Neutral Citation Number: [2020] EWCA Crim 1579

Case No: 201904055 B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 24/11/2020

Before :

LORD JUSTICE POPPLEWELL
MRS JUSTICE McGOWAN
and
HER HONOUR JUDGE MOLYNEUX

- -

Between :

R E G I N A — **Respondent**

- v -

ANDREW JOHN LUCKHURST — **Appellant**

- and -

SPENCER GOLDING — **Intervenor**

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- -

Benjamin Douglas-Jones QC and William Douglas-Jones (instructed by JRB Solicitors) appeared on behalf of the **Appellant**
Kennedy Talbot QC and James Lake appeared on behalf of the **Crown Prosecution Service**
James Lewis QC and Simon Baker made written submissions on behalf of the **Intervenor**

Hearing dates : 17 July and 12 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10 a.m. on 24 November 2020.

Lord Justice Popplewell :

Introduction

1. This appeal raises issues of principle as to the scope of living and legal expenditure which should be permitted by restraint orders granted pursuant to s. 41 Proceeds of Crime Act 2002 ("the 2002 Act"). The appellant appeals, with leave, from the judgment of HH Judge Carr, sitting in the Crown Court at Birmingham, handed down on 30 September 2019, in which he refused the appellant's application to vary a restraint order granted against him by HHJ Clark sitting in the Crown Court at Leeds on 15 December 2017.

Chronology

2. At the time of the application the appellant ("AL") was 68. After a career in his youth as a professional cricketer and footballer, AL set up a financial services business, BBT Partnership Limited ("BBT") through which he practised as an independent financial adviser for some 25 years before BBT collapsed in 2016. In 2014, AL and Nicholas Shaw, his long-time colleague at BBT, set up a company ("Aspirations") together with Ian Bascombe, through which they introduced clients to an investment scheme run by a Mr Denton and Mr Oakley. It is the Crown's case that the scheme was a fraudulent Ponzi scheme; that of £15.25 million collected from investors by Aspirations, only £9.75m was invested; and that AL stole other monies from his clients. He was charged with offences of fraud and theft in the spring of 2018, together with others. His trial is to take place separately from that of Messrs Denton and Oakley, and after its conclusion. Their trial commenced in January 2020 but had to be abandoned as a result of the COVID-19 pandemic. There is currently no firm date for its rehearing, which may be in May or September of next year. There will be a second trial thereafter of AL and his co-defendants Mr Shaw and Mr Bascombe.

3. In 2016, six of BBL's investors in the scheme commenced proceedings in the Chancery Division of the High Court against AL, BBT, Messrs Shaw, Bascombe and Denton, and others, including a firm of solicitors, Locke Lord (UK) LLP ("the civil proceedings"). On 30 September 2016 Barling J made a worldwide freezing order in those proceedings against AL up to a value of £2.71m. It permitted him to spend £600 per week on ordinary living expenses and a reasonable sum on legal advice and representation. The living expenses amount was increased to £1,500 per week on 11 October 2016.

4. AL's pension owned a commercial property, which he arranged to sell in order to provide funds for his living and legal expenses. It is said that those arrangements were made in principle in early 2017; the sale was not, however, completed until May or June of 2018. AL blames the pension trustees for the delay; the prosecution say AL is to blame because the property had been let to business tenants without the trustees' agreement and the rent paid to his wife.

5. In the interim, a settlement was reached in the civil proceedings on 8 December 2017 which resulted in the freezing order being discharged. AL was not party to that settlement, which was between Locke Lord and the claimants, now numbering 48, but has been told by Locke Lord's solicitors that it included an assignment of the Claimant's claims against him and the other defendants. AL therefore faces the

claims against him by the claimants, being pursued in Locke Lord's name, and Locke Lord's own claims to indemnity or for contribution as a Part 20 Claimant. Those claims have been pursued in correspondence by Locke Lord's solicitors, resulting in an offer of settlement on 9 April 2019.

6. At the time of the discharge of the freezing order on 8 December 2017, the police were already investigating the alleged fraud, and had already considered seeking a restraint order against AL, but took the view that they could not do so whilst the freezing order was in place restraining dissipation of assets. Shortly after the freezing order was discharged, an ex parte application was made by the Crown Prosecution Service ("CPS") for a restraint order, which was granted by HHJ Clark on 15 December 2017 ("the Restraint Order"). It extended to all AL's assets. The Restraint Order permitted AL to spend £250 per week on ordinary living expenses, and permitted variation of that amount with the written agreement of the CPS.

7. The Restraint Order also restrained his second wife ("HPL") from dealing with two identified properties in which she shared a joint interest with AL. They were the matrimonial home in Lichfield, and a holiday home in Marbella, Spain. Her assets are not caught by the Restraint Order save in respect of the two properties.

8. The Restraint Order has been varied to increase the living expenses allowance by agreement with the CPS on a number of occasions. At the date of the application it was £4,631.99 per month (representing agreed living expenses of £5,918.24, the difference to be met from HPL's income). At the date of the hearing before us it was £5,000 per month (representing agreed living expenses of £6,286.25 the difference again to be met from HPL's income). In addition the CPS has agreed to variations to allow a number of one off payments.

9. With the agreement of the CPS, the matrimonial home was sold in March 2019 and AL and HPL moved into rented accommodation. HPL received half of the proceeds.

The variation application

10. The variation application was supported by a witness statement of AL dated 12 July 2019. The CPS served a statement in response from Mr Sankey, a financial investigator employed by the North Yorkshire Police.

11. There are four categories of expenses for which a variation is sought. The first is expenditure in relation to a BMW X5 totalling £780.46 per month. This a second family car. The other is an A Class Mercedes purchased by HPL in March 2019, which AL says in his witness statement was for him. It is said that the family need two cars to manage their day to day routine when HPL is at work. AL and HPL have had the BMW from new in 2012, when it was worth some £49,000, under successive financing agreements. The penultimate financing agreement, expiring in August 2018, had a final hire payment of £16,000. The current hire purchase agreement dated 30 August 2018 provides that the cost of the vehicle is £16,000 plus interest of £1,456.76 which is to be paid by 36 equal monthly instalments of £484.91. Title remains with the finance company until the final payment, upon which title will transfer to AL. The terms permit AL to terminate the agreement at any time before the end of the three years; if he does so he is obliged to return the vehicle, and in addition to pay half the contract value (£8,728) to the extent that it has not already

been paid at the date of termination. The BMW is registered in HPL's name as keeper and the insurance is taken out by her. The total variation sought is made up of the monthly finance payments of £484.91 plus running costs of £295.55 per month (£200 for fuel, £64.12 for insurance, £25.37 for road tax and £6.06 for breakdown cover).

12. In Mr Sankey's witness statement he observed that the value of the vehicle was no greater than the finance amount (as is evidenced by the fact that the final hire payment which secures purchase is the same as all the other monthly payments); he suggested that the car should be returned and a more modest vehicle purchased for about £6,000. At that stage the agreement had run for just under a year.

13. The second category of expenditure for which a variation is sought comprises legal expenditure in relation to the civil proceedings. The amount currently sought is £3,000 which is the estimate which solicitors have given to the applicant for advice in relation to the offer to settle the outstanding claims, which is on potentially attractive terms.

14. The third category is the sum of £8,154.58 spent on home improvements to the kitchen in the Spanish property. These were paid for by HPL as a result of a loan to her by Lloyd's Bank Plc drawn down in 2015. The loan was repaid by her to the bank in instalments totalling £3,039.40 between June 2018 and March 2019; and by a lumpsum payment of £5,115.18 on 9 April 2019 to discharge the balance of the loan.

15. The fourth category comprises living expenses of £48,700. This is the total amount of what are said to have been eight loans made by family and friends between July 2017 and March 2018 on the basis that they were rendered necessary to cover living expenses by the delay in the sale of the pension property and are repayable following its sale.

The Judgment

16. HHJ Carr held that that the living expenses applications in categories 1, 3 and 4 were seeking repayment of loans from unsecured creditors, and as such were impermissible by reason of the decision of this court in *Director of the Serious Fraud Office v Lexi Holdings Plc* [2009] QB 376; and in the alternative that the expenses were not reasonable. This latter finding was stated simply as a conclusion without reasons, save in respect of the motoring expenses for the BMW, which the Judge indicated he treated as unreasonable for the reasons set out in Mr Sankey's statement. As to category 2, the £3,000 sought for legal expenses, he held that a variation was precluded by s. 41(4) of the 2002 Act which forbids provision for legal expenses which "relate to" the offence which gives rise to the restraint order; he held that the civil action fell within that prohibition because it has its factual origins in the fraud which is the subject matter of the criminal prosecution.

17. The arguments for the parties have to some extent changed shape over the course of the appeal, but the Respondent seeks to uphold the result reached by the Judge, in part for different reasons.

The statutory provisions

18. The 2002 Act provides two broad methods by which a defendant may be stripped of the proceeds of crime. One is by the making of a confiscation order, which is governed in England and Wales by Part 2 of the Act. The other is by way of a recovery order, which is governed in England and Wales by Part 5 of the Act. They differ in a number of significant respects.

19. A confiscation order under Part 2 is an order for payment of a specified sum. Its amount is calculated as the greater of the benefit obtained by the defendant from criminal conduct and the amount of the assets available to the defendant to pay it (ss. 6 to 10A). Confiscation orders provide for a period of imprisonment in default of payment in the same manner as a fine (s. 35). In the event of non-payment, a confiscation order may be enforced by the appointment of receivers over realisable property (ss. 48-57), or by obtaining realisable property under powers of search and seizure (ss. 47A-S). Realisable property includes the defendant's own property and tainted gifts, that is to say gifts by the defendant after a date 6 years before prosecution for the offence, or at any earlier time if the result of criminal conduct, unless a court has held that the defendant does not have a criminal lifestyle, in which case gifts since the date of commission of the offence are caught (ss. 77 and 83).

20. Section 40 enables a restraint order to be made in five circumstances, the two principal ones being where there is a criminal investigation with regard to an offence (s. 40(2)) and where proceedings for an offence have been commenced (s. 40(3)), and in each case there is reasonable cause to suspect or believe that the defendant has benefitted from his criminal conduct.

21. Section 41 grants power to make a restraint order in order to preserve assets for the purposes of a confiscation order being satisfied. Such an order may be made in advance, as commonly occurs, for the purposes of satisfying a confiscation order if and when made. The section provides in relevant respects:

"41 Restraint orders

(1) If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him.

(2) A restraint order may provide that it applies—

(a) to all realisable property held by the specified person whether or not the property is described in the order;

(b) to realisable property transferred to the specified person after the order is made.

(2A) A restraint order must be made subject to an exception enabling relevant legal aid payments to be made (a legal aid exception).

(2B) A relevant legal aid payment is a payment that the specified person is obliged to make—

(a) by regulations under section 23 or 24 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and

(b) in connection with services provided in relation to an offence which falls within subsection (5),

whether the obligation to make the payment arises before or after the restraint order is made.

(3) A restraint order may be made subject to other exceptions, and an exception may in particular—

(a) make provision for reasonable living expenses and reasonable legal expenses;

(b) make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;

(4) But where an exception to a restraint order is made under subsection (3), it must not make provision for any legal expenses which—

(a) relate to an offence which falls within subsection (5), and

(b) are incurred by the defendant or by a recipient of a tainted gift."

22. Section 42(5)(b) provides that the court may vary a restraint order upon the defendant's application.

23. Section 69(2) provides that the powers under s. 41 and 42 to grant and vary a restraint order (and other powers):

"(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;

(c) must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant;"

24. Section 69(2)(a) and (b) has come to be known as the "legislative steer", namely that the value of the realisable property should be maintained to be available to meet a confiscation order, insofar as that is reasonable bearing in mind that the defendant may not be convicted and that, unlike the jurisdiction in civil freezing order injunctions, there is no cross undertaking in damages: see the description by Mr John Laws as counsel approved by Lord Donaldson MR in *In re Peters* [1988] 1 QB 871 at p. 879G.

25. A confiscation order is not proprietary in nature. It does not confer a proprietary interest in any property. It is for a specified sum and may be enforced against any realisable property whether or not the latter constitutes the proceeds of crime. Nor, however, is it the same as a personal debt or money judgment. It ranks ahead of other unsecured creditors in a number of ways. Section 69(2)(c) provides that all the relevant powers, which include those of enforcement, must be exercised without regard to obligations to unsecured creditors. Sections 417 and 418 of the Act exclude property which is the subject matter of a restraint order or otherwise recoverable in confiscation proceedings from the estate of a bankrupt, and so such assets are

unavailable for distribution to unsecured creditors of a bankrupt; and there are equivalent provisions in relation to the assets of a corporate defendant in liquidation in s. 426 of the Act. In calculating the "available amount" under s. 9, there is no reduction in the calculation of the value of the defendant's assets to take account of debts to unsecured creditors. Moreover s. 58 provides that once a restraint order in support of a future confiscation order is in place, no distress may be levied against realisable property, nor may any tenancy of premises be forfeited without the court's consent, and courts may stay any other proceedings in respect of any property which is the subject of the restraint order. In these ways the debt constituted by a confiscation order is afforded priority over those owed to unsecured creditors generally.

26. Recovery proceedings under Part 5 of the Act, on the other hand, are akin to proprietary proceedings. That Part permits civil proceedings to be brought by the enforcement authority in the High Court to recover property obtained through unlawful conduct, whether or not criminal proceedings are brought for an offence in connection with the property (ss. 240, 241). The relief granted is a recovery order which vests title in particular property in the trustee for civil recovery. Interim protection is available in the form of a property freezing order as well as other forms of interim relief (s. 245A). The provisions concerning living and legal expenses in relation to property freezing orders under Part 5 do not mirror those applicable to restraint orders in support of confiscation proceedings under Part 2. In particular, there is no equivalent to s. 41(4) rendering impermissible legal expenditure related to the offence; on the contrary the court is required to take into account the desirability of the defendant being represented in the recovery proceedings: see s. 245C(6) and s. 252(4). The legislative steer is also in different terms: s. 245C(8) provides that the power to make exclusions from the property freezing order is to be made be made with a view to ensuring so far as practicable that the satisfaction of the right of recovery is not "unduly prejudiced" and is expressly subject to subsection (6) (i.e. the desirability of legal representation in the recovery proceedings).

Reasonable living expenses

27. The first issue of principle is what criteria to apply in determining whether living expenses are "reasonable" within the meaning of s. 41(3)(a). On behalf of the appellant, Mr Douglas-Jones QC submits that a defendant is entitled to maintain the same lifestyle as he enjoyed prior to the restraint order, subject only to a qualification that he may be restricted from enjoying a "Rolls Royce" or "extravagant lifestyle". On behalf of the CPS, Mr Talbot QC submits that the subsection imposes an objective standard which is not dictated by the previous lifestyle but must take into account a range of factors, of which previous living standards are only one.

28. Some assistance on this issue may be found in the approach to living expenses allowances in other restraining orders, including in particular (1) non-proprietary civil freezing orders (2) proprietary civil freezing orders and (3) property freezing orders under Part 5 of the 2002 Act.

Non-proprietary civil freezing orders

29. The Court of Appeal has recently confirmed in *Vneshprombank LLC v Bedzhamov* [2019] EWCA Civ 1992 that a defendant facing a non-proprietary civil freezing order

is entitled to living expenses set at a level which reflects his ordinary level of spending prior to the order, even if such expenditure is "by any normal standards quite extraordinary". In that case £120,000 per month was allowed. Males LJ identified at paragraph 68 the important points of principle supporting that conclusion. The nature of the freezing order jurisdiction is to restrain threatened *unjustified* dissipation, that is to say "taking steps outside the ordinary course which will have the effect of rendering any judgment unenforceable: subject to this a defendant should be entitled to do what he wishes with his own money." A freezing order is not intended to constrain an individual defendant from conducting his personal affairs in the way he has been accustomed to conduct them, providing of course that such conduct is legitimate. In this respect there is no difference between personal expenditure and business expenditure. If the defendant is not threatening to change the existing way of handling his assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

Proprietary civil freezing orders

30. In the case of a proprietary freezing order the position is different. In such a case, if the claimant establishes a good arguable case that the assets which the defendant is seeking to spend on living or legal expenses belong not to the defendant but to him, it is the purpose of the injunction to protect the claimant from the prejudice he will suffer from the dissipation of the assets if he makes good his proprietary claim at trial. The approach in such cases is that set out in *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 130 at paragraphs 18-23. Where the claimant has an arguable proprietary interest in funds in the hands of the defendant, the defendant who has funds of his own unaffected by such claim is required to use such unaffected funds to finance legal proceedings and meet his living expenses: *Sundt Wrigley & Co v Wrigley* CA unreported 23 June 1993; *Fitzgerald v Williams* [1996] QB 657; and *Marino* at paragraph 18. Where however he has no such unaffected assets "a difficult and anxious judgment" has to be made, in the words of Sir Thomas Bingham MR, whereby the balance of justice must be weighed between on the one hand allowing the defendant to expend funds which might belong to the claimant and on the other hand refusing to allow the defendant to spend funds which might belong to him: *Marino* at paragraphs 22-23. That may very well involve restricting a defendant to a reduced standard of living from that previously enjoyed, even where it cannot be shown that his previous lifestyle was maintained as a result of using the claimant's assets.

Property freezing orders under Part 5 of the 2002 Act

31. In *Director of the Assets Recovery Agency v Creaven* [2006] 1 WLR 622, Stanley Burnton J addressed the principles applicable to a property freezing order under Part 5 of the 2002 Act. Whilst recognising that a Part 5 claim for a recovery order was sui generis and differed from a civil proprietary claim in that the defendant has no personal liability if he disposes of the property, he held that the principles to be applied to exclusions from property freezing orders under the Act should be the same as for civil proprietary freezing orders because of the proprietary nature of the recovery order being sought: see paragraphs 21 to 23. Henderson J endorsed this

approach in *Serious Organised Crime Agency v Szepietowski* [2010] 1 WLR 1316 at paragraph 40 of his second judgment, stating that such a claim is clearly akin to a proprietary claim. I would respectfully agree.

Restraint orders

32. What then of the approach to living expenses under restraint orders? They cannot be equated with proprietary claims since they are made in support of confiscation orders which create personal obligations. Nevertheless there are important distinctions from non-proprietary civil freezing orders which render the approach in such cases inapposite:

(1) In relation to non-proprietary civil freezing orders one of the principal considerations dictating that the defendant may continue to enjoy his previous lifestyle is that the order is not intended to confer security or an advantage over other unsecured creditors. Confiscation orders, on the other hand, do more than create purely personal rights akin to those of other unsecured creditors: they rank ahead of other unsecured creditors, as ss. 58, 69(2)(c), 417, 418 and 426 demonstrate.

(2) The amount of a confiscation order is limited by the size of the defendant's remaining assets at the date of the making of the order, because however great the benefit obtained from criminal conduct the recoverable amount is limited to "the available amount". Therefore by disposal of assets prior to the making of a confiscation order, a defendant can directly reduce the amount of his confiscation liability, in just the same way as a defendant to a Part 5 recovery claim can do so by disposing of the property. This is very different from the position of a defendant to a non-proprietary civil freezing order, whose disposition of his own assets cannot affect the extent of his liability. There is a real risk of injustice if a defendant can reduce the extent to which he can be ordered to confiscate the proceeds of crime by spending on living expenses an amount which is not subject to some objective limit of reasonableness.

(3) The legislative steer in s. 69(2) requires the court to promote the preservation of assets so as to render them available to meet a confiscation order. That statutory objective is defeated rather than served by permitting a continuation of a previous lifestyle which reduces the amount available below that which would obtain by the imposition of some objective standard of reasonableness, merely because it was that to which the defendant was previously accustomed.

(4) Moreover it would seem to us to be contrary to the whole scheme and purpose of the 2002 Act to allow a person who acquires a lavish lifestyle through criminal activity to avoid having to disgorge such proceeds by arguing that he should be permitted to consume those assets at the rate dictated by his lavish criminal lifestyle whilst under investigation or awaiting conviction, merely on the grounds that such was the lifestyle to which he had become accustomed. One of the considerations in determining whether a lifestyle should be maintained at a particular level must surely be the extent to which it is or appears to be the result of criminal activity.

33. There are obvious difficulties in attempting a definition of an objective standard of reasonableness in relation to living expenses. Members of the public who themselves enjoy different standards of living will have different perspectives. Moreover any decision on what is reasonable for a given defendant is fact sensitive to the particular circumstances in which that defendant, and those for whom he may legitimately claim to have financial responsibility, find themselves. We do not therefore attempt any definition of reasonableness or seek to identify prescriptive principles. However it may assist those who have to make these assessments if we identify the following list of non-exhaustive factors which are potentially relevant to the fact sensitive decision in each case:

(1) *Whether the payment is necessary or desirable to improve or maintain the value of assets available to meet a confiscation order.* Clearly it is a fulfilment of the legislative steer in s. 69(2) if the expenditure is likely to preserve or enhance the value of realisable assets available for confiscation.

(2) *The defendant's assets in relation to the size of any likely confiscation order.* If it is clear that the level of expenditure sought will not diminish the value of the restrained assets below the likely level of a confiscation order, it is difficult to see how the expenditure could be characterised as unreasonable; allowing the expenditure would not interfere with the statutory purpose of the restraint order. There will be many cases in which it impossible to make the comparison because of the difficulty in trying to predict the likely extent of a confiscation order. Nevertheless it may be possible and appropriate in some cases.

(3) *The standard of living enjoyed by the defendant prior to the restraint order.* This is not determinative, and as we have endeavoured to explain, there is no entitlement to maintain such lifestyle merely because it is that which has previously been enjoyed. Nevertheless it must be kept firmly in mind that a restraint order will usually be made before the defendant has been convicted of any offence. It can be made when there is merely an investigation, in which case he may never be charged with an offence. If charged, he may be acquitted. The living expenses which he is to be allowed must give some weight to the fact that if innocent of any offence he would be entitled to continue to maintain his existing lifestyle.

(4) *Affordability: the defendant's means at the time of the restraint order or variation application*. When the restraint order is made, or a variation being considered, a defendant may by dint of events connected to the facts being investigated, or which give rise to charges, have a reduced income and be facing a more uncertain financial future than that enjoyed in the past. Some objective assessment of what is reasonable can be made on the basis of what expenditure someone in those circumstances and with those resources might reasonably be expected to make. In other words affordability is a factor which can inform what is reasonable. A defendant may be in a position to make payments from capital, but a reasonably prudent person in his position, with his finances and uncertainties, would be expected to pare down spending rather than use up capital. To take an extreme example, a defendant facing years in prison might be inclined to spend all his capital to avoid it being confiscated when he would act more prudently if he had only his own future

enjoyment of the assets to think of. That is not to say that drawing on capital will necessarily be unreasonable, even if it is not reflective of previous practice. The defendant's downturn in financial fortunes may itself be the result of the criminal accusations, and an innocent defendant may expect his finances to improve again when acquitted. This must be kept in mind when addressing affordability. Nevertheless the uncertainty of the defendant's financial future can inform the answer to the question what a reasonable person would spend in his or her situation.

(5) *The period of the restraint*. A reduction in living standards may be more reasonable for a short period than for a longer one. What it may be reasonable to expect a defendant to put up with in the face of an imminent trial or confiscation hearing may not be reasonable for a defendant who faces a lengthy period of investigation before even being told whether charges will be brought, and if they are, a further delay before conclusion of the trial and any confiscation proceedings.

(6) *Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity*. As we have already observed, it would be inconsistent with the purpose of the 2002 Act to treat a level of expenditure as reasonable if it were itself the result of criminal activity. That may appear to be the case when a restraint order is made or during its existence, notwithstanding that criminal liability will only be definitively established at trial. We are not suggesting that whenever dealing with the amount of living expenses allowances there should be a detailed examination of the strength of the prosecution case. However we can envisage cases in which this may be a powerful factor. Suppose, for example, that a person has for years led a very modest existence, but is charged with drug dealing over a two year period in which he has suddenly acquired a very extravagant lifestyle without any avowed or credible means of support other than the drug dealing which forms the subject matter of the investigation or prosecution which has given rise to the restraint order. That will be a factor tending to suggest that the appropriate level of expenditure permitted should be commensurate with his earlier modest lifestyle.

(7) *The amount of the expenditure sought: an absolute level of unreasonableness.* As Mr Douglas-Jones accepts, there is a level of expenditure which is above any objective standard which could be described as reasonable, irrespective of previous spending patterns. We do not think epithets such as "a Rolls Royce lifestyle" are helpful. What one is searching for by way of a cap is a level which is inconsistent with the statutory objective of preserving assets so far as possible for the purposes of enforcement of a confiscation order, taking into account the other factors which fall to be taken into account.

Living expenses incurred on credit: the scope of the principle in *Lexi Holdings*

34. As is now conceded by the CPS, the fact that living expenses are incurred on unsecured credit does not of itself prevent them being permitted under a restraint

order pursuant to s. 41(3) (a) of the 2002 Act. It would lead to absurd results if it did. Many ordinary and reasonable living expenses are incurred on unsecured credit. That is the position, for example, when food, clothes, or other necessaries are bought with a credit card. So too heating and lighting is often secured on credit, as are mobile phones.

35. The decision in *Lexi Holdings* does not suggest otherwise. In that case the court was concerned with a (partly) unsecured creditors' claim arising from a default judgment for causes of action in breach of fiduciary duty and constructive trust. The factors which persuaded the court that there was no power to permit payment of unsecured creditors by way of variation of a restraint ordered are set out at paragraphs [83] to [86] of the judgment. The essential reasoning is that a confiscation order takes precedence over unsecured creditors in the way I have described above, so that a restraint order designed to preserve the position must also be made or maintained with a view to achieving the same objective. That reasoning simply does not apply to debts incurred for the purposes of reasonable living expenditure. It is clear from s. 41(3)(a) itself that it is consistent with the purposes of the Act that reasonable living and legal expenses may be permitted (subject to s. 41(4) in the case of legal expenses).

36. Keene LJ addressed an argument at paragraph 87 that s. 41(3) showed that there was no general bar on repayment of unsecured creditors, in particular because they might have lent money to enable the carrying on of a trade. He distinguished the position of living and legal expenses from other liabilities on the grounds that the court could control such expenditure ex ante. He thereby recognised that living and legal expenses would not be precluded merely because they were by incurred by way of unsecured credit.

The other available assets principle

37. There is a well established principle applicable to civil freezing orders, both proprietary and non-proprietary, that where a defendant has assets available to meet living or legal expenses which are not caught by the restraint, he is expected to resort to that availability and he will not be allowed, to that extent, to draw on the restrained assets; it applies to unrestrained assets of the defendant himself, where the freezing order covers only part of his assets; and it extends to the availability of support from family, friends, or associated companies or business interests, where the restraint is over all the defendant's assets. See for example *A v C (No 2)* [1981] QB 962; *Atlas Marine v Avalon (No 3)* [1991] 1 WLR 917; *Sundt Wrigley*; *Fitzgerald v Williams*; *Ostrich Farming Corporation v Ketchell* CA 10 December 1997; and *Marino v FM Capital*.

38. The principle applies if the funds are *in practice* available to the defendant from others; it is not necessary that the defendant should have any legal or beneficial interest in them or legal right to call for them: see *Browne v Browne* [1981] FLR 291, *Atlas Marine v Avalon (No 3), Director of the Serious Fraud office v X* [2005] EWCA Civ 1564 at [38] and [43]; and *Serious Organised Crime Agency v Azam* [2013] 1 WLR 3800 at [63].

39. The defendant bears an evidential burden or a burden of persuasion in relation to the unavailability of other assets. In the context of a property freezing order under Part 5

of the 2002 Act it was summarised in the following terms at paragraph 66 of *SOCA v Azam*:

> "66 Accordingly, it seems to me that the position is as follows:
>
> (1) It is for the applicant to show that, in all the circumstances, it is just to permit him to use funds which are subject to the PFO in order to pay his legal expenses.
>
> (2) If on the evidence the court is satisfied that there are other available assets which may be used for this purpose, to whomsoever they may belong, it will not allow the affected assets to be used.
>
> (3) If the court is not satisfied of that, the court has to come to a conclusion as to the likelihood that there are other available assets on the basis of the evidence put before it. If the evidence leaves the court in doubt, but with specific grounds for suspicion that the applicant has not disclosed all that he could and should about his assets, then it may resolve that doubt against the applicant, as it did in *Director of the Serious Fraud Office v X* [2005] EWCA Civ 1564. But if the evidence does not provide any such specific indications or grounds for suspicion, then even if the court rejects the applicant s evidence as unreliable, it may not have any adequate basis for concluding that there are other available assets. In that case (Mrs Azam's application being an example) the court should not resolve the impasse against the applicant on the basis that it was for him to prove positively the absence of available assets. There may be objective factors which cast light on the probabilities one way or the other, as there were in the case of Mrs Azam. But if there is nothing of that kind, and nothing which indicates the existence of unexplained or undisclosed available assets, then the fact that the applicant has previously concealed relevant assets is not sufficient by itself to show that he is still concealing such assets, and thereby to deprive him of the ability to use his own assets, despite the constraints of the PFO, to defray the cost of legal representation to defend himself in the proceedings. I would therefore reject the proposition that there is a specific burden of proof on the applicant which requires him to prove that there are no other available assets which could be used for the relevant purpose, such that if he does not discharge that burden, his application must fail."

40. In *SFO v X* the other assets principle was held to be applicable to the provisions in the Criminal Justice Act 1998 which were the statutory precursor of the confiscation provisions in Part 2 of the 2002 Act. Mr Douglas-Jones accepted that the principle applies to restraint orders under s. 41 of the 2002 Act. He was, in our view, right to do so. He disputed, however, that it has any application on the facts to the variations sought in this case.

Section 41(4): legal expenses

41. Section 41(4) contains an absolute prohibition on permitting expenditure on "legal expenses related to the offence". Mr Talbot submits that this is wide enough to encompass expenditure in relation to any civil proceedings where they are concerned with the same or similar allegations as the alleged facts of the offence giving rise to the restraint order. Mr Douglas-Jones submits that they do not extend beyond the confiscation proceedings themselves and proceedings consequent thereon such as

those relating to restraint orders. In this he is supported by written submissions on behalf of Mr Golding, who is subject to a restraint order in other unrelated proceedings, which are concerned with the affairs of London Capital & Finance Ltd. We permitted Mr Golding to intervene in order for submissions to be made on his behalf, because in the week before the hearing of the appeal an application was made to Her Honour Judge Taylor at Southwark Crown Court to vary the restraint order in his case to permit substantial expenditure in parallel civil proceedings. His application raised the same point as to whether such a variation was precluded by the terms of s. 41(4). HHJ Taylor adjourned the hearing to await the outcome of this appeal.

42. We have concluded that s. 41(4) provides no bar to permitting reasonable legal expenditure in civil proceedings merely because they engage in whole or in part the same factual inquiry as will be engaged in the trial of the offence which gives rise to the restraint order. We emphasise at the outset that our conclusion that s. 41(4) does not prohibit such expenditure does not mean that it will always be allowed. On the contrary, it merely means that any such application calls for the exercise of a discretion. That exercise will always require weight to be given to the objective of preserving assets to meet a confiscation order and the legislative steer in s. 69(2) of the Act. That may justify a refusal to permit the expenditure, particularly where the countervailing factors are weak, as for example where the defendant's interests in the civil proceedings can be adequately protected by his legally represented co-defendants. Where the discretion is exercised in favour of permitting some expenditure, the court will be able to exercise a measure of control in advance over the nature and extent of the permitted spending, and can make successive orders tailored to the developing course of the civil proceedings. The Judge managing the civil proceedings will often be able to deal with variation applications by reconstituting himself/herself as a Judge of the Crown Court when doing so, as this court described may be appropriate in *Re Stanford* [2011] Ch 33 at paragraphs 210-211. A stay of the civil proceedings may also be available under s. 58(5) of the 2002 Act. The effect of the CPS's argument, on the other hand, is that s.41(4) provides an automatic bar, so that the discretion cannot arise.

43. There are a number of reasons for our conclusion that such an argument must be rejected.

44. First, it puts a strained and unnatural gloss on the language of the statute. The subsection talks simply of expenses related to the offence. It does not talk of expenses incurred in proceedings which engage an overlapping factual inquiry with the offence.

45. Secondly, the construction advanced by the CPS would have the effect of frustrating rather than fulfilling the purpose of the statute. The defendant might be a claimant, or a Part 20 claimant, in the civil proceedings, seeking to make a recovery; and so seeking to spend money with the objective of swelling the pool of assets amenable to satisfaction of a confiscation order. It is not difficult to imagine how such circumstances might obtain where the offence is a fraud and the defendant seeks contribution from third parties. To take another example, a defendant may be facing a civil claim from a claimant who is asserting a proprietary right over an asset; the effect of defeating the claim would be to preserve the asset as part of his realisable assets under the 2002 Act. It is not difficult to envisage and multiply other examples in which the legal expenditure may be for the very purpose of preserving or increasing

the assets which will then be available to meet a confiscation order. Yet if Mr Talbot be right, the court has no discretion to further the statutory purpose in this way.

46. Thirdly, we see real difficulties in the practical application of the construction advanced by the CPS. The ingredients of civil proceedings will rarely mirror exactly the criminal allegations constituting the offence. So, for example, where the offence concerned is fraud, the civil causes of action may include misrepresentation, unlawful means conspiracy, other economic torts, negligence, breaches of fiduciary duty, and constructive trust liability for dishonest assistance or knowing receipt. These will inevitably raise some different factual issues. It is a common experience that civil proceedings often involve additional transactions to those in related criminal proceedings. Criminal proceedings may reflect the overall criminality in specimen charges. Civil claims seeking compensation must prove all the breaches said to have caused damage. Some aspects of the series of events in question may not constitute criminal behaviour but nevertheless give rise to civil liability. What then is the degree of overlap which is necessary to engage the bright line exclusionary rule suggested by the CPS argument? Is one overlapping issue or area of factual inquiry sufficient to engage it (and if so which), even if the civil proceedings are concerned in their majority with other unrelated transactions or issues? Mr Talbot's answer when pressed in the course of argument was that any degree of overlap was sufficient unless it could be characterised as de minimis. This is a conclusion which would be unjust, and is unsupported by the language of the statute. There is no principled reason why a person facing investigation for an offence, with which he may not be ever be charged, should be mandatorily precluded from spending *any* of his assets on defending (or pursuing) civil proceedings which are very largely, although not exclusively, unrelated to the investigation. Such a restraint would be unfair. Moreover it would be an abuse of English to describe all the costs of such civil proceedings in which the issues were predominantly different as "legal expenses related to the offence". If, as we have concluded, subsection (4) is not a complete bar, then the degree of overlap and amount of permitted expenditure can be determined in the exercise of a discretion. The CPS argument of absolute prohibition, however, precludes justice being done in this way.

47. Fourthly, the case law supports this approach. *In re S (Restraint Order: Release of Assets)* [2005] 1 WLR 1338, involved an application to vary a restraint order to allow for the legal costs of proceedings in relation to the restraint order itself. The court was concerned at the potential injustice of construing the subsection so as to deprive the applicant of the ability to fund the challenge to the restraint order. However it was persuaded that the legal expenses fell within the wording of the subsection by the fact that at the same time as the introduction of the subsection, there had also been introduced the right to legal aid for such proceedings; accordingly the policy reflected in the subsection was that legal aid should be the source of litigation funding in priority to the depletion of assets of the defendant: see paragraphs 41 to 47. This reflects the explanatory notes published in relation to s. 41 which include the following:

> "Subsection (4) prevents funds under restraint from being released to the defendant or the recipient of a tainted gift for legal expenses incurred in relation to the offences in respect of which the restraint order is made. However public funding will be available to both instead."

48. It is the availability of such public funding which prevents the provision breaching Article 1 of the First Protocol to the European Convention on Human Rights and Article 6 thereof, as this court held in *R v AP; R v Utd* [2001] EWCA Crim 3128; [2008] 1 Cr App R 39. In civil proceedings such public funding is not generally available.

49. Mr Talbot relies on that case as supporting his argument, on the grounds that the application of the subsection to the particular facts relating to U Ltd involved extending it to civil proceedings by way of judicial review. The relevant facts were that the restraint order was granted in support of investigation into an offence arising out of the transfer of €7m by U Ltd, which described itself as a money transmitting business, to an account held by a customer at the London branch of a bank. The bank made disclosure of the transaction to the Serious Organised Crime Agency ("SOCA"), pursuant to the money laundering regulation framework, together with a request to be permitted to continue to provide facilities to U Ltd, which SOCA refused. The judicial review proceedings were a challenge to that decision by SOCA and were initiated before the restraint order was made. At paragraph 33 the court concluded that the legal expenses for the judicial review proceedings in relation to the disclosure reports by the bank were "related to" the money laundering offences whose investigation gave rise to the restraint order because "the disclosure reports were triggered by the transactions which were suspected of being part of such a scheme" so as to provide a sufficiently clear connection between the offence and the judicial review proceedings.

50. That aspect of the decision does not in our view assist Mr Talbot's argument. The subject matter of the judicial review proceedings was the SOCA decision to refuse permission to continue facilities because of suspected money laundering; that was a decision taken in exercise of powers related to investigation of money laundering offences, and it was the criminal investigation into the same money laundering which constituted the offence which gave rise to the restraint order. Although judicial review proceedings are civil in nature, the challenge was in substance to the criminal investigation process and parasitic upon it. The case provides no authority that the subsection applies generally to civil proceedings which are independent of the criminal inquiry or process.

51. Fifthly, this approach is supported by the contrast with s. 245C which applies to recovery proceedings under Part 5. It provides:

> "245C Exclusions
>
> ……
>
> (3) An exclusion may, in particular, make provision for the purpose of enabling any person—
>
> (a) to meet his reasonable living expenses, or
>
> (b)to carry on any trade, business, profession or occupation.
>
> ……….
>
> (5) Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or

> may incur, in respect of proceedings under this Part, it must ensure that the exclusion—
>
> (a) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs,
>
> (b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion, …..
>
> (6) The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet legal expenses of his in respect of proceedings under this Part—
>
> (a) must have regard (in particular) to the desirability of the person being represented in any proceedings under this Part in which he is a participant, and
>
> (b) must, where the person is the respondent, disregard the possibility that legal representation of the person in any such proceedings might, were an exclusion not made, be made available under arrangements made for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 or funded by the Department of Justice.
>
> …..
>
> (8) The power to make exclusions must, subject to subsection (6), be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement authority to recover the property obtained through unlawful conduct is not unduly prejudiced."

52. In civil recovery proceedings under Part 5, therefore, legal expenses are expressly permitted in respect of the recovery proceedings themselves and the legislative steer is in favour of enabling legal representation, and of it being paid for out of the defendant's own assets rather than from public funds by way of legal aid. If the statutory purpose expressed in Part 5 is that it is permissible to exclude from a property freezing order legal expenses on the basis that it is desirable that the defendant should be represented in those civil recovery proceedings at his own expense, the position is a fortiori in relation to independent civil proceedings.

The resolution of the issues in the appeal

53. We turn to the application of these principles to the variations which are the subject of the appeal.

BMW motoring expenses

54. The Judge was wrong to treat the finance payments as impermissible on the grounds that the finance company was an unsecured creditor. In fact the finance company was not a creditor at all in relation to the monthly payments, which only fell due each month in advance, but only so in relation to the early termination penalty, which constituted a contingent debt on termination less than halfway through the 36 month term. But in any event, the payments would not fall foul of the principle in *Lexi Holdings*. Running a car may constitute a reasonable living expense and what is known as PCP (Personal Contract Purchase) is a common method of buying cars on

financing terms. If the expenditure would otherwise constitute a reasonable living expense it is potentially allowable under s. 41(3)(a) even if it involves credit. Mr Talbot conceded as much on behalf of the CPS.

55. Nevertheless we think the Judge was right to conclude that this expenditure should not be allowed for two reasons, each of which is sufficient.

56. The first is that given by the Judge, relying on the evidence of Mr Sankey. The latter explained that the capital value of the car was no greater than the amount of the finance charges, so that this was not a case in which by making the payments, AL would be increasing the asset value available to meet a confiscation order by securing a residual value in excess of the payments. The Judge was entitled to take the view that retaining this BMW, in addition to a relatively new A Class Mercedes, was not reasonable and that its replacement by a more modest vehicle was justified. Mr Douglas-Jones suggested that there was a smaller sum now left by way of outstanding instalments (the amount was not precisely identified because there had been a repayment holiday due to COVID-19). However the question falls to be resolved by reference to the position at the time the Judge made his decision. Mr Douglas-Jones also submitted that terminating the agreement would deprive AL and HPL of the legitimate benefits of the relatively large initial deposit made to secure a future right to the equity in the car and to preserve a guaranteed minimum at the conclusion of the contract, and the continuing payments made in the knowledge of how reliable the car was, that the mileage was accurately recorded on the odometer and how the car had been maintained and driven throughout its life. The former is undermined by Mr Sankey's conclusions about the value of the car under the final financing agreement, and the latter is not a benefit which renders it reasonable to permit a second vehicle to be retained by unreasonably high payments.

57. The second reason why no variation should be permitted is that AL has available assets to fund the financing payments and running costs of the car, because his wife will in practice do so if there is no variation. This is the conclusion to be reached from the evidence put forward on his behalf. AL married HPL in 2001. When their daughter was born in 2005 HPL gave up full time work and became an employee of BBT earning salary and dividends. Following the collapse of BBT she went back to full time work in merchandising in February 2017 and her earnings have grown to about £600 per month. It was she who funded the kitchen improvements to the Spanish home. It was she who paid £42,860 towards AL's costs of the civil proceedings between October 2016 and February 2017. It was she who took out loans and received funds from family and friends to supplement their living expenses. It is she who has been paying the financing instalments and motoring expenses for the BMW since the restraint order. The picture which emerges is that the marriage is one in which they have each contributed to the expenditure according to their means and abilities from time to time. AL's evidence does not reveal the extent of HPL's capital or savings. It must have been significant prior to receipt of the proceeds of sale from the matrimonial home in March 2019 because it enabled her, for example, to pay over £40,000 of his legal fees at a time when she was not working or was earning a very modest income. AL's evidence does not reveal the amount of the sale proceeds of the matrimonial home, half of which were paid to HPL. It is to be inferred that they were substantial: the couple paid just under £300,000 for the house in 1998, all but the £20,000 deposit being by way of mortgage. Judicial notice can be taken of the fact

that house prices have typically risen very substantially over that period. Accordingly, and applying the evidential approach identified in paragraph 66 of *Azam*, there are strong grounds for concluding that if the variation is not made, HPL will continue to fund the motoring expenses from her own resources, as she has been to date. AL has failed to show that he is unable meet the expenditure without a variation of the restraint order.

Spanish kitchen home improvements

58. These were in fact funded by HPL. AL says in his witness statement that historically he made the initial payments to Lloyds Bank under the loan although it was taken out in his wife's name and that he would ordinarily have paid them from his income and more latterly his pension, so that they should be treated as loans to her from him. There is no real evidence that they can properly be treated as his liabilities: they were monies spent by HPL on a property in which she has a 50% interest. We would not regard them as reasonable living expenses, and they certainly do not, as AL contended, have the effect of enhancing the value of the Spanish property by an equivalent amount as an asset amenable to satisfaction of any confiscation order made. The property is not rented out and any capital value enhancement must be doubtful, only half of which in any event accrues to AL, since HPL is joint owner. But however that may be, the short answer to this aspect of the application is that the assets of HPL are in practice available to meet this expenditure. Indeed they have been made available by her for that purpose and spent by her.

Friends and family loans.

59. The evidence on this aspect of the application is particularly unsatisfactory. Some alleged transfers are unsupported by any bank statement. Those which are so supported show transfers into HPL's account. There are a number of letters purporting to confirm that the sums involved are loans, but not in all cases. The one for the largest loan, for £17,500, states that it is a loan to HPL alone, while the others suggest they are loans to both AL and HPL. The letters purporting to explain the payments as loans are all bar one after the date of transfer, and in most cases long after. The amounts are expressed in the letters to be repayable on sale of the commercial property, but there is no evidence of any request for repayment.

60. Moreover, although the monies were said to be used for living expenses, there is no explanation of what they were in fact spent on and it is therefore impossible to assess whether such expenditure was reasonable.

61. Accordingly there are several obstacles to these being the subject matter of a variation of the restraint order. First, what is sought is repayment of alleged loans by family and friends. This does fall foul of the *Lexi Holdings* principle. These are not living expenses incurred on credit from the suppliers of goods or services. They are (allegedly) third party loans. The third parties are unsecured creditors. Secondly, it is not possible to tell what these sums cover by way of expenditure and whether such expenditure is reasonable. The purposes of setting a limit on expenditure in an agreed sum in the restraint order is that the reasonableness of the expenditure can be assessed and authorised ex ante. In this case there is merely an assertion that sums which have been borrowed have been spent on unidentified living expenses, *in addition to* the sums specifically allowed by agreement by the restraint order. It is for AL to

establish that such additional expenditure is reasonable which he cannot do without identifying what the sums were spent on. Thirdly, they fall foul of the other assets principle. They were funds made available by family and friends, and even assuming they were used for reasonable living expenses, they were therefore made available to AL for that purpose. The fact that some may have been on terms that they should be repaid does not assist AL: the repayment obligation, if it exists, can and will be met if at all by HPL, who in the largest loan is the sole debtor, is a joint debtor for the others, and who has available funds for this purpose applying the evidential approach in *Azam*.

Legal expenses

62. For the reasons we have given the Judge was wrong to treat these as necessarily impermissible by reason of s. 41(4) of the Act. It is conceded by the CPS that they would be reasonably incurred and are reasonable in amount. The CPS did not object to the release of £3,000 for this purpose if we concluded that it was permitted by s. 41(4).

Anonymity

63. Mr Douglas-Jones requested that this judgment be anonymised to conceal AL's identity. We see no justification for doing so. Nothing we have said is capable of having an adverse effect on the fairness of his trial in the unlikely event that it should come to the attention of a juror. A desire on AL's part to conceal details of his financial affairs from his co-defendants is no reason to depart from the important principle of open justice.

Conclusion

64. Accordingly the appeal will be dismissed save to the extent that the Restraint Order will be varied to permit £3,000 to be paid in taking advice in relation to settlement of the civil proceedings.