Neutral Citation Number: [2020] EWHC 472 (Ch)

Case No: HC-2015-001647

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

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

Date: 2 March 2020

Before :

MR JUSTICE NUGEE

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Between :

Kea Investments Ltd	**Claimant**
- and -	
(1) Eric John Watson **(8) Ivory Castle Ltd** **(a company incorporated in the British Virgin Islands)** **(9) William Gibson**	**Defendants**

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Elizabeth Jones QC, **Paul Adams** and **Oliver Jones** (instructed by **Farrers LLP**) for the **Claimant**

Richard Power and **Guy Olliff-Cooper** (instructed by **Clyde & Co LLP**) for **Ivory Castle** and **Mr Gibson**

Hearing dates: 4, 5 and 6 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This judgment concerns the question whether a defendant can have resort to assets that are subject to an injunction to fund the costs of his defence. Over the course of 3 days I heard wide-ranging argument from Ms Elizabeth Jones QC for the Claimant, Kea Investments Ltd (**"Kea"**), and from Mr Richard Power for the 8th Defendant, Ivory Castle Ltd (**"Ivory Castle"**), and the 9th Defendant, Mr William Gibson (**"Mr Gibson"**). The case was very well argued on both sides and gives rise to a number of points of some difficulty.

Background

2. The background is well known to the parties but for reasons that will become apparent it is necessary to set it out in some detail. In April 2015, Sir Owen Glenn and Kea brought proceedings for fraud and breach of fiduciary duty against the 1st Defendant, Mr Eric Watson (**"Mr Watson"**), and others. The proceedings were tried by me and after a lengthy trial, I handed down judgment on 31 July 2018 (**"the Main Judgment"**) in Kea's favour, holding (among other things) that investments totalling £129m which Kea had made into a joint venture called Project Spartan had been procured by deceit on the part of Mr Watson and breach of fiduciary duty: see *Glenn v Watson* [2018] EWHC 2016 (Ch). I held that Kea was entitled to set the joint venture agreements aside and recover the monies paid over to the joint venture vehicle, together with interest, and that insofar as the joint venture vehicle was unable to pay, Kea was entitled to equitable compensation for the shortfall from Mr Watson. Kea was also entitled to trace into, and elect whether to claim, assets acquired by Mr Watson with some £12m of its money which had found its way into the hands of a company associated with Mr Watson.

3. After further argument on 10 and 13 September 2018 the Main Judgment was given effect to by an Order made by me and sealed on 14 September 2018. This did not quantify precisely the amount of equitable compensation that Mr Watson was liable to pay Kea, as that depended on the extent to which Kea was able to find, and elected to claim, traceable assets, but it set a maximum figure for equitable compensation of about £43.5m, and ordered Mr Watson to make an interim payment of slightly over £25m, together with over £3.8m on account of costs. Mr Watson did not appeal the findings in the Main Judgment or the Order of 14 September 2018, save in respect of the interest rate used in the calculation of the quantum of equitable compensation, which I had set at 6.5% pa and which he appealed with my permission. The appeal was dismissed by the Court of Appeal in October 2019: see *Watson v Kea Investments Ltd* [2019] EWCA Civ 1759. That means that there is no longer any doubt that Mr Watson is liable, at the very least, for the two sums which I ordered him to pay.

4. Mr Watson has not voluntarily paid a penny of either sum. Kea has managed to identify, and compel payment from, various assets, and has thereby obtained comparatively small sums towards the judgment debt but is still owed the vast majority of it, and has found it difficult to locate, let alone execute against, any substantial assets. This is particularly frustrating for Kea as Mr Watson formerly allowed himself to be represented as one of New Zealand's wealthiest men, but now claims to be impecunious. I am not directly concerned on the present applications

with whether he is right about that, but it is clear that Kea and its legal team do not believe him, and there have been numerous post-judgment applications, all heard by me, in which Kea has sought to pursue its rights as judgment creditor against Mr Watson and in which Mr Watson has claimed not to have any assets.

5. By contrast however Mr Gibson, an accountant who has worked for Mr Watson for many years and whose own description of himself at trial was that he was Mr Watson's *"right-hand man"*, appeared to Kea to have access to valuable assets. In particular Mr Gibson was the settlor and (together with his father) one of the beneficiaries of a Hong Kong trust called the Heron Bay Trust. The Heron Bay Trust owns Ivory Castle, a BVI company which it uses as a corporate vehicle to hold assets; and among the assets which Ivory Castle holds are a shareholding in an English company called Long Harbour Residential Freeholds Ltd (**"LHRF"**), which has a valuable ground rents business (as detailed in the Main Judgment), and interests in certain associated partnerships, including in particular a Guernsey limited partnership called Aegean LP (**"Aegean"**), which is used as a means of distributing profits to its participants. It had in fact been the Claimants' case at trial that Mr Watson, who initially had the valuable right to take up the LHRF shares, had allowed them to be taken in the name of Ivory Castle as a nominee for him, but I did not find it necessary to resolve that issue in the Main Judgment: see at [441].

6. In November 2018 however Kea learned that Aegean was due to make a substantial cash payment of about £2m to Ivory Castle by way of a distribution in respect of its interest in Aegean. That prompted Kea to seek to restrain payment of the money, Kea's case being that assets held by Ivory Castle were in truth held by it for Mr Watson as bare trustee or nominee, or on terms that they could be made available to him, or were otherwise amenable to execution of Kea's judgment debt against Mr Watson. (I will refer to Kea's case as being that Ivory Castle *"is a nominee for"* Mr Watson, as a way of encompassing all the various ways Kea puts its contention without having to repeat all the variants on each occasion). Aegean agreed to hold the money for a short period pending Kea applying to the Court.

7. That ultimately led to Kea making applications (i) to join Ivory Castle and Mr Gibson into these proceedings; (ii) for permission to serve Ivory Castle out of the jurisdiction; (iii) to amend its pleadings to assert that Ivory Castle was a nominee of its assets for Mr Watson, and to claim not only declarations to that effect but also the appointment of a receiver over them by way of equitable execution of Kea's judgment debt; and (iv) for injunctive relief against Ivory Castle to restrain the payment to it of the money due from Aegean, and in relation to its other assets in the form of what has come to be known as a notification injunction (following my decision in *Holyoake v Candy* [2016] EWHC 970 (Ch) where this expression was used by me, and adopted by Gloster LJ on appeal [2017] EWCA Civ 92). Since there was no immediate risk to the Aegean moneys, the applications were made on notice to Ivory Castle and Mr Gibson.

8. They were argued before me over 2 days on (Friday) 25 January 2019 and (Monday) 28 January 2019 by Ms Jones for Kea, and Mr Charles Béar QC for Ivory Castle and Mr Gibson. At the conclusion of argument on the Monday, I was not in a position to give an immediate judgment, but I thought I ought to grant a short-term injunction until I could do so. That could not be until (Friday) 1 February 2019 as I was sitting in the Court of Appeal that week and fully occupied on Tuesday to Thursday.

Mr Béar however took the point that I could not even grant a temporary injunction against Ivory Castle without being satisfied that it was an appropriate case to grant leave to serve out of the jurisdiction, so I gave a very short ruling concluding that it was an appropriate case for permission to serve out, but making it clear that that was a provisional view and that if after considering the very detailed arguments put before me I changed my mind I would discharge that order, and indicating that I would endeavour to give a definitive answer at 2 pm on 1 February. On that footing I granted an injunction against Ivory Castle, expressed to last until then; in relation to the Aegean moneys, it required Ivory Castle to instruct Aegean to retain the moneys and not pay them over to Ivory Castle; in relation to its other assets, Ivory Castle was restrained from dealing with, or disposing of, them without 14 days' notice to Kea's solicitors. It contained an exception to the order under which Ivory Castle could spend up to £150,000 on legal representation. There had been almost no discussion of this last point at the hearing. Kea's draft order, adapted from the standard Commercial Court form of freezing order, had provided for Ivory Castle to spend *"up to [£]"* on legal representation and there was a very brief discussion of the amount, Ms Jones not objecting to the figure that had been referred to in Mr Gibson's witness statement (thought to be £130,000, but in fact £150,000).

9. I was in the event able, as envisaged, to give an oral judgment at 2 pm on (Friday) 1 February 2019. In that judgment I upheld my provisional view that Kea should be permitted to join Ivory Castle and Mr Gibson, to amend its pleadings, and to serve Ivory Castle out of the jurisdiction; I also held that Kea had established a good arguable case on the merits and a real risk of dissipation such as to justify continuing the injunctions to trial: see *Kea Investments Ltd v Ivory Castle Ltd* [2019] EWHC 309 (Ch).

10. Counsel did not of course know what my judgment would say, and in particular whether I would continue the injunctions to trial or not, but shortly before the hearing Mr Béar sent an e-mail to Ms Jones (at 13.08) to the effect that if the injunctions were continued he would be contending that the amount to be spent on legal fees should not be subject to any specific limit but should be uncapped, followed by a further e-mail (at 13.41) attaching copies of an extract from *Gee on Commercial Injunctions*, and of the decision of David Richards J in *HMRC v Begum* [2010] EWHC 2186 (Ch) (***"Begum"***), which I will have to look at in more detail below. After I had given judgment continuing the injunctions, there was a brief discussion about the form of order, in which Mr Béar cited to me not only *Begum* but also the decision of Neuberger J in *The Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 3152 (Ch) for the proposition that the normal course in the case of a freezing injunction of a non-proprietary nature is to permit the defendant to spend a reasonable sum on his legal costs without any express limitation. His submission was that this was not a proprietary injunction; Ms Jones accepted that it was not a proprietary injunction in the sense that Kea was making a claim that the assets were its property, but submitted that it was much more like a proprietary situation.

11. I gave a very short ruling on the point (**"the February 2019 ruling"**) as follows:

> "In the light of the authorities Mr Béar has put before me, I am not going to impose a cap. I do understand the point that this is quasi-proprietary but particularly David Richards J's judgment proceeds on the basis that a clear line is to be drawn between true proprietary injunctions and non-proprietary injunctions and everything else.

> Kea does not have a claim, as matters stand, to the money in this pot. What it does is have a claim under which it seeks to execute against that, which is not quite the same, and as David Richards J said, it is important that there should be consistency of approach and, in the light of that, I won't impose a cap and Ivory Castle may spend up to a reasonable amount on legal representation, which I assume includes legal advice because I don't see why counsel should be paid and not solicitors."

12. I also decided, again after very short argument, that Ivory Castle could spend money on Mr Gibson's costs as well, as follows:

> "The remaining question is whether it should extend to Mr Gibson's legal advice and representation, and I do propose to allow Ivory Castle to spend money on his advice and representation. In practical terms, this is a pot of money which has been available to him on his case and it does seem to me that it would be invidious to seek to draw [a] distinction between Ivory Castle and Mr Gibson in circumstances where the reality is that the fight is between Kea on the one hand and Mr Gibson on the other.
>
> So I will extend it to legal advice and representation for Ivory Castle and Mr Gibson but I will confine it to these proceedings."

13. Those decisions were embodied in an Order dated 1 February and sealed on 4 February 2019 (**"the Ivory Castle Injunction"**). Paragraphs 6(1) and (2) of the Ivory Castle Injunction provided as follows:

> "6. (1) Ivory Castle must forthwith instruct Aegean General Partner Limited (**"Aegean GP"**), a company incorporated in Guernsey, that until further notice all sums due or payable or available to be paid by Aegean Limited Partnership, a Guernsey limited partnership (**"Aegean LP"**), to Ivory Castle shall be retained by Aegean LP or, if Aegean GP is unwilling or considers itself unable to cause Aegean LP to retain such sums, paid into court in England and Wales to the credit of this action.
>
> (2) Ivory Castle must not give notice to Aegean GP to vary the instruction required by paragraph 6(1) above except pursuant to a further order of this court."

Paragraph 7(1) provided:

> "7. Without prejudice to paragraph 6 above, until trial or further order of the court:
>
> (1) Ivory Castle must not, without giving 14 days' notice in writing to Farrer & Co:
>
> (a) remove from England and Wales any of its assets which are in England and Wales except in accordance with paragraph 10 below; or
>
> (b) in any way dispose of, deal with or diminish the value of its assets whether they are in or outside England and Wales except in accordance with paragraph 10 below."

Paragraph 12(1) provided:

> "12. (1) Ivory Castle may spend a reasonable amount on legal representation and advice for Ivory Castle and Mr Gibson in relation to these proceedings and any proceedings which may be taken pursuant to the permission given in paragraph

> 19(3) below and may also spend a reasonable amount on Ivory Castle's proper professional and administrative costs including directors' fees provided that (i) Ivory Castle must inform the claimant's solicitors where the money is to come from, and (ii) Ivory Castle's solicitors must certify that the costs and expenses to be paid, including the costs and expenses of any agents or professionals instructed by them, have been actually, reasonably and properly incurred."

14. The next relevant development was that on 12 November 2019 Kea applied (to me) without notice for a further injunction against Mr Gibson personally. The existing injunctions were solely against Ivory Castle, the pleaded claim for which I had granted permission in February being for declaratory relief in relation to, and the appointment of a receiver over, Ivory Castle's assets. No claim was at that stage asserted against Mr Gibson, and he was joined not on the basis that relief was claimed against him but simply on the basis that he was interested in the question whether Ivory Castle's assets were held for Mr Watson or not, as in the latter case they would be assets of the Heron Bay Trust in which he was interested. Now however Kea sought to expand the claims to add two claims against Mr Gibson personally, one a claim that he held certain assets as nominee for Mr Watson, and the other a claim for damages for the torts of conspiracy and deceit, the essential allegation being that Mr Gibson had conspired with Mr Watson to conceal Mr Watson's assets and lie about his ownership of them as part of a concerted attempt to make it difficult for Kea to enforce its judgment. On that basis Kea sought a notification injunction against Mr Gibson.

15. I granted that injunction (**"the Gibson Injunction"**) until a return date of 26 November, which has subsequently been extended to the current hearing. It restrained Mr Gibson from disposing of his assets without giving 14 days' notice to Kea's solicitors; it extended to the assets of another trust, the William Gibson Family Trust (**"the WGFT"**); and it contained various provisions requiring Mr Gibson to provide information. It contained an exception permitting Mr Gibson to spend £3,000 a week on living expenses and a reasonable sum on legal advice and representation in these proceedings for himself, the WGFT and Ivory Castle.

Current applications

16. There are the following relevant applications currently before the Court:

    (1) An application (**"Application (1)"**) by Ivory Castle and Mr Gibson, dated 5 November 2019, for an order pursuant to paragraph 6(2) of the Ivory Castle Injunction permitting Ivory Castle to draw on the Aegean monies for unlimited amounts required for legal advice and representation for Mr Gibson and Ivory Castle.

    (2) An application (**"Application (2)"**) by Kea dated 22 January 2020 for a variation of the Ivory Castle Injunction to preserve a sum of some £620,000 which Ivory Castle is due to receive from a company called Cottian Ltd (**"Cottian"**) in the same way as the Aegean monies.

    (3) An application (**"Application (3)"**) by Kea dated 12 November 2019 for continuation until trial of the Gibson Injunction, together with an application dated 22 January 2020 in which Kea seeks to replace the notification

injunction against Mr Gibson with a conventional freezing injunction in relation to certain assets derived from a payment of £1.1m which Mr Gibson received from Ivory Castle in April 2018, Kea's case being that they are held by Mr Gibson as nominee for Mr Watson.

17. All three applications raise the same legal questions, namely whether the Defendants (Ivory Castle and Mr Gibson) are obliged to resort to Mr Gibson's own assets before resorting to Ivory Castle's assets for payment of their legal costs. In very short summary, Kea's case is that Mr Gibson should be required to spend his own money before spending assets in the name of Ivory Castle, or in his own name, which are claimed by Kea to be held as nominee for Mr Watson and so should be available to Kea to execute against; the case for Ivory Castle and Mr Gibson is that this point has already been decided by me against Kea in the February 2019 ruling and cannot or should not be reopened; and that in any event even if it is reopened, I came to the right conclusion.

The law – payment of legal expenses from frozen assets

18. In those circumstances I propose to start with an analysis of the substantive legal point, namely whether as a matter of principle a defendant such as Ivory Castle should be at liberty to have recourse to frozen assets for its legal expenses.

19. Certain points are clear from the authorities. First, there is a well-established distinction between the case of an ordinary (non-proprietary) freezing injunction, based on what could still be described in 1993 as the *"relatively modern" Mareva* jurisdiction, and the case of a proprietary injunction based on the much older Chancery jurisdiction to preserve a disputed fund: see *Sundt, Wrigley & Co Ltd v Wrigley* (unrepd, 23 June 1993) (***"Sundt Wrigley"***) per Sir Thomas Bingham MR, cited by David Richards J in *Begum* at [35].

20. In the former case, the position is as follows:

(1) The *"ordinary rule"* is that since the money is the defendant's own money, he is entitled, subject to his demonstrating that he has no other assets with which to fund the litigation, to have resort to the frozen assets in order to finance his defence: *Sundt Wrigley* per Sir Thomas Bingham MR.

(2) This is, as Sir Thomas Bingham says, subject to the defendant demonstrating that he has no other available assets: *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm) (***"Tidewater"***) at [37]-[43] per Males J, *Halifax plc v Chandler* [2001] EWCA Civ 1750 at [17] per Clarke LJ, *Serious Fraud Office v X* [2005] EWCA Civ 1564 at [35], [43], [46]-[47] per Clarke LJ, referring to the *"burden of persuasion"* on the defendant, and the need to adduce *"credible evidence"* about his other assets. Judges are entitled to have a *"very healthy scepticism"* about unsupported assertions made by a defendant about the absence of assets: *Tidewater* at [40].

(3) It is relevant to consider not only the defendant's own assets but whether there are others who may be willing to assist: *Tidewater* at [41]-[42].

(4) The correct test is to consider objectively the overall justice of allowing the

payment to be made, bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim: *Tidewater* at [45], citing *Gee on Commercial Injunctions*.

(5) In most cases the absence of other assets or alternative sources of funding is likely to be decisive, as justice will require that such assets as there are should be available to fund the defendant's defence. But in what is likely to be an exceptional case, this is capable of being outweighed by other considerations. Ultimately it is the interests of justice which must be decisive: *Tidewater* at [37], [46].

21. As an example of a case where the Court refused to allow a defendant to spend frozen funds on its legal costs, Ms Jones referred me to *Atlas Maritime Co SA v Avalon Maritime Ltd (No 3)* [1991] 1 WLR 917 where the defendant (Avalon) applied for permission to spend frozen funds on its legal costs on the grounds that it had no other assets, but the Court of Appeal declined to allow it to, on the basis that its parent company (Marc Rich) exercised financial control over its affairs and had chosen to leave it without other funds. Lord Donaldson MR said at 926B that he was satisfied that Marc Rich would make money available to enable Avalon to defend the claim, unless the view were taken that it would simply be throwing good money after bad. Nicholls LJ, to similar effect, said at 929E-H that Marc Rich had chosen to operate the purse-strings so as to leave Avalon with no other money, and that Marc Rich should be left to finance Avalon's defence if it considered it worth doing, adding that otherwise Avalon's defence would be conducted at the expense of Atlas (the claimant).

22. In the case of proprietary injunctions, however, the position is different: see *Grant and Mumford, Civil Fraud* (1st edn) at §32-059 to §32-068. Here the principles are as follows:

(1) Since the basis of the proprietary claim is that the particular asset in question is said to belong to the claimant, the question is not whether the defendant should be able to use his own assets, but whether he should be permitted to use assets which may turn out to be the claimant's. There is therefore no presumption in favour of his being able to do so.

(2) There are four questions which fall to be answered: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch) (***"ITS"***) at [6] per Lewison J. The first is whether the claimant has an arguable proprietary claim to the money.

(3) The second is whether the defendant has arguable grounds for claiming the money himself; as Millett LJ said in *The Ostrich Farming Corp Ltd v Ketchell* (unrepd, 10 Dec 1997):

> "No man has a right to use somebody else's money, for the purpose of defending himself against legal proceedings."

(4) The third is whether the defendant has shown that he has no other funds available to him for this purpose.

(5) But even if the defendant gets over this hurdle then the Court has a discretion: *Sundt Wrigley*, where Sir Thomas Bingham referred to the Court having to make a:

> "careful and anxious judgment … as to whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may, in course, turn out to be a successful defence."

(I have not seen a transcript of this judgment but only quotations from it, and in some of these the words *"what may, in course, turn out"* appear as *"what may of course turn out"*, but nothing of course turns on this.) See also *Xylas v Khanna* (unrepd, 4 Nov 1992) where Hoffmann LJ referred to the decision requiring the balancing of the risks of injustice and to it being very much a matter of discretion.

23. Those principles were not disputed before me. The question which was debated was which category the present case came into. It was in this context that Mr Power relied on *Begum*. In *Begum* HMRC were pursuing a claim against the estate of a Mr Uddin (represented by his sister, Ms Begum), HMRC's case being that Mr Uddin had been involved in a large-scale missing trader fraud which had led to a net loss of VAT of some £95m. HMRC had obtained a freezing order, the only significant assets frozen being the funds held by a Gibraltar trust, of which Mr Uddin had been a beneficiary and which had been ostensibly settled by his grandmother. All the monies in the trust however (some £7m) had in fact come from a company said by HMRC to have been one of the companies used by Mr Uddin for the fraud, and their case was that he was the real settlor and that the monies were the proceeds of the fraud. Importantly, however, although HMRC had formerly asserted a proprietary claim to the trust monies, they had by the time of the hearing before David Richards J abandoned all proprietary claims and were pursuing only personal claims against Mr Uddin's estate. That was the background to an application by Ms Begum to have recourse to the trust monies to defend the claim.

24. David Richards J referred to the fact that HMRC had abandoned its proprietary claims as the most significant development, saying at [33]:

> "The purpose of the freezing order is no long[er] to protect a fund which HMRC claims belongs to it, but to prevent the disbursement of a fund against which HMRC will or may be able to enforce a judgment if it succeeds in some or all of its personal claims."

He then said at [34] that payment of reasonable legal costs was not a dissipation against which a non-proprietary freezing order provides protection, but a proper application by the defendant of funds belonging to him; and that there was a deeper concern that a claimant should not be able to deprive a defendant of the ability to defend himself with his own funds; see also at [47] referring again to the frozen assets being the defendant's property which he should be entitled to use to fund his own defence.

25. Counsel for HMRC (Mr Chivers) submitted that on HMRC's case the trust monies were all derived from the fraud and were the proceeds of crime. Although accepting that HMRC no longer claimed that they were held on trust for it, he said that the

circumstances were so closely analogous to a proprietary claim that they could properly be called quasi-proprietary (at [52]).

26. It was this submission that David Richards J rejected in clear terms. At [53] he said that although one could recognise the instinctive appeal of the argument it did not stand up to analysis:

> "First, whatever their source, HMRC has no proprietary interest in these assets. The use of the term quasi-proprietary seeks to give a flavour which is not present."

27. At [55] he said that one could not justify singling out claimants in this type of case. There were many cases in which the defendant's funds were limited so that expenditure on his legal costs would reduce the amount a successful claimant could recover. His conclusion was:

> "I do not see why those claimants are less deserving of protection than claimants in the present type of case. By drawing a clear line between proprietary and non-proprietary claims the courts have created a principled distinction. There is no proper basis for a further sub-category of the sort for which Mr Chivers contends."

28. When seen in context, these comments seem to me entirely orthodox and unsurprising. The facts make it clear that whether or not HMRC might have had an arguable proprietary claim to the frozen moneys, they had expressly abandoned such a claim and did not propose to resurrect it. In those circumstances the case was a straightforward one of an ordinary freezing injunction in support of a purely personal and non-proprietary claim, and David Richards J was in my judgment entirely right to adopt a conventional view under which the frozen monies were the defendant's assets, and there was no reason to deny the defendant the right to spend them on defending the claim. That was so, notwithstanding (i) that HMRC had a claim that the monies were the proceeds of the very fraud they were suing on – once the proprietary claims had been dropped, it is difficult to see what difference this could make to the analysis – and (ii) that since HMRC's claim (at £95m) vastly exceeded the available assets (at some £7m), any money spent on the defence would reduce the amount available to HMRC if it won. That is always the case where a claimant sues a defendant whose funds are insufficient to meet the claim. But that is not a good reason to prevent him using his own money to defend himself.

29. Ms Jones however said that the present case was different, and was in fact on all fours with one of the *Ablyazov* cases, namely *JSC BTA Bank v Ablyazov* [2015] EWHC 3871 (Comm) (***"Ablyazov"***), a decision of Popplewell J. The claimant Bank had obtained judgment against Mukhtar Ablyazov for some $4.6bn, the great majority of which remained unsatisfied. The Court had frozen Mukhtar's assets and that had had the *de facto* effect of freezing an account in London with EFG Private Bank Ltd in the name of his son Madiyar Ablyazov, as the Bank claimed that the monies in the account were in fact Mukhtar's, and EFG, being on notice of that claim and of the freezing order, would not allow Madiyar access to the funds. The monies in the account had come from his father and Madiyar claimed that they were a gift to him; the Bank's case was that Mukhtar (whose usual modus operandi was to use nominees) had not really intended Madiyar to have ownership of the money, and that a deed of gift relied on by Madiyar was a forgery. A receiver had already been appointed over various assets of Mukhtar's, and, as Popplewell J records at [6]:

> "In these proceedings relating to the EFG account and the money within it, the Bank seeks as part of its claim, a receivership order over the funds if it succeeds in its contention that they remain beneficially owned by Mukhtar, by way of equitable execution of the judgments against him."

The application before the Court was by Madiyar to be allowed to spend the money in the account on living and legal expenses.

30. It can be seen that the parallel with the present case is not only close but exact. In each case a judgment creditor (there the Bank, here Kea) has an unsatisfied judgment debt against a judgment debtor (there Mukhtar, here Mr Watson); in each case it has located an asset in the name of someone else (there the EFG account in the name of Madiyar, here the assets in the name of Ivory Castle); in each case it claims that the ostensible owner is a nominee, and that the true beneficial owner is the judgment debtor; in each case, subject to establishing that, it seeks the appointment of a receiver over the disputed asset by way of equitable execution of its judgment debt; in each case it has obtained an order freezing the disputed asset; in each case the ostensible owner has applied to the Court for liberty to have recourse to the disputed asset for his legal or living expenses.

31. Mr Knox QC, who appeared for Madiyar, submitted that the usual exception to a freezing order should apply so as to make allowance for normal living expenses and for legal expenses [7]-[9]. Popplewell J however preferred the submissions of Mr Jones QC for the Bank, as appears from [10]-[11] as follows:

> "10 On behalf of the Bank, Mr Jones QC has submitted in his written skeleton that the position is more analogous to that in which a respondent to a freezing order seeks to be permitted to use funds in respect of which the applicant has a proprietary claim. The Bank does not in this case advance a case that it has a proprietary interest in the funds, although it does contend that they derived from the frauds practised on it by Mukhtar. The Bank accepts for present purposes that Mukhtar was the beneficial owner of the money in the EFG Geneva account when it was transferred to the EFG London account. Nevertheless, it is submitted, if the Bank is proved right in its claim that Mukhtar retained and retains the beneficial interest in the money, it should be and will be available to the Bank in part-satisfaction of the Bank's judgment against Mukhtar. Therefore, it is submitted, to allow Madiyar to spend the money pending resolution of the issue would be to allow Madiyar to dissipate a fund to which the Bank is arguably now entitled by way of equitable execution of a judgment debt. The position, therefore, it is said, is analogous to that in which a claimant arguably has a proprietary interest in a fund which the defendant wishes to deplete pending the determination of the issue.
>
> 11 In my view, these submissions of Mr Jones are well founded. The principles in such cases of a proprietary claim are well established. Where there are assets which may belong to the claimant, the court will not allow those funds to be used for living expenses or legal costs unless the defendant has shown, by full and frank evidence that he does not have, or have access to, any other funds or asset which can be used for those purposes. If he does he must use such other funds or assets first. That is the threshold requirement which must be satisfied by a defendant in the case of a proprietary claim. If that threshold requirement is met, then the court has to carry out a balancing exercise."

Popplewell J went on to consider whether Madiyar had discharged that threshold burden, concluded that he had not, and dismissed his application.

32. If the point is open to me at all, I have no hesitation in saying that I would adopt the same view in this case as Popplewell J did in that. Although one High Court Judge is not bound by the decision of another, the practice is to follow the decision of another High Court Judge unless satisfied that he or she is wrong. Far from being so satisfied, I think Popplewell J was entirely right, and if I had had *Ablyazov* cited to me on 1 February 2019 as well as *Begum*, I have no doubt that that is the view that I would have taken on that occasion.

33. Mr Power said that the actual decision in *Ablyazov* was that Madiyar had not discharged the burden of showing that he had no other assets, but that he would have had to do that anyway even if the case were regarded as one of a normal non-proprietary injunction, and hence that what Popplewell J said in [11] was not actually necessary to the decision. I do not think this is right: whether he could have reached a similar conclusion by a different route, the actual basis on which he decided the case was that it was analogous to a proprietary claim, and that the principles applicable to such a claim should be applied.

34. Mr Power also said that it was inconsistent with *Begum* which had denied that there was a category of quasi-proprietary case, and that I should prefer *Begum* which, as far as one can tell, was not cited in *Ablyazov*. He said that the position of the Bank in *Ablyazov* (namely that if it had succeeded at trial it would have been able to claim the money in the account) was no different from the position of any claimant who was seeking a money judgment against a defendant and who would if successful be able to execute that judgment against a frozen asset. That was indeed the position that HMRC were in in *Begum*.

35. I do not accept this either. Although I quite accept that a claimant such as HMRC which is seeking a money judgment against a defendant with a single frozen asset will in practice be looking to that asset to meet its judgment, and that every penny spent on the defendant's costs will reduce its ultimate recovery, there does seem to me to be a clear distinction in principle between the position on the one hand of a claimant such as HMRC with an ordinary non-proprietary claim, and the position on the other of a claimant such as the Bank in *Ablyazov* (or Kea in the present action). A claimant such as HMRC that is bringing a purely personal claim has no present claim to the defendant's assets at all. They remain in both a technical and a real sense the defendant's own assets, and the jurisprudence in this area makes it clear that the reason why a defendant is entitled to spend frozen monies in such a case on defending himself is precisely because they are his own monies, however much this might prejudice the claimant by diminishing the only fund the defendant has: see the references to *Sundt Wrigley* and *Begum* above (paragraphs 20(1) and 24), and there are many similar statements in other cases. Even if the claim succeeds and the claimant obtains a judgment it will be a simple money judgment. That makes the claimant a judgment creditor but does not by itself give him any claim to any particular asset. So until judgment has been given, there is nothing to displace the defendant's entire beneficial interest in the frozen asset. As such he is entitled to spend it as long as he is not dissipating it, because, as I said in *Holyoake v Candy* [2016] EWHC 970 (Ch) (reversed at [2017] EWCA Civ 92, but not so as to affect this point) at [8(5)]:

> "A debtor is not obliged to keep his assets intact to meet a possible claim by a claimant and can continue to spend them in the ordinary course of business or on his ordinary living expenses, but he is not at liberty to dissipate them so as to render a judgment unenforceable, or indeed to dissipate them if that would be the effect."

But spending one's own money on one's own legal costs is not dissipation: see eg *Begum* at [34] (paragraph 24 above).

36. The position of a claimant such as the Bank in *Ablyazov* or Kea in the present case seems to me to be materially different. In such a case the frozen assets are not the undisputed property of the ostensible owner (there Madiyah, here Ivory Castle), but are assets the beneficial ownership in which is actively disputed. If the claimant wins the action, it will become apparent that the assets were not the ostensible owner's at all, and he therefore will be shown to have had no right to spend them, either on his legal expenses or his living expenses or anything else. In fact he will be shown to have been a trustee of them, and it will have been a breach of trust to spend the monies for his own benefit. Now of course the claimant does not in such a case have a present beneficial interest in the fund – that is indeed why it is not a simple case of a straightforward proprietary claim – but this is just as much a case of a disputed fund as the case of a proprietary claim, and it seems to me that the principle is that whereas a defendant cannot generally be prevented from spending his own money on defending himself, it is very different if the money that he proposes to spend arguably belongs to someone else. Why should he be at liberty to spend what may be someone else's money on defending himself? Long before the *Mareva* injunction existed, the Chancery courts were very ready to intervene to preserve a disputed fund pending litigation to resolve entitlement to it. And although the claimant does not have a present beneficial interest in the money, if it is in truth held for the benefit of the judgment debtor (there Mukhtar, here Mr Watson), the claimant as a judgment creditor of that debtor has a much better claim to it than the ostensible owner who has no claim to it at all. Moreover the claimant (in both *Ablyazov* and the present case) not only brings a claim designed to resolve the ownership of the disputed fund, but also claims in the action the appointment of a receiver by way of equitable execution over the fund. That means that if the claim is successful, the claimant will not just obtain relief in the form of a simple money judgment (indeed he may not be entitled to a simple money judgment as such) but will obtain actual possession of the fund (through the medium of the receiver). That may not strictly be a present proprietary claim, but it is very close to one, as the very gist of the action is to assert a right to possession of the disputed fund.

37. For all these reasons I do not have any doubt that *Ablyazov* is right, and can and should be distinguished from *Begum* where there was no proprietary claim of any kind, and, as I have already said, if *Ablyazov* had been cited to me as well as *Begum* on 1 February, I am entirely sure that I would have followed it in preference to *Begum*. I should make it clear that I am not meaning thereby to criticise Mr Béar, nor did Ms Jones suggest I should; counsel are undoubtedly under a duty to draw to the Court's attention any authorities that they know are directly in point, but cannot be expected to track down every case, however obscure, that might bear on the case, and Popplewell J's decision in *Ablyazov* does not seem to be well reported. Nor is it any criticism of Ms Jones that she was not in a position to answer Mr Béar's submission based on *Begum*; as the facts show, she was only presented with the argument at the very last moment.

38. I have some recollection that I was not entirely comfortable with applying *Begum* at the time, but I thought I ought to follow what I understood David Richards J to have decided. I now consider however for the reasons I have given that my February 2019 ruling was quite wrong in treating the present case as if it were a standard non-proprietary case.

Is there an issue estoppel?

39. Mr Power says however that it is not open to Kea to take the point, as I decided it against Kea in the February 2019 ruling and there is no principled basis on which Kea can now be allowed to reopen it. That gave rise to considerable argument as to what the relevant principles are.

40. Mr Power said that my decision gave rise to an issue estoppel; as such it was *prima facie* a complete bar to relitigation of the same issue between the same parties. He accepted that the operation of an issue estoppel could be prevented in *"special circumstances"* as decided by the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (***"Arnold"***), but said that there were no such special circumstances. In *Arnold* Walton J had, on appeal from an arbitrator, decided a question of construction of a rent review clause in a lease in favour of the landlords; the tenants attempted to appeal but Walton J refused to grant the necessary certificate and the Court of Appeal held that in those circumstances it had no jurisdiction to entertain an appeal. By the time of the next rent review, subsequent decisions, including two in the Court of Appeal, very strongly suggested that Walton J's decision was wrong.

41. By contrast, submitted Mr Power, Kea did not seek to appeal the February 2019 ruling, nor were there any subsequent decisions which had changed or clarified the law. It was just a case where Kea had failed to argue all the points that it might have done on 1 February, had never appealed the decision or sought to appeal it, and now simply wanted to re-argue it, and argue it better. That, he submitted, did not amount to special circumstances; it was a run of the mill circumstance which was classic issue estoppel territory.

42. Ms Jones denied that the relevant principle was that of issue estoppel at all. The February 2019 ruling was not a final decision on anything such as could give rise to an issue estoppel; it was merely an interlocutory exercise of a discretionary power. As such, there were other principles in play (see below) but they were not those applicable to issue estoppel.

43. On this point I prefer Ms Jones's submissions. Issue estoppel was described in *Arnold* by Lord Keith at 105D as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 (***"Virgin"***) at [17] per Lord Sumption JSC where he distinguished a number of different legal principles covered by the portmanteau term *res judicata*, and in relation

to issue estoppel said:

> "Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198."

In *Thoday v Thoday* [1964] P 181 at 198 Diplock LJ had said:

> "If in litigation upon one such cause of action any such separate issue as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

44. As those citations illustrate, I accept (as Ms Jones submitted) that an issue estoppel arises only where an issue has been determined as part of the determination of a claim. As explained by Lord Sumption in his extended treatment of this area of law in *Virgin* at [17]-[25], there are a number of legal principles which all have the same underlying purpose, that of limiting abusive and duplicative litigation, but they are juridically different and it is helpful for the purposes of analysis to keep them conceptually distinct. Thus cause of action estoppel applies where a cause of action has been held to exist or not to exist – that is where it has been finally determined. Similarly, as I understand the law, issue estoppel applies where an issue arising in claim A has been finally determined and the same issue then arises between the same parties (or their privies) in claim B. It will usually have been finally determined as part and parcel of the determination of claim A itself; once that has happened, the decision is binding on the parties and prevents them relitigating the same issue as part of claim B.

45. Mr Power said that interlocutory decisions as well as final ones could give rise to an issue estoppel, referring to *Seele Austria GmbH Co v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC) (***"Seele Austria"***) at [19] where Coulson J said that issue estoppel would apply to the determination of preliminary issues *"or even interlocutory matters decided earlier in the same action between the parties."* But I agree with Ms Jones that Coulson J's decision gives no support to the idea that an issue estoppel could arise unless an issue had arisen for determination and been determined: the context in that case was whether Field J at an earlier stage in the proceedings had or had not determined the issue whether defects in windows were the result of poor design or poor workmanship, and Coulson J's conclusion, after a careful analysis, was that that issue was indeed an issue that was before Field J and that was determined by him in favour of the defendant: see at [69].

46. The reference by Coulson J to issue estoppel arising in relation to interlocutory matters was a reference to what Diplock LJ had said in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 641ff. In that case an arbitrator had made an

interim award and it was held that this gave rise to an issue estoppel, as the award had determined a particular issue, even though it was not a final award: see per Lord Denning MR at 639G-640D and per Diplock LJ at 642B-643E. Diplock LJ explained what he meant in his judgment by an *"issue"* at 641F-642A as follows:

> "The final resolution of a dispute between parties as to their respective legal rights or duties may involve the determination of a number of different "issues," that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the facts. To determine an "issue" in this sense, which is that in which I shall use the word "issue" throughout this judgment, it is necessary for the person adjudicating upon the issue first to find out what are the facts…"

He then said at 642B-D:

> "In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined."

He went on to hold that the same applied to an interim award that finally determined a particular issue: see at 643C-E.

47. These citations make it clear that what Diplock LJ meant by an interlocutory judgment was the trial and determination of one or more issues that arose as part of a cause of action. He was not dealing with the question of discretionary decisions made at an interlocutory stage of an action before any of the facts had been found. Nor was Coulson J in *Seele Austria*. In my judgment therefore the February 2019 ruling, not being the final determination of an issue in the sense used by Diplock LJ, did not give rise to an issue estoppel properly so-called.

The Chanel *principle*

48. That does not mean that a party is free to fight over again interlocutory battles that it has fought and lost. But the relevant principles are not those applicable to issue estoppel; they are those laid down by the Court of Appeal in *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485 (***"Chanel"***). I will refer to this as **"the *Chanel* principle"**.

49. For a statement of the principle, Ms Jones referred to another decision of mine in *Holyoake v Candy*, this time in relation to security for costs, at [2016] EWHC 3065 (Ch). Although it is a lengthy passage, it is simplest to cite from this judgment as follows:

> "**Abuse of process – the law**
>
> 12. Mr Stewart QC, who appeared for the Claimants, submitted that in the

circumstances it was an abuse of process for the Defendants, having voluntarily withdrawn the first application, to bring a second application on effectively the same grounds. He relied on the principle known as the rule in *Henderson v Henderson* (1843) 3 Hare 100, as interpreted by Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1 at 31, where he referred to a:

> "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing on the question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

13. In *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 WLR 485 (***"Chanel"***), the plaintiffs, in an action for trade mark infringement and passing-off, obtained *ex parte* interlocutory injunctions; on the *inter partes* hearing the defendants felt constrained to give undertakings and by consent the motion was stood over to trial (without being opened or the evidence read) on the defendants giving undertakings "until judgment or further order". The defendants then carried out some research which led them to think they had an argument after all and applied to discharge the undertakings. Foster J refused the application, and the Court of Appeal refused leave to appeal. Buckley LJ held (at 492D) that an order (or undertaking) expressed to be until further order gave a right to the party bound to apply to have the order (or undertaking) discharged if good grounds for doing so are shown. He then said he would assume (without deciding) that the evidence the defendants had uncovered would have enabled them to resist the motion, and continued (at 492H):

> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

14. In *Woodhouse v Consignia plc* [2002] EWCA Civ 275, a claimant who had unsuccessfully sought to lift a stay applied to do so a second time, and both the district judge and judge held that he could not have a second bite at the cherry. The Court of Appeal allowed an appeal. Brooke LJ, giving the judgment of the Court, said that there was a public interest in discouraging a party from making a subsequent application for the same relief based on material which was not, but could have been, deployed in the first application; that one of the reasons was the need to protect respondents to successive applications from oppression [55]; but that although the policy that underpins the rule in *Henderson v Henderson* had relevance as regards successive pre-trial applications for the same relief:

> "it should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed." [56]

He then gave an example where an application for summary judgment under CPR Pt 24 had been dismissed, but a second application was made based on

evidence that, although available at the time of the first application, was not then deployed through incompetence, but which was conclusive; the second application ought to be allowed to proceed [57]. The district judge and judge had therefore been wrong to regard the fact that the second application was a second bite at the cherry as decisive [58], and the Court of Appeal proceeded to consider the second application on its merits, regarding the fact that it was a second bite at the cherry as an important factor [61], but in the event decided that it would be a disproportionate penalty for the claimant to lose his right to damages due to a pardonable mistake by his solicitor, and lifted the stay [63].

15. In *Orb a.r.l. v Ruhan* [2016] EWHC 850 (Comm) Popplewell J had to deal with a number of applications arising out of a freezing order made by Cooke J which had been obtained by the defendant (Mr Ruhan) against the claimants (the Orb Parties) [1]-[2]. The order required Mr Ruhan to fortify his cross undertaking in damages by charging certain shares [48]. Mr Ruhan had done so but the Orb Parties sought further fortification on the ground that the shares were inadequate security. Popplewell J dismissed the application for a number of reasons, the first of which was that it was open to the Orb Parties to take the point before Cooke J but they had failed to do so. None of the material relied on had come to their attention subsequently; Cooke J had given them an opportunity to raise any objections to the shares as fortification, but they had not raised the points now sought to be raised, although they were well known to them; there had been no significant or material change of circumstances [81]. Popplewell J continued [82]:

> "That is fatal to this ground for discharge: see *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

16. Mr Stewart also referred to a judgment of Etherton C in this action, *Holyoake v Candy* [2016] EWHC 1718 (Ch). The Claimants had initially applied for a notification injunction, making the decision not to apply for a freezing injunction. I granted that application in a modified form. The Claimants then applied for a freezing order after all. It was that application which came before the Chancellor. He dismissed it. The Claimants' counsel, Mr Trace QC, had submitted that all that he needed to show was the usual prerequisites for a freezing order, namely a good arguable case on the merits, a real risk of dissipation and that the balance of convenience favoured the grant of the order [18]. The Chancellor disagreed, saying [21]:

> "I do not agree with Mr Trace's statement of principle. The starting point in such a case as the present is that the claimants must point to something that has happened since the grant of the original order. They must show something material has changed to make it appropriate to investigate the

> same issues over again at yet another extensive hearing with even more voluminous evidential material. Absent any such change, the application for a freezing order is not only a disproportionate call on the court's resources, but an abuse of the court's process, in effect making successive applications for the same objective but testing the court's willingness each time to see how far the court will go, each such application involving, to a greater or lesser extent, duplication of issues, evidence and arguments."

He then examined, and rejected, various matters which were said to amount to a sufficiently material change of circumstances.

17. These authorities are not entirely easy to reconcile with each other. The decisions in *Orb v Ruhan* and *Holyoake v Candy* proceed on the basis that a party who has sought and obtained relief on an interlocutory application cannot return to court and ask to extend (or "upgrade", in the words of the Chancellor) the relief without showing a material change of circumstances. It is easy to see the policy reasons behind such a principle which are well articulated by both judges. *Chanel* indicates that similar considerations apply where a party has submitted to an order, and that the question does not turn on whether the applicant did in fact have the evidence at the earlier hearing but on whether it was reasonably available to him. Yet in *Woodhouse v Consignia* the Court of Appeal held that the rule in *Henderson v Henderson* was not applied so strictly in interlocutory matters, that the judges below had been wrong to dismiss the second application as a second bite at the cherry, and that it did not matter that the evidence deployed had in fact been available to the applicant at the time of the first application, at any rate if the evidence was conclusive."

50. I accept that these are the relevant principles that I should apply to the three applications referred to in paragraph 16 above.

Ivory Castle's / Mr Gibson's legal costs

51. The background to all three applications is the legal costs that Ivory Castle and Mr Gibson have incurred and expect to incur.

52. The evidence as to Ivory Castle's and Mr Gibson's costs down to the end of trial (listed for 4 weeks in November 2020) comes from Mr Christopher Burdett, a partner at Clyde & Co, the solicitor acting for them, and is to the following effect:

(1) Clyde & Co's invoices issued up to 5 December 2019 have been paid. They amount to some £553,000.

(2) Between then and 21 January 2020, Clyde & Co have issued further invoices totalling some £682,000; and have unbilled fees and disbursements of some £87,000.

(3) In addition Ivory Castle and Mr Gibson have a liability for Kea's costs of the Ivory Castle Injunction proceedings, which has been agreed at some £80,000. In total Ivory Castle and Mr Gibson therefore have a current liability, in addition to the £553,000 already paid, for costs of about £850,000.

(4) Mr Burdett's estimate for the minimum legal costs to trial is a further £2.4m. That includes the costs of the February CMC, a further CMC in April, a PTR

and the trial itself.

53. The evidence as to how those costs have been and might be met is as follows:

(1) At the time of the Ivory Castle Injunction granted in February 2019, Ivory Castle had cash balances with two banks (DBS Bank (Hong Kong) Ltd and Citibank) of about £295,000, $485,000 (I will use $ to refer to US $) and NZ $75,000, equivalent to about £700,000 in total.

(2) Ivory Castle paid all of Clyde & Co's invoices up to 5 December 2019. It also paid certain trustee fees to the trustee of the Heron Bay trust. The result of that was that its cash balances have been depleted to about £30,000 and it is apparently unable to deplete them further due to a requirement for minimum balances on its accounts.

(3) Mr Gibson had cash balances available to him as at 29 January 2020 of the equivalent of some £937,000; in addition Gallo Holdings Ltd (**"Gallo"**), a company held by the Heron Bay Trust, has a further £125,000 odd which could be made available to Mr Gibson, making a total of £1.062m.

(4) Out of that Mr Gibson seeks to reserve £200,000 for his living expenses to the end of trial, and about £100,000 to pay a tax liability to HMRC and credit card bills. He proposes to make £750,000 available to pay Clyde & Co's bills, made up of the £125,000 from Gallo, and some £625,000 from his own cash resources.

(5) As can be seen, that would mean a shortfall of roughly £100,000 against incurred liabilities, not to mention the estimated costs to trial.

54. Mr Gibson was proceeding on the basis that the Cottian monies would be available to meet this shortfall, and some of the further costs. The evidence as to the Cottian monies is as follows:

(1) Kea has known for some time that Ivory Castle loaned money to Cottian, a company held by the Summit Trust (a trust associated with Mr Watson) for the purpose of investing in two Long Harbour related entities known as Compass LP and Weddell LP. Mr Gibson's pleaded case is that Ivory Castle made £2m available to Cottian of which £1.44m was drawn down and just over £1m repaid, leaving just over £400,000 plus interest still due.

(2) At the time of applying for the Ivory Castle Injunction, Kea's solicitors, Farrers, were aware that Compass LP intended to make a distribution to Cottian. However they had been told by Novatrust Ltd (the trustee of the Summit Trust) (**"Novatrust"**) that the net payment from Compass to Cottian would only be about £60,000, and that Cottian was insolvent; and in November 2018 Novatrust confirmed to Farrers that Cottian would not for a period of 12 months make any distribution to Ivory Castle without giving 14 days' notice of the intention to make such a payment. In those circumstances Kea did not seek an injunction preventing payment from Cottian to Ivory Castle (as it did with the Aegean monies).

(3) In January 2020 however Farrers learned that in December 2019 Novatrust as trustee of the Summit Trust had put forward certain proposals to creditors of the Summit Trust and its underlying companies, including Cottian, the effect of which would be to recognise a liability from Cottian to Ivory Castle of some £620,000; and that Ivory Castle had consented to the proposals on 3 January 2020.

(4) That led Mr Graham of Farrers to anticipate that Ivory Castle would shortly receive substantial sums from Cottian; and indeed on 22 January 2020 Novatrust informed Mr Gibson that it intended to make a distribution to the Summit Trust creditors, including Ivory Castle. Mr Gibson's understanding is that the amount to be paid will be about £566,000. It has been withheld pending the outcome of this application, but is otherwise due to be paid.

55. From Mr Gibson's perspective therefore the Cottian monies of some £566,000 would be sufficient to meet the £100,000 shortfall (above), and provide sufficient funds to fund the legal costs for some part of the period going forward, which Mr Power identified as up to the end of the April CMC. That forms the background to Application (1) under which Ivory Castle seeks access to the Aegean monies to fund the rest of the anticipated costs to the end of trial.

56. From Kea's perspective, the fact that, contrary to what it understood the position to be at the time of seeking the Ivory Castle Injunction, Cottian is about to make a significant payment to Ivory Castle which will be spent on legal fees if not restrained, is what has prompted it to make Application (2) restraining that payment.

57. As to Application (3), the position is as follows:

(1) As appears above, Mr Gibson has a number of cash assets available to him, totalling some £937,000, of which he proposed to contribute about £625,000.

(2) Included in those assets are (i) some $485,000 held in an account at Bergos Berenberg (**"Berenberg"**) and (ii) some NZ $620,000 held for Mr Gibson by Nationwide Capital Ltd (**"Nationwide Capital"**). Kea claims that both sums are derived from a sum of £1.1m paid to him by Ivory Castle in April 2018, and which Kea asserts to be held by Mr Gibson as nominee for Mr Watson.

(3) By Application (3), Kea seeks an order continuing the Gibson Injunction to trial, but replacing the existing notification injunction with a standard freezing injunction in relation to these sums, and providing that although Mr Gibson should be at liberty to spend a reasonable sum on legal costs, he should not use the $485,000 at Berenberg or NZ $620,000 at Nationwide Capital unless all other assets of Mr Gibson, Gallo and the WGFT have first been exhausted.

Application (2) – the Cottian monies

58. I will consider first Application (2), that is Kea's application to vary the Ivory Castle Injunction to preserve the Cottian monies. It is accepted by Ms Jones that since it is seeking a variation of an existing injunction Kea needs to show a change of circumstances in accordance with the *Chanel* principle.

59. Five relevant changes of circumstances are relied on. Three of them amount to further evidence which Kea says strengthens the substantive argument that Mr Watson and Mr Gibson have indeed been conspiring with each other to defeat Kea's claims. They can be summarised as (i) the disclosure of advice given by Grosvenor Law to Mr Watson between June 2017 and April 2018 as to how to protect his trusts from being attacked by his creditors; (ii) the discovery by Kea of many further acts which Kea says Mr Gibson has undertaken at the behest of Mr Watson and so as to benefit him; and (iii) the discovery of what Kea characterises as very strong grounds to believe that Mr Watson and Mr Gibson have been destroying and suppressing electronic documents so as to avoid giving proper disclosure.

60. A large amount of evidence has been filed on these matters. But in general it is not the practice of the Court to reach conclusions on issues of disputed fact on written evidence alone. I had already concluded when granting the Ivory Castle Injunction that there was a sufficiently strong case on the merits against Ivory Castle, and when granting the Gibson Injunction that there was likewise a sufficiently strong case on the merits against him. I do not see that further evidence pointing in the same direction significantly alters matters. There is no application by Kea for summary judgment, which means that at this stage I am not being asked to conclude that there is no real prospect of a successful defence. It seems to me I must therefore proceed on the basis, unless and until the contrary is suggested, that Ivory Castle and Mr Gibson have defences which merit a trial. Similarly I am not being asked on this application to conclude that Mr Gibson has destroyed or suppressed documents such as to make a fair trial impossible; Kea has indeed recently said that in the absence of satisfactory explanation it will or might bring such an application, but it has not done so yet. I cannot therefore conclude at this stage either that there is no real prospect of a successful defence, or that the defences are liable to be struck out because the conduct of Mr Gibson has made a fair trial impossible.

61. Mr Power referred me to the decision of Jefford J in *The Processing Centre v Pitney Bowes Ltd* [2017] EWHC 3903 (QB) at [25] where an application was made to vary an injunction previously granted by Slade J. After citing *Chanel* and *Orb a.r.l. v Ruhan*, she said as follows:

> "25. From these authorities it seems to me, firstly, that the court has a discretion to vary an order including an injunction if there has been a material change of circumstances. Secondly, the test as whether a change in circumstances is material is not easily defined. A new argument is not sufficient; nor are facts that could have been adduced on the prior hearing. Thirdly, it seems to me obvious that there must be some causal connection between the circumstances in issue and the injunction granted, and between the change in circumstances and the reasons for varying the injunction, in order for the change to be material. It is not sufficient that a change in circumstance may lead a different judge to reach a different conclusion. Rather, the question I should ask myself is whether the change in circumstance is such that it seems to me either that Slade J would have reached a different conclusion or that it is such that in my judgment the injunction must be varied. In asking myself those questions, I must be wary of falling into the trap of treating this as an appeal against the decision of Slade J, which is a matter for the Court of Appeal."

62. It was not suggested that I should adopt a different approach. The question therefore is whether if these matters had been deployed before me in the hearing in

January/February 2019, I would have made a different decision in relation to the Cottian monies. I think it clear that this would have made no difference; I did not need any further persuasion that there was a sufficiently strong case against Ivory Castle. The reason why I made a notification order rather than a full freezing order in respect of the Cottian monies is because that is what Kea asked for. The reason why I gave Ivory Castle liberty to spend the Cottian monies on legal fees without imposing a cap is because that is what I understood *Begum* indicated that I should do. In neither case would it have made any difference to my decision had I been told that there was stronger evidence supporting the substantive case on the merits.

63. The same applies to the fourth change of circumstances relied on. This is that Kea has subsequently brought claims against Mr Gibson, both for a declaration that he is a nominee of certain assets, and for damages for conspiracy. I do not however see that this logically affects the question of what order is appropriate against Ivory Castle, nor would it have made any difference to the order I made in respect of the Cottian monies had Kea already brought these claims at the time of asking for the Ivory Castle Injunction.

64. The fifth matter relied on is an assertion that the certification regime incorporated into the Ivory Castle Injunction has been ineffective and abused. It is not disputed that Clyde & Co certified that the bills rendered to Ivory Castle, and subsequently paid by it, were in respect of these proceedings, whereas in fact one comparatively small bill (of under £3,000) paid by Ivory Castle was not. Clyde & Co accepts that that was a mistake and has since issued a credit note to Ivory Castle. Ivory Castle has also paid a number of invoices from Vistra (Hong Kong) Ltd (**"Vistra"**), the trustee of the Heron Bay Trust. Ivory Castle was permitted by the terms of the Ivory Castle Injunction to spend money on *"Ivory Castle's proper professional and administrative costs"* (paragraph 13 above), but Kea disputes that two of the invoices have been properly paid; in one of them (for $7,600) the narrative is entirely redacted, and in the other (for $19,900) the narrative is redacted save that it is headed *"Re: Heron Bay Trust"*. It is not therefore possible to identify whether they fall within the permission or not, and Clyde & Co have made it clear that they are entirely reliant on Vistra and have no knowledge of their own. It is said that further information is awaited from Vistra.

65. I accept that if there had been significant abuse of the certification regime, this could be a material change of circumstances, and I agree that it is unsatisfactory both that Clyde & Co certified that an invoice related to costs incurred on these proceedings when it plainly did not; and that fee notes from Vistra have been provided which are so redacted that it is impossible to confirm whether they are properly paid by Ivory Castle or not. Nevertheless these are relatively minor matters; the first has been corrected, and the other does not demonstrate widespread abuse. I revert below to what the appropriate response is, but I do not think this merits reopening the whole question of the Cottian monies.

66. In addition to these five specific matters, Kea also relies on the fact that at the time of the Ivory Castle Injunction, it did not expect any significant amount to become available from Cottian whereas there is now due to be paid a sum of £566,000. I accept that had Kea appreciated at the time that the Cottian monies would turn out to be significant, it is likely that it would not have been content with a regime under which Ivory Castle could resort without limit to the Cottian monies for legal costs. But the fact is that it did put forward a regime under which the Cottian monies could

be resorted to by Ivory Castle for legal costs, the only argument being whether that should be capped or uncapped, and, as Mr Power said, on that point the fact that the Cottian monies were then thought likely to be insignificant, and it is now known that they will be substantial, does not change the legal analysis.

67. Ms Jones said that Kea made it clear at the time of seeking the Ivory Castle Injunction that they were only seeking a notification injunction in relation to the Cottian monies at that stage and reserved the right to seek a full freezing injunction if necessary. That I accept: indeed the very purpose of a notification injunction is to alert the person with the benefit of the injunction, usually the claimant, of a proposed disposition so that he can return to Court to seek to prevent it in an appropriate case. But the significant point it seems to me is that while a notification injunction does give the claimant an opportunity to do this, in general that is intended to ensure that the defendant does not do anything improper, that is in the present context to dissipate his assets. But spending money on legal costs is not dissipation; and where a regime has been agreed to, or imposed, under which the defendant can resort to certain assets to fund its legal costs, I do not see that the claimant has a right to return to court to prevent this.

68. What Kea really wants to do is to unpick the regime imposed by the Ivory Castle Injunction under which the Cottian monies, whatever they were, could be spent on legal costs. That I think falls within the *Chanel* principle. Kea asked for a regime in which the only restraint on the Cottian monies was a notification injunction; it accepted that Ivory Castle could have recourse to such monies for legal costs, the only argument being whether that should be capped or not; having argued against it, it lost that point, but chose (no doubt for good reasons) not to appeal the provision allowing Ivory Castle to have unrestricted access to the Cottian funds for legal expenses; and although it has now identified a legal argument that would have enabled it to challenge this, I do not see how that differs from the position of the defendant in *Chanel* who submitted to giving undertakings at the hearing, and later identified an argument that it wished to run after all which would or might have enabled it to resist them. Nor do I think that the fact that the point now has more practical significance than it appeared to at the time makes a difference in principle.

69. In those circumstances I conclude that it is not now open to Kea to seek to vary the order so as to prevent the Cottian monies being spent by Ivory Castle on legal fees, and I will not therefore grant the relief sought by Kea by Application (2).

70. In the light however of the two disputed invoices paid by Ivory Castle to Vistra of \$7,600 and \$19,900 (paragraph 64 above), I think that the equivalent of \$27,500 should be preserved intact until it has been demonstrated to the satisfaction of Kea (or failing that the Court) that the invoices were properly paid.

Application (1) – the Aegean monies: can Kea rely on the Ablyazov *argument?*

71. I consider next Ivory Castle's application to vary the Ivory Castle Injunction to have recourse to the Aegean monies to meet its legal costs. Here I think the boot is on the other foot. It is Ivory Castle that now wishes to disturb the existing regime. The effect of the existing regime is to draw a significant distinction between the Aegean monies and Ivory Castle's other assets. In relation to the other assets, Ivory Castle is subject only to a notification regime and can spend them on (uncapped) legal costs. But in relation to the Aegean monies, Ivory Castle cannot spend them on legal costs

because it cannot access the funds.

72. Mr Power says that there was no discussion at the hearing in January/February 2019 as to whether Ivory Castle could use the Aegean monies for legal costs. That I think is so – Ms Jones herself said I was not asked to decide anything about the use of the Aegean money, as there was no suggestion that it should be available for legal expenses – but there did not need to be. Paragraph 6 of the Ivory Castle Injunction prevented the payment of the Aegean monies to Ivory Castle at all, as it required Ivory Castle to instruct Aegean to retain them, or if it was unwilling to do so, to pay them into Court (paragraph 13 above). That was not a standard freezing order; it was, as Mr Power said, a bespoke order. The practical effect of it was to preserve the Aegean monies intact, and prevent Ivory Castle from having recourse to the Aegean monies for any purpose without a further order of the Court. That made complete sense under the regime put forward by Kea, as Ivory Castle would on that proposal have only been able to spend a limited amount on legal costs, well below the value of its other cash assets. Mr Béar successfully argued that the permission to spend on legal costs should be uncapped, but did not ask for, and did not obtain, any permission to spend the Aegean monies on legal costs at all.

73. Ivory Castle's application now to have recourse to the Aegean monies after all therefore seems to me, as Ms Jones submitted, to engage the *Chanel* principle in which it is for Ivory Castle to justify disturbing the existing regime. Mr Power said that was easy to do because at the time of the Ivory Castle Injunction Ivory Castle did not need to have recourse to those monies to pay its legal costs, whereas now it does (or strictly will after the April CMC) as it will have exhausted its other assets. I accept that that explains why Ivory Castle now wishes to spend the Aegean monies. But nevertheless it seems to me that once Ivory Castle has sought to reopen the terms of the Ivory Castle Injunction by seeking access after all to the Aegean monies, it necessarily reopens the whole question whether that would be an appropriate exercise of the Court's discretion.

74. In these circumstances the critical question, it seems to me, is whether it is open to Kea to run the *Ablyazov* argument in answer to Ivory Castle's application to reopen the terms of the injunction. I accept Ms Jones's submission that it is. This is where there may be a significant distinction in practice between the operation of an issue estoppel strictly so-called – where an issue that has been decided as part of the determination of a cause of action cannot be reopened between the same parties on the same or another cause of action in the absence of special circumstances (as decided in *Arnold*) – and the more open-textured principle that in interlocutory matters it can be an abuse of process to seek to reopen matters that have already been decided. It is not Kea who is seeking on Application (1) to reopen matters; it is Ivory Castle that is. Where it is Ivory Castle that is asking the Court to look again at whether it should be able to have recourse to the Aegean monies for legal costs, it seems to me that there is nothing abusive in Kea resisting that on the grounds that although I previously decided to allow uncapped spending on legal costs out of the other assets, that is now shown to have been based on an erroneous understanding of the law; and that now that I am being asked to exercise my discretion anew, I should do so on the correct principle.

75. Ms Jones submitted that to require me to continue to apply what I am now satisfied is an erroneous principle to decide this fresh application would add insult to injury.

That seems to me to be right. It is noticeable that in *Woodhouse v Consignia Ltd*, the Court of Appeal said that one of the reasons for not allowing a second application for the same relief is the need to prevent respondents from oppression, but nevertheless held that the rules were not as strict in interlocutory matters as in final matters, and that it was open in appropriate circumstances to an applicant to make a second application for the same relief (paragraph 49 above); if that is so, then it seems to me *a fortiori* that it is not necessarily abusive or oppressive for a *respondent* to an application to take a point in answer to it that was not previously taken.

76. I conclude that it is open to Kea to rely on the *Ablyazov* argument in answer to Ivory Castle's application in Application (1) to have access to the Aegean monies for legal costs.

77. I have already said (paragraph 32 above) that if it is open to me to do so, I have no hesitation in following the decision of Popplewell J in *Ablyazov*. I proceed therefore on the basis that Ivory Castle's application is to be decided in accordance with the principles applicable to a proprietary injunction rather than those applicable to a standard freezing injunction.

Application of principles

78. What do those principles require? They require answering the four questions identified by Lewison J in *ITS* (paragraph 22(2) above). The first is whether the claimant has an arguable proprietary claim to the money. The answer is Yes (treating Kea's claim that the Aegean monies are Mr Watson's as analogous to a proprietary claim for this purpose). The second is whether Ivory Castle has arguable grounds for claiming the money itself. The answer is again Yes.

79. The third is whether Ivory Castle has shown that it has no other funds available to it for this purpose. The answer is again Yes, in that I accept that the evidence is that Ivory Castle itself has no other funds. This is subject to the point that it has some £30,000 available to it in its bank accounts. The evidence is (and I am prepared to accept) that its bankers require minimum balances to be kept in its accounts if they are to be kept open, but I do not see that this precludes Ivory Castle from withdrawing those monies if necessary, even if that means that it will be obliged to close its accounts. That may cause it some temporary inconvenience, but I do not see that it is likely to prejudice it significantly. Ivory Castle is not a trading company. Its business is to receive, hold and distribute assets. In practice I do not see what it is going to be doing between now and the end of this litigation other than spend such assets as it can on the litigation. That will in the light of my decision on Application (2) include the Cottian monies, but once those are exhausted, I do not see what practical difficulties it will cause it to spend its last £30,000 cash assets before resorting to the Aegean monies.

80. The fourth question is the most difficult one, being whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence. This is very much a matter of discretion and requires a *"careful and anxious judgment"*.

81. Here I think it is very material that Ivory Castle's and Mr Gibson's position in the

litigation are entirely aligned. There are only two camps in this dispute: there is Kea, which asserts that Ivory Castle is a nominee for Mr Watson; and there are Ivory Castle and Mr Gibson who assert (as indeed does Mr Watson, who is a party to these proceedings), that Ivory Castle is the owner of the assets. I accept that technically speaking on the Defendants' case Ivory Castle is not a trustee, but the beneficial owner of the disputed assets. But it is a corporate vehicle wholly owned by the Heron Bay Trust, which is a trust for the benefit of Mr Gibson and his family, and although not itself a trustee, it is effectively a vehicle for holding assets for their benefit. The real dispute in economic terms is therefore between Kea and Mr Gibson, as Mr Power indeed accepted. Had Ivory Castle itself been an ostensible trustee for Mr Gibson, then it would have been in the position of a trustee faced with a dispute between rival claimants to the assets it holds, and its duty would have been to remain neutral and leave the rival claimants to fight it out (cf *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1225C per Lightman J). I do not see that the fact that Ivory Castle is technically a corporate body held by a trust for Mr Gibson's benefit makes any significant difference. Where the rights to the entirety of Ivory Castle's assets are disputed, it seems to me plainly more just that the interests of the Defendants should be defended at the cost of Mr Gibson rather than at the cost of the fund in dispute which is the very subject-matter of the proceedings.

82. That requires a consideration of what assets are available to Mr Gibson. Ms Jones relied on an analysis of assets available to Mr Gibson scheduled to her written submissions which she said showed over £3m available to Mr Gibson (not counting the $485,000 at Berenberg or NZ $620,000 at Nationwide Capital which are the subject of Application (3)). It is not necessary to detail it all. It consists in broad terms of the following:

(1) Cash assets available to Mr Gibson, Gallo, or Ivory Castle, amounting to some £475,000. This includes the £125,000 held by Gallo, and the £30,000 by Ivory Castle. It also includes some shares held by Mr Gibson and Ivory Castle in a company called Long Blockchain Corp, said to be worth another £60,000 or so.

(2) A loan receivable by Mr Gibson from the WGFT in the sum of £580,000 odd.

(3) Less liquid assets held by Mr Gibson put at a value of £950,000. This includes an investment of £500,000 made by Mr Gibson in a company called Breathe International Ltd (**"Breathe"**), a start-up founded by Mr Watson's son Mr Sam Watson; a loan of $190,000 to Mr Sam Watson; and another loan of some $28,000 to a Mauritius company called Pan Africa BBOXX. It also includes various valuable works of art and watches owned by Mr Gibson and Gallo.

(4) Net equity held by WGFT said to be worth about a further £1m. WGFT's assets, apart from a cash balance of some NZ $194,000, largely consist of three properties in New Zealand, two residential properties in Auckland which are rented out, and a development plot in Queenstown. The properties, said to be worth some NZ $4.48m, are subject to mortgage facilities on which a sum of some NZ $1.4m is outstanding and under which WGFT can draw a further NZ $ 340,000.

83. Mr Power did not dispute these figures which were drawn from Mr Gibson's own evidence. His position however was that save for the cash assets none of these assets were readily realisable, nor would it be just to require Mr Gibson to sell items such as works of art or jewellery which could not be replaced if he were successful.

84. My conclusion on this aspect of the case is as follows:

(1) It is *prima facie* unjust to Kea that the proceedings should be litigated at the expense of the Aegean monies rather than at Mr Gibson's expense. As Ms Jones put it, the unfairness is that if Mr Gibson spends his own money, and wins, he will get that back; whereas if he spends the Aegean monies and Kea wins, Kea will not. I agree, and I think it is plainly more appropriate that Mr Gibson should litigate at his own risk rather than at the risk of the disputed funds.

(2) Mr Power said that Mr Gibson was in effect litigating at his own risk in any event as he is facing a claim for damages for conspiracy and part of the damages claimed by Kea are any sums spent out of Ivory Castle's assets on the defence of this action. In this way, if he loses, he will in effect be personally at risk as to those sums. That might be a cogent argument if success by Kea against Ivory Castle would lead to an unanswerable claim against Mr Gibson for the costs spent by Ivory Castle. But Kea's conspiracy claim is in some respects a novel one and raises a number of issues, and it is not I think clear at this stage that success by Kea against Ivory Castle will necessarily mean that Kea will be able to recover from Mr Gibson what Ivory Castle has spent. In any event a claim, even if unanswerable, is not the same as having a fund to execute against, as the history of the present action since judgment was entered against Mr Watson has amply demonstrated.

(3) On the other hand, I think there is likely to be practical difficulty in Mr Gibson raising funds from the non-cash assets. He could ask the WGFT to draw down the outstanding NZ $340,000 on its facility, and repay him that and the NZ $190,000 by way of partial repayment of his loan to it. It may also be possible to raise further sums on the properties held by the WGFT. But beyond that, it is not obvious how practical it would be for him to raise money. I have very little information about Breathe, but there is nothing to suggest that Mr Gibson has a right to demand his money back from Breathe, and I can I think take judicial notice that it is unlikely to be easy to sell, or raise money on, shares in a start-up founded by a 25-year old. The loan to Mr Sam Watson may not be easy to call in; the loan to Pan Africa BOXX is not repayable until another business has receipts. The works of art and jewellery could no doubt be sold but to require Mr Gibson to do so might work an injustice on him if his defence turned out to be well-founded.

(4) What is needed in my judgment, if possible, is a mechanism such that Mr Gibson can have access to funds to defend himself, but on terms that if he loses the costs of his defence fall on his assets rather than on the assets which are being litigated about.

85. I think it ought to be possible for the parties (or realistically Mr Gibson) to devise such a mechanism, and I propose to give him an opportunity to do so. What I have in

mind is that before he or Ivory Castle can have access to any of the disputed funds (which for this purpose includes not only the Aegean monies but also the $485,000 at Berenberg and NZ $620,000 at Nationwide Capital) he should undertake a personal liability direct to Kea to pay an equivalent sum, together with interest, if Kea's claims in relation to the disputed assets succeed, fortified by adequate security over his, or WGFT's, assets.

86. The trustees of the WGFT (other than Mr Gibson himself) have expressed reluctance to fund Mr Gibson's costs. He can *prima facie* require them to do so to the extent of his loan to them which, as no terms for repayment have been agreed, I assume to be repayable on demand, but even beyond that there is ample evidence that the WGFT was established, and has been used, for the primary benefit of Mr Gibson himself, and is otherwise for the benefit of his family, and if he cannot persuade the trustees to use his family assets to aid his defence, there is in my judgment no reason why he should be able to litigate at the expense of the disputed assets instead.

87. In that way, if Kea's claim fails, Mr Gibson will not be prejudiced by having to sell or seek to raise money on, illiquid assets, or having to part with irreplaceable ones such as unique works of art. But if Kea's claim succeeds, it will have a measure of protection against further erosion of its claim by spending on legal costs, and Mr Gibson's defence will effectively be at the risk of his own assets (or his family assets) rather than at the risk of the disputed funds, as in my judgment it undoubtedly should be.

88. Moreover, I consider that the Court can and should exercise a measure of control over the quantum of costs that can be so spent. In the case of a standard freezing injunction, it is the practice of the Court not to cap or limit the amount that the defendant can spend on legal costs: see *Begum* at [38]-[48]. But in such a case the frozen assets are the defendant's own property, and he is entitled to spend them on defending himself: see at [47]. It is not necessarily the same in a proprietary case, as such a claim raises special features which require special treatment: see at [49]. In a proprietary case (or the present case) the defendant is not asking to spend what is accepted to be his own money, but is asking to spend a disputed fund to which he may have no claim, and which may be at the expense of the claimant. In such a case I think there is good reason for the Court, before permitting that to be done, to be satisfied that the amounts sought are reasonable and proportionate.

89. I propose therefore to make no order at present on Ivory Castle's application to have access to the Aegean monies. I will instead adjourn the application to enable the parties to consider the views I have expressed and specifically to give Mr Gibson an opportunity to provide protection for Kea in the way I have suggested.

Application (3)

90. No separate consideration needs to be given to Application (3) which is catered for in the proposals I have set out above. I accept Ms Jones's submission that since this is the hearing on the return date of Kea's substantive application for an injunction to trial, it does not involve any breach of the *Chanel* principle. She referred to what I had said in *Holyoake v Candy* [2016] EWHC 3065 (Ch) at [26]:

> "Both *Chanel* and *Butt v Butt* seem to me to be decisions based on the regular practice in what was then the motions court and is now the Applications Court. Both are cases where the plaintiff sought an injunction initially *ex parte*, which was granted in the usual way until the return date when the matter came back *inter partes*. In the Applications Court the well-known practice is that applications for interlocutory injunctions will be adjourned from time to time until they are ready to be heard, with a temporary injunction being granted (or undertaking given in lieu) to hold the ring until the application can be argued substantively. Once however the application has been argued and a decision made, that is usually intended to govern the position until trial absent a sufficient change of circumstances."

(*Butt v Butt* is at [1987] 1 WLR 1351). I accept that where a claimant obtains an initial injunction without notice, expressed (in the way that is standard in this Division) to last for a short period until a return date, that is intended to be a temporary expedient until the matter can be fully argued and does not shut the claimant out from arguing for more extensive or different relief on the return date.

91. I am satisfied on the evidence that there is a good arguable case that the sums of $485,000 at Berenberg and NZ $620,000 at Nationwide Capital derive from a payment from Ivory Castle to Mr Gibson, and are nominee assets. I will therefore direct that pending further consideration of Application (1) Mr Gibson should not spend these sums.

Other matters

92. A number of other matters were canvassed at the hearing, in particular whether Mr Gibson should give further information. Rather than attempt to identify precisely what else is and what is not outstanding, I have thought it better to hand down this judgment as it stands on the principal matters that have been argued so that the parties know where they are sooner rather than later. Any further matters can be dealt with at or after the hand-down, and for that purpose it would be helpful for the parties to agree a list of other outstanding issues, together with where they are dealt with (i) in written submissions and (ii) in the transcripts of the argument.