding application for freezing order relief which the bank has expressly eschewed. The ancillary jurisdiction of the court exists for the purpose of giving effect to the existing order. Imposing a positive requirement to obtain permission where none is presently required would be going far, far beyond that. I reiterate that the bank accepted the undertaking in the terms in which it was given. If it has now decided that it no longer likes the wording of the undertaking, it must bring its own application which allows the court to replace it with something different.

28 It seems to me there is real force in Mr Venkatesan's submission that imposing a requirement on the basis of an alleged contempt, but without a finding of contempt, would, in the words of Hildyard J in *St Petersburg*, be *"to respond as if a contempt had been established, without proving it to the standard required"*.

29 So much for the halfway house argument. I now come on to the question of construction. While I am not prepared to make any determination now, or to make any order which requires the court to make periodical determinations in the future, I do consider that it is within the court's power to clarify the terms of the undertaking as a matter of construction, this being part and parcel of its ancillary jurisdiction to make its orders effective. The question therefore is what, if any, clarification should be made.

30 As to this, Mr Venkatesan submitted that "means to pay" only means assets which are capable of being used to pay legal fees or living expenses and that this does not include assets which Joan can only obtain by bringing legal proceedings or which depend on the goodwill of third parties. Funds which cannot be readily accessed, he submitted, cannot be regarded as available means to pay. He reminded me that a principle of strict construction applies to undertakings and freezing orders. This is because where the sanction is contempt, it must be absolutely clear what the defendant is or is not permitted to do. He referred in this context to the judgment of Lord Clarke in *JSC BTA Bank v Ablyazov (No 10)* [2015] 1 WLR 4754.

31 However, I do not consider that the principle of strict construction (which I accept) would be infringed by a clarification that "other means to pay" means other means which it is reasonable to expect Joan to use. That, it seems to me, works to the benefit of both parties.

It clarifies that even if Joan has means, but it is unreasonable to expect her to use them, such as might be the case as regards the funds in Lebanon, then she will not be in breach of the order. On the other hand, it is an objective test, so it is not for Joan alone to decide whether she has other means at her disposal. If she does and it is objectively reasonable to expect her to use them, then she must do so.

32 Having said that, this brings to the fore a further question, which was touched on by Mr Venkatesan in his skeleton and oral submissions, but was not really debated in detail and upon which I have been reflecting overnight. That is whether, even if I were to accept that there was a likelihood that Joan's living expenses and legal fees would be paid by her sons, those are other means *of Joan's* within the meaning of the undertaking.

33 Mr Penny submitted that I should construe the undertaking by reference to the freezing order jurisprudence and along the lines taken in security for costs cases. In other words, he submitted it was incumbent on Joan to discharge at least the evidential burden of showing that she had no access to funds from friends and family. He referred to a number of cases which, on their face, appear to accept that the defendant has a burden of showing that it does not have access to funds, whether of its own or from third parties.

34 On the other hand, Mr Venkatesan argued that there was a real distinction between this type of case, and security for costs cases, where a claimant was alleging that his claim would be stifled if he had to provide security. In the security for costs cases, the court was saying that it would not accept a stifling argument as a reason to exercise its discretion in favour of the claimant unless the claimant could provide credible evidence that no funds were available from other sources.

35 By contrast, the question here is whether Joan has other means, not whether she might be able to persuade someone else to make his means available to her. That seems to me to be a very real and powerful point of distinction. Insofar as Joan might seek to assert that depriving her of access to the frozen funds would prevent her from mounting an effective defence, the likelihood of her sons coming to her aid would, of course, be a very relevant consideration, but that is conceptually an entirely different question from the question whether she herself has other means to pay.

36 I remind myself that the purpose of this order is not to provide the bank with security. Still less is it the purpose of the order to provide security to the bank at the expense of third parties, all the more so where there has been no adjudication by the court on the question of either good arguable case or risk of dissipation.

37 Applying the principle of strict construction, the undertaking, as currently worded, which it is common ground I have no power to vary, is focused solely on whether Joan herself has other means to pay. My instinctive reaction is that it would be going too far to construe the order as requiring her to raid the piggy banks of her friends and relations in order to avoid drawing down on funds which are admittedly hers.

38 Although he did not deploy his arguments for quite this purpose, I surmise that Mr Penny's answer to this would be to point to the cases on freezing orders and the emphasis they place on looking at the overall justice to the case. Would it be just, he asked rhetorically, to allow Joan to access frozen funds in circumstances where her sons could be expected to cover her legal fees and expenses? He referred to the following cases:

39 *The Coral Rose* (*Atlas Maritime CO SA v Avalon Maritime LTD (No.3) [1991] 1 WLR 917*) concerned an application by a defendant to vary a freezing order to allow it to meet legal

costs. It was held by the Court of Appeal that the corporate veil could be lifted to have regard to the fact that the defendant was effectively funded by its parent and had no bank account or funds of its own. Since the parent had chosen to leave the defendant with no money apart from the frozen funds and in the absence of any evidence that it would not continue to fund the defendant's defence, the court held it would not be just and equitable to release the frozen funds.

40 *Sundt, Wrigley & Co. v Wrigley* (Court of Appeal, unreported, 23 June 1993) involved a proprietary injunction where the usual form of freezing order had been varied to prevent the defendant altogether from drawing down on frozen funds, although it had been given a liberty to apply if it had evidence that it could not pay its legal costs without doing so. The court restated the ordinary rule in freezing order cases that the defendant should have access to frozen funds to finance its defence *"subject to demonstrating that he has no other assets with which to fund the litigation"* and it distinguished that situation from the proprietary injunction case before it where the claimant was asserting that the money was really his. In the latter case, the question was whether the risk of injustice to the defendant was so great as to justify recourse to frozen funds which might eventually be shown to be the claimant's.

41 *Sundt v Wrigley* was cited in *Halifax v Chandler* [2001] EWCA Civ 1750, another case where the defendant applied for permission to mortgage a frozen asset and use the loan proceeds to pay legal expenses. Clarke LJ (as he then was) referred at paragraph 17 to *Sundt v Wrigley* as authority for the proposition that in the ordinary freezing order case a defendant must show that he has no other assets which he can use before he will be allowed to use frozen assets. He went on to quote with approval a passage from **Gee on Commercial Injunctions**, to the effect that what is important is restraining the defendant from improper dissipation and that a freezing order should not be used to prevent a defendant dealing with his assets in the ordinary course of business.

42 *Serious Fraud Office v X* [2005] EWCA Civ 1564 was another judgment of Sir Antony Clarke MR. He held that, in the context of an application by a defendant to vary an injunction, it may be appropriate to consider whether there were reasonable grounds for thinking that – if the variation were refused – the defendant might have recourse to other funds, even if he had no legal right to them. In this respect, it would be in principle for the defendant to satisfy the court that it would be just to permit access to the frozen funds and the court would not be bound to vary the order if it thought there was every prospect that he could call on other assets, including those which might be provided by third parties.

43 Finally *Tidewater*, which was really the high-water mark of Mr Penny's submissions on this point. *Tidewater* concerned a similar form of order to the undertaking here, where the defendant sought an order enabling him to use frozen funds to fund his defence. The claimant objected on the basis that the defendant had not shown to the necessary standard that there were no other sources of available funds. Males J started from the proposition that the freezing order had been made and that the court had already, therefore, concluded that justice required the defendant's freedom to dispose of his own assets be curtailed. I pause to note that the same starting point is not necessarily appropriate where the court has made no adjudication on the freezing order application at all and has merely endorsed a consent order containing voluntary undertakings.

44 The judge then pointed out that the purpose of a freezing order was not to provide security, but only to prevent unjustifiable dissipation of assets and that a defendant was entitled in principle to defend itself and to use the frozen funds to do so. However, he went on to say that this was only the ordinary rule which could be outweighed in an appropriate case by other considerations. Furthermore, in order to be permitted to use the frozen funds the

defendant must demonstrate that he has no other assets with which to fund the litigation. The judge relied for this latter proposition on what Clarke LJ had said in *Halifax v Chandler*, in reliance on *Sundt*. The burden of proving that there were no other available assets which he could use rested on the defendant, because it was the defendant who knew the facts and also because the court had already concluded that there was a risk of dissipation. I pause again to say that, of course, no risk of dissipation has been established by any court in this case as yet.

45 Males J further cited *SFO v X* (above) in support of the proposition that on an application to vary a freezing order it is relevant to consider not only the defendant's own assets, but whether there are others who may be willing to assist the defendant, and that this may require the defendant to adduce credible evidence about his other assets before the court will permit him to draw down on the frozen funds. At paragraph 44, he expressed himself to be sanguine at the prospect that the court might reach the wrong conclusion on the limited material available at an interlocutory stage. He said this was inherent in all interlocutory applications which were necessarily dealing with risks and prospects rather than certainties.

46 He articulated the underlying principle as being one of the overall justice of the case. He pointed out that the availability of other assets was one aspect of that assessment, but not the only one, and that while justice would usually require the defendant's assets to be available for his defence, in exceptional circumstances it might be appropriate to deny him access to frozen funds.

47 In response, Mr Venkatesan referred to *Koza Ltd v Akcil* [2020] 2 CLC 1, where Floyd LJ stated in terms that he did not consider what Clarke LJ had said in *Halifax* to mean that whenever there was an exception for payment of legal expenses it was necessary for the defendant to show in the case of each payment that there were no other assets to which he could have recourse. Floyd LJ recognised that where a court was exercising a discretion to vary an undertaking, it might be reluctant to allow access to frozen funds where this was unnecessary, but said he was reluctant to lay down any rigid rule. Alternative funding might or might not be relevant, but in the case before him it was reasonable and proper for Koza to have decided to fund the litigation itself, rather than calling on outside sources of funding.

48 Mr Venkatesan also referred me to three Court of Appeal decisions in *Mussells v Thompson* (1985) 135 NLJ 1012, *Kea v Parrot* (Court of Appeal, unreported, 24 September 1986) and *Southern Cross Commodities Pty Ltd v Martin* (Court of Appeal, unreported, 11 February 1986). These were all fairly early on in the development of the freezing order jurisdiction and the Court of Appeal expressed the clear view that the availability of non-frozen funds was not a threshold precondition for being allowed access to frozen funds, but was simply a factor going to the question of whether any dissipation was unjustifiable or not.

49 He further drew my attention to the decision of Neuberger J (as he then was) in *Kermanshahchi*. Again, this was an application by a defendant to vary a freezing order to permit the sale of property so that he could access funds. The claimant resisted on the grounds that unfrozen funds were available. Neuberger J considered all the authorities and concluded that it was inappropriate to lay down any general rule. In his view, the freezing order jurisdiction should be flexible and exercised on the facts of each case. He emphasised that a claimant was entitled to protection because the court had already concluded that it had reasonable prospects of success and that there was a real risk of dissipation, neither of which has, of course, happened here. He concluded that if the defendant applied to use a particular asset it was for the claimant to show that there was another asset which could and should be used and not for the defendant to prove the negative.

50 Mr Venkatesan submitted that *Tidewater* is difficult to reconcile with these cases and should be treated with caution in circumstances where neither *Kea* nor *Southern Cross* nor *Kermanshahchi* had apparently been cited to Males J. He also pointed out that Males J had relied upon *SFO v X* for a reading which was subsequently held by the Court of Appeal in *Serious Organised Crime Agency v Azam* [2013] 1 WLR 3800 to be incorrect. In *Azam*, Lloyd LJ had approved the judgment of Mitting J in *The Queen on the Application of the Director of the Assets Recovery Agency v Gale* [2008] EWHC 1320 (Admin) to the effect that the obligation on the defendant to satisfy the court that it was just and fair to permit the use of frozen funds did not mean that he was obliged to show that he did not have any unfrozen funds. He went on to make the obvious point that if the court was satisfied that there were other available assets then clearly it would not permit access to frozen funds. However, that was simply one factor in the balance.

51 Where does this leave us? It seems to me that there are two points to be made. First, I agree that there is some apparent conflict in the authorities as to the nature of the onus which the defendant bears as regards the availability of other sources of funding. Is it a legal burden or an evidential burden? The general rule would be that he who asserts must prove. Thus, if an application were brought by a defendant on the basis that he did not have access to other assets, that is an assertion he would have to make good. On the other hand, if the application were brought by a claimant to tighten an existing injunction or obtain other relief on the basis that the defendant did have access to other funds, then he would bear the burden.

52 In fact, it is unnecessary to grapple with this point in the present case for two reasons. First, Mr Penny accepted that the bank bore the ultimate burden of proof, but secondly and in any event, since I am not making any determination as to Joan's other means of payment the point does not arise.

53 Furthermore, the second headline point that I derive from these cases is that none of them squarely addresses the question of whether a defendant has other means simply because there is a prospect that third party funds may be made available to it. It seems to me that the cases cited to me are all addressing a different point. First, they all start from the premise that the court has already decided that there is a good arguable case against the defendant and a real risk of dissipation. As I have already said, neither applies in this situation. More importantly, however, what a freezing order is seeking to do, is to restrain unjustifiable dissipation. What is unjustifiable may or may not depend on whether the defendant has access to other funds from, for example, a parent company, friends, family or other third parties. Many of the cases concerned applications by the defendant to vary the order. In that situation, the court is being asked to exercise a discretion and it is entitled to say that it will not make a variation unless it is satisfied that the overall justice of the case requires it. One factor in its assessment will be whether the defendant has ready access to other funds, whether unfrozen funds of its own or funds from third parties.

54 *A fortiori* this will be a relevant consideration if one of the reasons why a defendant says it would be just to make a variation is that its defence will be otherwise stifled. To that limited extent, the situation is analogous to security for costs cases and I accept that in those circumstances there will be at least an evidential burden on the defendant to show that it does not have such access.

55 However, none of this seems to me to have any bearing on whether money belonging to Joan's sons can be regarded as Joan's own means within the wording of her undertaking. On the contrary, all the decisions seem to me to be premised on an acceptance that the defendant itself did not have the funds, but that because it could procure them from

elsewhere nonetheless the overall justice of the case did not require access to the frozen funds on the particular facts that arose.

56 Were it necessary to decide the point, I would be inclined to say that Joan does not have other means to pay where the other means in question are in fact the assets of a third party. However, it is not necessary to decide this today, particularly on an interlocutory application where the point has not been fully argued on this basis and where, moreover, I am not making any determination as to whether she does or does not have other means.

57 Is it nonetheless a question on which I should provide further clarification as a matter of construction of the undertaking? I do not consider that it is. I would want to hear further argument on the point, and I anticipate that there would be much to be said on both sides. Again, therefore, I consider that this a matter best left until it becomes live.

58 Accordingly, I do not propose to go any further by way of clarification than to add at the end of the first sentence in undertaking (2) words along the lines of *"which it is reasonable to expect her to use"* or something to that effect, which I understand to be relatively uncontroversial. The question of whether "means to pay" extends to the funds of third parties will have to await a later date.

59 Given that I am not making any determination, it is unnecessary for me to go into the factual basis of the application. Suffice it to say that on the basis of the unchallenged evidence of Professor Slim, I would have required considerable persuasion before concluding that it was reasonable to expect Joan to undertake litigation at unknown cost or timescale against banks in Lebanon with a wholly uncertain outcome as regards prospects of enforcement in order to obtain funding for a trial which is due to start in a mere seven or eight months' time.

60 As regards the likelihood of her being funded by her sons, and Mo in particular, I should also say that I saw considerable force in Mr Penny's criticisms of the evidence adduced on behalf of Joan to date, which is generalised and wholly unspecific. In particular, insofar as it is said that her sons are unwilling to fund her relatively modest legal fees, it is unclear whether that means they will not do so in any circumstances, even if she is denied access to the frozen funds, or only that they will not do so unless she is denied access to the frozen funds, or even that they would prefer not to do so, but will do so if necessary. Given that Mo now uses the same solicitors as Joan and is sharing their costs, it seems inherently unlikely that he would not be prepared to cover her legal costs if necessary. In the light of their commonality of interest, it is not likely to cost very much less to run Mo's defence alone as to run both together. The trial costs in particular will be almost the same. If Mo wants to continue with his defence, he cannot simply pay half a counsel's brief fee, for example. He will have to pay the entire brief fee, whether or not counsel makes submissions on his behalf alone or on behalf of both of them. In those circumstances, I confess to being somewhat sceptical about the assertion that her sons are unwilling to fund her in all circumstances.

61 Insofar as the allegation is that they are unable to fund her, this appears at the moment to be a matter of pure assertion, unsupported by any tangible evidence. I find it difficult to believe that Joan's sons would be prepared to leave her destitute and the possibility of them being able to provide at least limited funding is one that would need to be explored.

62 I did consider whether I could or should incorporate a recital in an order which reflected this scepticism without going so far as to make any finding one way or the other; in other words, to fire a warning shot that more specificity might well be needed in relation to the availability of funds should any future application be brought for freezing order relief or

committal. I do not agree with Mr Venkatesan that this would necessarily entail rejection of sworn evidence. However, on reflection and bearing in mind that there is at least some evidence as to the unwillingness and inability of her sons to fund her, which has not so far been tested, I take the view that, if I am not making a determination, the less said on paper the better.

63 Joan will have the benefit of this judgment and will no doubt take heed of the fact that if this matter comes back before the court, it can be expected that the bank will want to test her evidence thoroughly by cross-examination if necessary.

64 Two final points. First, Joan has offered an undertaking to replenish any monies drawn down from the frozen funds from her Lebanese funds as and when available. I understand that she is still willing to give that undertaking and, in my view, that should be incorporated in any order. Secondly, Joan has her own application for a variation, which I do not understand to be contentious.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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