Neutral Citation Number: [2022] EWHC 3213 (Admin)

Case No: CO/4250/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2022

Before :

MR JUSTICE GRIFFITHS

- -

Between :

PetroSaudi Oil Services (Venezuela) Limited

Applicant

- and -

National Crime Agency

Respondent

- -
- -

James Lewis KC and **Robert Morris** (instructed by **Armstrong Teasdale Ltd**) for the **Applicant**
Martin Evans KC and **Tom Rainsbury** (instructed by **Legal Department, National Crime Agency**) for the **Respondent**
Thomas Cockburn (instructed by **Government Legal Department**) for the **Accountant General of the Senior Courts**

Hearing date: 22 November 2022
Further written submissions: 24 November 2022

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APPROVED JUDGMENT

Mr Justice Griffiths:

1. On 13 April 2022 I gave judgment on an application by the National Crime Agency ("NCA") against PetroSaudi Oil Services (Venezuela) Ltd ("POSVL") for a Prohibition Order and for payment of a fund ("the Fund") of about £240 million into the hands of a Receiver and (on the cross-application of POSVL) for exclusions for legal and business expenses from the Prohibition Order: *National Crime Agency v PetroSaudi Oil Services (Venezuela) Ltd* [2022] EWHC 920 (Admin). I will refer to this as my "earlier judgment".

2. In brief, on that occasion I decided:

   i) That a Prohibition Order should be granted over the Fund.

   ii) That the Fund should be paid into the hands of a Receiver.

   iii) That, whilst exclusions might be ordered as a matter of principle, the evidence before me did not justify POSVL's claims for exclusions at that stage.

The position of the Accountant General and the variation of para 8 of the Order of 13 April 2022

3. In relation to payment of the Fund into the hands of a Receiver, para 8 of the Order of 13 April 2022 consequent on my judgment of the same day provided:

   > "The Receiver will hold the Fund as agent for the Court Funds Office and not as agent for POSVL. The Fund is not being paid to the receiver by way of release from the High Court. The Fund will remain in the control of the High Court and the Receiver will be subject to the orders and directions of the High Court."

   The background to this is explained in my earlier judgment at paras 116-122.

4. By an application notice dated 10 June 2022, the Accountant General sought an amendment to para 8 because of concerns he had that the statutory régime under which the Accountant General and the Court Funds Office operate would make the arrangement envisaged by para 8 impossible.

5. In brief, the Accountant General submitted:

   i) The Court Funds Office is the name by which the office of the Accountant General of the Senior Courts is known: rule 4 of the Court Funds Rules 2011.

   ii) The office of Accountant General is a creation of statute, preserved by section 97(1) of the Senior Courts Act 1981.

   iii) The powers of the Accountant General are regulated by Part VI of the Administration of Justice Act 1982 and the Court Funds Rules 2011.

   iv) The 1982 Act and the 2011 Rules are not sufficiently flexible to allow the payment of funds in court to a Proceeds of Crime Act receiver or to any third

party under an agency arrangement such as that envisaged by para 8 in its original form.

6. Following discussions between the parties, it was, therefore, agreed that para 8 of the Order should be amended so that paras 7-9 provide as follows:

> "APPOINTMENT OF A RECEIVER
>
> 7. The Court appoints Adam Ewart as receiver ("the Receiver") of the Fund pursuant to Article 141I of the 2005 Order.
>
> 8. For the purposes of the Administration of Justice Act 1982 and the Court Funds Rules 2011, the Court Funds Office do pay the Fund out to the Receiver. The Receiver will hold the Fund as an officer of the High Court and not as agent for POSVL. The Fund will remain in the control of the High Court pursuant to the prohibition order and the Receiver will be subject to such further orders and directions of the High Court as it may give thereunder.
>
> 9. The Fund will be administered by the Receiver pursuant to the orders and directions of the Court from time to time or, in the event of agreement in writing between NCA and POSVL on any point from time to time, in accordance with that agreement."

7. I made an order at the hearing on 22 November 2022, varying para 8 of the Order accordingly.

POSVL's application for exclusions

8. The remaining, contested, issue for me to decide is whether I should now make an order for exclusions in favour of POSVL and, if so, in what respects and in what amounts.

9. In my earlier judgment, I decided that, whilst exclusions from the Prohibition Order for legal and business expenses might be ordered as a matter of principle, the evidence before me did not justify POSVL's claims for exclusions at that stage (paras 124-137 of my earlier judgment). However, I said (at para 137) that POSVL might apply for exclusions in future, if better evidence could be produced in support of exclusions for particular purposes and in particular amounts, and if a clearer picture of POSVL's other sources of funding could be presented.

10. By Application Notice dated 5 August 2022, POSVL have taken up that suggestion.

11. The Prohibition Order was made under Article 141D of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 ("the 2005 Statutory Instrument"). The Application Notice seeks an order pursuant to Article 141G of the 2005 Statutory Instrument for exclusions from the Prohibition Order.

12. The form of the Order is not attached to the Application Notice but a draft order was included in the bundles provided to me which had been prepared not long before the hearing. The application was supported by the earlier witness statements (which I had decided were inadequate to justify the exclusions sought) supplemented by further

witness statements on behalf of POSVL. Other witness statements were filed on behalf of the NCA, which opposes the application.

13. In a skeleton argument, POSVL says that the purpose of the exclusions is "to enable [POSVL] to comply with its regulatory duties, remain in existence and to defend itself and its assets in proceedings in the UK, Malaysia, the US, France and Switzerland."

Article 141G

14. Article 141G is in Part 4A of the 2005 Statutory Instrument and provides:

> "**141G.— Exclusions**
>
> (1) The power to vary a prohibition order includes (in particular) power to make exclusions as follows—
>
> (a) power to exclude property from the order, and
>
> (b) power, otherwise than by excluding property from the order, to make exclusions from the prohibition on dealing with the property to which the order applies.
>
> (2) Exclusions from the prohibition on dealing with the property to which the order applies (other than exclusions of property from the order) may also be made when the order is made.
>
> (3) An exclusion may, in particular, make provision for the purposes of enabling any person—
>
> (a) to meet their reasonable living expenses,
>
> (b) to meet their reasonable legal expenses in connection with the prohibition order, or
>
> (c) to carry on any trade, business, profession or occupation.
>
> (4) An exclusion may be made subject to conditions.
>
> (4A) Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that the person 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 reasonably incurs;
>
> (b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion; and
>
> (c) is made subject to the required conditions in addition to any conditions imposed under paragraph (4).

> (4B) The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet their legal expenses 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 the person 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.
>
> (5) If excluded property is not specified in the order it must be described in the order in general terms."

15. From this, I highlight the following relevant points:

i) The power to grant exclusions is discretionary. There is no right to exclusions. Like any discretion, however, this power will be exercised in accordance with principle.

ii) It is expressly envisaged that the power may be exercised to enable any person "to meet their reasonable living expenses" and there is express contemplation, also, of exclusions to enable any person "to carry on any trade, business, profession or occupation".

iii) It is expressly envisaged that the power may be exercised to cover the person's legal expenses. But the provision for this - Article 141G(3) – refers only to legal expenses "in respect of proceedings under this Part" which, for the purposes of this case, is legal expenses in respect of proceedings about the Prohibition Order itself. There are no other proceedings under Part 4A of the 2005 Statutory Instrument in this case.

iv) Article 141G(4A) makes it mandatory ("must") that any exclusion for legal expenses in connection with Part 4A is strictly regulated. The legal expenses in question must be "limited to reasonable legal expenses" and they must be legal expenses that the person "has reasonably incurred or reasonably incurs". They must be subject to a cap ("specifies the total amount that may be released for legal expenses in pursuance of this exclusion").

v) There is no provision for other legal expenses. That is not to say that other legal expenses might not be allowed in the exercise of the general discretion given by Article 141G. But it would seem to make no sense for other legal expenses to be allowed on a more generous basis than the provisions applied, specifically, to legal expenses in connection with the Part 4A proceedings.

16. Articles 141NA and 141NB empower the Lord Chancellor to make regulations specifying the "required conditions" referred to in Article 141G(4A) in relation to

"legal expenses… in respect of proceedings under this Part". However, no such regulations have been made. I was invited by Counsel for POSVL to examine what regulations he might have made, and to be guided by the indications in Article 141NA about what such regulations "may (in particular)" address. Since he is not bound to make any such regulations, and has not done so, I do not find it helpful or even correct to speculate in this way.

17. I was invited also to consider regulations the Lord Chancellor has made under Article 149(5), Article 157(4) and Article 177(1)), none of which deal with Prohibition Orders, and none of which are applicable to the present claims for exclusions. This argument might be run either way. If what are said to be analogous regulations are unfavourable, it might be emphasised that they do not apply to Article 141G. If considered favourable, it might be argued that they provide good ideas to be applied also to Article 141G. As it happens, POSVL considers them unfavourable, and adopted the former posture. I am not attracted by either. The fact that this argument can be applied either way deprives it of force.

18. I will apply the applicable law.

19. As I pointed out in para 135 of my earlier judgment, the Practice Direction – Civil Recovery Proceedings applies (by para 1) to proceedings in relation to a Prohibition Order. Para 7H.6 says that "The court will normally refer to a costs judge any question relating to the amount which an exclusion should allow for reasonable legal costs in respect of proceedings or a stage in proceedings". Costs judges have specialist expertise. It is efficient for a costs judge rather than a High Court judge to assess what might be said to be reasonable legal expenses.

20. Counsel for POSVL cited the judgment of David Richards J in *HMRC v Begum* [2010] EWHC 2186 (Ch) at paras 39-47 (which, in turn, cites and comments upon the judgments of Ferris J in *Cala Cristal SA v Al Borno* (9 February 1994, unreported) and of Neuberger J in *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 2938 and 3152) in support of a proposition that the court should not get involved in regulating the costs of a party which is subject to a freezing order. These were cases about non-proprietary civil freezing orders or *Mareva* injunctions and are not directly applicable to Prohibition Order proceedings. All those cases were decided before the costs budgeting régime was introduced to the High Court in 2013, and were therefore decided in a different climate. They were also decided in a context which did not include either the mandatory provision in Article 141G(4A) that exclusions for legal costs must be limited to reasonable legal expenses reasonably incurred or the express indication in para 7H.6 of the Practice Direction that "The court will normally refer to a costs judge any question relating to the amount which an exclusion should allow for reasonable legal costs".

21. Moreover, although it is correct that the requirements of reasonableness apply only to costs of Prohibition Order proceedings (and reasonable living expenses), it would be strange if there was no requirement of reasonableness when it comes to other legal costs, for which express provision is not even made. Reasonable must as a matter of principle mean both that the nature of the cost is reasonable as an exclusion from the Prohibition Order and that the amount is limited to what is reasonable, in line with the policy in Article 141G(3)(a) and (b) and even when those provisions do not directly apply. However, in some cases the difficulty of assessing what is reasonable, and the

costs that might be incurred in doing so, might be greater than in the context of established costs assessment structures, and that might justify a lighter touch and a broader brush assessment. However, it cannot be right that anyone is given an exclusion simply on the basis of what they ask for, without further scrutiny, and without regard to the primary purpose of preserving the fund which lies behind the making of a Prohibition Order in the first place.

22. Counsel for POSVL conceded that any exclusions should only be for reasonable costs and expenses. That concession was made in respect of non-legal as well as legal costs and expenses, and in respect of all legal costs, whether incurred in the Prohibition Order proceedings or not, and whether incurred in England and Wales or elsewhere. I have no doubt that this concession was rightly made.

23. In my earlier judgment, I referred to the Practice Direction and said (at paras 134-135):

> "134. So far as legal expenses are concerned, I am not satisfied that sufficient explanation has been given to justify the large sums claimed by way of exclusions from the Prohibition Order. These claims should be examined by a costs judge who will be able to give directions for what is, effectively, a costs budget to be submitted, evidenced and, if appropriate, approved. There should also be provision for it to come back to court after a suitable period of time, rather than running indefinitely.
>
> 135. I will not make any order in that respect at present. It will be for POSVL to make an application, supported by evidence addressing the deficiencies I have mentioned. I envisage that this application should be listed before a costs judge."

24. POSVL has since then filed evidence from a partner in POSVL's solicitors (Kerman 5 of 3 August 2022, para 49) referring to that ruling, and saying "I respectfully disagree". (A number of passages in Kerman 5 in support of the present application express direct or indirect disagreement with my earlier judgment; see Kerman 5 paras 5, 10, 20-21, 25-26, 30, and 36-37). That judgment was final on the evidence and points which it determined. The Court of Appeal has refused permission to appeal.

25. Mr Kerman's objection to involving a costs judge is based on the exclusions being for future costs (see Kerman 5 para 49, "POSVL requires exclusions to cover my firm (and Counsel's) costs now and in advance of each application"). But costs judges are used to evaluating future costs when setting costs budgets and this is not a rational basis for not involving a costs judge as envisaged by para 7H.6 of the Practice Direction and my earlier judgment. I did invite leading Counsel for POSVL to reconsider what process he might offer or propose in this respect, over the short adjournment on the day of the hearing, but he did not come up with anything.

Authorities

26. Both sides relied on *Serious Organised Crime Agency v Azam* [2013] 1 WLR 3800, [2013] EWCA Civ 970 as a guide to the present application for exclusions. Although *Azam* is a case about a Property Freezing Order, and not a Prohibition Order, I agree

that the observations of the Court of Appeal are apt and on point in relation to Prohibition Orders as well (and I said so in my earlier judgment at para 126).

27. *Azam* was a case about exclusions sought only for legal expenses in the proceedings in question. It was, therefore, a case in which section 245C(6) of the Proceeds of Crime Act 2002 provided that the Court "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" (*Azam* para 59). This mirrors the wording in Article 141G of the 2005 Statutory Instrument at Article 141G (4B)(a), which I have quoted. That provision does not apply to most if not all of the exclusions now sought, because no future proceedings in relation to the Prohibition Order are envisaged by POSVL, the Court of Appeal having on 11 November 2022 refused permission to appeal against the judgment I delivered and the order I made in April 2022.

28. The Court of Appeal in *Azam* took as its starting point the observation that:

> "…the nature of proceedings for a recovery order, backed up by a PFO, is that a proprietary claim is asserted, i.e. a claim to particular property, but that this is not based on any prior proprietary right. It is, in fact, a procedure by way of confiscation on the part of the state. That in itself engages article 1 of the First Protocol to the [European Convention on Human Rights], as well as article 6 of the Convention itself which is relevant in any event."

29. Article 1 of the First Protocol of the European Convention on Human Rights ("the Convention") provides that "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." I have no doubt that the Prohibition Order is provided for by law and has been granted in the public interest, including the public interest reflected in the Mutual Legal Assistance Treaty of 1994 pursuant to which an external request has been made resulting in the Prohibition Order.

30. More to the point, therefore, is Article 6 of the Convention, which provides the right to a fair hearing in civil and criminal matters. In some cases, the Article 6 right of access to justice may include a right to access to funding for it, even in civil cases: *Steel v United Kingdom* (68416/01) (2005) 41 EHRR 22, [2005] EMLR 15. However, countries which have not signed up to the European Convention on Human Rights include the USA, Malaysia and Saudi Arabia, which are all countries in which POSVL wishes to pay legal costs by way of exclusions from the Prohibition Order.

31. The Court of Appeal in *Azam* said at para 63 (per Lloyd LJ, with whom the rest of the court agreed):

> "…it seems to me that it is not right simply to transpose to proceedings under Part 5 of the 2002 Act all of the principles applying in the case of freezing orders in ordinary civil proceedings to enforce proprietary claims. Of course, if there are other available assets, for example in a trust which is not itself tainted by connection with the alleged unlawful conduct, or untainted property belonging to family or friends who are

> willing to support the defendant, then that would be a good reason in a CRO case, as it would be in an ordinary civil case, not to allow the use of contested assets for legal expenses. But if the evidence does not allow the court to conclude, and does not give any specific substantial grounds for suspicion, that this is the case, then to cast the burden on the defendant of showing that there are no other available assets from which his expenses can be paid would be a more serious and difficult task in this kind of claim than it would be in an ordinary civil claim. It would have a more drastic effect for the defendant, in that it would deprive him of the ability to use assets which do belong beneficially to him in order to defend himself in legal proceedings in a way compliant with article 6, against an attempt by the state to confiscate his assets, an exercise to which article 1 of the First Protocol is directly relevant."

32. It then laid down (at para 66) the following three propositions, which both parties invited me to apply:

> "(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."

33. Leaving aside the question of the burden of proof, therefore (although I will return to that), the primary question is whether it is "just" to grant the exclusions sought, as well as applying the specific tests in Article 141G of the 2005 Statutory Instrument where they apply.

The exclusions sought on this application

34. No specific exclusions are sought in the Application Notice and the Application Notice did not attach a draft order. The draft order provided to me by POSVL is more recent. The nature and extent of the exclusions applied for has been characterised by a degree of free-wheeling on the part of POSVL which has, to some extent, reduced the amount of scrutiny to which POSVL has exposed its claims.

35. In particular, although I gave directions for an agreed bundle before the hearing, and no-one asked for or was granted permission to serve late evidence, POSVL put in a witness statement on the day of the hearing, dated 22 November 2022 (which was the day of the hearing), from James Thorndyke, a partner in POSVL's solicitors, of which the essential part consisted only of the following single sentence:

> "As at the date of this witness statement, the sum of outstanding invoices payable by [POSVL] and its group to third parties (including my firm) totals £1,021,078.69" (Thorndyke 2 para 4).

36. Exhibited to the statement was an exhibit of 119 pages, with no accompanying index, breakdown or analysis (in breach, therefore, of paras 13.3 and 18.5 of Practice Direction 32, which require exhibits of more than one document to begin with a list of contents). It was difficult for this to be digested before the conclusion of the hearing that day and the NCA objected to the way in which it was produced, and made no detailed submissions on it, but did not suggest it should be excluded. It was unclear how this late evidence affected figures in earlier witness statements, which claimed monthly amounts based partly on sums falling due, or expected to fall due, before the date of the hearing. I was invited by Counsel for POSVL at the hearing to order exclusions in the amount of the invoices, although the draft order claims everything by way of future monthly instalments.

37. On examination, most of these invoices are not addressed to POSVL (the exceptions being exhibit pp 62-67 and pp 111-114). They are addressed to Saturn Drillships Pte Ltd (exhibit p 1), PSI Group Services Ltd (pp 2-3, 7-12, 31, 96, 119), PSI Group (pp 4-6, 28-30, 97-100), PetroSaudi International (UK) Ltd (pp 13-20), PetroSaudi International Services Ltd (pp 21, 24, 70), PS Group Ltd (pp 102-110), PSOS Finance Ltd (pp 22-23, 25-26), Everit Pte. Ltd (p 27), Petrosaudi International SA (p 32-49), PSI (pp 50), PetroSaudi Drillships Cooperatief UA (pp 51-60, 74-93), Petro Saudi

Drillship COOP (p 61), Petrosaudi Indonesia (pp 68-69), PSI (UK) Ltd (pp 71-73), a joint invoice for POSVL/PDVSA Servicios SA (pp 94-95), and invoices to Armstrong Teasdale Ltd not specifying a client (p 101 for "Advisory and legal proceedings in Malaysia; and pp 115-118 "Re Armstrong – DOJ Motion", the narrative of which has been blacked out).

38. Most of the invoices, therefore, are caught by Mr Thorndyke's reference to POSVL "and its group". In my earlier judgment, I noted, at para 136, POSVL's failure to distinguish its own position from that of other companies in the group. The only invoices in the exhibit to Thorndyke 2 addressed to POSVL itself are for legal services: they are from Opus 2 (a legal services company, charging for e-bundle access) and from POSVL's solicitors, Armstrong Teasdale Ltd.

39. Kerman 5 of 3 August 2022 explains why POSVL has not attempted to distinguish itself from other group companies as follows:

> "The costs of the remaining group entities are not readily distinguishable from the costs of POSVL as all of these companies [with the exception of the three dormant entities in the process of being wound up] are implicated in the legal proceedings connected with the Fund and have no other activity. As a consequence, all of the costs and expenses set out in the cashflow forecast either directly or indirectly relate to those legal proceedings (with the limited exception of necessary legal compliance costs, liquidation costs and the costs of defending the Trinidad legal proceedings)."

40. However, by the time POSVL's skeleton argument for the hearing was filed on 16 November 2022, a Scott Schedule of the exclusions sought had been prepared and annexed, in which "Operational Costs" had been separated out from "Legal Costs", and proved to constitute nearly 40% of the whole.

41. Subject to the point that there is no reconciliation between the £1,021,078.69 of invoices exhibited to Thorndyke 2 dated 22 November 2022 ("the Thorndyke Invoices") and the costs and projections in the earlier evidence upon which the POSVL Scott Schedules of 16 November 2022 are based, the POSVL application was at the hearing presented to me as a claim (1) for payment of the Thorndyke Invoices and (2) for payment of the sums in the POSVL Scott Schedules by future instalments. However, the way in which this evidence has emerged means that the future instalments were calculated to overlap with the Thorndyke Invoices and to service POSVL's reasonable requirements going forwards. In the absence of any detail as to why the Thorndyke Invoices were appropriate for POSVL to pay, or how ordering exclusions to pay them would not create double counting in the payments in the Scott Schedules, I do not consider it just or necessary to order payment of Thorndyke Invoices separately from the detailed consideration of the Scott Schedules, item by item, which I am about to undertake.

42. The sums claimed in the POSVL Scott Schedules are based on a "12-month average cashflow forecast" on p 3 of exhibit ADK-9 dated 15 November 2022 as follows:

i) Legal costs (both already incurred and projected) totalling £358,435.03 per month (equivalent to over £4.3 million per annum); broken down into:

a) UK legal costs: total £44,389.50 per month (equivalent to £532,674 per annum).

b) France legal costs: £18,763.14 per month (equivalent to £225,157 per annum).

c) Switzerland legal costs: total £84,676.56 per month (equivalent to £1,016,118 per annum).

d) USA legal costs: £120,522.54 per month (equivalent to £1,446,270 per annum).

e) Malaysia legal costs: £83,740.00 per month (equivalent to £1,004.880 per annum).

f) Saudi Arabia legal costs: £6,343.29 per month (equivalent to £76,119 per annum).

ii) Operational costs for PetroSaudi Group monthly forecast of £137,371.38 per month (equivalent to £1,648,456 per annum), again based on a "12-month average cashflow forecast" derived from aggregating historic and projecting future costs in order to produce the "monthly forecast".

43. The claim for exclusions therefore totals just under £5.95 million over twelve months.

Other sources of funding

44. Both sides accepted from *Azam* para 66, quoted above, that "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." Whether or not there are such assets is therefore a threshold question before I consider the various particular exclusions applied for.

45. POSVL has in its more recent evidence tried to address the gaps in its original evidence about what appeared to be other available funds or sources of funds. Most of these explanations appeared to me to be adequate: in particular, those in relation to sums in a Temple Fiduciary Account Service Account (which are subject to a freezing order by the High Court of Malaysia) and sums in Swiss accounts (which are subject to freezing orders by courts in Switzerland). However, argument continued to be focused on two areas.

46. The first was a sum of US$88 million which PDVSA was ordered to pay in the arbitration. This is not part of the Fund and is not subject to any freezing order anywhere in the world. It was not dealt with in POSVL's evidence until I referred to it in my earlier judgment (para 133). Kerman 5 dated 3 August 2022 then said that PDVSA had not paid the money, although it was bound to, and that it was not expected that it would pay, although this was a breach of the orders made in the arbitration. I was told that POSVL is taking no steps to secure payment, or to hold PDVSA to account for not paying (for example, by applying to prevent PDVSA from

pursuing its arbitration appeal unless it complies with the order for payment). However, it is argued that, even if POSVL were to be successful in getting its hands on this money, this money too would probably be made subject to freezing orders at the suit of the US Department of Justice, in the same way that the Fund has been, and so it would not be right to point to it as an alternative source of funding to cover the exclusions now applied for. This is a more persuasive argument than the principal argument addressed to me, which was that, since POSVL did not currently have this money, it should be ignored for all present purposes.

47. The second source was the person who is acknowledged to be the 100% beneficial owner both of POSVL and of all its group companies, Tarek Obaid. I do not accept the submission that his assets are to be regarded as irrelevant because he controls POSVL rather than POSVL having any right to demand funding from him. Pointing to his assets as alternative sources of funding does not amount to piercing the corporate veil. The question is, as *Azam* puts it (at para 66(2), quoted above) whether "there are other available assets which may be used… to whomsoever they belong", and this is in the context of examples such as "untainted property belonging to family or friends who are willing to support the defendant" (*Azam* para 63, quoted above). It is not "just" to release funds from a Prohibition Order if another person might reasonably be expected to cover the costs or expenses which are otherwise going to come out of the frozen assets by way of exclusions. This does not mean piercing the corporate veil. Since Mr Obaid is the 100% beneficial owner of POSVL and all its group companies, it is reasonable to expect him to fund them, if he is able to, they being his creature, before recourse is had to the Fund. This is supported, not only by *Azam,* but by the approach adopted in the non-Prohibition Order cases of *R v Luckhurst* [2020] EWCA Crim 159, [2021] 1 WLR 1807 at paras 37-38 (appealed to the Supreme Court, but not on this issue).

48. I am not, however, persuaded that he is able to provide this funding. He is, on the face of it, a very wealthy man, but all his assets appear to have been frozen by the various proceedings against him or entities which he controls. Whilst the detail of his financial position has not been made clear to me, I am not satisfied, taking the evidence currently before me as a whole, that there are assets available to Mr Obaid which could fund the purposes for which POSVL is seeking exclusions. Nor am I satisfied that there are "specific substantial grounds for suspicion", as discussed in *Azam* para 63 and para 66(2), which would justify me in refusing exclusions on this basis alone. Applying the burden of proof in the way discussed in *Azam*, therefore, I will not refuse exclusions on the basis that Mr Obaid is able to provide the money.

Proposed application to Judge Fischer

49. POSVL told me that, if and insofar as I grant exclusions, they will not be taken up until it has either been agreed by the US Department of Justice, or ordered by Judge Fischer in the United States District Court for the Central District of California, that it is permissible to take them up (para 39 of POSVL's skeleton argument). Otherwise, POSVL is concerned that money taken out of the Fund by way of exclusions might fall foul of Judge Fischer's Protective Order of 9 December 2021, which orders POSVL "and any agents" (which would include lawyers) to deposit any of the Fund "that might be released to them after the entry of this order" with the United States District Court, Central District of California (para 17 of my earlier judgment).

50. That is a matter for POSVL to consider and take forward if it chooses to. I do not think that it means I should not grant any exclusions until Judge Fischer has ruled on whether she will allow them by way of exception to her Protective Order. She might well consider it too speculative and theoretical to decide on her reaction to orders I have not yet made. But in any event, I am being asked to grant exclusions to my own order, and I am willing to consider that now.

The UK costs of the Prohibition Order proceedings past and present

51. POSVL claims exclusions to allow it to pay legal costs incurred in respect of the Prohibition Order proceedings themselves. That is an application which comes directly under Article 141G of the 2005 Statutory Instrument since it is a claim for exclusions to enable it to meet "reasonable legal expenses in connection with the prohibition order" (Article 141G(3)(b)). It follows that I have to "ensure" that the exclusion is limited to legal expenses that POSVL "has reasonably incurred or reasonably incurs" and I have to specify the total amount that may be released for legal expenses (Article 141G(4A)). I have to have regard to the desirability of POSVL being represented in the Prohibition Order proceedings (Article 141G(4B)(a)).

52. Since permission to appeal my earlier judgment has been refused, and since the costs of the hearing of the present application have already been incurred, it is not suggested that there will be any future costs under this heading.

53. In POSVL's Scott Schedules, these costs are mixed in with the costs of other proceedings being handled by English solicitors and are claimed by way of future instalments in the coming months. There is no logic to that, since the costs of the Prohibition Order proceedings are specifically provided for in Article 141G in a way that costs of non-Prohibition Order proceedings are not, and, moreover, they can be assessed now as the figures in relation to the Prohibition Order proceedings have already been incurred and are stated and known from costs schedules.

54. I will therefore deal with the Prohibition Order proceedings costs separately.

55. POSVL claims £116,418 in total in respect of the latest hearing before me, including £75,000 as a brief fee for Counsel (POSVL statement of costs). That is far too much to be reasonable in relation to an application which was rightly estimated and listed for half a day and in which both the volume and the quality of the new evidence filed since my earlier judgment was relatively limited. NCA's total costs of the exclusion application are only £24,867 (including £15,083.33 for leading and junior Counsel combined). I recognise that POSVL as the applicant bears a heavier burden, including the burden of preparing most of the evidence. POSVL has failed to submit its costs to a costs judge or to propose a process for doing so. I am asked to assess what is reasonable myself. Bearing in mind the volume of evidence, the level of preparation required, the issues, and the sums at stake, I consider a maximum of £40,000 to be a reasonable sum for POSVL's total costs of the application before me, which is substantially more than the sums incurred by NCA in opposing it. I will allow an exclusion of £40,000 in this respect accordingly.

56. POSVL also claims £32,500 as "Counsel's estimated fee for the Accountant General's application" (Scott Schedule p 5). This is the application considered at paras 4. to 7. above. That application was resolved by agreement substantially in the terms of a

proposal which POSVL had rejected on 11 May 2022, for which reason I ordered POSVL to pay the Accountant General's costs, which were £12,542 including solicitors and Counsel, and in which the Accountant General (as applicant) bore the burden of preparing the bundles. POSVL's statement of costs for the Accountant General's application claimed a grand total of £53,956. It was unreasonable of POSVL not to reach agreement on the proposal of 11 May 2022, instead of incurring costs in the six months which followed before reaching agreement just before the hearing before me on 24 November 2022. The level of costs is also out of proportion. I will allow an exclusion of £10,000 in this respect.

57. I must also consider the costs of the hearing resulting in my earlier judgment. Although costs were awarded against POSVL, because it was unsuccessful in its attempts to resist a Prohibition Order and to obtain exclusions, it was not unreasonable for POSVL to make those attempts or to incur legal costs in doing so. I must, however, consider the quantum of what is reasonable. POSVL's statement of costs for that hearing came to a grand total of £218,118.78, including Counsel's fees of £112,500. That was a one-day hearing in which POSVL was the respondent. NCA was awarded its costs, which were assessed in the sum of £23,362, including leading and junior Counsel. The figures claimed by POSVL are unreasonable. I will allow exclusions in respect of that hearing of £25,000.

58. No further or future legal costs in relation to the Prohibition Order are, I am told, now envisaged.

59. The total exclusions for POSVL's reasonable legal costs in relation to the Prohibition Order are therefore assessed at £75,000. The enormous difference between that and the total of £388,492.78 claimed in the three schedules of costs for the Prohibition Order proceedings indicates that costs across the board may be being claimed in unreasonable amounts. It also seems to be significant that POSVL has so resolutely refused to take any steps to involve or propose the involvement of a costs judge to assess the reasonableness of its legal costs, whether already charged or forecast, notwithstanding what I said in para 135 of my earlier judgment and para 7H.6 of the Practice Direction – Civil Recovery Proceedings.

60. In POSVL's First Chancery Action (to which I referred in paras 24-27 of my earlier judgment), Snowden J refused an application by POSVL to be joined as a party. In a judgment on 2 December 2020 (*POSVL v NCA* [2020] EWHC 3297 (Ch) at para 61), Snowden J declined to order costs in POSVL's favour. In doing so, he added this:

> "I do not therefore need to consider the amount of the costs sought by POS. I would, however, observe that I regard POS's claim for £81,877.50 as wholly excessive. By contrast, the NCA's bill (albeit at public sector rates) was a very modest £9,065. The costs claimed by POS included fees of £56,450 for two leading counsel and two junior counsel advising and appearing at the hearing, and £25,172 for five fee earners at POS's solicitors, of whom three attended the hearing. The instruction of such a large number of counsel and solicitors was, in my judgment, unnecessary and disproportionate. If I had been minded to make a costs order in favour of POS, I would very substantially have reduced the amount claimed."

61. POSVL now has a track record of charges which are unreasonable in their amounts (quite apart from whether it was reasonable to incur them at all).

62. I will award total exclusions in respect of POSVL's reasonable costs of the Prohibition Order proceedings past and present of £75,000 accordingly.

Other UK legal costs

63. Having separately assessed the exclusions claimed in respect of the Prohibition Order proceedings, I must look at the remaining claims for UK legal costs which are not in respect of the Prohibition Order proceedings.

64. I was referred to exhibit ADK-9 of Kerman 9 dated 15 November 2022 for breakdowns of the various amounts claimed in the Scott Schedules, including other UK legal costs. Although the invoices exhibited to Thorndyke 2 dated 22 November 2022 were not reconciled to these breakdowns, it is obvious from scrutiny of both that there is a significant overlap and, therefore, a risk of double counting which has to be avoided.

65. The risk of double counting is particularly important because of POSVL's method of using past costs as well as projected costs to calculate claims for exclusions by way of future monthly payments in accordance with its "12-month average cashflow forecast". There is therefore potential not only to repeat payments which have already been claimed in the Thorndyke 2 £1 million lump sum, or in the amounts I have just considered by way of Prohibition Order related legal costs, but to inflate them by including their effect in future monthly payments which may continue for an indefinite period.

66. This is connected to a point urged on me by POSVL both in oral and written submissions, which was that there have been adjudications in the past about what might be allowed by way of reasonable or regular expenses, and I should fall into line with them and readily continue allowances by way of exclusions along the lines of those already awarded. However, every application has to be determined on the evidence before the court when it is made, and in the circumstances presented to the court at that time. Previous allowances are almost bound to have been made on different evidence and in different circumstances, and potentially, also, with a different level of scrutiny. I noted in my earlier judgment that allowances made by Miles J were requested and granted in proceedings in which there was effectively no opposition to them (para 85 of my earlier judgment). I think it is better to assess costs and expenses already incurred on a once and for all basis (leaving any future instalments to cover only future costs), both because this is likely to be more accurate than rolling them up into future instalments or payments in which they are mixed in with amounts which are only forecasts, and because it reduces the risk that a court will assume that they are recurring costs, justifying future further payments, when they are not.

67. An example of this is that the UK legal costs totalling £44,389.50 per month (equivalent to £532,674 per annum) claimed in POSVL's Scott Schedule going forwards includes £75,000 for Counsel's brief fee of the exclusions application before me, whereas I have decided that figure is part of costs of solicitors and Counsel that

cannot be justified as reasonable in excess of £75,000 in total and these costs are not going to recur.

68. Also included in the monthly UK legal costs calculation is the £32,500 in respect of "Counsel's estimated fee for the Accountant General's application" to which I have already referred (Scott Schedule p 5). I have allowed a total exclusion of £10,000 for legal costs (including solicitors and Counsel) in relation to the Accountant General's application, above. As well as, again, demonstrating unreasonable figures being claimed on POSVL's side, this is another element inflating the future monthly instalment claim although it is a past cost and claimed, in my judgment, at an unreasonable rate.

69. I have worked out (although this was not clear to me when the figures were presented in oral submissions) that the monthly figure of £8,958.33 claimed on p 6 of AKD-9 between July 2022 and June 2023 inclusive (equivalent to £107,499 annually) for "Three Raymond Buildings Professional" is actually double counting the £75,000 brief fee for the exclusions hearing before me and the £32,500 brief fee for the Accountant General's application. It is presented in the Scott Schedule at para 2D as "Estimated fees for silk retainer at 3RB", and further explained there as "Providing ongoing advice and assistance for items 2A-2B (full estimates set out at 2D(i) and 2D(ii) below)". That on first reading makes it appear as "ongoing advice and assistance" into the future, in line with its inclusion as a monthly cost in the year ending June 2023. However, items 2A and 2B of the Scott Schedule are the costs incurred in relation to the exclusions application and the Accountant General's application respectively, and what are described as the "estimates set out at 2D(i) and 2D(ii) below" are the £75,000 and £32,500 brief fees.

70. In addition, POSVL's Scott Schedule shows that the monthly claim for legal expenses includes £3,000 per month in relation to "Costs incurred in relation to the exclusions application" by Armstrong Teasdale (para 2A, see Kerman 5 para 49(2)) and £2,500 per month in relation to "Costs incurred in relation to the Accountant General's application" by Armstrong Teasdale (para 2B, see Kerman 5 para 49(3)). These, again, overlap with the figures I have already considered and scaled down, and do not fall for payment in the future by way of monthly instalments. They are costs incurred before the hearing on 22 November 2022 in relation to the applications listed on that date.

71. That disposes of the UK legal expenses claimed in paras 2A, 2B, 2D (including 2D(i) and (ii)) of the Scott Schedule "England and Wales costs breakdown". They do not fall to be excluded at all, over and above the total £75,000 I have assessed and allowed as reasonable legal costs exclusions above.

72. All that is left, therefore, by way of claims for other UK legal costs, is:

i) £25,000 per month (equivalent to £300,000 annually) for Armstrong Teasdale's "Advice to [POSVL and other companies in the Group] in connection with all global ongoing proceedings" (Scott Schedule para 2C); and

ii) £4,934.14 per month (equivalent to £59,209 annually) for "Costs incurred with Clyde & Co LLP" (Scott Schedule para 2E).

73. Armstrong Teasdale's claims are based on hourly rates which, as recently as when I first considered exclusions at the hearing on 22 February 2022, were said in their statement of costs to be £550 per hour for Mr Kerman and £300 per hour for Mr Thorndyke. In Kerman 5, dated only six months later on 3 August 2022, Mr Kerman's hourly rate is stated as £750 (plus VAT) and Mr Thorndyke's as £460 (plus VAT). These are increases of 36% and 53% respectively. Mr Kerman's evidence did not disclose that the rates had increased in this way; it was a point spotted by the NCA (Byrne 4 para 4.26). In response, Kerman 8 says only: "It is correct that my firm's rates have increased, as have the rates of most commercial law firms in London". This explanation is inadequate. The rates claimed are already much greater than those that would be allowed on a detailed assessment of costs.

74. Armstrong Teasdale has not broken down the £300,000 claimed under this heading. Kerman 5 makes the general point:

> "My firm is general counsel to the Petrosaudi group of companies and has responsibility for the conduct of all litigation matters throughout the world and collateral negotiations, supporting local counsel in each jurisdiction. I estimate that the cost of my firm's time for acting as general Counsel to POSVL and the Petrosaudi group should not exceed £25,000 per month."

That is not much to go on. The number of hours used to construct the estimate has not been stated. There is no attempt to reconcile it to past costs or bills, for example, or to provide a breakdown between jurisdictions. I am not told what level of fee earner and what rates are used to produce this figure in their various proportions, even though Mr Kerman and Mr Thorndyke's hourly rates have been stated as above. No distinction is drawn between costs of POSVL properly so called – for example, costs in proceedings to which POSVL is a party – and costs of other companies in the group.

75. Nevertheless, I am willing to allow something on this account. It is conceded that I should apply a requirement of reasonableness to this as to the other costs. The limited evidence I have is that POSVL's English lawyers have a track record of charging excessive and unreasonable costs. By not providing more detail of the very large sums claimed in this estimate, let alone submitting them to a costs judge, Armstrong Teasdale force me to make an assessment based only on what I have. I take into account the difference between reasonable costs and claimed costs in the proceedings before me, the uplift in the hourly rates, and the excess of those rates, even before uplift, over what would be allowed at published rates on detailed assessment. I also bear in mind that Armstrong Teasdale are not, under this heading, claiming anything in respect of UK proceedings (which I have addressed separately) but only for their role as general counsel, including supervision and coordination of legal advice and representation provided primarily by other local legal professionals, whose fees are being claimed by way of separate exclusions. Even if all the hours were those of Mr Kerman and not lower charging fee earners, and if he is charging his latest claimed rate of £750 per hour, that works out at 400 hours a year, or an average of one 7.5 hour day a week every week for 52 weeks of the year. If lower rates are applied (for example, because lower charging fee earners are involved) the number of hours would have to increase even more to justify £300,000 per annum. For the role described in POSVL's evidence, that seems impossible at worst and unreasonable at best.

76. Based on the considerations I have outlined, I will assess this heading at a maximum of £50,000, as against the £300,000 claimed, and I will not allow monthly amounts but will state this as the maximum reasonable exclusion.

77. Turning to the fees of Clyde & Co, exclusions for these are claimed at £4,934.14 per month (equivalent to £59,209.68 over a year) in instalments between July 2022 and June 2023 for Clyde & Co as UK "Legal Counsel / PDVSA &1MDB Proceedings" (p 6 of ADK-9). Clyde & Co's involvement in the UK proceedings ended when they paid the Fund into the Court Funds Office in accordance with an order of Miles J on 23 March 2021 in the Third Chancery Action (see para 45 of my earlier judgment). However, their further fees are now claimed "To pay for Clyde & Co's assistance as matters arise, most notably in connection with PDVSA's appeal" (Scott Schedule para 2E), i.e. in connection with a possible appeal against the arbitral award in Paris (Kerman 5 para 49). I will allow this exclusion in principle. However, the amount is clearly an estimate, and no attempt has been made to justify it by reference to past bills, or hourly rates, or estimated future hours. The reference in Kerman 5 para 41 does not seem to envisage very much in this respect, stating that POSVL seek "a modest balance from the Fund to cover Clyde & Co's legal fees as and when they arise". Separate amounts are claimed in respect of advocates in Paris for the arbitration appeal, which I will consider and assess in the next section of this judgment.

78. I will allow an exclusion for the fees of Clyde & Co as a single maximum of £20,000 instead of dividing it into continuing monthly instalments.

France legal costs

79. The largest amount claimed as an exclusion in relation to the arbitration appeal in France is in respect of POSVL's engagement of the firm FTPA Avocats in Paris "for the costs of the appeal process for the arbitration award" (Scott Schedule item 21). As before, it is claimed as a recurring monthly payment of £18,763.14 (equivalent to £225,157 per annum) but this is to represent a total sum of €250,000, which has been divided by twelve and converted into sterling to reach the monthly figure.

80. The figure of €250,000 is supported by a written estimate from FTPA dated 22 December 2021 which says something about the anticipated progress of the appeal. Kerman 5 supplements this with details of the partner hourly rates charged by FTPA's two partners (€600 and €440 per hour respectively), its two associates (€600 and €440 respectively) and its paralegal (€80 per hour). The hourly rates are high but NCA does not suggest that they are above market. On the other hand, the FTPA estimate does not refer to estimated hours, or to what level of fee earner will be delivering them and to what extent.

81. It is reasonable for POSVL to defend the arbitration appeal and important that they do so, but FTPA say that "it is extremely difficult to estimate our fees at this stage". €250,000 converts to about £215,000 at current rates. I will award an exclusion of up to £200,000 in total for FTPA's costs of the arbitration appeal in Paris as a rough and ready estimate of what may be reasonable.

Switzerland legal costs

82. Exclusions are claimed in respect of legal advice and assistance in Switzerland at a rate of £84,676.56 per month (Scott Schedule para 2F), which is equivalent to £1,016,118 per annum.

83. POSVL is not a party to the legal proceedings in Switzerland.

84. The sum claimed is supported by two very brief letters from Python Attorneys at Law (Geneva) SA dated 1 February and 27 July 2022 which are in my judgment inadequate to assess the reasonableness of such a very large sum and do not justify it.

85. The justification put forward for asking the Fund to pay legal fees for proceedings in Switzerland to which POSVL is not a party is that the Swiss proceedings have frozen a specific POSVL fund at JP Morgan. However, the Swiss freezing order was made in 2015 and no application has been made or (it seems) is contemplated in order to challenge that aspect of the litigation.

86. The value of the specific POSVL frozen fund is US$400,351.64. Legal costs of over £1 million are out of all proportion to this value. There are further funds in Switzerland frozen at the same time, to the value of $28 million, but these belong to other companies in the Group.

87. Switzerland is party to the European Convention on Human Rights and will be able, should it be argued that it is necessary or just for anyone to have recourse to the POSVL or other Group funds in Switzerland to pay legal costs, to adjudicate on that question in accordance with its local law and any relevant considerations deriving from the Convention.

88. I can see no justification for allowing the Fund in the UK to be used for this purpose. I will grant no exclusion under this heading.

USA legal costs

89. Exclusions of £120,522.54 per month (equivalent to £1,446,270 per annum) are claimed in respect of USA legal costs, i.e. costs in connection with the forfeiture proceedings brought by the US Department of Justice.

90. This is broken down into three elements (Scott Schedule paras 2G, 2H and 2I):

i) $150,000 for advice and assistance from US attorneys Clayman Rosenberg Krishner & Linder ("Claymans") in reviewing the work and fees of Baker Hostetler.

ii) $1.75 million in relation to the potential appointment of Claymans to replace Baker Hostetler for litigation beyond the current appeal.

iii) £2,083.33 per month (equivalent to £25,000 over 12 months) fees of James Lewis KC as an English law expert for POSVL in the US proceedings.

91. The Claymans fees for reviewing the level of earlier legal fees – item (i) - are in respect of invoices already presented and not paid. Both Kerman 5 footnote 14 and the letter from Claymans itself dated 19 July 2022 highlight that POSVL has appealed to the 9th circuit Judge Fischer's denial of its motion to dismiss the civil forfeiture case

and her imposition of the Protective Order in the US proceedings, and Claymans note that POSVL "may not wish to instruct Baker Hostetler to undertake further work pending the outcome of that appeal". The resolution of the fees dispute is not, therefore, necessary in order to secure ongoing legal advice and assistance. If the appeal is successful, the Protective Order and my own Prohibition Order will presumably be discharged in due course, making exclusions unnecessary. If it is not successful, it appears from Kerman 5 that it is anticipated that Baker Hostetler will be replaced by Claymans, the firm conducting the review, for future legal work. A fees review is necessary because of a failure to agree or control reasonable costs in the first place. I do not consider it just to allow any exclusion under this head. Even if I did, I would regard the evidence as inadequate for it to be just to award the figure claimed or for me to assess a lesser sum. The first paragraph of the Claymans letter of 19 July 2022 is the source of the figure of $150,000 but it is vague and, in particular, does not explain how many hours will be spent on the fees review, and by what level of fee-earner, although hourly rates of up to $975 for a partner and down to $245 for a paralegal are set out. The claim for exclusions in relation to item (i) is refused.

92. The principal claim is for item (ii), the anticipated future legal costs quoted by Claymans in their letter of 19 July 2022 as "an evergreen legal retainer of not less than $1,750,000 with hourly rates for partners being charged at not less than $1,000 per hour over the next twelve months". This is a very large sum and I would expect a more detailed calculation to justify it. Once again, however, no attempt is made in this part of the letter to explain the nature of the work which will be performed, and what level of fee earners are expected to be engaged in it and in what proportions. It is evident that POSVL considers that previous US attorneys have charged too much, which is the reason for asking Claymans to review the existing Baker Hostetler invoices. It is also clear that Claymans are referring to what they describe as a "first class firm", and their offices are on Madison Avenue.

93. Although I think it is in principle reasonable that there should be an exclusion for these fees, I am not persuaded that the proposed sum of $1.75 million for one year's work is reasonable. I assess the exclusion which it is just to allow under this heading at $1 million.

94. In relation to item (iii), no explanation has been given as to why James Lewis KC needs to give expert evidence in the US proceedings or what aspects of the case or the law such advice would address. The evidence of Kerman 5, which is the only evidence or submission on this point, is contained in just two sentences, and is uninformative. It is not clear that this evidence is required at all at this stage. The figure of £25,000 is not (so far as the evidence shows) based on an actual assessment and quotation for any specific work. I have already found that Counsel fees have generally been charged in excessive amounts, when they have been stated in schedules of costs in English proceedings. I will order no exclusion in respect of this.

Malaysia legal costs

95. Exclusions of £83,740 per month (equivalent to £1,004.880 per annum) are sought in respect of legal costs of proceedings in Malaysia (p 6 of exhibit ADK-9 to Kerman 9 dated 22 November 2022). A slightly different figure of £78,333.33 per month (equivalent to £940,000) had been claimed in the body of Kerman 5 (para 49) which, however, is relied upon as a more detailed explanation of the components of this £1

million a year claim. The letter from Malaysian lawyers underpinning this evidence is at pp 92-93 of exhibit ADK-5 to Kerman 5.

96. NCA object that the fees are not limited to those in respect of POSVL's involvement, as opposed to other companies in the group. However, POSVL is a party to the proceedings and it may be unrealistic in these particular proceedings to separate the interests of POSVL from those of other group companies.

97. The Malaysian litigation is important, and it is reasonable for POSVL to do its best to win success in it.

98. I will allow an exclusion capped at £1 million.

Saudi Arabia legal costs

99. Exclusions are claimed in respect of legal costs in Saudi Arabia of £6,343.29 per month (equivalent to £76,119 per annum). These do not appear to be litigation costs, but general administrative costs charged by a firm of lawyers in Saudi Arabia, Baker Botts, through what is described as a monthly retainer (Kerman 1 para 32, to which Kerman 5 para 49 refers, adding nothing).

100. Baker Botts are charging the retainer "in order to deal with all local legal and reporting implications arising from the ongoing legal proceedings involving the Group" (Kerman 1 para 32), the point being made that the ultimate parent company of the Group is headquartered and incorporated in Saudi Arabia.

101. No underlying evidence of the precise amount of the monthly retainer (for example, in the form of any invoice) has been provided. The Thorndyke Invoices do not include anything from Baker Botts. Although Kerman 1 and Kerman 5 refer to "a monthly retainer", they immediately go on to refer to the amount claimed as an "average monthly cost" which is "estimated", from which I infer that there is no monthly retainer as such, and the monthly cost is, like the other monthly costs in the Scott Schedules, a blended average by way of a more or less informed guess. It seems inevitable that any reporting performed by Baker Botts must be on the basis of information from legal professionals in other jurisdictions to whom I have given separate consideration.

102. This is a small sum relative to the others claimed. However, there is no justification for such scanty evidence of what a reasonable estimate might be. I consider it just to grant an exclusion under this head but my concern about the deficiencies in the evidence means that I cannot consider more than £50,000 to be the reasonable amount.

103. I will allow a total exclusion of £50,000 accordingly.

Non-legal operational costs

104. POSVL claims exclusions to cover the non-legal operating and administrative costs of all the companies in the Group.

105. The amount claimed is a monthly forecast of £137,371.38 (equivalent to £1,648,456 per annum), based on a "12-month average cashflow forecast" derived from

aggregating historic and projecting future costs.

106. There is a separate Scott Schedule in relation to these costs.

107. This is a colossal sum over and above legal costs and in respect of companies which are not trading and have no employees (Kerman 5 paras 23-25). The activity of the Group is said to be restricted to the defence of legal proceedings "and such maintenance as is necessary for those companies within the group that are involved in or connected with the litigation" (para 23).

108. The amount has been broken down in a cashflow forecast by a firm of accountants, Cameron Cunningham Ltd, who are not said to have audited the accounts; they are described in the evidence simply as POSVL's "external accountants" (Kerman 5 para 29) and it is emphasised that the Group "does not require the preparation of company accounts that are not required by statute and is categorised as a "small" group for accounting purposes which dispenses with any requirement for consolidated accounts" (para 30).

109. No named person at the practice is identified as responsible for the forecast, and the practice itself has undertaken no responsibility to the Court for it. No evidence has been filed by Cameron Cunningham Ltd verifying the cashflow forecast or stating the information upon which it is based. The assumptions upon which it is based have also not been explained or justified. For such large sums, which have not yet been incurred, in relation to companies which are on the face of it not doing much except ticking over or winding down, this is not good enough.

110. I consider this evidence to be practically worthless and certainly insufficient to justify any exclusions other than those I have already allowed.

111. I consider that it is not, in any event, just for the Fund to be used to pay Group expenses of this nature and on this scale. This claim is far removed from what is primarily envisaged by Article 141G(3) even if it might theoretically be possible to bring it within a broad discretion.

Contingency Fund

112. Finally, POSVL claims an uplift on all exclusions of 15% as what is described as "an ongoing contingency payment" (Kerman 5 para 52).

113. I have assessed all the exclusions which it is just to allow, and in the amounts which are reasonable. Anything more than that is neither justified nor reasonable.

Conclusion and summary

114. The exclusions I have decided to allow are all by way of cap or maximum. There can be no question of money being paid except on presentation of genuine invoices for monies actually and immediately due. POSVL has offered an undertaking that no money will be paid except on presentation of invoices, and that copies of all such invoices will be provided to the NCA. I will order that payment will not be made by the Receiver or by Armstrong Teasdale until not less than 14 days after provision of the invoices to NCA, to allow it to object or make application in the event that it considers that payment would not be justified or appropriate. The invoices should be

sufficiently informative to allow NCA to understand what exactly is being paid for and why.

115. I have set no time limit on the cap. In other words, I do not envisage that an application will be made for further exclusions on or after a fixed date, whether twelve months hence, or ever. The figures I have reached are in my judgment sufficient for the foreseeable future. There can be no assumption that further exclusions will be allowed in any respect. It is to my mind inconceivable that any future applications for legal costs capable of consideration of a costs judge should not be so considered. I would also expect that any evidence on behalf of POSVL in future would be less vague, and less second-hand, than the evidence filed to date. It is not enough to produce forecasts which are mathematically correct, or to rely on brief unparticularised assertions from third parties about future estimates, although I have on this occasion (it being POSVL's second attempt) made what I can of the evidence I have been given.

116. In conclusion and in summary, the exclusions I will allow are as follows:

i) A total maximum of £75,000 in respect of POSVL's legal costs of the Prohibition Order proceedings (the total of £40,000 in respect of POSVL's legal costs of the present application, £10,000 in respect of POSVL's legal costs of the Accountant General's application and £25,000 in respect of POSVL's legal costs of the applications upon which I gave my earlier judgment).

ii) A total maximum of £50,000 in respect of UK legal costs (excluding Clyde & Co) which are not in respect of the Prohibition Order proceedings.

iii) A total maximum of £20,000 in respect of the fees of Clyde & Co.

iv) A total maximum of £200,000 for FTPA's costs of the arbitration appeal in Paris.

v) A total maximum of US$1 million in respect of US legal costs.

vi) A total maximum of £1 million in respect of Malaysian legal costs.

vii) A total maximum of £50,000 in respect of the costs of Baker Botts in Saudi Arabia.