



Neutral Citation Number: [2021] EWHC 2691 (Ch)

Case No: BL-2020-000565

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
(ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 1 October 2021

Before:

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

Between:

- (1) CIRCUMFERENCE INVESTMENTS
(EUROPE) LIMITED
- (2) CIRCUMFERENCE (LUXEMBOURG) SARL
- (3) CIRCUMFERENCE HOLDINGS LTD

Claimants /
Respondents

- and -

NICHOLAS JAMES MARTIN

Defendant /
Applicant

Mr Stephen Auld QC and Mr Simon Oakes (instructed by **Penningtons Manches Cooper LLP**) for the Applicant/Defendant

Mr Simon Mills and Mr Zachary Kell (instructed by **Dentons UK and Middle East LLP**) for the **Respondents/Claimants**

Remote Hearing via Microsoft Teams: 28th September 2021 and 1 October 2021

JUDGMENT

MR NICHOLAS THOMPSELL:

1. INTRODUCTION

1. This hearing deals with various applications relating to certain freezing orders, and a so-called "unless order". These have been made in relation to litigation concerning the share sale by the Applicant, Mr Nicholas Martin, (whom I will refer to as "**the Defendant**"). The sale related to shares in a Luxembourg-based company called Coficom Trust Sàrl. The Claimants, various companies in the Circumference group, allege that the sale was procured by fraudulent misrepresentations.
2. The principal freezing orders currently in force are those made by Bacon J. on 20 July 2021 ("**the Bacon Order**"), which continued an order made without notice by Joanna Smith J. on 13 July 2021 ("**the Smith Order**"), and certain freezing orders granted by the court in Luxembourg. These include freezing orders granted by the court in Luxembourg on 15 April 2021 (which was discussed before Bacon J.), and orders granted by the court in Luxembourg on 22, 29 and 30 July 2021 which were not discussed before Bacon J. The Defendant is particularly concerned about the order made in Luxembourg on 30 July 2021 ("**the Luxembourg Order**") which applies to the Defendant's bank accounts in Luxembourg.
3. The Bacon Order prohibits the Defendant from dealing with or dissipating his assets worldwide up to a value of £5.44m and contains provisos excepting living expenses and legal expenses. The Luxembourg Order froze further of the

Defendant's assets in Luxembourg but did not include any exception for living costs or legal expenses.

4. The unless order ("**the Ambrose Order**") is an order made on notice by Ms Clare Ambrose, sitting as a Deputy Judge of the High Court. It was made on 9 August 2021. This required the Defendant to produce certain information and provided that unless that information is provided as required by the order the Defendant's Re-Amended Defence would be struck out and the Defendant would be debarred from defending the claim.
5. The Claimants allege breaches of the Ambrose Order. The Defendant denies breach or in the alternative, by means of an application dated 10 September 2021, applies for relief from the consequences of the breach. He applies also within that application for other relief as discussed further below.

2. THE CIRCUMSTANCES OF THE HEARING

6. This hearing has been conducted remotely via Microsoft Teams. It is an adjourned hearing. It was originally listed for a full day on 23 September 2021 but the Judge (HHJ Gerald) was not allocated time for pre-reading and considered that, without having read into the papers in detail, he could not determine the matters in question. He adjourned the hearing on 23 September 2021, and in the meanwhile made an order ("**the Gerald Order**") permitting the Defendant to spend £40,000 of the proceeds of sale of certain monies referred to as the French Property Proceeds (held by his solicitors, Penningtons) on their legal costs for the adjourned hearing and permitting the Defendant to spend the EUR 8,901.19 held in a Moroccan bank account on his ordinary living expenses, up to the limit imposed by the Bacon Order of €1,750 per week. He also ordered that the Defendant pay £150,000 together with interest in discharge of outstanding adverse costs orders. It is understood that this has now been satisfied.
7. Before this hearing I had an opportunity to consider skeleton arguments put forward by counsel for the Defendant in relation to his application and a draft order ("**the Draft Order**") prepared on the Defendant's behalf as well as a

skeleton argument prepared by counsel for the Claimants. I have also had a chance to peruse and selectively, but not comprehensively, study the Core Hearing Bundle amounting to more than 1700 pages and Counsel's joint list of authorities. During the hearing itself, my attention was drawn to a further supplementary bundle amounting to 1220 pages.

8. At this hearing the Defendant was ably represented in his application by Mr Stephen Auld Q.C. and Mr Simon Oakes. The Claimants were no less ably represented by Mr Simon Mills and Mr Zachary Kell. The time estimate of one day proved inadequate in view of the detail of the evidence that counsel considered that the Court should be required to be taken through in order to appreciate their arguments, particularly the argument of the Claimants and as a result I required the hearing to be extended for a further half day.
9. At the end of that hearing I briefly recited my conclusions and outlined a form of order that I proposed to give and promised to follow this up with a more detailed reasoned judgment setting out my decision. This is that reasoned judgment.

3. IS THE DEFENDANT IN BREACH OF THE AMBROSE ORDER?

10. The question of breach of the Ambrose Order is one of fundamental importance to the parties. If the Ambrose Order has been breached as the Claimants contend then it operates automatically to strike out the Defendant's Re-Amended Defence and debars the Defendant from defending the claim, entitling the Claimants to apply for judgment.
11. In making her order Judge Ambrose considered fully the draconian nature of that order. She was persuaded to make it because she considered that the Defendant's responses to previous orders requiring information were unsatisfactory. He had failed, without good excuse, to provide information where it was clear what information was required, and his many failures in this regard could not be regarded as merely administrative shortcomings. In view of his previous unsatisfactory responses a serious sanction was appropriate.

12. The draconian consequences of breach of an "unless order" are tempered only by the ability of the Defendant to apply to the court for relief. The Defendant denies breaching the Ambrose Order but, in case any breaches are found, has applied for relief. However that part of his application is only relevant if the Ambrose Order is breached so as to attract this sanction.
13. On the face of the documents provided to the court, the Ambrose Order has not been breached, in that within the time required by the Order the Defendant responded to the order by means of his third affidavit dated 16 August 2021 in which he provided, or at least purported to provide, the information required by the Ambrose Order.
14. The Claimants contend that, nevertheless, the Ambrose Order was breached. Essentially they cite two ways in which it was breached. First they contend that information given in the affidavit was false and that by, the Claimants allege, deliberately providing this false information the Defendant was in breach of the order. Secondly, they contend that the Defendant's third affidavit did not include all the information required by the Ambrose Order.

4. WAS THE ORDER BREACHED AS A RESULT OF THE PROVISION OF FALSE INFORMATION?

15. Paragraph 3 of the Ambrose Order set out the requirements on the Defendant to provide information by way of a sworn affidavit (his third affidavit). The information required included:
 - (a) "*Details of each and every payment made by him or on his behalf by which he spent or dealt with the net sale money in respect of*" certain properties in Luxembourg, referred to in the hearings as Properties 4 to 6. The details required were then set out in detail. They included the date and amount of payment, names and addresses of payees and (importantly) the names and contact details of the "*ultimate beneficiary of each payment*" if different to the payee.
 - (b) "*Details of the payment obligation or obligations in respect of which each*

payment referred to was made".

- (c) The location of certain artworks.
 - (d) Details concerning certain properties referred to in a statement of wealth that the Defendant had made to ING Bank.
 - (e) Certain details concerning properties in Guernsey.
 - (f) Certain details concerning a property in France.
16. Paragraph 4 of the Ambrose Order required the affidavit also to exhibit full, unredacted, copies of bank statements or bank transaction documents recording each of the relevant payments.
17. The Claimants argue that the Defendant breached paragraphs 3 and 4 of the Ambrose Order in various ways.
18. In his third affidavit, the principal disclosure made by the Defendant in relation to how he dealt with the net sale money was his disclosure that he paid the vast bulk of this (€825,000) to his wife's account at a bank in Morocco so as to settle various debts owed by him to her and to members of her family.
19. The Claimants' principal argument is that the payment to his wife was not made for the reasons that the Defendant stated, that is, to meet various obligations to his wife and his wife's family. They say that it was made for the purposes of putting this part of his assets beyond the reach of the Court whilst ensuring that the Defendant retained control of the money as his wife would deal with it as he requested. They say that the Defendant deliberately concealed his real motivation for making the payment. This deliberate concealment amounted to a breach of the order and, in particular, by failing truthfully to disclose that the ultimate beneficiary of the payment was the Defendant himself the Defendant has failed to meet the stated requirements of Ambrose Order to disclose the ultimate beneficiary.
20. To substantiate this argument Mr Mills has taken me in great detail through the Defendant's record in meeting his requirements under the various orders that have been made in this litigation to disclose information. He drew my attention to a

pattern (which has been remarked upon by the previous judges that have considered this) of the Defendant being disingenuous, withholding information required by an order and giving information that has later been found to be false. He invited me to conclude that the Defendant throughout has been seeking to hide his actions and to misdirect the Claimants as to the whereabouts of his assets in order to exploit opportunities to take them outside the jurisdiction of the Court in case the Court finds in favour of the Claimants in relation to the main action. In particular, he tried, until compelled not to do so by the Ambrose Order to hide his bank account in Morocco.

21. Mr Mills further invites me to conclude that the reasons given for the payment of €825,000 to his wife lack credibility.
22. The reasons given for the payment were that this was a payment to meet debts that the Defendant had to his wife and her family amounting to over €1 million including:
 - (a) an obligation to his wife's father (acting as her protector) to pay a dowry of around €472,000;
 - (b) €83,200 due to his mother-in-law in relation to rental of an apartment in Morocco between 2012 and 2016;
 - (c) over €186,000 due to his wife in respect of rentals that he had received in relation to properties which they owned jointly;
 - (d) €220,000 due to his wife for general living costs in respect of the period between 2012 and 2015 when they were living in Morocco; and
 - (e) Other "family loan obligations" of €84,000.
23. Mr Mills took me in detail through the correspondence and previous witness statements and affidavits to show how the Defendant's explanation of what he had owed his wife's family kept changing. What had earlier been described as "loans" for the most part turned out not to be loans but to be (according to the Defendant's third affidavit) other types of obligation. It was notable also that many of these obligations were not documented and appeared to be based on estimates. The Claimants doubted whether the dowry obligation (said to be

created in 2012) existed or was a later concoction, although I am disposed to accept the evidence proffered, which included a statement by a Moroccan attorney about his involvement in the formation of the dowry obligation in 2012. Even if the Defendant had undertaken this dowry obligation, the Claimants questioned whether this was enforceable. It might also be noted that even if the obligation were enforceable, under its terms the amount payable was not yet finally due.

24. Given all these points Mr Mills invites me to conclude that the reasons given for the payment of €825,000 lack credibility and that taking this inherent lack of credibility with the Defendant's record in providing answers that were false or at least disingenuous, I should conclude that his explanation of these reasons also is false and that the obligations described were concocted for the purposes of justifying a payment that was not made bone fide to settle obligations, but in fact was just a way of parking assets outside the reach of the court. The Defendant, in Mr Mills' submission has lied, about purpose of the payment of the €825,000 and this untruth amounted to a breach of the Ambrose Order.
25. In response to these points Mr Auld acknowledged that his client had previously fallen short of expectations in the quality of his affidavit and witness statement evidence but asked the court to consider that this was now "water under the bridge". He asked the court to accept that, under the tutelage of his now current legal team, the Defendant had accepted the need for full compliance and had done his very best to do so in relation to the Ambrose Order. The main purpose of the Ambrose Order was to allow the Claimants to know what had happened to the proceeds of sale of the Luxembourg properties and they now knew – they had been paid to the Defendant's wife.
26. Furthermore, he pointed out that the requirements of the Order did not require the Defendant to say *why* he was making the payment, only to give details of the payment made. However, insofar as this was a question that the court needed to consider, Mr Auld argued that the Defendant's motivation was his wish to ensure that he met obligations that he had to his wife and his wife's family (in preference to ensuring that funds were available for other creditors). At the time payment

was made there was no freezing order in place and the Defendant was free to transfer assets to his wife if he wished to. There was nothing to prevent him doing so other, perhaps, than remedies under any applicable jurisdiction's law of insolvency should this be deemed in hindsight to amount to an unfair preference.

27. I agree with Mr Auld that the Order did not require the Defendant to explain his motivation and reasons for making the payment. However it did require details to be given of any obligations that a payment was intended to discharge and to disclose the ultimate beneficiary of the payment.

28. In order for me to find for the Claimants in relation to this principal ground of their argument, I need to be persuaded that their explanation that the Defendant was the ultimate beneficiary of the transfer of €825,000 he made to his wife and/or that the description given of the obligations it was meant to satisfy was untrue. The burden of proof is on the Claimants to establish a breach.

29. It seems to me to be a credible explanation that the Defendant made the payment to his wife in order to protect his wife (and to the extent that he had obligations to them, other members of her family) from his other creditors. That motivation would explain his actions just as well as the explanation that he himself was the intended beneficiary of the funds and his wife was merely holding it as his nominee. Whilst the Claimants' conjecture as to the motivation of the payment is by no means fanciful given the Defendant's poor history of compliance with his disclosure obligations and the active steps he has been taking to liquidate property, I cannot dismiss the equally credible narrative that the payment was motivated by a desire to protect his wife and his reputation with his wife's family at a time when he was not estranged from her but his failure to provide for her was causing tensions with her and her family. Given this equally credible narrative and in the absence of any proof, I do not think that I can just assume that the Defendant rather than his wife was the ultimate beneficiary of the payment he made to his wife in order to conclude that he has not met the requirements of the Ambrose Order to provide details of the ultimate beneficiary.

30. Mr Mills has drawn attention in particular to the lengths that the Defendant had

previously taken to conceal his bank account in Morocco and the transfer to his wife. He invites the court to consider that the Defendant must have thought that he had something to hide and to draw from this the implication that that something was the fact that the Defendant's motivation of placing these monies beyond the reach of the court whilst retaining control of them so that the Defendant must be regarded as the ultimate beneficiary. Even though I agree that the Defendant's previous lack of openness probably was motivated by a desire to conceal the payment, I do not think that this implication follows from it. At the time of the original disclosures the Defendant was not estranged from his wife and may well have concluded that it was better for him that the court was not aware of the full resources available to his wife. Whilst the Defendant's previous lack of transparency is grounds for the court to be suspicious of his explanation, it is not enough for the explanation to be dismissed out of hand.

31. As Mr Auld has pointed out, there are also factors that suggest that the Defendant has not retained control of the money transferred to his wife. In particular Mr Auld questions whether it is credible that the Defendant would be living on the hand-to-mouth basis that he has described to the court, or would have failed to continue to pay his legal team, thus denying himself their representation and advice if these monies were readily available to him.

32. As to whether the Defendant provided a false report of the obligations that he was seeking to satisfy by this payment, I do have some difficulty in believing that all of the matters claimed for (in particular in relation to living expenses in the period 2012 to 2015) gave rise to enforceable debts. I do not think, however, that it much matters as regards compliance with the Ambrose Order whether the obligations which the Defendant said that he was seeking to discharge were legal and enforceable obligations or merely obligations that the parties involved considered to be applicable in honour or as a matter of family or religious duty. The broad sweep of the Defendant's narrative was that his wife's family considered that he (as the husband in a society where the husband was expected to provide for the wife) had obligations binding in honour to his wife and her family that had not been met, that the payment to his wife was intended to satisfy or part satisfy those obligations and that the quantification of those obligations

set out in his third affidavit was a reasonable attempt at quantifying those obligations. This explanation does not strike me as being intrinsically incredible and, whilst I can understand the Claimants' suspicion of this explanation given the Defendant's record to date regarding truthfulness, they have not produced any compelling evidence that it is not true.

33. Given these findings, I conclude that the Claimants have not discharged their burden of proof in demonstrating that the Ambrose Order was breached on the basis of their principal argument.

5. WAS THERE A FAILURE TO PROVIDE INFORMATION REQUIRED?

34. However, the Claimants argue that, even if their principal argument is not accepted and the Defendant's affidavit is to be accepted as being truthful, it fell short of the disclosure required under the Order.

35. They argue as follows. They accept that the Defendant did disclose payments that were made by him personally in which he dealt with the net sale money. In relation to the vast bulk of this, he disclosed that he paid it to his wife by means of a transfer of €825,000 to his wife's account at a bank in Morocco. However, they say that at least some payments that his wife then made using this money were made on his behalf. Therefore he should have disclosed, and failed to disclose, the necessary details of these payments made by his wife using his money.

36. Furthermore they say that he breached paragraph 4 of the Order by failing to disclose his wife's bank statements or banking transaction documents recording such payments made on his behalf. If these payments were made on his behalf then, under the terms of the Ambrose Order, bank statements relating to the bank accounts from which these payments were made fell to be disclosed. In addition, as these payments were made on his behalf, his wife cannot, at least in relation to these amounts, be regarded as the "ultimate beneficiary" and therefore there was a failure to meet the requirement to provide details of the ultimate beneficiaries.

37. The Claimants identify various specific payments that they have (as a result of later information provided by the Defendant) identified as being payments which were made by the Defendant's wife which they say must be regarded as payments made on behalf of the Defendant and as identifying an "ultimate beneficiary" different to the Defendant's wife. These payments include:

- (a) payments made by his wife to her father and mother which, in the Claimants' submission, should be regarded as discharging obligations that the Defendant says that he had to her father in respect of an agreed dowry and to her mother for rents;
- (b) a payment of just under €25,000 made to Albert Steif, a removals firm; and
- (c) a payment of £25,000 made to Counsel previously representing the Defendant in this action.

38. They also are suspicious about further payments made out of the wife's account including in particular a payment of over €240,000 on 6 July 2021 to a firm of lawyers in Spain. They speculate that this may have been used to purchase a property in Spain on behalf of the Defendant and his wife.

39. As regards these specific payments, Mr Auld argues for the Defendant that it is wrong to treat these payments as having been "*made by him or on his behalf by which he spent or dealt with the net sale money*".

40. Of course, if one accepts the Claimants' primary argument that it was the Defendant's intention that his wife would act as his nominee in using the €825,000, (and this was agreed with his wife) then all of these payments could and should be seen as payments that were made by her on his behalf and as payments by which he spent or dealt with the net sale money.

41. However, having found that it is not safe to accept this argument on the evidence before the court at present, and in the absence of any evidence of a prior arrangement between the Defendant and his wife for her to make these payments on his behalf, it follows that I should regard these payments as being payments that his wife made from what was her own money (or money which she had

received and was obliged to account for to her father and mother) and therefore that these were not dealings by which *the Defendant* spent or dealt with the net sale money.

42. As regards many of these payments, it is also arguable as to whether the payment should be regarded as having been made on the Defendant's behalf.
43. The Defendant says as regards the payments made by his wife to her father and mother, these were not made "*on his behalf*" to discharge his obligations to them. It had been accepted by all involved that he would discharge his obligations to his wife's family by making the payment to his wife (at least to the extent of the payment). There would only be a need to disclose information about payments made by his wife if his wife was making these payments as agent or nominee for the Defendant. If his wife had received the monies as agent or on behalf of her parents then her onward payment to them would not be a payment made on his behalf. Again, the Defendant's explanation seems at least as credible as the alternative. It also would explain why the Defendant's father-in-law considered that the dowry obligation had been satisfied in June 2021 (the month in which the payment was made to the Defendant's wife) rather than later in the year when she transferred to her father and mother part of the monies that she had received.
44. Equally, there is no reason to assume that the wife did not have her own reasons to make a payment to the removals firm.
45. As regards the payment to Counsel, there is no doubt that the Defendant benefited from this payment, and to that extent it must be regarded as a payment made for his benefit and as a result to that extent a payment "*on his behalf*". Nevertheless, there remains even in relation to this payment the argument that it was not a dealing "*by which he spent or dealt with the net sale money*" as he had already dealt with the net sale money by transferring it to his wife to meet various obligations to her and her family and his wife's choice to benefit him in this way was her choice to spend her money.
46. Having considered all of the matters above, whilst I have a great deal of sympathy

for the Claimants' distaste and suspicion about the way the Defendant liquidated interests in property and then transferred the proceeds of this to his wife, I do not consider that the Claimants have made the case that the Ambrose Order has been breached.

47. As I have found no breach, it is not necessary, or indeed possible, for me to determine what relief from sanctions might be appropriate if a breach was found. I will just mention, however, that if the breach substantiated had been the failure that is alleged in providing further information relation to some or all of the specific payments mentioned above, I would have had sympathy for the argument that the damage occasioned to the Claimant by such breach was not particularly great and I might well have provided relief against the draconian sanction provided for by the Ambrose Order, perhaps subject to imposing further requirements on the Defendant to provide further information.

6. SHOULD THE COURT MANDATE THE VARIATION OF THE LUXEMBOURG ORDER?

48. The Defendant has applied to the court for relief so as to allow him to pay his living expenses and his legal fees within the terms of the Bacon Order by allowing him to be given access to funds frozen by the Luxembourg Order, (as well as clarifying that he may access the proceeds of the French property, which are not frozen by any court order, but are the subject of a solicitors' undertaking). Under the terms of an exception to the Bacon Order, the Defendant has access to frozen funds (except those that have been identified in the Bacon Order as "Trust Assets") in order to spend €1750 per week towards his ordinary living expenses and also a reasonable sum on legal advice and representation, subject to his, before spending any money, telling the Claimant's legal representatives of where the monies are to come from. Neither party has made any application to vary the Bacon Order in this regard.

49. However, this exception in the Bacon Order is presently useless to the Defendant as a result of the terms of the Luxembourg Order. This order freezes the bank accounts in Luxembourg which represent most of the cash that the Defendant

possesses and do not include a similar exception. Accordingly the Defendant has asked the court to order that the Claimants join with the Defendant in writing a joint letter requesting the release of certain proceeds injunctioned by the Luxembourg Order to be used for the purposes for which the Defendant is allowed to draw on frozen assets under the Bacon Order.

50. Mr Auld on behalf of the Defendant has painted a picture of the dire difficulties that the Defendant says he is suffering as a result of his having no access to any of his funds, including his having to resort to living in a tent, having to live on one meal a day and being unable to meet legal obligations with potential criminal consequences to provide support to former girlfriends. He also explained that the Defendant will be unable to defend his case effectively without access to funds as his solicitors and barristers are unwilling to go further in extending credit to him.

51. Mr Auld argues that the Luxembourg Order operates contrary to the intentions of the Bacon Order which follows the usual principles in providing a compromise between preventing dissipation of assets whilst allowing the Defendant to meet his living expenses and to use his own assets to defend his case. The court should not allow the Claimants to override this compromise through action taken in a foreign court and therefore should order the Claimants to provide the relief requested. In principle this seems a sound argument.

52. However, Mr Mills has forcefully made a case that I should not order steps to be taken to vary the Luxembourg Order if the Claimants raise reasonable suspicions that the Defendant may have monies available to him other than the monies that are subject to the order unless the Defendant then satisfies what has been described as a "burden of persuasion" in demonstrating that there are no such monies. He cites the *Tidewater* case (*Tidewater Marine v Phoenixtide Offshore* [2015] EWHC 2748 Comm), as providing authority that the court should proceed in this way. This was another case where the court's assistance similarly was sought to vary a foreign freezing order. I consider further below the applicability of this case to the present circumstances, but before doing so should explain the matters which the Claimants say arouse such a reasonable suspicion.

7. WHAT REASON IS THERE TO BELIEVE THAT THE DEFENDANT HAS OTHER ASSETS?

53. The Claimants' primary argument that the Defendant has other assets available for his use is based on the contention that the €825,000 transferred to his wife remains under his control. They argue that this follows from their contention that the reasons given for this transfer were false.

54. I have not accepted that they have demonstrated this to be the case in relation to the discussion regarding the breach of the Ambrose Order (where I consider that the Claimants have the burden of proving a breach). Of course, that is not the same as saying that the Claimants have failed to substantiate a reasonable suspicion that this €825,000 may continue to be available to the Defendant, so as to bring into play any so-called burden of persuasion, if that rule applies to the current circumstances.

55. However, even if I accept that the Claimants may have a reasonable suspicion that the Defendant's transfer to his wife was made in the expectation that she would hold this money to his order, it does not follow that it is reasonable to suspect that she is holding this money to his order now. The Defendant says that he is now estranged from his wife and has produced evidence that she has commenced divorce proceedings. If the Defendant is telling the truth in relation to these matters, then, even if he thought at the time of the transfer he might remain what Mr Mills has described as the "puppet-master" in relation to these monies, it must be doubted whether this remains the case following this estrangement. This estrangement also, if true, answers the Claimants' other argument that the court should not give this relief on the grounds that the Defendant's wife may be willing to assist him.

56. The Claimants have made no secret of their view that the estrangement between the Defendant and his wife is not genuine and is merely a ruse so that the court will disregard the prospect of any assets held by the Defendant's wife being used to maintain the Defendant or to pay his legal fees. However, they have produced

no evidence to support this view. Mr Mills in his skeleton argument claims that the family is still living together but there is no evidence to back this up beyond noting that she provided an affidavit in support of the Strike Out/Adjournment Application earlier in the year. With the evidence that the court has seen I do not think that the Claimants could be considered to have gone far enough to demonstrate a reasonable suspicion that the estrangement is false and so as to activate any principle (if applicable) that it is for the Defendant to demonstrate that the assets held by his wife are not available to him.

57. However, the Claimants also suggest other specific potential sources of funds available to the Defendant which they say give rise to a suspicion that these amounts remain available to the Defendant and therefore, in their submission, should put onto him a burden to establish that he does not have assets available, and that he has failed to discharge that burden.
58. First, they say that there is an unaccounted for balance arising from the sale of what has been described in the proceedings as Properties 1 to 3. They argue that there is reason to believe that the Defendant has available for his use some of the monies from the sale of Properties 1-3. These were sold for an aggregate of €1,570,000 of which the Defendant's net share was (according to the Defendant) some €759,444. The Defendant has, in the Claimants' submission, not adequately accounted for all of these proceeds and (after allowing for lawyers' fees that the Claimants accept were paid out of the sale) there is a sum of between €210,971 and €236,527 which has been accounted for only in the vaguest terms as having been spent on unspecified lawyers' fees and living expenses.
59. Secondly, they draw the court's attention to the fact that there was a significant period where properties in which the Defendant continued to have an interest would be expected to have been continuing to accruing rent, but there is no evidence of the rent being received into any of the bank accounts which the Defendant has disclosed.
60. Thirdly, they have raised their suspicion that the Defendant may be beneficiary of a bank account in Guernsey under the name "JA & N Martin" which the

Defendant says is his mother's account and in which he has no interest.

61. Fourthly, they raise their suspicion about one of the payments which the Defendant's wife made out of the €825,000 transferred to her being a payment of €240,000 made to a firm of Spanish lawyers. They speculate that this may have been used to purchase a property in Spain for the benefit or part benefit of the Defendant. As these proceeds may be considered to constitute or include "Trust Assets" within the definition of the Bacon Order, in which the Claimants may wish to claim the availability of tracing, they have an understandable desire to understand more about this payment.

62. I agree with Mr Mills that the points summarised in paragraphs 58 to 61 above (which I will refer to as the "**Outstanding Questions**") do still require elucidation and, as I explain further below, I will make an order requiring more information about these points. It may well be that these points are sufficient to raise a justifiable suspicion that the Defendant may have other assets of which the Claimants are unaware (although these would not be assets outside the freezing provisions of the Bacon Order, as they apply to the Defendant's assets worldwide, whether disclosed or undisclosed). However I do not accept Mr Mills' argument that, his having raised a justifiable suspicion, I am definitively compelled to require the Defendant to discharge a burden of persuasion to show that these assets are not available to him before granting him the relief for which he has applied.

8. APPLICABLE LEGAL PRINCIPLES

63. In support of his proposition that I should require the Defendant to dispel the suspicions raised before ordering the parties to take any steps to vary the Luxembourg Order, Mr Mills referred me to passages in the leading textbook, *Gee on Commercial Injunctions* (7th Edition) and to the decision in *A. v C. (No.2)* [1981] Q.B. 961. These support a general principle that the Defendant may be denied use of assets that are subject to a Freezing Order for his personal expenses and legal expenses if he has recourse to other assets that are not subject to a freezing order.

64. In *A. v C. (No.2)*, Goff J (as he then was) explained the basis of this principle as follows:

"I can only permit a qualification to the injunction if the defendant satisfies the court that the money is required for a purpose which does not conflict with the policy underlying the Mareva jurisdiction."

65. My attention also has been directed to the decision in *Campbell Mussells v Thompson* [1984] 1 WLUK 78 where the Court of Appeal considered whether the effect of *A. v C. (No. 2)* had been correctly understood. Sir John Donaldson MR (as he then was) found as follows:

"The whole appeal appears to turn on whether the decision in A. v. C. (No. 2) (1981) 1 Queen's Bench 961 is to be regarded as holy writ which limits the discretion of judges administering the Mareva jurisdiction. The Seventh Cumulative Supplement to the Annual Practice under the heading 29/1/11F claims to summarise that decision as follows:

"Although the Court had power to qualify a Mareva injunction in relation to assets which were subject to the injunction but which were required for a purpose which did not conflict with the underlying policy of the injunction such a qualification will not be made unless the defendant satisfied the Court not merely that he owed money to someone but also that he did not have any other assets available out of which that debt would be paid. In the absence of such evidence, the Court would not permit the defendants to pay out of the assets subject to the injunction the legal costs likely to be incurred by them in the proceedings."

I do not regard this decision as laying down a principle of universal application and, if it did so decide, I consider that it was wrong. Every case has to be dealt with on its own merits. The fundamental purpose of the Mareva injunction is re-stated in A. v. C. quoting Iraqi Ministry

of Defence v. Arcepey Shipping Co. S.A. (1981) Queen's Bench 65 , as being:

“The fundamental purpose of the Mareva jurisdiction is to prevent foreign parties from causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against them in pending proceedings in this country.” ”

66. He went on to say that there was no point of law here:

"All that A. v. C. (No. 2) illustrates is that judges should have a very healthy scepticism when they are dealing with parties to whom Mareva injunctions apply – and they do."

67. The case that I was referred to which seems most directly on point was *Tidewater*.

In that case Males J was asked to consider a request to compel the parties to take action to vary an attachment order made by the court in Switzerland. After reviewing precedent in a very helpful and comprehensive manner Males J decided that he would not provide the relief asked for. In doing so he considered that the appropriate test for him to apply was whether granting the application was "*just and convenient*" – the test laid down in section 37(1) of the Senior Courts Act 1981, noting that he was being asked to vary the original order of the English court and that the principles which he should apply the were the same as when considering whether or not to grant *Mareva* relief. He considered it correct to emphasise "*the need for an assessment of the "overall justice" of the case*" but appeared to accept that these principles included a principle that the defendant bears the burden of persuading the court that there are no other assets available to fund the litigation, although he saw this as only one aspect of the assessment.

68. Mr Auld has pointed out that the circumstances in *Tidewater* are distinguished from the circumstances in the current case in at least one important respect. In the case of *Tidewater*, the Swiss order had been entered into as a result of a previous order of the English court and the defendants in that case were

effectively seeking to vary that order. In our current case the Luxembourg Order was obtained by the Claimants without any mandate of the English court so that in this case rather than the Defendant seeking a variation of the Bacon Order, the Defendant is asking the court to ensure that the intent of the Bacon Order is not subverted by foreign proceedings that have not been approved by the English court. Mr Auld points out that the passages in *Gee* that I had been referred to, and the various decisions where it was suggested that once a suspicion is raised that there may be assets outside the jurisdiction of a freezing order the onus was on the defendant to satisfy the court to the contrary, were all in the context of either an application for an order or for variation of an order. He argues that only in such circumstances should the court feel any compulsion to apply a requirement for the Defendant to satisfy a "burden of persuasion" that he does not have other assets available to him which he could use for the payment of personal expenses or legal costs.

69. I am persuaded by Mr Auld's arguments on this point. In my view, I should not consider myself bound to approach this matter in the way Mr Mills suggests, and refuse to grant the relief requested in relation to the Luxembourg Order unless and until the Defendant satisfies a burden of persuading the court that he has no further assets with which he could pay his living costs and legal expenses. I consider that I should approach this application more broadly having regard to what is just and convenient within the test laid down in section 37(1) of the Senior Courts Act 1981 and having regard to the overriding objective provided by rule 1.1 of the Civil Procedure Rules 1998 to enable the court to deal with cases justly and at proportionate cost.

9. DECISION IN RELATION TO THE APPLICATION RELATING TO THE LUXEMBOURG ORDER

70. After approaching the application in this way I consider that the court should grant the relief requested and order the Claimants to join in the proposed letter requesting variation of the Luxembourg Order and also, to the extent that this needs further clarification, confirm that the Defendant may have access to the so-called French Property proceeds within the terms permitted under the Bacon

Order.

71. In reaching this view, I have taken account of the real possibility that the Defendant will be greatly hampered in preparing his case unless he is able to use his own funds, including the so-called French Property proceeds and the funds frozen by the Luxembourg Order and that there is a risk of this matter not being capable of proceeding to trial according to the timetable set by the court (as the same may be varied consequent upon the application currently before the court).
72. I have weighed this consideration against the possible damage that there might be to the Claimants if it turns out that their suspicions are correct that some or all of the assets that are subject to the Outstanding Questions are indeed assets that may be available to the Defendant to meet his living costs and legal expenses. The potential for damage here does not seem to me to be likely to be particularly great, given that these assets (except any assets transferred absolutely to the Defendant's wife), would themselves be subject to the Bacon Order and having regard to the likely value of these assets in the context of the value of the claim and of the other assets which remain subject to the Bacon Order. Insofar as any apparently missing assets have been transferred to the Defendant's wife, on the present state of knowledge that the court has, I do not think it is reasonable to assume that the Defendant still has access to these assets.
73. I am also persuaded that the interests of justice and the overriding principle are such that we should try to minimise delay being occasioned by further satellite litigation and seek to focus on the trial at hand. As a result I do not think it would be in the interests of justice to make this access conditional on the provision of further information.
74. I propose therefore granting an order in the form set out in paragraphs 1 and 2 of the Draft Order amended to reflect changes in circumstances since it was drafted.
75. However, I do not lightly dismiss the concerns that the Claimants have raised in relation to the Outstanding Questions. In relation to the first three of these Outstanding Questions (what has happened in relation to the questions that were

raised by Mr Mills including the €211,000 or more missing proceeds from the sale of Properties 1 to 3; the Guernsey joint bank account; and what happened to the proceeds of rentals of the properties) it is possible that these will lead to the Claimants being aware of other assets that the Defendant still has. This is also a possibility (but possibly a more remote one) in relation to the more than €240,000 paid to a Spanish lawyer and the Claimants also have an interest in this point as it may affect their ability (if established) to trace Trust Assets.

76. I consider that these legitimate concerns of the Claimants should be dealt with by the court ordering for further information to be provided in relation to these questions. If having received this further information the Claimants still consider that they have reason to believe that the Defendant has assets available to him that are beyond the reach of the Bacon Order, they can then make that argument by means of a properly formulated application to vary the Bacon Order.

77. I should also deal with another argument that was raised on behalf of the Claimants during the course of the proceedings.

78. The Claimants have suggested that the appropriate level of living expenses, which was set by the court based on the Defendant's credit card statements for the months of March 2019 to February 2020, should be revisited. I have some sympathy with the argument that the Defendant's circumstances have changed markedly since then, but I do not think that this is a reason for the court not to give the relief requested in relation to the Luxembourg Order. If the Claimants consider that the sum allowed for living expenses in the Bacon Order is incorrect they should apply separately for a variation of that order.

10. OTHER MATTERS DEALT WITH IN THE APPLICATION.

79. I can deal very briefly with the other matters that are dealt with in the Defendant's application. The application included a request for certain extensions of time of the directions to trial. I understand that this is not contested in principle and that the parties are hopeful of agreeing an amended timetable for the court's approval at the hearing when this decision will be handed down. That occasion will also

be used to finalise the form of the order made by this court to reflect the decisions made in this judgment.