Case No: A2/2013/1706

Neutral Citation Number: [2013] EWCA Civ 970

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MR JUSTICE GLOBE
[2013] EWHC 1480 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 31st July 2013

Before:

LORD JUSTICE LLOYD
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE MCFARLANE

- -

Between:

THE SERIOUS ORGANISED CRIME AGENCY	**Claimant** **Respondent**
- and -	
AMIR AZAM	**Defendant** **Appellant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Philip Coppel QC and **David Bedenham** (instructed by **Litigaid Law**) for the **Appellant**
Andrew Sutcliffe QC and **Jonathan Hall** (instructed by **CRT Legal**) for the **Respondent**

- -

Judgment

Lord Justice Lloyd:

Introduction and summary

1. This judgment is given on an application for permission to appeal, heard on notice to the respondent with the appeal to follow, against an order of Globe J made on 3 June 2013. The appellant, Mr Azam, is the first defendant in proceedings brought by the Serious Organised Crime Agency (SOCA) under section 243 of the Proceeds of Crime Act 2002 ("the 2002 Act" or just "the Act"). On 22 February 2010 Silber J made a property freezing order (PFO) against him under section 245A of the 2002 Act. Globe J's order was made on an application by Mr Azam under section 245C of the Act to vary the PFO so as to permit him to apply some of his assets which are the subject of the PFO in paying for his future legal representation in the proceedings against him. Globe J refused the application and refused permission to appeal. His judgment has the reference [2013] EWHC 1480 (QB). Patten LJ, considering the matter on the papers, adjourned the permission to appeal application to a full court to be heard on notice and with the appeal to follow because of the urgency of the case.

2. At that time the trial was due to start this month. It has been put off and is now not due to start before January 2014. Despite the adjournment the application remains urgent since the proper preparation of the case requires a great deal of time and effort between now and then.

3. The appeal is put to us for Mr Azam on the basis that, if the PFO is not varied as is sought, he will have to do what he can to represent himself in the proceedings, facing a claim whose avowed purpose is in effect to confiscate all his assets, estimated at some £3.5m in value, on the basis that they are, or they represent, property obtained through unlawful conduct, namely drug trafficking and money laundering.

4. SOCA is represented in the claim by a team of lawyers led by Mr Andrew Sutcliffe QC and Mr Jonathan Hall as Counsel, who argued the appeal. On the appeal, Mr Azam has the benefit of representation by Mr Philip Coppel Q.C. and Mr David Bedenham as Counsel, having been represented by other Counsel before Globe J. However neither they nor their instructing solicitors would be able to act for him once the appeal has been determined unless he is able to have access to funds to pay them, which he says he cannot do without using some of the funds the subject of the PFO. I am grateful to Counsel on both sides for their written and oral submissions in relation to the appeal.

5. The appellant would be at a very great disadvantage without representation of his own in any event. The trial is expected to last for at least seven days. It is suggested that a number of issues arise on the claim under the Act which are by no means straightforward, quite apart from the basic, and controversial, issues of fact which lie at the heart of the case for SOCA as to whether there was unlawful conduct and, if so, whether any of the relevant property was obtained by that unlawful conduct, or can be traced to such property. I need not go into detail as to these factors.

6. Mr Azam says that the disadvantage would be all the more acute because of his damaged psychological condition. That particular problem is attributable to the fact that he spent more than six years in prison in the United Arab Emirates, first of all pending trial on charges there of drug trafficking and money laundering, and then,

after conviction, pending various appeals. His appeal was ultimately successful and he was released and able to return to the United Kingdom in March 2013. He faces a re-trial in the UAE on money laundering charges but not on drug trafficking charges. The evidence is that his experiences in prison were altogether traumatic for him and that he suffers as a result from Post Traumatic Stress Disorder. Again, I need not go into detail.

7. The PFO required Mr Azam to disclose all his assets by way of a witness statement verified by a statement of truth within 21 days of the service on him of the order. He was at that time in prison in the UAE. He did not make a witness statement in accordance with the order until 13 April 2012. Having regard to the difficulties that he experienced in having any contact with solicitors or anyone else who might have helped him in making disclosure until that time, he is not criticised for that delay.

8. In his statement of assets he disclosed accounts at a number of banks including one in Luxembourg referred to as KBL. At that time he was represented and advised by Saunders Law. A number of ad hoc specific exclusions from the PFO were made to allow a lawyer to travel to the UAE and to see him in order to take instructions, advise him and help him comply with the order.

9. SOCA later discovered that he had an account at another Luxembourg bank, which I will call BDL, with some £350,000 to its credit, which had been in the account since April 2000. SOCA is critical of the explanations he gave for not having disclosed this account when making his first witness statement as to assets.

10. Globe J considered that Mr Azam had to show that there were no other assets available to him to use to defray his legal expenses, and that he had failed to do so. To the contrary, the judge held that he did have other such assets, and he refused to make the exclusion sought so as to allow Mr Azam to use funds the subject of the PFO to pay for his legal representation.

11. For reasons which I set out below, while I agree with the judge on several points in the case, I think that he was wrong to treat Mr Azam as subject to a burden of proving that he had no other relevant assets, and to hold that he did have other such assets. On the basis, therefore, that it is for this court to consider the exercise of the relevant discretion, my conclusion is that Mr Azam has shown that it would be just to allow him to use assets which are subject to the PFO for the purpose of meeting his legal expenses in relation to these proceedings. Accordingly I would grant permission to appeal (though only on the first of the two grounds asserted) and would allow the appeal.

The facts

12. Mr Azam lived in the UK until 2002, when he moved to Dubai. SOCA's case which is the basis of the recovery proceedings, and on which Silber J was persuaded that it had an arguable case which justified making the PFO, is that, from at least 1996, Mr Azam was engaged in criminal conduct, principally drug trafficking and money laundering, thereby acquiring real property and cash in bank accounts which amount to recoverable property under the 2002 Act. It relies on a lack of sufficient legitimate income to justify his assets. It also relies on surveillance, carried out by the National Crime Squad over a lengthy period prior to Mr Azam leaving the country in 2002,

which is said to establish his participation in activity consistent with drug trafficking and his close association with many people who have been convicted of such offences.

13. Mr Azam's dealings with the Luxembourg banks occurred in the course of the period of his alleged illegal activity. In September 1999, he opened the BDL account. In the period up to April 2000, five cash deposits totalling US$500,000 were made to its credit. In April 2000, he opened the second bank account, at KBL, using a pseudonym, into which he deposited €255,645. SOCA's case is that, during this same period, Mr Azam was subject to police surveillance in the United Kingdom and was seen associating with numerous individuals who were involved in and later convicted of a conspiracy to supply controlled drugs.

14. Having moved to Dubai in 2002, Mr Azam was arrested there in February 2006 and remained in custody thereafter through until March 2013. He was convicted in March 2007, but he appealed successfully in 2008, the case being ordered for a re-trial. In 2010 he was convicted again but later in that year his appeal to the Abu Dhabi Federal Supreme Court was allowed and the case was then returned for re-trial in the Abu Dhabi Appeal Court. In 2012 he was found not guilty by the Appeal Court and the prosecution's appeal to the Supreme Court failed later that year. He was not released from prison in the UAE until March of this year pending the prosecution's decision as to what to do about a yet further re-trial. He has bank accounts in Dubai, but these have been, and remain, frozen by the UAE authorities.

15. As I have mentioned, on 13 April 2012, while he was in prison, he made a witness statement disclosing his assets purportedly in compliance with the disclosure obligations in the PFO, but he did not disclose the BDL account. Later SOCA discovered the BDL account, and wrote to his solicitors on 30 November 2012 to ask for an explanation. His solicitors replied after he had returned to this country in March 2013. His explanation, as conveyed by them, was that he had been reliant on his wife to provide him with details, he being in prison and without access to records, and that she seemed not to have known about the BDL account, and also that the appellant was genuinely confused as to what accounts he had and that he had believed that the KBL account was the only account he held in Luxembourg.

16. Going back to before the date of the statement as to assets, there is a record of a telephone call made on 23 February 2011 between Mr Azam in prison and Mr Saunders of Saunders Law which refers to the KBL account and then says this:

> "He has another bank account in Luxembourg, but can't remember the name of the bank, will think about it."

17. The only verified statement by Mr Azam as to the reason for the failure to disclose the BDL account previously is in his fourth witness statement made on 15 May 2013. The appellant said in paragraph 3.1 that he presumed his wife "had included both Luxembourg accounts", that he did not see the statements or sign them and he did not know of the omission.

18. When the BDL account was discovered by SOCA, it was subject to a freezing order, or an equivalent, imposed by the Luxembourg authorities. This was released on 9 April 2013. Mr Azam became aware of this, and took steps to withdraw funds from

that account. He succeeded in withdrawing $30,000, and made arrangements to come to Luxembourg on 26 April to close the account and withdraw the entire balance. Those arrangements were frustrated, in circumstances which I must explain by a brief digression.

19. On 25 July 2012 the Supreme Court held, in *Perry v SOCA* [2012] UKSC 35, that a restraint order could not be made under the 2002 Act in relation to property outside the UK. The same would apply to a PFO. As a result of that, therefore, property outside the UK was not affected by proceedings under Part 5 of the 2002 Act. In Mr Azam's case that included the KBL account, the BDL account once discovered, and a property in Spain. Therefore, subject to the restraint imposed by the Luxembourg authorities, the money in the BDL account would have been available to Mr Azam despite the PFO.

20. However, on 25 April 2013 the Crime and Courts Act 2013 was passed. Section 48 of this Act made amendments to the 2002 Act, with retrospective effect, to reverse the effect of *Perry*.

21. On that very day, SOCA made a without notice application for a further PFO relating to the BDL account. This was granted and was at once notified to the Luxembourg bank. Accordingly, by the time Mr Azam arrived at the bank to withdraw the remaining credit balance, the bank was prevented from complying with his request by the newly granted PFO.

22. A number of requests had been made from time to time for the release of funds to allow Mr Azam to pay for legal advice and representation. I need not go into the details of these. Some were granted, in particular to allow Saunders Law to go to Dubai and take instructions from Mr Azam. However, once the BDL account had been discovered, and once Mr Azam had returned to the UK in March 2013, SOCA declined to agree to any further releases. That led to the applications which came before Globe J and, on his refusal, to the appeal now before us.

The relevant legal provisions

23. Part 5 of the 2002 Act provides a way for the State to seize the proceeds of unlawful conduct by civil proceedings. I do not need to go into great detail about the regime generally, but if proceedings are brought under Chapter 2 of Part 5, and if the court is satisfied that any property is "recoverable", then the court is required to make a recovery order: section 266(1). It must vest the property in a trustee for civil recovery. Broadly speaking, property is recoverable if it is obtained through unlawful conduct, as to which sections 241 and 242 contain definitions.

24. Section 243 allows SOCA to take proceedings for a recovery order (CRO) and section 245A provides for property freezing orders. I need not go into the details of these and the immediately related provisions. Section 245B gives the court a discretionary power at any time to vary or set aside a PFO. Section 245C deals with a particular type of variation of a PFO, namely an exclusion from a PFO either of particular property or in some other way, for example by permitting expenditure up to a given amount for given purposes despite the PFO. Exclusions can be made either at the outset or by varying the order. Exclusions may allow, in particular, for (a) meeting reasonable living expenses, (b) meeting expenses of carrying on a trade, business,

profession or occupation, or (c) paying legal expenses that the person in question has incurred or may incur in respect of the CRO proceedings. Exclusions may be made subject to conditions; in the case of exclusions for the purposes of paying for legal expenses they must in any event be made subject to conditions prescribed by a statutory instrument.

25. The regime as regards legal expenses exclusions was introduced on 1 January 2006 by amendments made during 2005. Previously neither a PFO nor the analogous interim receiving order (under section 252) could allow for the payment of legal expenses. Part of the set of amendments made for this purpose was section 266(8A) and (8B) which state that a recovery order may provide for payment of reasonable legal expenses that a person has reasonably incurred, or may reasonably incur, in respect of the proceedings in which the order was made, or related proceedings. That is, as it were, the substantive provision to be made at the end of the day, and the provision as to exclusions from a PFO for legal expenses reflects that as regards the position in the meantime.

26. A legal expenses exclusion is dealt with in more detail than other types of exclusion. As Mr Coppel pointed out, the relevant substantive provisions in section 245C come after the procedural and administrative provisions. As to the former, the court is required, in deciding whether to make an exclusion to meet legal expenses, to have regard in particular to the desirability of the person being represented in any CRO proceedings in which he is a participant: see section 245C(6). Subject to that, the power to make exclusions must be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of SOCA to recover property obtained through unlawful conduct is not unduly prejudiced: section 245C(8). There is therefore emphatic reference on the desirability of legal representation, no doubt included with article 6 of the ECHR in mind. That is a factor of evident relevance in the present case.

27. If an exclusion for legal expenses is to be made, it must be limited to reasonable legal expenses that the person in question has reasonably incurred or that he reasonably incurs, it must specify the total amount that may be released for legal expenses under the exclusion, and, as already mentioned, it must be made subject to prescribed conditions.

28. Those provisions of the primary legislation set the scene but they do not identify the particular issue which is critical on the appeal.

29. Nor is it necessary to consider the statutory instrument (2005/3382) by which the prescribed conditions are set out.

30. More relevant is a practice direction entitled Civil Recovery Proceedings, currently to be found in volume 2 of the White Book at section 3K, starting at page 1785 in the 2013 edition. This practice direction does not supplement any part of the CPR and was not made under the Civil Procedure Act 1997. Its status was examined by Henderson J in *SOCA v Szepietowski* (second judgment) [2009] EWHC 1560 (Ch), [2010] 1 WLR 1316 at page 1349, between paragraphs 29 and 34. Neither party sought to argue that we should take any different view from that expressed by Henderson J as to the status and effect of this practice direction as regards provision for the form and manner of relevant applications. Mr Coppel submitted that it was not

the proper function of a practice direction to prescribe where the burden of proof lay on any given issue or to deal with any other substantive issue. He submitted that on its true construction the practice direction does not do so, but also that if it did it ought not to have done so and could not properly have done so, and ought therefore, to that extent, to be disregarded. I will revert to that when I come to the point in detail.

31. Thus the practice direction must be recognised and applied, subject to any conflict with primary or secondary legislation and subject, if relevant, to the exercise of case management powers under the CPR – not a point relevant to the present case – and subject also to the point made by Mr Coppel to which I have just referred.

32. Section 7A of this practice direction is headed "exclusions for the purpose of meeting legal costs: general provision". Paragraph 7A.2 says that the court will not make an exclusion, except for preliminary purposes, unless the person in question has made and filed a statement of assets. Such a statement is defined in paragraph 7A.3. It requires the maker to set out all the property which he owns, holds or controls or in which he has an interest, giving the value, location and details in each case. Paragraph 7A.4 is of specific importance to the case. It is as follows:

> "The court –
>
> (1) will not make an exclusion for the purpose of enabling a person to meet his reasonable legal costs (including an initial exclusion under paragraph 5B.1); and
>
> (2) may set aside any exclusion which it has made for that purpose or reduce any amount specified in such an exclusion,
>
> if it is satisfied that the person has property to which the property freezing order or interim receiving order does not apply from which he may meet those costs."

33. Much of the argument in this case has centred on the effect of that paragraph and on the issue as to which party bears any particular burden of proof as to the existence or non-existence of other property which may be available to meet the legal costs. For convenience I will refer to such property as "other available assets". Such assets may not necessarily be limited to assets belonging to the person in question, though paragraph 7A.4 itself is limited to assets which he "has", which implies the ownership of at least some interest in the property.

34. At the time when the BDL account was discovered, in November 2012, the money in that account was in the category of other available assets, apart from the effect of the local restraint imposed in Luxembourg, because it was not specified in the PFO and because, as foreign property, the PFO could not then apply to it. Now, however, as the jurisdiction over foreign property has been restored and the PFO has been extended, this account is no longer in the category of other available assets.

35. Thus all disclosed and known assets of the appellant are affected by the PFO, and he contends that he has no other available assets from which he can meet the cost of his legal representation. Conversely, SOCA points to his prior failure to disclose the BDL account and argues that this shows that he may very well have concealed other

assets of which, necessarily, they are not aware. This poses a question on which neither the legislation nor the practice direction provides explicit guidance: on whom is the burden of proof on a point which is inherently difficult to prove? Must the appellant prove that there are no assets that he has not disclosed? Or must SOCA prove that there are assets of his as yet undisclosed, necessarily unknown to them? In each case the standard of proof is the balance of probability. In the nature of things any evidence that there are or may be other available assets is likely to be circumstantial rather than direct.

Decided cases about available assets and freezing orders

36. We have been shown some observations in decided cases, some relating to the 2002 Act and similar legislation, and others to freezing orders in other civil proceedings. I will refer to these authorities before reviewing their significance. None is binding on us in relation to the 2002 Act in its present form, and only one in the statutory field is a decision of the Court of Appeal. Given that this seems to be the first time that the Court of Appeal has had occasion to consider and rule on exclusions for legal expenses under Part 5 of the 2002 Act in its present form, I make no excuse for referring to all the cases cited to us for assistance.

37. In the context of ordinary civil litigation a party who is subject to a freezing order made to protect a proprietary claim cannot draw on the contested funds unless he shows that he has no other available assets on which he can draw, so the onus is on him. This is established by *Fitzgerald v Williams* [1996] QB 657 at 669-670 per Sir Thomas Bingham MR. It is for the defendant to show "on proper evidence" that there are no other funds available to him for the purpose. Waite and Otton LJJ agreed. This was followed and endorsed by the Court of Appeal (Roch and Millett LJJ) in *The Ostrich Farming Corporation Limited v Ketchell* (unreported) 10 December 1997.

38. In *Serious Fraud Office v X* [2005] EWCA Civ 1564, concerned with earlier legislation in the same realm as the 2002 Act, Sir Anthony Clarke MR spoke in similar terms about varying a restraint order under the relevant legislation. In that case the defendant was to stand trial on 13 counts of conspiracy to defraud a company and its shareholders of a large sum of money. A restraint order had been made under the Criminal Justice Act 1988 section 77, which applied to all the defendant's assets, not just to those identified in the order. The defendant applied for a variation of the order to permit him to fund his representation in the criminal proceedings. This was resisted by the SFO on the basis that there was reason to believe that X had substantial assets abroad which he had not disclosed. There was evidence that he had had such assets in the past and the court was invited to infer that he still had them, in the absence of any satisfactory explanation as to what had become of them, sufficient to show that he no longer had them or property representing them. The judge granted the application and the SFO appealed.

39. Sir Anthony Clarke MR referred to an earlier decision of the Court of Appeal, *Re Peters* [1988] QB 871, and said (at paragraph 33) that this showed, first, that the purpose of the restraint order was that the defendant's realisable assets should be preserved so as to be available to satisfy any confiscation order that might be made, but secondly that the court should approach an application to vary a restraint order in a similar way to that in which it would consider an application to vary a freezing order. At paragraph 34 he also referred to article 6 of the ECHR, and to the

defendant's need for a fair opportunity to defend himself, and therefore to be able to fund the costs of his defence.

40. At paragraph 35 he said this:

> "If a defendant against whom a restraint order has been made wishes to vary the order in order to enable him to use the funds or assets which are the subject of the order, which I will call "the restrained assets", in order to pay for his defence, it is for him to persuade the court that it would be just for the court to make the variation sought. I would call that the burden of persuasion. For example, if it were clear that the defendant had assets which were not restrained assets, the court would not vary the order because it would not be just to do so consistently with the underlying purpose of the restraint order."

41. He then referred to cases about freezing orders in ordinary civil proceedings, and went on to consider cases in the statutory context, at paragraphs 41 to 45. His starting point was that it was for the person applying for the variation to adduce evidence sufficient to persuade the court that it would be just to vary the order in such a way as to entitle him to use the particular funds: paragraph 41. Counsel for X argued that all of X's assets were affected by the restraint order, that he said he had no undisclosed assets and that the SFO's position would prevent him from having any legal representation at trial, inconsistently with article 6 (see paragraph 42).

42. At paragraph 43 the Master of the Rolls rejected that argument, as follows:

> "I would not accept that submission. In my opinion the principles identified above apply to this class of case. The question for the judge was whether X discharged the burden of proof or, as I would prefer to put it, the burden of persuasion. That depends upon an analysis of the facts. As I see it, on an application to vary a restraint order in a case of this kind, where the order relates to all the defendant's assets, the position in principle is that it is for the defendant to satisfy the court that it would be just to permit him to use funds which are identified as being caught by the order. If the court concludes that there is every prospect of the defendant being able to call on assets which are not specifically identified in the order, or assets which others will provide for him, I do not think that the court is bound to vary the order in the terms sought."

43. He also rejected an argument that this approach meant that if the court rejected the application, it would be holding that his disclosure had been in breach of the order. He said that this would be too narrow a view: "the court should in my view consider all the circumstances of the case and not confine its attention to the statement made by the defendant pursuant to the order": paragraph 44.

44. In conclusion on the question of the right approach, he held that it was for the person applying for the variation of the order so as to release funds to show that it would be just to permit him to draw on the restrained assets, by reference to all the circumstances of the case: paragraph 51.

45. Having applied those principles to the facts of the case before the court, he concluded that the appeal should be allowed and that the order should not have been varied, on the evidence, so as to allow the expenditure. The evidence before the court was in a very unsatisfactory state, with several important questions unanswered as to what had happened to assets previously available to X. Brooke and Buxton LJJ agreed with the Master of the Rolls.

46. In *Director of the Assets Recovery Agency v Creaven* [2005] EWHC 2726 (Admin) [2006] 1 WLR 622, Part 5 of the 2002 Act itself was the relevant legislation, but the Director (predecessor of SOCA for this purpose) had applied for a non-statutory freezing order, rather than for a statutory PFO. This meant that it would be possible to consider allowing a variation for legal expenses, not then permissible in relation to a PFO. Stanley Burnton J granted the application, having followed the *Ostrich Farming* case in holding that it was for the defendant to show that he had no other funds available for the purpose. He also observed at paragraph 22 that a claim under Part 5 of the 2002 Act for a civil recovery order is a statutory creation of a special kind, but that in relation to an interim freezing order the principles applicable should be similar to those applying to proprietary claims, though with allowance made for the fact that any depletion of the property frozen by the order would not be recoverable from any property of the defendant that is free from any claim under the Act.

47. In *The Queen on the Application of the Director of the Assets Recovery Agency v Gale* [2008] EWHC 1320 (Admin) an interim receiving order had been made under section 252 of the 2002 Act. The application was for it to be varied to allow for the payment of legal expenses. The relevant provisions of section 252 mirror those of section 245C. Mitting J referred to paragraph 7A.4 of the practice direction and to paragraph 43 of *SFO v X*. He said that the evidential and persuasive burden on the issue whether the person in question has other assets from which he may meet the legal costs lay with the Director. He pointed out that Sir Anthony Clarke did not say, in *SFO v X*, that if the court concludes that there is a prospect that the defendant might call on assets not caught by the order it will necessarily refuse to allow money to be drawn to pay legal costs. What he said was that in such a case the court was not bound to allow the order to be varied.

48. Mitting J said this at paragraph 20:

> "The obligation on the defendant to satisfy the court that it would be just to permit the use of funds for the payment of legal expenses is not the same as that there is an obligation on the defendant to prove the negative, that he does not have money outside those covered by the order. To hold otherwise would be to require him to undertake a task that would be extraordinarily difficult to discharge, the proof of the negative, and to do so in circumstances where his own first protocol article 1 rights were engaged because it is money which belongs beneficially to him and assets which belong beneficially to him which are the subject of the proceedings. It seems to me that to require him to prove the negative in those circumstances would, at the very least, risk infringing his article 6 rights; a difficulty which will not arise if the persuasive burden rests on the Director."

49. In *SOCA v Szepietowski*, the second judgment, to which I have already referred, at paragraph 41 Henderson J referred to *Creaven* as showing that it was for the defendant to show that he has no other funds available for the purpose. He noted that Stanley Burnton J had made his comments at a time before the amendments to the 2002 Act made in 2005 had come into force and therefore at a time when there was still an absolute bar under the Act as originally enacted against exercising the power to make an exclusion for the purpose of enabling any person to meet any legal expenses in respect of proceedings for a civil recovery order. Henderson J went on to say this:

> "Nevertheless his basic point in my judgment still holds good, and even in the absence of the practice direction it would be appropriate for the court to approach applications for an exclusion for legal expenses, or an application to vary or set aside such an exclusion, having regard to the familiar principles applicable to proprietary claims."

50. The last case in time that we were shown is a judgment of Ouseley J in an application made by the second defendant in the present proceedings, the judgment in which has the neutral citation reference [2011] EWHC 1551 (Admin). He noted that *Creaven*, following what had been said in the earlier civil cases, put the burden on the defendant but he said that the practice direction appears to alter the way in which the court should approach the issue of whether there are or are not other available funds. At paragraph 23 he said that, on an application for an exclusion, "the court should lean towards enabling advice to be taken as the statute intends and as the controls on the amount indicate". The latter point is a reference to the fact that, even if an exclusion is made for legal expenses, there are controls on how much can be spent, and SOCA is involved in the administration of those controls.

51. Then at paragraph 24 he said this:

> "… on the evidence before me, the applicant is a wholly unreliable witness and I could not hold that I am satisfied that she has no other sources of funds, even though none have been identified. … But, again, it seems to me that the important feature is that I have to judge whether or not the exclusion of money for legal expenses is being done in circumstances where there is a proper basis for satisfaction that there are other funds. There is nothing in her current lifestyle to suggest that that is so: she lives on benefits, the private schooling has ended and her husband is in prison, as he has been for many years."

52. The judge made an exclusion in her favour.

The correct legal test: discussion

53. I accept that the proposition set out by Sir Anthony Clarke MR in *SFO v X* at paragraph 51 applies in relation to an exclusion from a PFO to allow for the payment of legal expenses. Thus, it is for the applicant to persuade the court that it would be just to permit the expenditure out of assets affected by the PFO, having regard to all the circumstances.

54. If the court is able to be satisfied that the applicant does have other available assets from which he may meet the costs, then it is plain that the court will not make the order. Paragraph 7A.4 of the Practice Direction states the obvious in that respect. It does not seem to me that it alters the substantive law. Moreover to say that there will be no exclusion if the court is satisfied that there are other available assets is not to say that there will be an exclusion if the court is not so satisfied. I regard this part of the Practice Direction as neutral. It does not give guidance in the more difficult cases, where the court is not satisfied as to the position.

55. I should mention another point on the Practice Direction. Mr Sutcliffe submitted that paragraph 7A.2 has the effect that no exclusion can be made unless a statement as to assets has been made which is fully compliant with the requirements of paragraph 7A.3. That would mean that, in a case where a statement of assets has been filed and an exclusion has been made on the basis that it is accurate, if it were to turn out later that there was a defect in the statement of assets, even if it was one for which the maker of the statement could not be regarded as culpable, then the exclusion would be liable to be set aside. I do not accept that proposition. Of course, if what emerges later is a culpable defect, as in the present case, then it may be that an exclusion made in reliance on the statement of assets might be set aside, but that would be a matter of discretion and judgment for the court depending on all the circumstances. To find that there was a defect in the statement of assets would not be enough by itself.

56. It may well only rarely be the case that the court can be satisfied that there are other available assets, at any rate now that the brief period has come to an end during which foreign assets were not subject to a PFO.

57. It is more likely that the evidence will leave the court with specific grounds for suspicion that the applicant has other available assets, because of lifestyle factors, or because he has not explained what has become of assets formerly recorded as his; *SFO v X* was such a case. In those cases, the court may well not be satisfied, overall, that the applicant has discharged the burden of showing that it would be just for him to be allowed to spend assets which are subject to the PFO.

58. The more difficult, and perhaps more common, position is where there are no specific grounds for suspicion, and where what SOCA seeks to rely on is a previous instance of non-disclosure, as here. Clearly the applicant must explain his previous non-disclosure, as best he can, and much may depend on how thoroughly and properly he does so. If the court concludes that his evidence is altogether unsatisfactory on this and on other points, but that there is nothing else which points specifically to the existence of other available assets, can the court proceed on the basis, merely because of the past record, that there are other available assets which he is concealing? Must he prove the negative, that there are indeed no other undisclosed assets, or must SOCA prove the opposite proposition, namely that there are undisclosed assets, whose nature, identity and value, necessarily, are unknown to them?

59. In seeking to answer this question, I start from the point that the nature of proceedings for a recovery order, backed up by a PFO, is that a proprietary claim is asserted, i.e. a claim to particular property, but that this is not based on any prior proprietary right. It is, in fact, a procedure by way of confiscation on the part of the State. That in itself engages article 1 of the First Protocol to the ECHR, as well as article 6 of the ECHR itself which is relevant in any event.

60. Conformably with that, section 245C(6) requires the court to have regard to the desirability that persons involved in proceedings for recovery under the Act should have the benefit of legal representation. This consideration has priority over the other statutorily defined factor, namely the desirability of preserving from undue prejudice the right of SOCA to recover property which is directly or indirectly, the proceeds of illegal activity.

61. I can understand why the courts have drawn an analogy between cases of this kind and cases of freezing orders in civil proceedings to protect an asserted proprietary claim, where the person subject to the injunction wishes to be able to use the frozen assets to pay for his conduct of the proceedings. If it is clear, in such a case, that the applicant has no beneficial claim to the asset, then he should not be able to use that asset at all. But if that is not clear, and if the rights to the asset are genuinely contested, then there may be cases where the defendant should be allowed to have recourse to the asset (which may, after all, be his) to pay his legal expenses.

62. However, it seems to me that there is a material difference between such cases, on the one hand, and that of a PFO under the 2002 Act on the other. In the former, the proprietary claim is limited to assets which belong to the claimant, or assets which can be traced through from something which belonged to the claimant. In most cases an individual defendant will have, or at least will have had, other assets of his own, not traceable to the claimant's property. By contrast, even though a PFO relates to specific and identified assets, not (by definition) to all of the defendant's assets, nevertheless given the wide definition of what is recoverable, it may well be that in a case such as this the CRO claim extends, and accordingly the PFO also extends, to every asset known to SOCA, leaving nothing unaffected from which the defendant can pay his lawyers. It seems to me that this difference needs to be taken into account when making a comparison between the two types of case.

63. For that reason, it seems to me that it is not right simply to transpose to proceedings under Part 5 of the 2002 Act all of the principles applying in the case of freezing orders in ordinary civil proceedings to enforce proprietary claims. Of course, if there are other available assets, for example in a trust which is not itself tainted by connection with the alleged unlawful conduct, or untainted property belonging to family or friends who are willing to support the defendant, then that would be a good reason in a CRO case, as it would be in an ordinary civil case, not to allow the use of contested assets for legal expenses. But if the evidence does not allow the court to conclude, and does not give any specific substantial grounds for suspicion, that this is the case, then to cast the burden on the defendant of showing that there are no other available assets from which his expenses can be paid would be a more serious and difficult task in this kind of claim than it would be in an ordinary civil claim. It would have a more drastic effect for the defendant, in that it would deprive him of the ability to use assets which do belong beneficially to him in order to defend himself in legal proceedings in a way compliant with article 6, against an attempt by the State to confiscate his assets, an exercise to which article 1 of the first Protocol is directly relevant.

64. I do not find anything in the judgment of the Court of Appeal in *SFO v X* to be incompatible with this approach. As I have said, I accept the Master of the Rolls' formulation that it is for the applicant to show that, in all the circumstances, it would be just to allow him to use the affected assets to defray his legal expenses. It does not

seem to me that he said anything in his judgment which shows that, unless the applicant satisfies the court that there are no other available assets, then the application will fail for want of proof. In that respect I agree with what Mitting J said in *Gale* at paragraph 19.

65. Correspondingly, it seems to me that Ouseley J's approach in Mrs Azam's case was correct. Despite the fact that he found her evidence entirely unreliable, and that he could not regard himself as satisfied that there were no other available assets, nevertheless he was able to, and did, proceed on the footing that he was not satisfied that there were other available assets.

66. Accordingly, it seems to me that the position is as follows:

i) It is for the applicant to show that, in all the circumstances, it is just to permit him to use funds which are subject to the PFO in order to pay his legal expenses.

ii) If on the evidence the court is satisfied that there are other available assets which may be used for this purpose, to whomsoever they may belong, it will not allow the affected assets to be used.

iii) If the court is not satisfied of that, the court has to come to a conclusion as to the likelihood that there are other available assets on the basis of the evidence put before it. If the evidence leaves the court in doubt, but with specific grounds for suspicion that the applicant has not disclosed all that he could and should about his assets, then it may resolve that doubt against the applicant, as it did in *SFO v X*. But if the evidence does not provide any such specific indications or grounds for suspicion, then even if the court rejects the applicant's evidence as unreliable, it may not have any adequate basis for concluding that there are other available assets. In that case (Mrs Azam's application being an example) the court should not resolve the impasse against the applicant on the basis that it was for him to prove positively the absence of available assets. There may be objective factors which cast light on the probabilities one way or the other, as there were in the case of Mrs Azam. But if there is nothing of that kind, and nothing which indicates the existence of unexplained or undisclosed available assets, then the fact that the applicant has previously concealed relevant assets is not sufficient by itself to show that he is still concealing such assets, and thereby to deprive him of the ability to use his own assets, despite the constraints of the PFO, to defray the cost of legal representation to defend himself in the proceedings. I would therefore reject the proposition that there is a specific burden of proof on the applicant which requires him to prove that there are no other available assets which could be used for the relevant purpose, such that if he does not discharge that burden, his application must fail.

iv) In coming to that conclusion I am aware that I differ from the way the point was put by Henderson J in *Szepietowski* at paragraph 41, as to the applicability to cases under the 2002 Act (in its present form) of the principles applying in the case of freezing orders to protect proprietary claims in ordinary civil proceedings, and as to the burden of proof lying on the defendant, in which he followed what Stanley Burnton J had said in *Creaven*, before the 2006

amendments to the 2002 Act. I hesitate before disagreeing with Henderson J on any point, but it seems to me that this point was not necessary for his decision and he did not have occasion to examine the issue so closely as we have had to. In my judgment the observations of Mitting J and Ouseley J are better indications as to the correct approach in this respect. For each of those judges the point was central to the case before him.

Grounds of appeal

67. Two distinct points are raised in the grounds of appeal. The first is that the judge was wrong to find that there were other funds available from which the appellant could pay for his legal expenses. That is the point to which the provisions that I have already discussed are particularly relevant. The second ground is that even if the appellant did have undisclosed assets, they could not in practice be used for legal expenses because no solicitor could accept payment from such a source.

68. The second of these seems to me to be a bad point, since if there were concealed assets of the appellant it is quite likely that he could deal with them in such a way that they could be used for payment through a third party without the solicitor being put on notice of their source. Moreover, the availability of assets to meet the legal expenses does not, as I have said, necessarily depend on there being assets of the appellant. Mr Coppel touched on this second ground of appeal in his skeleton argument but not at all in his oral submissions. It seems to me that, in that respect, he was wise. I would refuse permission to appeal on the second ground.

69. The first ground of appeal raises the real point in the case. On that I would grant permission to appeal. I now turn to what Globe J said on this in his reserved judgment.

The judgment below

70. The judge had applications before him both from Saunders Law in respect of payment for past services and from Mr Azam in respect of the ability to pay for future representation and advice. We are only concerned with the future. The judge set out the history with admirable succinctness, then the relevant legal provisions, the nature of the applications before him and the rival contentions. He came to the submissions about the issue which is now live on the appeal at paragraph 56. SOCA relied before him on five points to show that the court should be satisfied that Mr Azam does have other available assets. The judge rejected four of these points as insufficient by themselves. He said they raised suspicion but no more. "Standing alone, they do not convince me that Azam has unfrozen assets": paragraph 62. Therefore I can limit my attention to the first point.

71. This, of course, is the appellant's failure to disclose the BDL account and his explanation for that failure, which is said to lack credibility. The judge dealt with this in paragraphs 63 and 64 of his judgment which I must quote:

> "63. The key point is the first point. The circumstances of travelling from England to Luxembourg to open two completely different bank accounts into which hundreds of thousands of pounds of cash were deposited is not something that one would forget. They

were deliberate actions. They required guile, effort and planning. If the truth is that he only opened two Luxembourg accounts, I reject the proposition made by him that he would have needed the assistance of his wife to inform him about them. I am satisfied that Azam knew the difference between the two accounts and he knew roughly how much was in each. He even partly identified the second account to Mr Saunders in February 2011. I am further satisfied that he knew that he had to provide a full and complete statement of his assets and not just respond to what SOCA knew existed. He was in prison and I do not underestimate the difficulties inherent in that fact. However, he had plenty of time within which to think and to give his instructions. During April and May 2012, he was in the company of Mr Rose-Smith, a senior solicitor, for almost 25 hours discussing his assets. The detailed and professional way that Mr Rose-Smith went about the production of the statement and the defence, including reading his notes back to Azam, underline the care he was taking to ensure that both documents were an accurate reflection of what Azam had told him. The contradictory explanations later given by Azam as to why the existence of the BDL account was omitted are illuminating. I am satisfied that Azam appreciated that SOCA only knew about the KBL account and deliberately chose not to disclose the BDL account.

64. The consequence of this finding is that I am satisfied that Azam's statements of truth cannot be relied upon. I am also satisfied that I cannot rely upon Azam's statement that he has no unfrozen assets. To the contrary, I am satisfied that he has not provided full and frank information about his finances and has other assets which have not yet been discovered. Given the sums that have been deposited in the accounts that have been discovered, I am satisfied that whatever is deposited elsewhere will be a sizeable sum out of which he can pay the reasonable legal expenses of both his past and present solicitors."

Conclusion

72. Realistically, Mr Coppel does not, for the purposes of the appeal at any rate, challenge the conclusion of the judge that the appellant deliberately concealed the BDL account when making his statements of assets, knowing that he should disclose it, nor the judge's conclusion that he should treat the appellant's evidence as worthless. But he submitted that this does not show that there are other available assets which can be used to pay for Mr Azam's legal expenses. Likewise he submitted that SOCA's evidence provides no support for the conclusion that there are other available assets. He argued that Mr Azam's failure to prove a negative, i.e. that he did not have other available assets, does not amount to proof of the contrary, i.e. that he did have other available assets. This is the same contrast as was drawn by Ouseley J in Mrs Azam's case. For SOCA, Mr Sutcliffe contended that, on the judge's findings of fact, the legal issues as to the burden of proof do not need to be answered. According to him the only issue is whether the judge's finding was one which was open to him on the evidence.

73. In the light of what I have said above as to the correct legal principles, it seems to me that, in paragraph 64 which sets out the judge's essential reasoning, his first two

sentences are plainly justified. Nor did Mr Coppel argue otherwise. The same may be true of the first half of the third sentence. However, it does not seem to me that the judge was entitled to conclude that he could be satisfied that Mr Azam "has other assets which have not yet been discovered", nor did he have any basis for saying that there were substantial deposits elsewhere sufficient to defray the costs of defending Mr Azam in the proceedings. That is pure speculation. Of course, it may be the case, but there is nothing in the evidence which provides any specific indication or pointer to there being such assets, given the judge's rejection of the four specific points relied on by SOCA as insufficient in themselves. If they had been more substantial, they might have afforded the sort of circumstantial evidence from lifestyle, or from unexplained dealings or otherwise, that could suffice for a court to conclude that there are some other available assets somewhere, or at any rate that the applicant has not discharged the burden of showing that it is just for him to be allowed to spend some of the assets affected by the PFO.

74. What the evidence amounts to is the fact that Mr Azam tucked substantial sums of money away in Luxembourg, quite a long time ago, left them there without touching them, and concealed one of the accounts (as the judge found, knowingly) when making disclosure of his assets for the purposes of the PFO. He may, of course, have done the same with other funds in the period 1996 to 2002, in an account in Luxembourg or elsewhere, and under an alias or not. But there is no positive indication that he did, nor any reason to suspect that he did, rather than that he might have done.

75. In my judgment Mr Coppel was justified in drawing a close analogy between the present case and that of Mrs Azam and Ouseley J's treatment of her application. It does not seem to me that Globe J should have concluded that there were, or even that there probably were, other available assets. In doing so, it seems to me that, in effect, he put a burden of proof on Mr Azam as to the positive absence of other available assets. If that is not the correct analysis of his approach, nevertheless it seems to me that he drew a conclusion as to the existence of other available assets which was not open to him on the evidence.

76. Accordingly, accepting the first two sentences of paragraph 64 of Globe J's judgment, and the first half of the third sentence, as well as all of paragraph 63, I would myself hold that the judge ought not to have proceeded on the basis that he was satisfied that there were other available assets, or that he had any adequate grounds for suspicion that there were any such.

77. On that basis, there is nothing to displace the factor identified in section 245C(6) as to the desirability that Mr Azam should be represented in the proceedings. Bearing in mind the various factors that I have mentioned, in particular the confiscatory nature of the claim, the relevance of article 6 and also of article 1 of the First Protocol, and the absence of any reliable evidence to suggest that there are other available assets, as well as the evidence as to Mr Azam's mental health, I would hold that he has shown that it would be just for an exclusion from the PFO to be made as regards the legal costs to be incurred by him in defending the proceedings, so as to enable him to have legal representation for that purpose through to the trial and judgment.

78. I would therefore grant permission to appeal on the first of the two grounds of appeal, and would allow the appeal on that ground.

79. Mr Coppel told us that Mr Azam seeks £64,020 (including VAT) to cover legal costs incurred and to be incurred from the date of the application, including the costs of representation on the appeal and of preliminary consideration of the issues involved in the proceedings so as to be able to participate in a meaningful way in the process of listing. Further costs would follow in due course as the case moves on towards trial.

80. He also seeks exclusions for purposes other than for legal expenses to do with the proceedings brought by SOCA, under several heads: ordinary living expenses, medical treatment for himself and his son, and legal expenses as regards his UAE lawyers in relation to the money-laundering charges which are still pending against him. It may be that, given that the principle is established on the present state of the evidence, the detail of amounts and purposes can be resolved between the parties. I invite submissions on that to be made on the handing down of our judgment.

Lord Justice Moore-Bick

81. I agree.

Lord Justice McFarlane

82. I also agree.