Neutral Citation Number: [2021] EWCA Civ 1017

Case No: A3/2020/1580

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)
Mr Justice Meade
B1/2020/001343

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2021

Before:

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE SIMLER
and
LORD JUSTICE NUGEE

- -

Between:

AA & Others

Claimants/ Respondents

- and –

(1) BB
(2) CC

Defendants/ Appellants

- -
- -

Charles Béar QC and Laura John QC (instructed by **Stokoe Partnership Solicitors**) for the **First Appellant**
Tim James-Matthews (instructed by **Byrne and Partners LLP**) for the **Second Appellant**
Stephen Robins, Matthew Abraham and Andrew Shaw (instructed by **Mishcon de Reya LLP**) for the Respondents

Hearing date: 31 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 7 July 2021.

Lord Justice David Richards:

1. These are appeals against the continuation of worldwide freezing orders made on 7 September 2020 until trial or further order. The principal ground of appeal is that, because criminal restraint orders extending to all the assets of the appellants had been made under the Proceeds of Crime Act 2002 (as amended) (POCA) and remained in force, the respondents were unable to show that there was a real risk of dissipation of their assets such as to justify the making of freezing orders.

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

3. The claimants, who are the respondents to the appeal, are two companies and their respective administrators. They allege in these proceedings that substantial sums have been misappropriated, by or for the benefit of the defendants or otherwise in circumstances giving rise to liability on the part of the defendants.

4. Freezing orders were made against five defendants, of whom four are alleged to have been directors or *de facto* directors of one or other of the claimant companies. The appeal is brought by two of those defendants.

5. Before the freezing orders were made, criminal restraint orders (CROs) had been made, on the application of the Serious Fraud Office (the SFO), against the appellants, restraining them from disposing of any of their assets, wherever situated, save in accordance with the terms of the orders. Those orders have since continued in force.

6. On 20 August 2020, the claimants applied, without notice to the defendants or to the SFO, for worldwide freezing orders against the five defendants to whom I have referred. The application was supported by a very substantial witness statement of over 230 pages and several bundles of exhibits running to thousands of pages, as well as the proposed claim form and particulars of claim. The application was heard on 24 August 2020 by Edwin Johnson QC, sitting as a Deputy High Court Judge in the Chancery Division. The deputy judge recorded in his *ex tempore* judgment that he had considered and taken account of all the evidence and other information provided in support of the application, as well as the written and oral submissions made on behalf of the claimants. He was satisfied that the claimants had shown a good arguable case in respect of their proposed claims based on misappropriation of funds. He was also satisfied that there was a good arguable case of a current risk of dissipation of assets by the defendants. He concluded that it was appropriate to make worldwide freezing orders. He declined to make proprietary injunctions. He accepted that there was a serious issue to be tried in respect of the intended proprietary claims but the proposed orders lacked sufficient detail of the specific assets to be frozen.

7. The claim form was issued on 27 August 2020 and notice of the application to continue the freezing orders was given to the relevant defendants, all of whom were represented at the hearing of the application on 7 September 2020 before Meade J in the Chancery Division. Given the volume of evidence in support of the application, it is not surprising that none of the defendants was in a position fully to contest the

application on its merits, in particular as to whether a good arguable case had been shown in respect of the claims made against them. They each reserved their position in this respect. As Meade J recorded in his judgment at [13]: "Pragmatically, and I am sure rightly, Mr Béar [counsel, then as now, for the first appellant] did not submit for today's purposes that there was not a reasonably arguable case, although he does not admit that there is". Nor did any of the defendants make submissions in answer to the claimants' case that the nature of their alleged dishonest acts, and the alleged disposals of assets made by them after investigations were started but before the CROs were made, gave rise to a reasonable inference that they might try to dissipate their assets, if they were not subject to a CRO or freezing order: again, see the judgment at [13].

8. While the other defendants against whom the freezing orders had been made did not resist the continuation of the orders, the appellants resisted the continuation of the orders against them on the specific ground that, in the light of the CROs against them, the claimants were unable to establish a real risk of dissipation of their assets.

9. After hearing submissions on that issue, the judge gave an *ex tempore* judgment in which he clearly and concisely gave his reasons for concluding that, notwithstanding the CROs, the claimants had shown a real risk of dissipation and for continuing the freezing orders against the appellants until trial or further order in the meantime.

10. The judge first mentioned some first instance decisions, to which I later refer, which, as he put it, "contain broad statements of principle that the existence of a CRO does not stand in the way of the grant of a worldwide freezing order or, in itself, remove the risk of dissipation of assets by a defendant who is the subject of it". After referring to Mr Béar's submissions on those cases, the judge said at [22]:

> "As a matter of theory, I can accept that it might be possible, in the right circumstances, and with careful liaison and preparation, that a CRO might be so watertight and so cogent that it removes the need for a worldwide freezing order. But the statements of principle by the judges in the cases that I have identified make clear that, for pragmatic and systemic reasons, this will be very unlikely at best."

11. After citing passages from the judgments in two of the first instance decisions, the judge continued:

> "25. So although, as I say, I accept at least, for the purposes of this judgment, that in theory there might be a CRO so arranged that there is no risk of dissipation justifying a worldwide freezing order, I think it would be a very unusual case.
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> 26. It is perhaps a tenable view of the above authorities that as a matter of principle a CRO can never stand in the way of the grant or continuance of a worldwide freezing order, but I do not find it necessary to decide that, because on the facts of this case, which I will now turn to consider, the CROs are not an adequate or complete substitute.

27. In this case, there is no provision which would ensure that if the CROs were to be discharged or varied the claimants would find out or find out in enough time to apply for a worldwide freezing order. It may be that right now, today, that is relatively unlikely, since the SFO proceedings are at a stage where they have quite a long way to run, but the issue is that neither I nor the claimants have visibility of what might happen to the SFO proceedings. This is no criticism of the SFO, but there is no reason to suppose that in the time for which the worldwide freezing order might be in force there would not be a variation of the CRO or the prosecution or investigation might cease for some reason. And there are specific reasons to consider that this could happen.

28. Two matters illustrate this. First of all, it is not in dispute, in circumstances set out in paragraph 23 of the annex to the claimants' supplemental skeleton, that [AA] applied to discharge the restraint orders. Neither [AA], nor the SFO, it is common ground, told the claimants about the application – I am not suggesting that they had to – or the appeal against the dismissal of the application. In fact the claimants found out by chance, as is related by Mr Hardman in paragraph 642 of his affidavit in support of the worldwide freezing order.

29. It is conceivable that these problems could be patched up by some sort of undertaking to keep the claimants informed of the criminal proceedings and the SFO's investigation, but that would be a piecemeal approach which I think would be vulnerable to failure. Certainly, as matters stand before me today, there is nothing remotely to suggest a rigorous regime would ensure that that would happen. The inherent difficulty in doing this, if it is ever to be possible, is one of the reasons underlying the judgments to which I have referred above.

30. The second incident which illustrates the position is that there was an issue raised at the hearing of the application for the worldwide freezing order before the deputy judge about the sale of [an asset] engineered, it is alleged, by [AA].

31. I need not go into the detail of this. As it turns out, and as the claimants now accept, the SFO, in fact, consented to the sale of the [asset]. Mr Robins suggested that they had insufficient information about the sale and, in particular, about the fact that it may have been sold, it has been suggested – and I make no finding – at an undervalue.

32. This illustrates, in my mind, that decisions taken by the SFO, no doubt in good faith, to permit dealings by the respondents in disputed assets could affect and undermine the position of the claimants, without the claimants being aware of

> them, in circumstances where a worldwide freezing order would have prevented those dealings.
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> 33. Given that the authorities I have cited identify that the SFO, for quite understandable reasons, have different interests from the civil claimants that, to my mind, is important.
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> 34. I ask myself what level of risk is represented by the current circumstances. I consider that it is very difficult to put a number on it. I cannot put a percentage on it, but, in my view, the risk is real and non-trivial; and although it may be relatively slight right now, that could change at any time without the claimants being in a position to address it, as matters stand.
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> 35. In my view, I have to consider the position now, but also during the likely lifetime of the worldwide freezing order. In my view, looking at the facts as a whole, there is an appreciable risk, such that, I think there is an adequate risk of dissipation of assets if there is no worldwide freezing order that something like that could happen."

12. The appeal is brought with permission granted by the judge. In view of the grounds of appeal, it is worth noting that the judge's reason for giving permission was that: "The opposition to the continuation of the orders was almost hopeless on the existing first-instance authorities, and failed on the facts, but the issue has not previously been considered by the Court of Appeal, and there are reasonable prospects that it might change the approach to be taken". That was a proper basis for the grant of permission, but it was confined, as was the submission made to him in support of the application for permission to appeal, to the impact of a CRO on an assessment of the risk of dissipation.

13. The appellants are separately represented and have filed their own grounds of appeal, but the grounds are not substantially different and Mr James-Matthews on behalf of the second appellant simply adopted Mr Béar's submissions for the first appellant. I will therefore focus on the latter's grounds of appeal. After stating that the appeal raises a point of principle concerning the grant of a worldwide freezing order when a CRO is already in place, the grounds also raise issues of procedural fairness.

14. In opening the appeal, Mr Béar submitted that the judge and, when granting the order at the without notice hearing, the deputy judge erred in four ways. First, they should have refused to make the order on the grounds that the existence of a prior CRO removed any real risk of dissipation of assets. Second, the deputy judge erred in not appreciating that, in light of the existence of the CRO, there was no justification for the application to be heard without notice and to do so was therefore a breach of the fundamental principle not to make an order without first hearing the defendant; and Meade J did not address this. Third, there was a failure, which was not drawn to the attention of the deputy judge, to comply with the statutory obligation under section 58 of POCA to give notice of the application to the SFO. Fourth, had notice been given to the appellants and to the SFO, errors in the presentation of the application which

were material to the alleged risk of dissipation would have been corrected and there would have been a full presentation of the claimants' case and consideration of its merits in the presence of the appellants.

15. I shall consider the first of these grounds, which may be said to raise the point of principle. Having done so, I will consider the other grounds, but I will say now that, in the circumstances of this case, I do not think that any of them has substance.

16. It is not in dispute that the court will not grant a freezing order unless satisfied that there is a real risk of dissipation of assets if the order is not granted. Mr Béar referred us to this court's decision in *Holyoake v Candy* [2017] EWCA Civ 92, [2018] Ch 297 where, in a judgment with which Jackson LJ agreed, Gloster LJ said at [34]:

> "There must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what this entails in any given case will necessarily vary according to the individual circumstances."

17. *Holyoake v Candy* was not a case involving any prior restraint. It was a case where the evidence simply did not establish any real risk that the defendants would dissipate their assets. In the present case, as mentioned above, the defendants did not dispute before the judge, and do not dispute now, that the evidence in support of the allegations made against them in the proceedings was sufficient to establish a real risk of dissipation, in the absence of the CROs.

18. The case of the appellants was, and is, limited to saying that the existence of a prior CRO was not only relevant to whether a freezing order should be granted but was also, at least generally, fatal to any submission that there was a real risk of dissipation. It was, Mr Béar submitted, a factor which in the present case should prima facie have resulted in no freezing order being made. A CRO in respect of all the assets of a person imposed the same restraints on disposal as a freezing order, thus removing any real risk of dissipation. Moreover, a second restraint or freezing order was likely to impose significant additional legal costs on the defendant, and this strengthened the case against the grant of a second order.

19. The statutory regime applicable to CROs was recently and conveniently summarised by Popplewell LJ, giving the judgment of the Court of Appeal (Criminal Division) in *R v Luckhurst* [2020] EWCA Crim 1579, [2021] 1 WLR 1807 at [18]-[26]. In short, the Crown Court may make a restraint order pursuant to sections 40-41 of POCA, prohibiting any specified person from dealing with any realisable property held by that person, where (among other circumstances) there is a criminal investigation with regard to an offence and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. The purpose of a restraint order is to preserve assets for the purposes of any confiscation order that may be made. Under section 42, a restraint order may be discharged or varied on the application of any person affected by it. In what has become known as "the legislative steer", section 69(2) provides that the power to make a restraint order "(a) must be exercised with a

view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant; (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property".

20. The appellants placed heavy weight on the decision of this court in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] Ch 33. Mr Béar has explained that the appellants did not refer Meade J to this authority, as it had not been located in time. It was a decision made against a complex procedural background, to which it is necessary to refer.

21. The SFO, at the request of the US Department of Justice, applied for and obtained a CRO over the assets of the bank and its prime mover, Allen Stanford, pursuant to the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181), which largely mirrored the relevant domestic provisions of POCA. At the time of the application on 7 April 2009, (i) in proceedings commenced by the US Securities Exchange Commission (the SEC), the US District Court had appointed receivers of the worldwide assets of the bank and Stanford and had granted freezing orders in respect of their assets; (ii) receiver-managers of the bank had been appointed by the Financial Services Regulatory Commission of Antigua and Barbuda, where the bank was incorporated and had its centre of main interests, and subsequently by the High Court of Antigua and Barbuda; (iii) freezing orders as regards the bank's assets had been made by that court; (iv) petitions to wind up the bank had been presented to that court and were due to be heard shortly, after the receiver-managers had reported to the court that the bank was insolvent, could not be reorganised through a receivership and should be wound up compulsorily; and (v) the SEC had successfully applied to the English High Court on 27 March 2009 for an interim freezing order over the assets of the bank, which on 6 April had been continued until 27 April 2009.

22. The application for a CRO was made, without notice, to HH Judge Kramer QC in the Central Criminal Court on 7 April 2009 pursuant to a letter of request from the US Department of Justice. The bank was the subject of criminal investigations by various US federal law enforcement agencies. The judge was not informed of (i) the orders made and proceedings brought in Antigua and Barbuda, (ii) the freezing order made by the English High Court (the evidence in support of the application mentioned the freezing order but stated, without foundation, that it was about to be discharged), (iii) the extensive powers granted to the receivers appointed in the US or the fact that the US court had assumed exclusive jurisdiction and taken possession of all the assets of the bank, wherever situated, (iv) correspondence between the receiver-managers appointed in Antigua and Barbuda and financial institutions holding assets of the bank, the practical effect of which was that no instructions would be accepted from the former officers of the bank.

23. Referring to these deficiencies, Sir Andrew Morritt C said at [93]: "Taken together, the matters which should have been disclosed but were not undermined the allegation made both in the letter of request and the witness statement of Mr Tehal that there was an immediate risk of dissipation of the assets of SIB such as to warrant the grant of a restraint order unlimited in point of time on an ex parte application". If full disclosure had been made, Judge Kramer could not have been criticised if he had refused to make the restraint order. The obvious course was to adjourn the application to be

heard by the judge in the High Court who was due to hear the application to continue the freezing order on 27 April 2009, with at most a restraint order for a short period before a hearing on notice to the respondents.

24. The application for the CRO came before Judge Kramer for a full hearing on notice on 29 July 2009. He ordered that it should continue in force. This court held that the non-disclosures were such as to require the CRO made on 7 April 2009 to be discharged, and the issue then was whether it should have been reimposed with effect from 29 July 2009. There had been further developments, including the discharge of the freezing order made by the English High Court and the making of a compulsory winding up order against the bank and the appointment of liquidators by the court in Antigua and Barbuda. The question of a further order had to be decided in accordance with "the legislative steer", namely "with a view to securing that there is no diminution in the value of the property". Sir Andrew Morritt said at [100]: "In my view this consideration would require the grant of a restraint order on 29 July 2009 because by then the freezing order originally obtained by the SEC had been discharged by Jack J but also to stop for the time being the risk of the diminution in the value of the deposits held with specified banks in the name of SIB in paying the costs of either the Antiguan liquidation or the US receivership."

25. Hughes LJ agreed with Sir Andrew Morritt, in large part for the same reasons. He regarded as serious and material failures of the duty of candour the failure to disclose "(i) the existence of the Antiguan proceedings, the prior appointment of receivers over SIB and the pending application to wind it up: and (ii) the correspondence between the Antiguan receivers and the banks: and they misstated or at least failed to explain: (iii) the risk of Jack J's order being discharged; and (iv) the consequential need for urgency" (para [190]).

26. In considering what Judge Kramer might have done if there had been full and accurate disclosure, Hughes LJ said at [194] that it was certainly not the ordinary case "where there is a danger of the defendant personally moving or dissipating the assets; that much was known because of the disclosed existence of the civil freezing order". The Antiguan receivers, or liquidators as they later became, might seek to discharge the civil freezing order, but they "were not absent protection; the assets were frozen by the civil injunction". As regards the US authorities: "The judge would have been likely, as it seems to me, to point out that with a civil restraint order in force, the US prosecutors did not need a separate criminal restraint order that day". At [198], Hughes LJ pointed out that there were unusual features to the case: "(i) there appears to be little risk of the alleged criminals getting their hands on the assets in question, at least unless the allegations prove to be misplaced, but (ii) there are no less than three institutional claimants all seeking to administer those assets".

27. These features identified by Hughes LJ emphasise the very unusual circumstances of the *Stanford* case. It is possible to point to sentences which suggest that the existence of the prior English freezing order was of itself sufficient to mean that there was no real risk of dissipation, such that an immediate CRO need not be made. However, those statements must be considered in the overall context of the case. It is not suggested that the existence of a prior civil or criminal restraint order is not a material fact to consider on a subsequent application for a separate restraint order, but there is nothing in *Stanford* which, in my judgment, establishes as a principle that the court

must prima facie refuse to make a civil or criminal restraint order where another restraint order is already in force.

28. Clearly the existence of a prior restraint order is a material fact, and Meade J treated it as such. Not only is it relevant to the risk of dissipation but the court must also be astute to the burdens that freezing orders place on defendants, not so much because of the fact of restraint, which is simply duplicative, but because of the costs in time and legal fees in complying with orders for disclosure and in seeking consents to any disposal. That, however, is very different from a principle that the existence of a prior restraint or freezing order will prima facie exclude a second order.

29. Meade J referred to first instance decisions which had identified the difficulties in reliance on an earlier order as a ground for refusing a subsequent order.

30. In *Faya Ltd v Butt* [2010] EWHC 3461 (Ch), the liquidator of a company alleged to have been involved in a VAT fraud applied for a freezing order against a director of another participant in the fraud, effectively on the basis of a claim in conspiracy. Four months before the application, a CRO had been made by a Crown Court judge against the defendant in respect of all his assets in connection with an unrelated fraud investigation. Mann J rejected the submission that the existence of the CRO obviated the need for a freezing order. He referred to *Cancer Research UK Ltd v Morris* [2008] EWHC 2678 (QB), in which King J, a judge with very considerable experience of criminal cases, had rejected reliance on the ability of the CPS to seek a CRO in opposition to the making of a freezing order, saying at [23]:

> "I should say that I reject Mr Lennon's overall submission of principle against the making of the entire order based on the availability to the Crown Prosecution Service of commencing criminal restraint proceedings in support of the criminal investigation. It is said that such proceedings would achieve the same end as the present application while giving the respondents the protection of legal aid to defend such proceedings not available in the present proceedings. I accept that the instigation of criminal restraint proceedings is an option open to the CPS. However I see no reason why that availability should be a bar to the claimant seeking its own relief in separate civil proceedings, notwithstanding it may have instigated the initial police interest in the conduct of the respondents. There is a fundamental difference between the two sets of contemplated proceedings. Restraint proceedings instigated by the CPS will, subject to the overall control of the court, be under the control of the CPS, a public body whose primary duty is to act in the public interest and not in any private interest. In contrast, the claimant in these civil proceedings is seeking to protect its own private interests by the making of a proprietary claim in respect of funds said to have been wrongfully obtained from them. I see no reason why in these circumstances the claimant should be denied relief in private law proceedings in proper protection of those interests which would otherwise be appropriate."

31. Mann J said at [25]:

> "All that applies in this case where there is an extant criminal restraint order. The extant criminal order in this case is not even for alleged wrongs associated with the alleged wrongs in this case; it is apparently for wrongs on a much lower scale and of a completely different nature. It is possible that that criminal restraint order will be abandoned. It is for the CPS to decide whether it wishes to maintain it. Dr Butt has not even been charged. If it were to go and there were to be nothing else in place, then the claimant would not have any protection in this case. Similarly it may be varied in due course to limit it to something like the amount of sums which are the subject of the present investigation in the criminal proceedings. In other words, the criminal restraint order is in no way geared or intended to protect the interests of the claimant liquidator in the present proceedings. He has his own rights and his own interest in getting his own order which he controls. In the circumstances, while as a matter of fact at this very moment in time there is not a risk of dissipation because of the criminal restraint order, that position may change. The liquidator is, in my view entitled, subject to his otherwise being entitled to the order, to his own order which he controls and to bring about a situation which is not vulnerable to a change of mind by a party to other proceedings or indeed by the court, if the court were to come to the conclusion that the criminal restraint order ought to go. Accordingly for those reasons I do not think that the existence of the criminal restraint order means that there is no risk of dissipation in this case."

32. In my judgment, the points made by King J and Mann J are relevant and legitimate for the court to consider when deciding whether to make a freezing order in circumstances where a CRO is already in force. They are not determinative in favour of making a freezing order, just as the existence of a prior CRO is not determinative against making such an order.

33. Meade J rightly considered these factors in the context and circumstances of the present case, holding at [26] that on the facts of the case the CRO was not an adequate or complete substitute for a freezing order.

34. Meade J focused on two aspects. First, there was no provision that would ensure sufficient notice to the claimants to apply for a freezing order if the CRO were about to be discharged or varied. Mr Béar emphasised that the SFO stated in a witness statement put before Meade J that "the SFO investigation is likely to continue for the remainder of 2020 and into 2021". There was, therefore, Mr Béar submitted, no real risk of an early discharge of the CRO, such as to create any immediate risk of dissipation. Meade J addressed this point at [27] in general terms, and at [28] gave the specific example of the application which had earlier been made by the first appellant to discharge the CRO. Neither he nor the SFO were obliged to give notice of the application to the claimants, and they had not done so.

35. Second, Meade J referred at [30]-[32] to the way in which decisions by the SFO to consent to dealings in assets might affect and undermine the position of the claimants. This is not, in my view, a fanciful concern. The administrators may well have information and expert opinion available to them about the existence or value of defendants' assets which is not available to the SFO. There is the additional factor in the present case that, although the freezing orders are not proprietary orders, significant proprietary claims are made in the proceedings. Assets to which the claimants prove to be entitled on this basis will fall outside the property of the appellants for the purposes of a confiscation order. The claimants could have separate and well-founded objections to the disposal of assets to which the SFO was willing to consent.

36. In my view, it is impossible to say of Meade J's judgment that he applied, or failed to apply, a relevant factor as regards the existence of the CRO. On the contrary, he acknowledged it as a relevant factor in the exercise of his discretion but equally acknowledged its possible shortcomings in guarding against a risk of dissipation and weighed those factors in the particular circumstances of the case. In those circumstances, it is not open to this court to interfere with his decision.

37. Mr Béar submitted that the concerns expressed by the judge could be met in one or more of the following ways. First, the appellants could give undertakings to notify the claimants of any proposed application to vary or discharge the CRO or to obtain the SFO's consent to a disposal. In view of the nature of the case made against the appellants in the proceedings and the lack of any challenge, except based on the CROs, to the grounds for making freezing orders, undertakings by the appellants could not be regarded as adequate protection for the claimants.

38. Second, it was suggested that the Crown Court could order the SFO to give notice to the claimants of any application to vary or discharge the CROs. I am not clear whether this suggestion was put to Meade J but, in any event, he was not sitting as a judge of the Crown Court. If the appellants wished to apply to the Crown Court for such an order, no doubt they could do so.

39. Third, there should be joint case management of the criminal and civil proceedings as regards CROs and freezing orders. I will say a little more about this at the end of this judgment, but it must be noted that the first appellant rejected the idea of joint management at the hearing before Meade J. In any event, I am far from sure that it could have been achieved at that stage.

40. As I earlier mentioned, the other challenges made to the freezing orders seek to raise issues of procedural fairness.

41. It is first said that, in continuing the freezing orders, Meade J did not satisfactorily address the fundamental principle that, save in exceptional circumstances, no order should be made against a party without giving that party an opportunity to be heard in opposition to it. No-one doubts the existence and importance of so basic a proposition, but one of the exceptions is where it is reasonably judged that giving notice might frustrate the order that is sought. Mr Béar accepts that a freezing order is a paradigm example of an exceptional case, where there is an imminent risk of dissipation of assets by the defendant. He submits that, by reason of the CRO against his client, no such imminent risk existed when Mr Johnson QC heard the without

notice application on 24 August 2020 and made the freezing order against his client. In the absence of any imminent risk of dissipation, the application should have been made on notice to his client and at a hearing at which the claimants would have been required to justify, on the evidence, the making of a freezing order.

42. The appeal is not, however, against the *ex parte* orders made by Mr Johnson QC on 24 August 2020 but against the continuation of those orders by Meade J at the hearing on 7 September 2020, of which proper notice had been given and at which both appellants were represented. At that hearing, the appellants did not seek to argue that the claimants did not have an arguable case on the merits of the claim but reserved their position. They were given the opportunity of applying to discharge the orders on the merits of the claim, when the burden to show an arguable case would have been on the claimants, but they have declined to take advantage of that opportunity. At the hearing on 7 September 2020, they chose, for good reason, to confine their submissions to the effect of the CROs on the assessment of the risk of dissipation of assets. In these circumstances, reliance on the principle of *audi alterem partem* cannot, in my judgment, assist the appellants.

43. The second procedural challenge, combined with the third, relates to section 58(5)-(6) of POCA which provides:

> "(5) If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit.
>
> (6) Before exercising any power conferred by subsection (5), the court must give an opportunity to be heard to – (a) the applicant for the restraint order…"

44. Notice of the *ex parte* application was not given to the SFO, which was therefore not given an opportunity to be heard at the hearing on 24 August 2020. Mr Robins, on behalf of the claimants, submitted that subsections (5) and (6) applied only where "proceedings are pending" and that, as the claim form was not issued until after the *ex parte* hearing, no proceedings were pending at that time. In my view, this is too technical a reading of section 58(5). As is always the case, the claimants were required to give an undertaking to the court to issue proceedings as soon as practicable and did so three days later. The purpose of section 58(6) is clear from its terms and is applicable to a hearing of an application for a freezing order over assets which are subject to a CRO. In my view, "proceedings are pending in respect of any property" from the time that an application is made for a freezing order, even though the claim form or other originating process has yet to be issued.

45. It follows that the SFO should have been notified of the *ex parte* application for freezing orders heard on 24 August 2020. The failure to give such notice is not, however, something about which the appellants can complain. The SFO's right to be heard was not for their benefit. They say that, if the SFO had been given notice and attended the hearing, it would have been able to correct the error made by the claimants in believing and informing Mr Johnson QC that the SFO had not consented to the disposal of a particular asset by the first appellant. The SFO was, however,

given notice of the hearing before Meade J, provided a witness statement and was represented. It corrected the error as regards the disposal. Meade J, therefore, continued the freezing orders with knowledge of the correct facts and I cannot see that this complaint can ground a challenge to his order.

46. For the reasons given above, I would dismiss these appeals. It is therefore unnecessary to consider the claimants' application to rely on further evidence, which would arise only if we were to set aside the freezing orders and consider afresh whether they should be made.

47. I wish to add a word about joint management of the CROs and freezing orders. The existence of two or more such orders against a single party is liable to increase substantially the burden of compliance, as regards both the provision of information and obtaining consent to any disposals. This may be to some extent unavoidable but joint management is a way by which such burden can be kept within proportionate bounds. In *Re Stanford International Bank Ltd*, Hughes LJ discussed in some detail at [204]-[212] how this might be achieved. Serious consideration should be given to arranging joint management in cases such as the present, but in the present case efforts to achieve it appear to have failed.

Lady Justice Simler:

48. I agree.

Lord Justice Nugee:

49. I also agree.