Neutral Citation Number: [2022] EWHC 3258 (Comm)

Case No: LM-2022-000197

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

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

Date: 22/12/2022

Before :

HHJ RUSSEN KC

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Between :

(1) DAVID TYLER MOSS	**Claimants**
(2) BRANDON GABRIEL KEATING	
(3) FIDELISSIMUS LLC	
- and -	
(1) BRIAN MARTIN	**Defendants**
(2) HOLLY SUSAN BONE	

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- -

Roger Laville (instructed by **Kelly Owen Ltd**) for the **Claimants**
James McWilliams (instructed by **Birketts LLP**) for the **Defendants**

Hearing date: 12 December 2022

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Approved Judgment

This judgment (a draft of which was circulated to the parties' legal representatives on 17th December 2022) was handed down remotely at 10.00am on 22nd December 2022 by circulation to the parties' legal representatives by e-mail and by its release to The National Archives

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HHJ RUSSEN KC

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Introduction

1. This is my judgment on those matters on which I reserved judgment following the hearing on 12 December 2022. The matters which came to be argued at that hearing are identified towards the end of this Introduction. I am grateful to Mr Laville and Mr McWilliams for their clear and helpful submissions on the points for my decision made both at the hearing and (as I explain below) subsequently.

2. The claimants commenced these proceedings on 14 April 2022 seeking the enforcement of two judgments obtained in each case by two of them against either or both defendants (and in each case one other person) in proceedings in the United States. The defendants are husband and wife.

3. The first of the foreign judgments ("**the 2016 Judgment**") was entered in favour of the First and Second Claimants ("**Mr Moss**" and "**Mr Keating**") by the District Court for the Northern District of Texas on 15 April 2016. Under the terms of the 2016 Judgment the First Defendant ("**Mr Martin**") and a Mr Marko Princip are jointly and severally liable to pay each of Mr Moss and Mr Keating the sum of US$2,100,000 in compensatory damages. The 2016 Judgment, which followed a jury trial, also included an order for payment of exemplary damages of US 4,200,000 to each of Mr Moss and Mr Keating but that element of the judgment forms no part of the present enforcement proceedings.

4. The second of the foreign judgments ("**the 2022 Judgment**") was entered in separate US proceedings brought by Mr Moss and, as assignee of Mr Keating's rights under the 2016 Judgment, by the Third Defendant ("**Fidelissimus**") in the District Court of the 68th Judicial District of Dallas County, Texas. The 2022 Judgment ordered Mr Martin and Ms Bone each to pay Mr Moss and Fidelissimus compensatory damages. In addition, the 2022 Judgment included orders for the payment of exemplary damages to each of them (approximately US$9.1m in the case of Mr Martin and US$2.8m in the case of Ms Bone) but, again, those parts of the 2022 Judgment are irrelevant to the present proceedings.

5. Mr Martin and Mr Princip appealed the 2016 Judgment to the United States Court of Appeals for the 5th Circuit on jurisdictional grounds. That appeal was dismissed on 7 February 2019. Mr Keating assigned his rights under the 2016 Judgment to Fidelissimus on 20 November 2019. Mr Martin and Ms Bone have appealed the 2022 Judgment pursuant to a Notice of Appeal filed at the Dallas County Court in Texas on 9 May 2022. That appeal has not yet been determined.

6. The Particulars of Claim in these proceedings quantified the relevant judgment liability of Mr Martin and Ms Bone to each of Mr Moss and Fidelissimus, including interest, at US$6,665,244 (or £5,098,111) and US$2,809,926 (or £2,149,256) respectively.

7. The background to the entry of the 2016 Judgment and the 2022 Judgment, with a summary of the claimants' respective causes of action in the US proceedings, is set

out in the Judgment of Mr Philip Marshall KC, dated 4 November 2022, to which I turn in paragraph 12 below.

8. On 6 May 2022, the claimants obtained a without notice freezing injunction in this jurisdiction against the defendants. The injunction was granted by Mr Justice Andrew Baker and subsequently varied (on paper) by the judge on 12 May 2022, and on 20 May 2022 it was continued by Mr Justice Butcher to today's date ("**the Freezing Order**"). The Order of Butcher J dated 20 May 2022 contained an exception for the defendants between them to spend a reasonable sum up to £175,000 on legal costs. Further orders made by consent on 26 August 2022 and 18 October 2022 increased the cap upon the expenditure on legal costs that might reasonably be made to £200,000 and then £230,000.

9. In addition to the Freezing Order, on 20 May 2022 Butcher J also made a further Order ("**the Directions Order**") containing directions which reflected the defendants' intention to seek the discharge of the Freezing Order and/or to oppose its continuation. This was also something contemplated by the Order dated 4 November 2022 mentioned in paragraph 14 below.

10. The Directions Order also addressed an application for summary judgment on the claim which the claimants had issued the day before. It gave retrospective permission to issue it even though the defendants had not yet filed an Acknowledgment of Service and the time for them to do so had not yet expired.

11. The claimants' summary judgment application came before HHJ Pelling KC on 15 July 2022 but was adjourned for further hearing in circumstances where the court considered the time allotted to it was insufficient. It was adjourned with a time estimate of 2 days. The application was heard before Mr Philip Marshall KC, sitting as a Deputy High Court Judge, who heard it during the morning of 26 October 2022. The deputy judge reserved judgment on the application.

12. By his judgment dated 4 November 2022 ("**the English Judgment**") Mr Marshall KC granted summary judgment in favour of the claimants. For the reasons comprehensively given in the English Judgment the deputy judge concluded that Mr Martin had no defence carrying a real prospect of success to the enforcement of the 2016 Judgment or the 2022 Judgment and that Ms Bone had no such defence to the enforcement of the 2022 Judgment. At the conclusion of the English Judgment the judge noted that he had not seen any application for a stay but said that he would hear submissions on any stay application alongside other consequential matters.

13. The English Judgment recognised that the 2022 Judgment was under appeal but noted, as was common ground between the parties, that it did not follow that the judgment was not "final and conclusive" for the purpose of being enforced in England and Wales by way of action at common law.

14. The Order of Mr Marshall KC dated 4 November 2022 ("**the November Order**") provided for Mr Martin and Ms Bone to pay the sums respectively due from each of them to each of Mr Moss and Fidelissimus under the 2016 Judgment and/or the 2022 Judgment with interest calculated from the respective dates of those judgments.

15. The hearing before me on 12 December 2022 had been listed as the "Adjourned Return Date" which the Directions Order identified as the hearing at which the claimants' entitlement to the Freezing Order would be reviewed. The November Order also recited that this was the purpose of the hearing on 12 December. The costs reserved by the Orders dated 6 May, 12 May and 20 May 2022 were also to be addressed at the hearing.

16. In the event, there was no contest at the hearing over the claimants' entitlement to continuing injunctive relief. Mr McWilliams for the defendants explained that the decision not to pursue their application to discharge the Freezing Order had not been prompted by any change in their views as to the claimants' conduct in obtaining it. Rather, it was based upon them recognising that, after the grant of summary judgment on the claim, the court would be less likely to countenance the discharge of the Freezing Order. In addition, the continuation of the Freezing Injunction was a factor which, Mr McWilliams submitted, went in his clients' favour when it came to the exercise of the court's discretion to grant or a refuse a stay of execution on the application mentioned next.

17. The hearing before me instead concerned two principal matters:

    i) the defendants' Application Notice dated 14 November 2022 seeking a stay of the November Order ("**the Stay Application**"); and

    ii) the defendants' Application Notice dated 5 December 2022 seeking an increase from £230,000 to £260,000 for the capped sum that they are permitted under the Freezing Order for reasonable expenditure on legal costs ("**the Legal Expenses Application**").

18. The defendants' non-opposition to the continuation of the Freezing Order (save in relation to its current cap on permitting expenditure on legal expenses) did not mean that consideration of its terms was otherwise unnecessary. That is because Mr McWilliams raised a number of other points about the effect of the Freezing Order going forward.

19. The first was that the defendants said that any order continuing the injunction should contain an express liberty for the defendants to apply for its discharge or variation in the event of their appeal in the United States against the 2022 Judgment being successful. The second was that they should also benefit from an express liberty to apply in respect of the ordinary living expenses and the reasonable legal costs (beyond the £260,000 cap sought on the Legal Expenses Application) permitted under the Freezing Order. Mr McWilliams was concerned that, without these express provisions, the defendants might be met with the argument that there had been no change of circumstances to justify the court re-visiting the terms of the Freezing Order as continued by me. My instinctive reaction to that was to say that the defendants' success on the appeal in the United States or them reasonably incurring further legal fees which saw them exceed whatever was the existing capped amount would be a relevant change of circumstance. Mr Laville for the claimants did not take issue with that or the inclusion of an express liberty to apply for the avoidance of any doubt.

20. A third matter raised by the defendants under the terms of the Freezing Order was more contentious and concerned the ability of an English company called Wild MC Limited ("**WMC**") to spend money on its own legal costs.

21. The Freezing Order contained the expanded definition of *"the Respondent's assets*" adopted by the Commercial Court form of freezing injunction and in its non-exhaustive list of the particular assets covered on this basis (because they might be owned "legally, beneficially or otherwise" by Mr Martin or Ms Bone or within either's direct or indirect power of disposal) were not only the shares in WMC but also "*the assets of [WMC]*" (and another limited company). Mr Laville told me that Ms Bone was the sole director and the sole (or at least principal) shareholder of WMC.

22. Because the assets of WMC are frozen by the Freezing Order, the order contained (at paragraph 10(b))) the following expanded version of the '*Angel Bell*' proviso; namely:

> "This order does not prohibit the Respondent (or any company whose assets are frozen pursuant to paragraphs 4 and 5 above) from dealing with or disposing of any of his assets in the ordinary and proper course of business, but:
>
> i) the Respondent must give the Applicant's solicitors two clear working days' notice of his intention of so doing in respect of any transaction (or series of connected transactions) exceeding £3,000 in value;
>
> ii) the Respondent must inform the Applicant's solicitors when the aggregate value of transactions effected pursuant to this paragraph has exceeded £25,000; and
>
> iii) the Respondent must tell the Applicant's legal representatives where the money is to come from.

23. By his skeleton argument and oral submissions Mr McWilliams asked the court to make a ruling as to whether or not expenditure by WMC on legal fees could fall within the proviso. He said that WMC was not a respondent to the Freezing Order (I loosely described it as a "quasi-respondent" in the light of the freeze of the company's own assets) nor a judgment debtor in the United States or here and yet was encountering difficulties with its YouTube channels in the United States and, in particular, whether or nor those channels are caught by the 2022 Judgment, so that the revenue from them should be paid into the Texas Court Registry. WMC wished to take legal advice about that. Mr McWilliams pointed to recent solicitors' correspondence which revealed the claimants' position to be that the only expenditure on legal fees permitted by the Freezing Order was that under the exception in favour of Mr Martin and Ms Bone (i.e. paragraph 10(a) which was the subject of the Legal Expenses Application) and that any payment of legal fees by WMC would not be in "*the ordinary and proper course of business*" but would instead be extraordinary (and unpermitted) expenditure. The claimants' solicitors said that if Ms Bone had wanted WMC to incur legal costs then she should have sought an exemption to that effect on 20 May 2022.

24. Mr Laville said that I should not entertain the request for clarification of what the Freezing Order did or did not permit in this regard. He pointed out that there was no evidence to support it and there had been no formal application by the defendants. He drew my attention to an exchange of emails on 21 November 2022 between WMC and the claimants' solicitors which revealed that WMC proposed to pay a "*flat fee US$100,000 retainer*" to a Texas lawyer for advice and representation in the Texas proceedings. WMC said the lawyer's hourly rate was US$500 but the lump sum was sought as security that he would be paid. In any event, Mr Laville submitted, WMC had no separate entitlement to pay legal fees than that recognised in favour of Mr Martin and Ms Bone and on which there was a clear monetary cap.

25. Despite the claimants' stance it seemed appropriate to me to give a ruling at the hearing as to whether or not *as a matter of principle* expenditure by WMC on legal fees could be categorised as falling within the '*Angel Bell*' proviso inserted for its benefit. The potential for a challenge to the propriety of the actual payment, if it is made, of US$100,000 by WMC at some stage of these proceedings (whether pre-execution or post-execution) which the emails of 21 November 2022 highlighted was, it seemed to me, a reason to engage with an argument which turned upon the true construction of the Freezing Order. I made it clear that I was not making any decision about the actual *propriety* of that proposed payment, and whether it would be a breach of the Freezing Order, or any other particular payment WMC might make to lawyers. Mr McWilliams was correct to point out that the notification provisions in paragraph 10(b) of the Freezing Order put the onus upon the claimants to make any immediate challenge to the proposed payment; though I would add that the absence of any such prompt challenge cannot in my view undermine any application the claimants might later wish to make on the basis that Ms Bone has caused WMC to make a payment which breached the Freezing Order.

26. For the reasons given in a short extempore judgment, I decided that WMC can as a matter of principle incur and pay legal fees and attribute them to its ordinary and proper course of its business.

27. In summary, I concluded that the absence of a separate, express exception in favour of WMC for the payment of reasonable legal fees was simply a reflection of the fact that WMC is neither a defendant to these proceedings nor a respondent to the Freezing Order. WMC does not therefore fall within the definition of "the Respondent" for the purposes of the Freezing Order and, on that basis, it would be wrong to infer from the absence of any mention of the company in paragraph 10(a) a "non-entitlement" in relation to expenditure on legal fees. Had WMC been a respondent to the Freezing Order in its own right, and not just a "quasi-respondent", then the standard form of freezing injunction would have seen it expressly benefiting from the legal expenses exception. Mr Laville's point that it cannot be right that WMC should be able to pay legal fees without regard to the monetary cap applicable to the two respondents was, in my judgment, simply a reflection of the point that WMC was not a third respondent (whose inclusion as such *might* have meant the cap would have been fixed, or might on a later review be fixed, in a higher sum). It did not mean that WMC's payment of lawyers could not, as a matter of principle, fall within the scope of ordinary and proper course of business expenditure. This conclusion was supported by the decision of the Court of Appeal in *Michael Wilson v Partners Ltd v Emmott* [2015] EWCA Civ 1028 where, at [22]-[23], Lewison LJ observed that a payment which was neither

routine nor recurring in nature could nevertheless be regarded as being in the ordinary course of business, for the purposes of the '*Angel Bell*' exception.

28. In *Michael Wilson v Emmott*, at [23], Lewison LJ endorsed the example of a respondent to a freezing injunction meeting an award of damages awarded to an employee as being in the ordinary course of business. I recognise that, for a named respondent, the legal expenses incurred in unsuccessfully defending the employee's claim would be permitted by the separate exception in the injunction. But for a non-respondent like WMC which, as such, does not benefit from that other exception, I said it was difficult to see on what basis such legal costs should not also be regarded as being in its ordinary course of business. I also recognise that the example given in that case involved a respondent facing unwelcome litigation but, as I observed at the hearing, most litigants including corporate ones may be presumed to be incurring their legal costs in the belief that it is money well spent and in the hope that the litigation will at least preserve if not enhance the value of their assets and, potentially at least, thereby the value of the shareholdings in them. Expenditure by WMC on legal services therefore has the potential to preserve and perhaps result in a net increase the value of assets frozen by the Freezing Order.

29. The thrust of Mr Laville's submissions, however, was that Ms Bone's control of WMC meant that the value of its assets and the value of her shareholding in the company (each separately frozen) were at risk of dissipation through unwarranted and inflated expenditure on legal fees. Recognising that it involved an unrealistic scenario, because such a company - with its assets (or income) and expenditure regulated by court order - would not be at all likely to be regarded as potentially the "asset" of a respondent for the purposes of a freezing injunction, I observed that the question of principle for my decision should be approached on the same basis as would apply to a company under the direction of an independent board. However, I did not (I think) in the course of my extempore judgment on this point mention the decision of the Court of Appeal in *Halifax Plc v Chandler* [2001] EWCA Civ 1750 upon which Mr McWilliams had also relied in the course of argument. The observation by Clarke LJ, at [18], that the court does not usually consider whether or not the purpose or amount of business expenditure is reasonable, because the purpose of a freezing injunction is not to interfere with the defendant's ordinary business, lends support to my decision on the question of principle.

30. That decision left the issues raised by the Stay Application and the Legal Expenses Application remaining unresolved at the conclusion of the hearing. As I explain below, the parties agreed to consider further the jurisdictional basis and principles governing the Stay Application. The Legal Expenses Application raised a much shorter point for decision but, as the defendants had by the time of the hearing already incurred one half of the costs sought to be covered by the uplift in the monetary cap and the other half in part related to potential future costs related to enforcement of the November Order, I decided it was appropriate to also reserve my judgment on that application.

31. At the conclusion of the hearing on 12 December 2022, I continued the Freezing Order (with its current cap of £230,000 on legal expenses) until the handing down of this judgment on the Stay Application and the Legal Expenses Application.

The Stay Application

32. On the face of it, the Stay Application sought a stay of execution and enforcement of the November Order which of course included recognition of Mr Martin's liability under the 2016 Judgment. The basis of the requested stay was the defendants' pending appeal against the 2022 Judgment. In his skeleton argument Mr Laville pointed out that there was no basis for staying enforcement of the 2016 Judgment when (see paragraph 5 above) the appeal against that judgment had failed.

33. In response, Mr McWilliams clarified at the hearing that his clients were only seeking a stay of that part of the November Order which recognised the claimants' right to enforce the 2022 Judgment. He said that the real value of the stay, at least in its interim protection against execution and enforcement, would be that in favour of Ms Bone who was liable only under the 2022 Judgment and has assets of some value whereas Mr Martin really has none.

34. Mr McWilliams also recognised that the Stay Application sought a stay of execution pending the determination of the appeal against the 2022 Judgment, even though that might not be for quite some time. One of the witness statements in support of the Stay Application was made by Susan Clouthier, an appellate attorney at law practising in the state of Texas. Ms Clouthier's statement explained how there had been significant delay in obtaining (1) the court reporter's record for the hearings in the proceedings which led to the 2022 Judgment and (2) the trial judge's Findings of Fact and Conclusions of Law for the purpose of progressing the appeal. The result was that an appeal commenced with the filing of a Notice of Appeal on 9 May 2022 was "abated" (i.e. temporarily put on hold) on 20 September and then reinstated on 31 October 2022. As at the date of her statement (14 November 2022) Ms Clouthier had not been in the position of being able to give considered advice to the defendants about specific grounds of appeal or their merits. Mr Laville also pointed out that the appeal against the 2016 Judgment had not been dismissed until February 2019. On behalf of the claimants he also noted that the potential grounds of challenge to the 2022 Judgment identified in Ms Clouthier's statement were very vague.

35. In the light of these points Mr McWilliams recognised that the court might choose to exercise its discretion to stay the November Order (in relation to the liability arising under the 2022 Judgment) for a shorter period by reference to an earlier event within the Texas appellate procedure than the eventual determination of the appeal. Mr McWilliams suggested one option would be to stay execution until the defendants had filed the "appeal brief" in the Texas proceedings. On instructions, he said at the hearing that the appeal brief was due to be filed on 6 January 2023 and that was an anticipated event by reference to which a stay until, say, the end of February 2023 might appropriately be granted. In the submissions sent after the hearing (see below) Mr McWilliams helpfully clarified matters by confirming that the deadline for filing the appeal brief had been extended, without opposition from the claimants' US appellate attorney, until 20 February 2023 and this by reference to matters personal to Ms Clouthier. Accordingly, any stay fixed by reference to that event should be for a period which accommodated that extended date for filing.

36. So far as this court's power to grant a stay of execution is concerned, the Application Notice dated 14 November 2022 had identified the provisions of CPR 3.1(2)(f) and/or CPR 40.8A as supporting the Stay Application.

37. At the outset of Mr McWilliams' submissions on the application, I questioned my power to grant a stay in circumstances where the notes to each of those provisions in the 2022 White Book (at paras. 3.1.8 and 40.8A.1 respectively) perhaps indicated that only CPR 40.8A could be relied upon to stay the November Order and yet the date of that order was so recent that the defendants might not be able to point to the requisite "*ground of matters which have occurred since the date of judgment*" to support a stay under that provision. (The commentary in each also referred to the Court of Appeal decision in *Michael Wilson & Partners Limited v Sinclair* [2017] EWCA Civ 55 which was an authority upon which Mr McWilliams came to rely after the hearing.). Ms Clouthier's witness statement had not identified any such post-judgment matters.

38. I was also mindful of the point urged upon me in Mr Laville's skeleton argument which was to approach the issue of a stay by applying by analogy the provisions of CPR 52.16 (recognising the power of the lower court or the appellate court to grant a stay pending an appeal in proceedings here) and treating the District Court in Dallas County as the "lower court" for these purposes. I had initial doubts about that when the English Judgment and November Order were, as I put it, not just about recognition of the existence of a judgment-based liability but enforcement of that liability. I recognised that Mr Marshall KC had indicated he would later decide any application for a stay that might be made but, sharing my musings with Mr McWilliams and Mr Laville, I contemplated that any such application made at the handing down of the English Judgment might almost be said to involve a repudiation of his finding (to the standard required on a summary judgment application) that both the 2016 Judgment and the 2022 Judgment should be enforced and, therefore, *not* stayed. And the position before me was that there was no appeal against the November Order which obviously might justify resort to CPR 52.16.

39. However, through a show of consensus, counsel put me right on that second line of thought and brought me back to Mr Laville's position that the Stay Application meant that the situation was indeed comparable to one where CPR 52.16 operates. Mr McWilliams highlighted that the English Judgment did nothing more than recognise the obligation created by the 2022 Judgment which, in effect, provided the cause of action for the proceedings here. The 2022 Judgment has no status as a judgment here and this court had made no findings about the fraudulent transfer of assets aimed at inhibiting the execution of the 2016 Judgment which (as summarised at paragraph 17 of the English Judgment) formed the basis of the Texas proceedings in which the 2022 Judgment was granted. There were only limited grounds on which the defendants could resist the claim on the foreign judgments at common law and (as clearly explained at paragraphs 41 and 66 of the English Judgment) the fact that an appeal was pending against the 2022 judgment was not one of them. The United States is the only jurisdiction where the defendants can make their substantive appeal. In the post-hearing submissions mentioned next, Mr McWilliams also submitted that the court can and should apply by analogy the principles it would apply if the substantive appeal were taking place in this jurisdiction. In other words, it should have regard to the principles applicable under CPR 52.16.

40. Even so, my observations about the provisions of the CPR relied upon in the Application Notice did prompt consideration at the hearing of the provisions of CPR 83.7 to which the above-mentioned notes in the White Book directed attention. CPR 83.7(1) provides that at the time a judgment or order for payment of money is made or

granted, or subsequently, the judgment debtor (or other person liable to certain forms of execution) may apply to the court for a stay of execution. Mr Laville suggested that one of the cases mentioned in the notes in the White Book (at para. 83.7.1) - the decision of the Court of Appeal in *Ferdinand Wagner v Laubscher Bros & Co* [1970] 2 QB 313 – might be of some significance because it appeared to concern the issue of a stay of execution of a foreign judgment registered in England.

41. It was clear at the hearing that the parties and the court would benefit from further reflection upon the provisions of CPR 83.7. I invited counsel to provide me with brief submissions upon the proper approach to the Stay Application after the hearing.

42. At the hearing, counsel's competing submissions about the merits of the Stay Application proceeded on the basis that the relevant test was that of "*special circumstances which render it inexpedient to enforce the judgment or order*": see CPR 83.7(4)(a). If such circumstances are made out then "*the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit*." I return below to the arguments advanced for and against the exercise of any such discretion after analysing the court's power to grant a stay on the Stay Application.

43. Counsel assisted me with further brief submissions upon the court's power to grant a stay by emails (with attachments) dated 13 December 2022.

44. They were in agreement that the relevant rule is CPR 83.7, which requires "*special circumstances*" pointing to enforcement of the November Order being "*inexpedient*" (Mr McWilliams placed no reliance upon the other ground, which is required to be supported by a witness statement as to the judgment debtor's means, that the applicant for a stay is "*unable from any reason to pay the reason the money*").

45. Mr Laville said in his brief submissions by email that, although CPR 52.16 is not directly applicable, it is appropriate, when considering what are special circumstances, to consider the test which applies to an application under CPR 52.16. That is because the test under what is now CPR 52.16 has been developed by the courts over time in a way which fairly and appropriately balances the interests of the parties while respecting the *prima facie* enforceability of a judgment debt. Mr Laville said the decision in *Ferdinand Wagner v Laubscher Bros* was not directly relevant because it did not concern an appeal of a foreign judgment. However, it did confirm that a foreign judgment which is registered in England should be given the same force as would be given to an English judgment. In that case the Court of Appeal overturned the judge's decision to grant a stay of execution of a German judgment granted in the plaintiff's favour pending the trial of a separate English action (relating to the same issues as those decided in the German action) which the defendant had brought against the plaintiff, for a sum greater than the amount of the German judgment, but which had been held in abeyance while the proceedings had been going on in Germany. Lord Denning MR observed, at p. 317, that *"[i]f the plaintiffs had obtained an English judgment, we should not for one moment, grant a stay simply because the defendants had brought a cross-claim in another action against the plaintiffs*" and the same should apply in the case of a foreign judgment registered in England.

46. Mr Laville said the decision of the Court of Appeal was consistent with the approach which he was suggesting and militated against the grant of a stay. He also relied upon the decision of Mrs Justice Steyn in *Readie Construction Limited v Geo Quarries Ltd* [2021] EWHC 484 (QB) where, at [7], the judge summarised the principles to be applied on an application for a stay under CPR 52.16. Having noted that the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending, so that a stay pending appeal is the exception rather than the rule, she referred to the need for "solid grounds" to be put forward in support of the stay which will then enable the court to undertake a balancing exercise which involves weighing the risks of injustice to each side if a stay is or is not granted. The applicant for a stay would normally need to point to some form of irremediable harm if no stay is granted. By her adoption of a more recent authority citing the case, Steyn J referred to the passage in the Court of Appeal's judgment in *Hammond Suddards v Agrichem* upon which Mr McWilliams relied (see paragraph 49 below) in relation to the sort of questions to be asked when undertaking the balancing exercise. The last point confirmed by Steyn J was that the perceived merits of the appeal may be considered when there is doubt about the justice of refusing a stay.

47. By his email, Mr McWilliams said that *Ferdinand Wagner v Laubscher Bros* was not on point. That is because it concerned the enforcement of the German judgment (duly registered in this jurisdiction) rather than the present situation of the English Judgment having been entered upon a freestanding claim brought upon the 2022 Judgment as the cause of action.

48. Mr McWilliams said so far as he was aware there was no express limit on what can or cannot constitute a special circumstance for the purpose of the test under CPR 83.7(4)(a). He said the fact that the defendants have an extant substantive appeal against the judgment on which the judgment in this jurisdiction was founded is capable of constituting a special circumstance. On this question, Mr McWilliams submitted, in harmony with Mr Laville on the approach if not the end result, that the court should apply by analogy the principles it would apply if the substantive appeal were taking place in this jurisdiction. In other words, it should have regard to the principles applicable under CPR 52.16. Doing so will ensure that the defendants are not placed in a worse position purely by reason of the fact that the underlying substantive judgment is a Texas judgment rather than an English one.

49. Mr McWilliams relied upon *Michael Wilson & Partners Limited v Sinclair* [2017] EWCA Civ 55, at [15], where McCombe LJ confirmed that the power under CPR 83.7 is not limited to stays in respect of writs or warrants of control but may extend to "*a stay of execution generally*" (and other forms of enforcement) "*similar to the grant of a general stay pending an appeal*". He also relied upon the decision of the Court of Appeal in *Hammond Suddards v Agrichem International Holdings Limited* [2001] EWCA Civ 2065; [2002] CP Rep 21 which did concern an application for the stay of a costs order pending appeal (the relevant provisions then being in CPR 52.7 rather than 52.16).

50. In *Hammond Suddards v Agrichem* the appellant's case for a stay was based upon its extremely poor financial position and the risk of the appeal (for which permission had been given paper) being stifled if the stay was not granted. The Court of Appeal, on the renewed application for a stay which had been refused on paper, was unpersuaded

by that argument, saying that the evidence was "wholly insufficient" to show there was a risk the appeal would be stifled. Clarke LJ (giving the judgment of the court), made the following observations about the power to grant a stay under what is now CPR 52.16, at [22]:

> "By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

51. Under both CPR 83.7 and (implicitly) CPR 52.16 the court has a discretion to stay execution of judgment whether generally ("*absolutely*", to use the language of CPR 83.7(4)) or for some defined period and whether or not conditionally. In light of counsel's further helpful submissions I approach the Stay Application having reached the following conclusions about the court's jurisdiction to entertain it:

i) The test (here) is whether or not "*there are special circumstances which render it inexpedient to enforce*" (the relevant parts of) the November Order: CPR 83.7(4)(a).

ii) Although there is nothing "*special*" about an unsuccessful litigant who is exposed to enforcement of a judgment then appealing against that judgment, and the distinct power to stay recognised by CPR 52.16 (with the "*risk of injustice*" test adumbrated in *Hammond Suddards v Agrichem*) is there to be invoked in an appropriate case by an appellant in English proceedings, the appeal which the defendants have filed in Texas is capable of amounting to a special circumstance which renders it inexpedient to enforce the relevant parts of the November Order. That is because the Texas appeal has the potential to undermine the foundation of those parts of the November Order (and the basis of the English Judgment so far as the 2022 Judgment is concerned); and that appeal, rather than an English appeal which might support an application for a stay under CPR 52.16, is the appropriate one for them to pursue in attacking the payment obligation which they say should be stayed. In other words, I regard the unavailability in this case of the power to stay which is recognised by CPR 52.16, as a factor which can provide the basis for concluding it would be "inexpedient" to permit the enforcement of the relevant parts of the November Order.

iii) In approaching the question of whether enforcement of the November Order (so far as it reflects success on a cause of action based on the 2022 Judgment) would be inexpedient in light of the appeal against the 2022 Judgment, the

court should apply by analogy the principles which govern the grant of a stay under CPR 52.16. As was made clear in *Hammond Suddards v Agrichem*, this involves consideration of all the circumstances of the case with a view to identifying and, as appropriate, balancing any risks of injustice (where there are competing risks to each side) which arise according to whether a stay is granted or refused. As the decision of Steyn J in *Readie Construction v Geo Quarries* equally makes clear, "solid evidence" of prejudice is required from the defendants for the court to be able to conduct this balancing exercise and, if there is doubt as to where the balance comes down, the court can have regard to the perceived merits of the appeal against the 2022 Judgment.

iv) The "inexpediency" test should not therefore be approached on the basis that a stay of the November Order is, given the nature of that order, unthinkable (if that is not an unfair way of summarising the decision in *Ferdinand Wagner v Laubscher Bros*) or runs counter to intuition (which I have explained in paragraph 38 above is where my own thoughts had begun to take me by the start of the hearing). *Ferdinand Wagner v Laubscher Bros* concerned a different situation, as Mr McWilliams submitted, and concerned a yet-to-be established cross-claim being raised in the face of the German judgment which, through its registration here in accordance with Foreign Judgments (Reciprocal Enforcement) Act 1933, was effectively assimilated to the status of an English judgment. The judgments in that case addressed the test under what is now CPR 83.7 (then R.S.C. Ord.47 r. 1) but rejected the defendant's argument in circumstances where the German judgment was not the subject of challenge. There was no appeal against it nor any challenge to the registration which gave it the same force and effect as an English judgment. As for my initial view that a stay was perhaps inimical to the nature and purpose of English Judgment in these enforcement proceedings, I have already explained how counsel pointed out that this took insufficient account of the Texas appeal as the proper tool with which to shake the bedrock of the English Judgment and the November Order. And, as already noted and recognising that the judge might well also have had in mind the ground in CPR 83.74(b), an application for a stay of execution was one which Mr Marshall KC expressly countenanced.

52. I therefore turn to the parties' arguments as to whether or not the grounds for a stay under CPR 83.7 have been made out and upon the exercise of the discretion to grant one, either until the determination of the Texas appeal or for a shorter period.

53. I have already explained that the Stay Application is supported in part by the witness statement of Ms Clouthier. The essential point made in her witness statement is that the delay in the pursuit of the appeal since it was filed in May 2022 is attributable to delays in obtaining from the District Court material required under the relevant procedural rules for pursuing it. To that must now be added the postponement until 20 February 2023 of the deadline for filing the appeal brief which Mr McWilliams highlighted in his email of 13 December 2022. The delays at the Texas court end meant that, as at the date of her witness statement, Ms Clouthier had been unable to provide considered advice to the defendants upon specific grounds of appeal and their merits. The trial judge signed the Findings of Fact and Conclusions of Law on 22 September 2022 but she had only a partial record of the trial proceedings on 7

November 2022. Her limited discussions with the trial attorney led her to understand that he considered that there were some grounds for appeal.

54. I have already mentioned Mr Laville's criticism of the vagueness of Ms Clouthier's witness statement so far as the potential grounds of appeal are concerned. Mr Laville also drew my attention to the request which had been made on behalf of Ms Couthier for the court record (i.e. transcripts) for all 23 days of the trial in District Court of Dallas County in late April 2022. He said that this was indicative of the defendants adopting the speculative approach of hoping something might turn up rather than being able to point to any specific error of fact or law on the part of the trial judge. He said the witness statement was vague in its reference to a complaint about the exclusion of an expert at trial (the expert was not even identified in the statement) and that, on the face of it, it might be too late now for the defendants to pursue and appeal against the trial judge's rejection of Ms Bone's request for a trial by jury.

55. The other witness statement relied upon in support of the Stay Application was Maria-Christina Peyman, a partner in the defendants' solicitors Birketts LLP. Ms Peyman made three points about the irremediable prejudice the defendants might suffer if no stay was granted. The first was that the value of the November Order greatly exceeded the combined value of the defendants' assets and if the claimants are able to enforce it against those assets that is likely to hinder the pursuit of the Texas appeal. In other words, there is a significant risk of the appeal being stifled. The second point was that the claimants are based in the United States without, it seems, any assets in this jurisdiction and, in the event of the appeal against the 2022 Judgment later being successful, the defendants are likely to face difficulties in recovering any moneys paid in the meantime towards the November Order. The third was that Mr Martin is residing in the UK on a spousal visa which is supported by Ms Bone and her assets. Enforcement of the November Order would significantly prejudice the prospects of Mr Martin successfully renewing his visa. Against these points of prejudice to the defendants Ms Peyman pointed to the ongoing protection afforded to the claimants under the Freezing Order. She also said that the claimants had made some recovery in the United States towards the 2016 and 2022 Judgments referred to her understanding that they had received approximately US$848,072 as at 22 September 2022. Ms Peyman said that figure might increase on the basis that revenue derived from various YouTube channels is to be paid over by Google LLC to the claimants. I note that the "turn over" order made the court which entered the 2022 Judgment is mentioned in paragraphs 21 to 30 of the English Judgment. In his submissions, Mr McWilliams said that subsequent filings by the claimants in the United States indicated that in excess of US$1m in total had been received.

56. In meeting this case on the balance of prejudice Mr Laville made the following points. First, there was no basis for the defendants to argue that the appeal against the 2022 Judgment would be stifled if a stay was refused. He pointed to a summary prepared by Birketts LLP of the legal costs incurred by the defendants as at 19 July 2022. This showed that Ms Clouthier's firm has already been put in funds for the appeal in the sum of USS$90,000 which included a "retainer fee" of $75,000 in addition to invoiced sums of $15,000. Second, the grant of a stay would be likely to result in considerable further delay before his clients were able to enforce the November Order, pointing to the fact that the appeal of the 2016 Judgment was not finally dismissed until January 2019, and also result in further legal costs on both sides. Mr

Laville noted that there is no requirement to obtain permission to appeal in Texas, so that the claimants cannot benefit from the early control mechanism that would apply to an appeal here. The vagueness and uncertainty in Ms Clouthier's statement about the grounds on which the defendants are intending to bring their appeal meant that this court is unable to conclude that they have good, or indeed any, prospects of success. Third and lastly, in relation to any application by Mr Martin for the renewal of his visa rights, the grant of a stay would not alter the fact that the 2022 Judgment remains unsatisfied by either defendant. Although I recognise that the defendants' concern focuses upon Ms Bone's spousal support for Mr Martin's visa, I would also add that there is no question of a stay of execution of the November Order against Mr Martin which rests upon the 2016 Judgment. Therefore, Mr Laville submitted, it seems unlikely that a stay would have much of an impact on the prospects of Mr Martin renewing his visa.

57. Having reflected upon the rival arguments I am not persuaded it is appropriate to exercise my discretion in favour of a stay of the November Order so far as it rests upon the 2022 Judgment. The test of establishing special circumstances rendering it inexpedient to enforce the November Order, with the default position under CPR 52.16 (imported into the test to be applied in this case) being against a stay pending an appeal, sets a high bar for the defendants. I have concluded they do not meet it. Mr McWilliams' suggestion of a shorter stay to await the filing of the appeal brief in the Texas appeal has caused me to hesitate longer over that alternative option (not least because Ms Clouthier's witness statement refers to the potentially serious consequences under the Texas Rules of Appellate Procedure for both an appellant and his appellate attorneys if a frivolous appeal is filed) but I am not persuaded to adopt that course either.

58. My reasons for reaching this conclusion are as follows:

i) The Texas appeal against the 2022 Judgment was filed 7 months ago but, because of the matters mentioned in Ms Clouthier's witness statement, this court is unable to undertake any assessment of its merits of it. I recognise that the filing of the appeal brief at the end of February 2023 *might* permit some high-level assessment of merits but any shorter, truly interim stay pending that event granted now would involve an assumption that it is a meritorious appeal. Yet the true position is that the defendants are only able to point to an appeal having been filed with the grounds of appeal not yet identified or articulated (as the judge noted in paragraph 35 of the English Judgment). This means that the Stay Application gains no strength from the last piece of guidance in *Readie Construction v Geo Quarries*, at [7].

ii) I am not persuaded that the refusal of stay creates the risk of the Texas appeal being stifled, and certainly not over its next procedural stage for the filing of the appeal brief. Ms Peyman's evidence on this aspect is very short and, in my view, it falls short of the solid evidence which is required to support an application under CPR 52.16. Her firm's correspondence shows that Ms Clouthier's firm has been paid a significant retainer fee to enable the appeal to be pursued, at least (I think I am entitled to infer) over the alternative shorter stay period suggested by Mr McWilliams.

iii) The equal brevity of Ms Peyman's evidence on the potential prejudice to Mr Martin's position under his spousal visa has also left me doubting the true weight of this point for the purpose of the balancing exercise identified in *Hammond Suddards v Agrichem*. Mr Martin himself will still be exposed to execution to the value of some US$4.35m (in respect of the 2016 Judgment) under the November Order. Of course, Mr McWilliams says the real value and purpose of a stay lies in the interim protection of Ms Bone in respect of the approximately US$5.9m payable by her under the November Order. However, on the limited evidence available, it does not seem unreasonable to infer that, even if her assets were to be protected from judgment execution by a stay, an outstanding liability of hers in that sum might make her successful support for her spouse's visa renewal a harder prospect.

iv) If the appeal against the 2022 Judgment was pursued to a successful conclusion then it does appear to be the case that the defendants (in practical terms Ms Bone) would have to pursue the recovery of any sums received by the claimants though execution of the November Order, reflecting liability under that judgment, by proceedings in the United States. Mr Laville did not challenge this assumption which is based upon where the claimants and their assets are based. However, that is the country where the defendants' liability originates as a matter of judicial decision and it does not seem to me to be a matter of any real weight that the defendants would have to pursue the consequences of its reversal there. They might now both live in England but the English Judgment confirms that District Court of the 68th Judicial District of Dallas County had jurisdiction over them. Any recovery against Ms Bone under the November Order would, of course, also be recovery against the 2022 Judgment obtained in Texas.

v) It is the case that the claimants have received significant sums towards these judgments under the "turn over" order made by the Judicial District Court. However, there is a significant shortfall between the amounts mentioned in Ms Peyman's witness statement as having been paid over by Google and the total liability of the defendants (some US$15m) under the November Order which is sought to be stayed. It is also true that the claimants would still benefit from the protection of the Freezing Order over any assets of Ms Bone in respect of which execution might be stayed (subject to the exceptions for expenditure as currently permitted, proposed by the Legal Expenses Application and also contemplated further down the line). However, a party entitled to a freezing injunction in anticipation of judgment is entitled to see its protection extend to aiding execution if and when that judgment is obtained. The first and most important of the three principles governing the court's discretion to grant a freezing injunction is "the enforcement principle": see *JSC BTA Bank v Ablyazov (No. 10)* [2013] EWCA Civ 928; [2014] 1 WLR 1414, at [34]. Although not a matter for my decision on the present applications, Mr Laville cited authority which shows that the court might take a stricter view of a respondent's permitted dealings with assets once the purpose of the freeze has shifted to anticipated execution. I regard the continuing effect of the Freezing Order as a neutral factor on the Stay Application.

59. The "special circumstances" ground in CPR 87.3(4)(a) has not in my judgment been made out.

60. For these reasons I refuse the Stay Application

The Legal Expenses Application

61. The Legal Expenses Application seeks an increase of £30,000 in the capped sum that the defendants might reasonably spend on legal expenses. As I have explained in the Introduction above, the last increase was to the cap of £230,000 by the consent order dated 18 October 2022. The defendants wish to have the cap increased to £260,000. Their Application Notice said that the extra £30,000 was broken down into £15,000 for representation on the Stay Application and the hearing before me and another £15,000 for "*future applications relating to the freezing order and/or deal [sic] with any enforcement applications which may arise.*" It follows from my decision on the Stay Application that the defendants are indeed likely to be involved in applications by the claimants to enforce the November Order. Indeed, although not formally before me, Mr Laville had suggested that, if a ruling on the Stay Application and remaining time had permitted, that I should make interim charging orders and third party debt orders.

62. Mr McWilliams rightly pointed out that, by increasing the capped sum to £260,000, the court would not be writing a blank cheque for expenditure in that sum as the defendants' permitted expenditure is still moderated by the requirement that it must be reasonable. Having said that, he made the point that he and his instructing solicitors were already at risk of not being paid for the hearing before me because the £230,000 cap had been reached before the hearing took place. In that regard, he said that the *de facto* position was that the defendants were seeking to remove the legal expenses exception under the Freezing Order when such a step would be wholly unjustified and the November Order had expressly provided that any application by the claimants to vary the Freezing Injunction should have been made by an application notice issued and served by 4pm on 7 November 2022. No such application had been made.

63. Mr Laville made a number of points in his skeleton argument against the increase in the cap. He began by referring to a passage in *Gee on Commercial Injunctions* (7th ed) at para. 3-026 and to the decision of the *Court of Appeal in Emmott v Michael Wilson & Partners Ltd* [2019] EWCA Civ 219, at [53]-[57]. Each in fact addressed the question of whether or not it will be appropriate, in any particular case, to include the '*Angel Bell*' proviso in favour of a defendant in a post-judgment freezing injunction. The carrying on of business *might* not be regarded as appropriate *if* it is tantamount to a licence to ignore the outstanding judgment. However, in the present case the fact is that the legal proceedings (here and in the United States) are ongoing and the terms of the Freezing Order continue to recognise the principle that the defendants should not be unfairly hindered in obtaining legal representation. The decision in *Halifax v Chandler* upon which Mr McWilliams relied in addressing WMC's legal fees (see paragraph 29 above), at [16]-[17], is just one case which confirms that a non-proprietary freezing injunction should not provide "security" against that.

64. Mr Laville's points about the increased cap sought were in large part based upon the significant increases to date (from the £175,000 fixed on 20 May 2022) and the claimants' concern, by reference to their assessment of the lack of merit in the defendants' position both before and after the 2022 Judgment, as to whether the costs incurred to date had been money well spent. I do not regard this application of hindsight as particularly relevant to my determination of the Legal Expenses Application which is looking at expenditure going forward. The increases in the cap to £200,000 and then £230,000 were agreed by the parties. That agreement no doubt reflected the claimants' acceptance of the basic principle recognised in *Halifax v Chandler*. That principle still applies and I should give it proper recognition when considering the defendants' expenditure on legal fees beyond that contemplated by the last consensual increase.

65. Mr Laville made the point that the £230,000 cap was agreed when it was understood that the summary judgment application would last 2 days, rather than the half day it actually took on 26 October 2022, and that the defendants would be pursuing an application to discharge the Freezing Order, when they have not done so. While recognising that it would not be appropriate for the court to attempt something approaching a costs budgeting exercise on the present application, he also made particular points about the defendants' solicitors' hourly rates exceeding the guideline rates.

66. Mr McWilliams responded by saying that the hearing over consequential matters, on 4 November 2022, was a reasonably substantial hearing and the statements of costs served by the parties for the hearing before me spoke for themselves as to what the parties were actually continuing to spend on legal fees. He said that his clients should be entitled to be represented at future hearings about the execution of the November Order, such as the making of final charging order or an application for possession.

67. Having reflected upon these rival submissions, I am satisfied that the Legal Expenses Application should be granted. The short history of past increases in the cap leads me to conclude that the further increase sought is a reasonable one, rather than unreasonable as suggested by the claimants, and that granting the application properly reflects the principle underpinning the legal expenses exception. The point is illustrated by my observation that, although the Stay Application failed, I do not regard the defendants as having acted unreasonably in making it.

68. I am also mindful of the stance which the claimants' solicitors adopted in their letter dated 21 November 2021. That letter recognised that it would be preferable to resolve matters by further agreement but (while is only fair to point out that they were seeking transparency from the defendants through a high-level breakdown of their legal costs incurred so far) went on to say *"[a]ny agreement to increase the cap on your clients' legal costs will be subject to the prior payment of the costs of £44,275 in our clients' favour under the order dated 4 November 2022*." This followed a statement that the claimants did not accept the principle of the defendants continuing to incur legal fees after the November Order. Mr McWilliams described this as the claimants seeking to impose improper leverage in connection with the legal expenses issue. I simply note that, once the need to focus upon the costs going forward is recognised, the terms of the letter are in my view consistent with the decision I have reached.

Disposal

69. The Stay Application is therefore dismissed and the Legal Expenses Application granted. The Freezing Order will be continued until further order with the cap of £260,000 inserted in paragraph 10(a).

70. As things turned out, the lack of time and me reserving judgment on the two applications meant that I was not in a position at the hearing to address applications for interim charging orders and third party debt orders as the claimants would have liked. The claimants should pursue those matters in the usual way.

71. This judgment has been handed down remotely by email circulation to the parties and uploading to The National Archives. In order to preserve the parties' position on any appeal I will adjourn the handing down for the purpose of enabling any application for permission to appeal made to me to be considered alongside my determination of any other consequential matters necessary for settling the order which reflects this judgment (those matters will include the costs reserved by the Orders dated 6 May, 12 May and 20 May 2022). I will set the time for filing any notice of appeal under CPR 52.12 by that next order. Although Mr Laville did not intimate that his clients wished to appeal my ruling on the WMC costs aspect at the hearing on 12 December 2022, in the interests of orderliness the same period will apply to any application for permission to appeal that decision.

72. Any application for permission to appeal and submissions on consequential matters on which the parties are not agreed should be served and filed by 4pm on 17 January with responsive submissions due by 4pm on 24 January 2023. In the absence of any further direction, and if the parties are content with this course, I will endeavour to reach my decisions on the papers without the need for a further hearing (whether remote or attended).