PROPRIETARY INJUNCTIONS: OBTAINING PERMISSION TO USE JOINT ASSETS TO MEET COSTS AND EXPENSES

Introduction

1. This paper will consider the nature of a proprietary injunction and the current state of the law in relation to using the enjoined assets to meet the respondent's legal costs and living expenses.

Proprietary injunction

2. An injunction in support of a proprietary claim is an injunction preventing the dissipation of assets in the hands of the respondent to which the applicant lays claim as his property. In short, an injunction in support of such a claim prohibits the respondent from disposing of what are said to be the applicant's assets.

3. In contrast, a freezing injunction is an injunction granted by the Court by which the Respondent is prevented from disposing of dissipating his assets up to a specified value, either within or without the jurisdiction. It may incorporate "asset-specific injunctions" and invariably includes other relief, notably disclosure obligations. It is aimed against the Respondent making himself "judgment proof", in the event that the claim should succeed. Such an injunction would not accord any de facto priority in the event of insolvency and thus serves a very different purpose from an injunction restraining dissipation of assets subject to a proprietary claim.

4. This distinction is not new but is fundamental. It was been explained at some length by Harman J in *Chandler v Church* (unreported) 21 December 1987[1] where the judge observed that:-

> "First, injunctions restraining defendants from dealing with assets in their hands are of two different kinds. There is the long-established Chancery jurisdiction that a trust fund will be preserved, in whosoever hands it may have come, provided the holder is a volunteer or has notice of the trust (see citation from Templeman L.J. opposite B on p.1281 of the report in *Bankers Trust Co. v Shapira*). The ground for this exercise of jurisdiction is that preventative justice is better than punitive or retributory justice, and that "*if the trust fund has*

[1] And, more succinctly, it in other cases, for example, *Marino v FM Capital Partners Limited* [2016] EWCA Civ 1301, [18].

> *disappeared, equity will have been invoked in vain*". The basic reasoning justifying the jurisdiction is that the property presently in A's hands is not his beneficially, but belongs to B. The early decisions show the court of Chancery intervening to protect infants where the fund is undoubtedly a trust fund, and from that the jurisdiction developed.
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> Secondly, there is the modern jurisdiction called the Mareva jurisdiction. This is quite different in its basis from the older, Chancery jurisdiction. The jurisdiction is exercised over property which is the defendant's own property. He is prevented from dissipating his own money and from taking it out of the High Court's reach. However, the injuncted assets remain of the property of the defendant, who is entitled to use them for proper purposes – for example, in paying prior debts even though the assets may thereby be exhausted before the action comes to trial – because a Mareva jurisdiction gives the plaintiff no priority for his claim in damages over existing debts of the defendant. Equally, as it seems to me, a defendant would be allowed to spend his own assets on defending an action even if he thereby spent all the funds the subject of the jurisdiction and was likely to be a bankrupt and unable to meet any judgment against him."

5. This last observation identifies quite succinctly the difference. Harman J went on to observe that that:-

> "In my judgment, however, a court of equity will not usually permit assets which are trust assets to be used for any personal purpose of the trustee. A trustee cannot pay costs of proceedings against him in respect of the trust out of trust assets except by order of the court, as appears in every originating summons for construction or administration of the trust and as is apparent in every Re Beddoes application for leave to use trust assets to pay costs."

6. This difference in the approach to costs arises from the difference in the nature of the underlying cause of action and can have a significant effect on the conduct of the litigation, since applicants will seek to hinder or prevent a respondent from applying the assets subject to the proprietary claim in order to fund the defence.

Costs and living expenses

7. Standard form freezing injunctions permit the respondent to expend either specified sums or a reasonable amount in discharge not only of his costs but also of his day-to-day living expenses. A respondent to a proprietary claim enjoys no such prima facie right. As a matter of principle, that individual is required to use his own assets not

subject to such a claim before there is any question of him being permitted to use assets subject to such a claim to meet his costs or living expenses.[2] In circumstances where the respondent has sufficient assets of his own, this general prohibition causes no difficulty. It is in circumstances where those assets are (or will be) insufficient that the principle referred to immediately above gives rise to a difficult balancing exercise arises. It is in relation to that scenario that the remainder of this paper will focus.

The principal authorities: –
***Sundt Wrigley & Co-Limited v Wrigley*, unreported, 23 June 1993 (CA)**

8. In *Sundt Wrigley*, an order allowing (in principle) the use of enjoined funds to meet legal expenses had been made by Blofeld J. The matter before the judge whose decision was under appeal (Mr Stone Q.C.) was to increase the amount that could be used; the Court of Appeal was being asked to reverse the decision to permit that increase and also – by cross-appeal – to remove the cap imposed by him. The appeal in cross-appeal both failed. The case illustrates the importance of taking the point about the adequacy of the evidence concerning the non-proprietary assets at an early stage.

9. Primarily, the Court approached the exercise on the basis of injustice; Sir John Donaldson MR observed:-

> "The question which really arises is…the following: Is there so great a risk of injustice to the defendant if he is not represented as to justify recourse to the enjoined funds which may be shown to be the plaintiff's funds held by the defendant as trustee or constructive trustee?"

On the facts of the case, this does not represent a heresy: see paragraph 10 below.

10. The factors which were urged on the Court in *Sundt Wrigley* to prevent any greater latitude being granted are perennial and included:

(1) The absence of evidence from the respondent as to his other or current assets. As the later authorities demonstrate, this is often the Achilles heel of any respondent. However, on the facts of *Sundt Wrigley*, there had been

[2] *Marino v FM Capital Partners Limited* [2016] EWCA Civ 1301, [18].

earlier enquiries and evidence on the subject and, in light of that, Blofeld J. had permitted access to the enjoined proprietary assets. Since there was evidence that there had been no material change, this point was discounted.

(2) That allowing the respondent recourse to the frozen monies would exhaust them and thus defeat the prospects of recovery. (Described as a 'formidable point'.) Although the judge at first instance had required the amount frozen to be fortified in the light of the substantial additional costs now sought to be incurred, the Master of Rolls upheld the conclusion to allow the respondent access to that augmented pot not on the basis that it was correct but because it was an outcome open to the judge at first instance as a legitimate exercise of his discretion.

(3) That there was no evidence to show the respondents could not cope unrepresented at trial. This submission and the submission that the respondents would be familiar with the documents fell on stony ground in what was 'full-blooded' commercial litigation. Nor (it was held) could the applicant rely on the judge's duty to 'hold the ring' for a litigant in person.

(4) The merits. (The Court felt that such an analysis was inappropriate save where 'within the reasonable confines of an interlocutory hearing' it can be demonstrated that they are strong. Such a demonstration would bear heavily on the exercise of the discretion.

Fitzgerald v Williams **[1996] QB 657 (CA).**

11. This was a case concerning security costs in which the claimants advanced a proprietary claim to the funds advanced by them on the strength of fraudulent misrepresentations made by the first defendant and his agents and sought an order requiring legal and living expenses to be drawn from other funds first. Having established that the cause of action was arguable, the claimant addressed the issue of whether the defendant should be entitled to draw on the funds said to be subject to the proprietary claim. Sir Thomas Bingham MR consider that argument in these terms: –

> "A defendant should not be entitled to draw on a fund which may belong to a [claimant] until he shows that there is no fund of his own on which he can draw. Where he shows that he has no funds of his own on which he can draw, the court must make a difficult decision, as explained by this court in [Sundt

> Wrigley]. But the plaintiffs may very well be right in contending that that stage has not yet been reached in this case. The judge was, I think, wrong not to accept both limbs of the plaintiffs'' argument at this interlocutory stage [i.e. that they had a good arguable proprietary claim to the assets in question and that the relevant defendant had not shown that he had no other assets of his own on which to draw].
>
> On this point I would grant leave to appeal and allow [the appeal]. The plaintiffs are in my view right to contend that unless and until the first defendant can establish on proper evidence that there are no funds or assets available to him to be utilised for payment of his legal fees and other legitimate expenses other than assets to which the plaintiffs maintain an arguable proprietary claim he should not be allowed to draw on the latter type of assets."

***Ostrich Farming Corporation Limited v Ketchell*, unreported, 10 December 1997 (CA)**

12. The underlying cause of action arose from the respondents' alleged breaches of fiduciary duty; two of the respondents sought *inter* alia to be committed to spend a reasonable sum on legal advice and representation from bank accounts in relation to which proprietary claims were advanced.

13. A poorly drafted order at first instance permitted the respondents to withdraw £10,000 from those accounts provided each of them swore an affidavit confirming "*that they did not have or have access to funds which are available for the purposes of legal expenses that are not subject* [to the injunction]". They duly did so, providing no further detail.

14. The Court of Appeal were unimpressed holding that *Fitzgerald v Williams,* supra. laid down

> "the rule that proper evidence must be submitted to establish that the defendant has no other funds beyond those to which the plaintiff has a proprietary claim which are available to him for the payment of his legal fees and other legitimate expenses".

Indeed, Roch LJ considered that this evidential requirement was, in effect, the first stage of the application in order to establish jurisdiction: –

> "The first stage is in effect a hurdle that the defendant must clear before the court's discretionary power to release monies from the frozen funds for the purpose of

financing the defendant's defence arises. That hurdle is to establish on proper evidence that there are no funds or assets available to the defendant which can be used by him to pay his legal expenses other than the assets in respect of which the plaintiff brings his proprietary claim.

The reason for the first hurdle is obvious. The defendant should not be permitted to diminish the funds which the plaintiff claims are his and in respect of which the defendant is (if the plaintiff is correct) a trustee for the plaintiff. A defendant cannot clear this hurdle unless he provides evidence on affidavit giving a full and frank account of his finances to the court." (Emphasis added).

15. In addition, the Court held that it was not merely sufficient for a defendant is to establish that he has no other funds with which to conduct his own defence; he must, in addition, show that the has an arguable case for having recourse to the funds in question stop in the absence of being able to establish an arguable claim on his behalf to the funds in relation to which the proprietary claim is advanced, the Court held that he had no right to use the money; as Millett LJ explained

> "A trustee has no right to have recourse to trust money to defend himself against a claim for breach of trust unless he has an arguable case for saying that he has a beneficial interest in the funds in question. No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings. Just as the Court's jurisdiction to grant the injunction in the first place depended on the plaintiff's establishing an arguable case that the money belonged to it, so its willingness to permit the defendant to have recourse to the money depends upon his establishing an arguable claim to the money."

16. Once those elements of the first hurdle cleared, the consequence was that: –

> "….the court can make an order allowing the defendant to use part of the funds (the equitable ownership of which is claimed by the plaintiff) for the defendant's legal expenses. That power in the court is a discretionary power. The court in deciding whether to exercise that power, must weigh the potential injustice to the plaintiff of permitting the funds which may turn out to be the plaintiff's property to be diminished so that the defendant can be legally represented, against the possible injustice to the defendant of depriving him of the opportunity of having the assistance of professional lawyers in advancing what may, at the end of the day, turn out to be a successful defence."

17. The judge at first instance did not follow this 2-stage test and the appeal was allowed, the respondents being criticised for not explaining the origin of the monies in the bank account, being something peculiarly within their knowledge. Accordingly, it will be seen that in relation to sophisticated businessman with varied asset portfolios, the requirement for a "full and frank account" may represent a real challenge. In contrast, where the defendant is the 99-year-old widow with no alternative source of funding, the exercises undoubtedly relatively more straightforward: *Nugent v Nugent* [2015] Ch. 121.

***Armco Inc v Donohue*, unreported, 24 September 1998 (Jersey CA)**

18. Whilst only of persuasive authority, the Court undoubtedly carried significant weight, consisting of Sir David Calcutt Q.C., Miss Elizabeth Gloster Q.C. (as she then was – now Gloster LJ) and the Hon. Michael Beloff Q.C., with the judgment being given by Miss Glocester Q.C..

19. The decision (that arose in complex, multijurisdictional proceedings) is noteworthy for what it said in relation to the relevant principles that govern the exercise of the Court's discretion to allow payment of a defendant's legal costs out of enjoined funds in circumstances where proprietary claim was being asserted.

> "For present purposes they may shortly be stated as follows, although I emphasize that this is not an exhaustive list of the very many different factors that may affect a court's discretion in such circumstances:
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> l. Only in an exceptional case, "*where the merits could be gone into for the purpose of satisfying a Court that the proprietary claim was so strong that it could be demonstrated that such a proprietary claim was well founded at an interlocutory stage* [should] *a Defendant . . not be free to draw on enjoined funds to finance his defence*": see the passage from United Mizrahi Bank -v- Doherty [1998] 2 All ER 230 at 234…, citing Lord Bingham MR in Sundt Wrigley & Co -v- Wrigley [1993] Unreported Judgment of the Court of Appeal of England.
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> 2. In non-exceptional cases where a proprietary claim is made a "*careful and anxious judgment has to be made....as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn*

out to be a successful defence"; see per Lord Bingham MR in Sundt Wrigley & Co -v- Wrigley (supra).

3. A defendant should not be allowed to draw on a fund which may belong to a plaintiff for the purpose of paying the defendant's legal costs unless and until he has shown that there are no funds of his own upon which he can draw for that purpose; see Fitzgerald -v- Williams [1996] QB 657 at 669G-H. The burden of proof is upon the defendant to do so; see A -v- C (No. 2) [1981] 2 All ER 126 at 127h-128c.

4. The Court looks at the reality of what is likely to occur if no order were made. If the costs would, in practice, be funded by a third party, then the Court will take this into account; see Gee on Mareva Injunctions and Anton Piller Relief (4th Ed'n) page 319.

5. The Court will not normally concern itself with the quantum of individual items of costs, although it may well fix a limit to the overall amount to be allowed for this purpose pending further application to the Court; it will not act as a form of provisional taxing body for the purposes of scrutinising the defendant's legal fees; see Cala Cristal SA -v- Emran Al-Borno (6th May, 1994) "The Times".

6. The Court may impose safeguards such as, for example, an undertaking by the defendant that he will make good, out of funds to which the plaintiffs have no proprietary claims, any sums which are spent on costs which at the end of the day are found to have come out of property to which the plaintiffs have a good proprietary claim; see Cala Cristal SA -v- Emran Al-Borno (supra), (although one might have thought that this would follow in any event, since all the Court is authorising is an act that would otherwise be in breach of an injunction, and is not in any way altering the beneficial interest in the funds, which, on the stated hypothesis, would at all times have remained subject to the plaintiffs' equitable proprietary' claim)."

***Marino v FM Capital Partners* [2016] EWCA Civ 1301**

20. The application that was before the Court at first instance was fairly standard: a variation of a proprietary injunction to enable recourse to be had to the monies frozen in order to meet the costs going forward and the Defendant's living expenses. The facts were not exceptional: the company of which the Defendant was a director and employee had alleged that he had misappropriated or diverted funds due to the company to himself and associated entities. A general personal freezing injunction and a proprietary injunction had been granted. The Defendant had exhausted his general assets, save for shares worth some $18,000 and an £800,000 part share of equity in a property situated

within the jurisdiction. He sought a variation to drawdown £548,000 from the proprietary assets frozen in order to fund his legal and living expenses, with the same to be repaid from the proceeds of the sale of the shares and the house in due course. This approach did not appeal to the Judge who dismissed the application.

21. The Court of Appeal upheld the first-instance Judge's decision and dismissed the appeal. When it came to considering the legal tests and thresholds to be applied the court considered that:

> "18. In this sort of situation, the guidance from the authorities is clear. The ordinary position is that a defendant who has resources of his own which are not affected by a good arguable claim by the claimant that they are his (the claimant's) property should be required to use those unaffected resources to finance his legal defence and to meet his living expenses: *Sundt Wrigley & Co. Ltd v Wrigley*, Court of Appeal, unreported, 23 June 1993; *Fitzgerald v Williams* [1996] QB 657, CA; and the *Ostrich Farming* case. The position where there is a proprietary freezing injunction is thus to be distinguished from that in which there is a general personal freezing injunction imposed under the court's Mareva jurisdiction in relation to the defendant's own assets (unaffected by any arguable proprietary claim made by the claimant), in which case the defendant is ordinarily to be given permission to draw on his resources so frozen to meet his reasonable legal and living expenses.
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> 19 A more difficult situation may arise if the claimant has a good arguable proprietary claim in relation to funds in the defendant's hands and the defendant has no, or inadequate, other assets of his own unaffected by such proprietary claim from which he can meet his living and legal expenses. In that case, the court will have to weigh up the balance of justice to decide whether the defendant should then be permitted to have recourse to the proprietary assets. As Sir Thomas Bingham MR put it in *Sundt Wrigley*, in this situation "a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds held by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may in course turn out to be a successful defence." Under the Civil Procedure Rules which came into force in 1999, the court should examine this question in the light of the overriding objective to deal with cases justly and at proportionate cost: CPR Part 1 . In deciding where the balance of justice falls at this stage, it may be relevant to consider whether the defendant is willing to undertake to replenish the funds taken from the

proprietary assets at a later stage out of non-proprietary assets which might thereafter become available to him… ..

20 In deciding whether a case falls into the first category, where the defendant has resources of his own unaffected by proprietary claims, or the second, where he does not, the authorities are again clear. The onus is on the defendant to persuade the court that he has no, or inadequate, assets of his own unaffected by proprietary claims, so that he potentially has good grounds to argue to be allowed to have recourse to the proprietary assets. There is obvious justice in adopting such an approach, as the defendant has full knowledge of his assets and financial position, whereas the claimant does not.

21 ……

22 This court in the *Ostrich Farming* case followed the staged approach set out in *Fitzgerald v Williams*. At the first stage, the onus is on the defendant to establish that he has no assets unaffected by proprietary claims against him on which he can draw to meet his living and legal expenses. Only if he can show that does the second stage arise, in which the court has to balance considerations of justice on both sides in making the "careful and anxious judgment" to which Sir Thomas Bingham MR referred in *Sundt Wrigley*. As in *Fitzgerald v Williams*, the defendants had not put evidence before the court regarding their assets and so this court held that the court at first instance should not have proceeded past the first stage of the analysis."

22. Of particular note are the following:

(1) The requirement for "*a careful and anxious judgment*" identified by Sir Thomas Bingham MR in *Sundt Wrigley* was upheld: that exercise had to be performed against the backdrop of the overriding objective under the CPR and the need to deal with cases justly and at a proportionate cost.

(2) At that stage when performing that exercise, it was held to be a relevant consideration that the Defendant was willing to undertake to replenish the funds at a later stage out of the sale of the shares and the house (i.e. non-proprietary assets).

(3) The Defendant bore the burden of establishing that he had no or no adequate assets of his own unaffected by proprietary claims in order to fund his costs and living expenses; thus, failing to put in any evidence would fail to discharge the burden (see *Fitzgerald v Williams* and *Ostrich Farming*) but where evidence

had been put in, the onus increased on the Defendant to explain why – in the circumstances of this case – those non-proprietary assets (shares/house) could not be used to fund living and legal expenses.

(4) The Court of Appeal concluded that the first instance Judge was "*well entitled to conclude that he had failed to discharge the onus on him to show that he could not utilise his assets to raise funds (either by selling them or by borrowing against another security) to meet his living and legal expenses*" (see paragraph [25]).

(5) There was no offer at first instance of security over the house by way of a second charge (presumably because such a charge was prohibited) nor was it suggested at first instance that there was any satisfactory mechanism which could be put in place to safeguard fully the company's existing interests in the proprietary assets by replicating its proprietary claim to those assets to the same degree in relation to any replenished funds derived from the sale of the director's assets later on; an attempt at remedying this on appeal (by suggesting an overriding charge under LRA 2002, s. 46) failed because of uncertainty over whether any other proprietary claims might be defeated by the making of such an order.

23. During the course of judgment, the Court of Appeal endorsed the judgment of Lewison J (as he then was) in *Independent Trustee Services Limited v. GP Noble Trustees Limited* [2009] EWHC 161 at paragraph [23] as follows:-

> "(1) does the claimant have an arguable proprietary claim to the funds in issue?
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> (2) if yes, does the defendant have arguable grounds for denying that claim?
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> (3) if yes, has the defendant demonstrated that without the release of the funds in issue he cannot effectively defend the proceedings (or, it may be added, meet his legitimate living expenses)?
>
> (4) if yes, where does the balance of justice lie as between, on the one hand, permitting the defendant to expend funds which might belong to the claimant and, on the other hand, refusing to allow the defendant to expend funds which might belong to it?"

24. However, a word of warning: the Court considered there was a risk about being overly rigid in the application of stages (3) and (4) in circumstances where (unlike the instant

case) there was a risk that the Claimant was not good for any liability under the cross-undertaking in damages supporting the original injunction. Sales LJ considered this significant for the following reason:-

> "33 This is of significance, because the justice of adopting an approach which separates question (3) from question (4) as distinct stages in the analysis depends, in my view, on the assurance that a defendant who succeeds at trial at the end of the day in establishing that the funds made subject to the proprietary freezing order are indeed his own will be able to recover under the cross-undertaking in damages in respect of items which represent additional costs or losses for him from having to use his own assets to fund his living and legal expenses. In such a case, the position will be that the defendant was in fact entitled (had the true position been known) to use any alleged proprietary assets in liquid form for that purpose, without incurring such costs or losses. The cross-undertaking in damages would cover, in particular, any additional losses the defendant has suffered by reason of the proprietary freezing order through having to incur costs of sale – or, as the case may be, costs of arranging borrowing – in relation to the non-proprietary assets which he was forced to sell or charge to raise funds to defend himself. Similarly, if by reason of the proprietary freezing order the defendant is forced to sell non-proprietary assets in a fire sale, at lesser prices than could have been achieved in a more orderly sale process, because he urgently needs to raise money to pay his lawyers, he ought in principle to be able to recover for such loss under the cross-undertaking in damages.
>
> 34 If, on the other hand, there is a real risk that the defendant in such a case, if successful at trial, would not be able to recover the extra costs of sale or borrowing to raise funds which have resulted from the making of the freezing order or would not be able to recover for a loss of value in his assets by reason of having to engage in a fire sale as a result of that order, then in my view questions (3) and (4) in the analysis above would have to be taken together rather than in separate stages. The court would then have to balance the possible injustice to the defendant of being forced to incur costs or suffer loss which may not be compensated at the end of the day if he is successful at trial against any injustice to the claimant in allowing the defendant to draw against the proprietary assets in question where they may prove to be irrecoverable by the claimant at the end of the day if the claimant is successful at trial.
>
> 35 However, in this case, there is no evidence of any particular additional costs or any special loss in realising the value of his assets which Mr Marino might have to bear if he is ultimately successful at trial in defending himself

> against the proprietary claims against him. Moreover, as I have noted above, as in the authorities which establish the staged approach for applications of this kind, there is no suggestion that even if there were such additional costs or such special loss FMCP would be unable to pay any compensation ordered to be paid pursuant to its cross-undertaking in damages. Therefore, it is just and appropriate that the ordinary staged analysis involving questions (1) to (4) as set out in the authorities should be applied in this case, as the judge did."

25. Subject to that qualification, the test laid down by Lewison J in *Independent Trustees Services Limited* are, it is submitted, authoritative, unless and until the Supreme Court reviews the issue.

Human Rights

26. By way of an aside, a Human Rights Act 1998 based argument on Article 6 (rights to a fair trial) was considered unsustainable because:-

> "it has not been shown that, even if Mr Marino had to appear at the case management conference as a litigant in person, he would not receive a fair hearing, since judges are familiar with dealing with litigants in person and seek to ensure that despite the disadvantage they may be under through not being represented by lawyers they do in fact have a fair and effective opportunity to present their case. It is unnecessary to consider what might be the position if Mr Marino faced a final trial without legal representation, since he is seeking to sell the house and it was not suggested that he would have failed in that endeavour before the final trial of the claims against him takes place."

27. There is thus a contra-distinction between the immediate litigation scenario in *Marino* (CMC) and *Sundt Wrigley* (trial). However, a Human Rights argument may take an applicant only so far: "*it is the task of courts to struggle with difficult and ill-prepared cases; and court do so every day*"; [3] indeed, in *Perotti v Collyer Bristow* [2003] EWCA Civ 1521, the Court of Appeal held (in the context of an application for the grant of civil legal aid to assist an appellant) that "*a litigant who wishes to establish that without legal aid his right of effective access will have been violated has a relatively high threshold to cross*" (at [31]). The application in that case failed, the test not being whether (with legal assistance) the court would find it easier to reach the decision which

[3] *Perotti v Collyer Bristow* [2003] EWCA Civ 1521, [32], *per* Chdwick LJ.

it had to reach on the facts of the case. Instead, the test for a violation under Article 6 was whether the court was put in a position that it really could not do justice on the case because it had no confidence in its ability to grasp the facts and principles of the matter on which it had to decide. Chadwick LJ considered that it was in such a case that it may well be said that the litigant was deprived of effective access because although he could present his case in person, he could not do so in a way which would enable the court to fulfil its paramount over-arching function of reaching a just decision: [32].

Some other discrete issues

28. Two in particular are worthy of mention: first, in *Cala Cristal SA v Al Borno*, unreported, 9 February 1994 (Ferris J), the judge was mindful when exceeding to the application, in proceedings described as being of "extreme complexity" which were being conducted in an atmosphere of considerable hostility with the utmost vigour that he would not be able to determine allegations and counter allegations of whether assets were "clean" from the proprietary claim and that it would be undesirable to have "*a series of mini trials on affidavit as to the source of particular assets*". Indeed, he was mindful that there was a risk that the effect of the injunctions and their consequence of preventing legal costs being paid could be used in such a way as to extract from the applicants evidence about the source of their existing funds which they would not otherwise be obliged to disclose at that stage and that the exercise amounted to "*an undesirable reversal of the burden of proof*". Whilst the limitations identified by the Judge as the determining contested issues of "cleanliness" remain, the comment about the reversal of the burden of proof must be viewed with some caution given the later determination by the Court of Appeal that a full and frank account is necessary of the provenance of the assets in question.

29. Secondly, permission to use assets subject to a proprietary claim does not impliedly protect third parties who have received the money from claiming constructive trust for knowing receipt: *United Mizrahi Bank Limited v Doherty* [1998] 1 WLR 435. It will be of some comfort to solicitors, however, that a creditor who in good faith receives payment of a liability due to him from his debtor out of money which he knows to be subject to a proprietary trust claim from a third party will not be liable for knowing receipt by reason of that knowledge alone, even if the claim subsequently turns out to be well-founded: *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276. In

that case, it was held that that a solicitor acting honestly in his capacity as a solicitor for his client was in no different position from any other agent acting for his principal and was not to be imputed with knowledge of a trust merely because, in acting for his client, he knew that it was claimed against his client that there was a trust and such knowledge could not be notice of a trust or notice of misapplication of trust funds. Accordingly, since the defendant solicitors had no notice of a trust or that they had received trust funds from their clients, they were not accountable to the plaintiffs for the moneys which had come to their hands on account of costs, fees and disbursements. Indeed, it was also held – but only by majority! – that a solicitor had no duty to assume the facts averred against his client with true and was under no duty to make enquiries that as to whether such facts were true.

Conclusion

30. Assuming that a claimant has an arguable claim to a proprietary right, there can be no doubt that a defendant who wishes to vary a proprietary injunction must give a full and frank account of all of his assets in order to found the jurisdiction he seeks to invoke and establish an arguable claim to the assets being beneficially his. It is only once these features have been established that he can hope to invite the Court to exercise its discretion in his favour.

31. In doing so, he must rely upon evidence which will withstand careful and critical analysis: it must be detailed as to how the case has been funded to date; where the non-proprietary assets (if any) have gone; to the extent that they remain, their utility as security (whether to the claimant or third parties) or the availability for quick sale must be addressed, as must the claimant's proprietary rights in the event that it is to be suggested that any depletion of the proprietary fund might be remedied subsequently. Whilst the scope for legal aid may now be largely theoretical and CFAs no longer as popular, alternative methods of funding (whether by CFA, DBA or third party/insurer) must at least receive consideration as to whether they should be addressed in the evidence. Whether a defendant should address any ability to borrow money from a spouse or other family members (in the same manner he might on a security for costs application: see CPR 25.13.1 and *Al-Koronky v Time Life Entertainment Group* [2005]

EWHC 1688) has not been specifically addressed in the authorities but (it is submitted) it must be a relevant consideration. It is not enough for a defendant simply to say it will be difficult for him to present the matter at trial in the absence of representation.

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