IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2019] EWHC 1282 (QB)

No. HQ17X01422

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 15 April 2019

Before:

MR JUSTICE MORRIS

B E T W E E N :

NATIONAL CRIME AGENCY — Claimant

- and -

SHANE DAVIES & ORS — Defendants

MR T. RAINSBURY (instructed by National Crime Agency) appeared on behalf of the Claimant.

The First and Fourth Defendant appeared in person in respect of the first application.
MR J. HODIVALA (instructed by Blackfords LLP) appeared on behalf of the First and Fourth Defendants in respect of the second application.

J U D G M E N T

(Please note this transcript has been prepared without the aid of documentation)

MR JUSTICE MORRIS:

1 These are two applications made by the first defendant in these proceedings, Shane Davies ("the first applicant") and the fourth defendant, Rhianna Davies ("the second applicant") for the variation of a property freezing order granted by Supperstone J on 16 January 2015 ("the PFO") to remove a property for the scope of the order and/or from the scope of a management receiver order made on 29 April 2016 ("the MRO") and to allow for exclusions to fund living expenses and for the funding or legal representation. The relevant proceedings are civil recovery proceedings brought by the National Crime Agency ("the NCA") against the two applicants amongst others. The applications are brought within these proceedings under section 245C(1)(a), (3)(a), and (5) of the Proceeds of Crime Act 2002 ("POCA").

The Applications

2 By the first application first made on 13 April 2018, the applicants seek an order to vary the PFO in three respects: (1) that one property, namely, 23 Argyle Terrace, Lower Bristol Road, Bath, is "varied from the PFO to allow my family and I a home to live in"; (2) that there is an exclusion to the PFO to cover day-to-day living expenses incurred by the applicants and their family, in an amount of £250 per week; and (3) that there be a further exclusion to the PFO to fund the first applicant's legal representation in ongoing tax proceedings before the First Tier Tribunal in a sum of £8,010. By the second application made on 13 March 2019, the applicants seek to vary the PFO to allow them both to pay reasonable legal expenses in respect of the CRO proceedings themselves.

3 On these applications, the NCA is represented by counsel, Mr Tom Rainsbury. The applicants are represented by solicitors and counsel Mr Jamas Hodivala in respect of the second application, and, in respect of the first application, they appear in person.

The Background

4 The applications are made in the context of civil recovery order proceedings commenced by the NCA against, amongst others, the first and second applicants, originally in respect of 22 properties. The NCA seeks a Civil Recovery Order against properties which were registered in the names of the first and second applicants and other defendants including the first applicant's mother Sheila Davies, his sister, and the five other named defendants. The case has a long factual and procedural history which it is not necessary to recite in this judgment. There is before the Court a large volume of evidence including many witness statements from both the applicants and from the NCA. The applicants have filed 31 witness statements and NCA have filed 17 witness statements - albeit not all concerned with these specific applications. For present purposes, the most pertinent witness statements are the 17th witness statement of Mr Byrne on behalf of the NCA, consolidating his previous evidence, and the 21st, 26th, 28th, 30th, and 31st witness statements of the applicants.

5 I observe that as litigants in person in respect of the first application, the applicants have had a substantial burden and I commend the clarity of their presentation of written materials. I also acknowledge the substantial emotional burden that these proceedings have placed upon them and their family, including their two young children. However, in making these observations, I make no comment on the underlying merits of the proceedings brought by the NCA.

6 Some of the material has been filed and served after the expiry of deadlines imposed by the Court previously and, late in the day. I have allowed this evidence to be admitted. In addition, there was an application by the NCA to cross-examine the applicants. I declined to exercise my discretion to permit, exceptionally, such cross-examination under CPR 32.7. I concluded that this would not have assisted the court in determining the issues that fall for consideration.

Factual Chronology

7 In 2013, a criminal trial took place at Bristol Crown Court. The first applicant and the second applicant, along with six others, were charged with conspiracy to defraud mortgage lenders by providing false income details. Two of the defendants pleaded guilty to a conspiracy with, amongst others, the first applicant to defraud. However, during the trial, the prosecution ultimately offered no evidence. The first applicant was acquitted by the jury and the second applicant had a not guilty verdict entered. Accordingly, neither of the applicants was convicted of the alleged fraud.

8 In October 2013, the NCA began a civil recovery investigation into the known assets of the first applicant and his extended family. The NCA also conducted a parallel investigation under Part 6 of POCA relating to a tax assessment of income. Subsequently, proceedings were commenced against the first applicant for a tax debt of approximately £750,000. The first applicant has appealed to the First Tier Tribunal on that assessment, contesting the amount as being grossly exaggerated. I refer to this appeal as the "FTT proceedings".

9 As part of the NCA investigation, on 16 January 2015, and before the issue of the Civil Recovery Order proceedings themselves, the NCA obtained a PFO and a disclosure order pursuant to section 245A and 357 of POCA.

10 The property which is caught by the PFO identifies originally 22 separate properties and, in respect of each, the registered proprietor. The first applicant was identified as registered proprietor of three of those properties and the second applicant as registered proprietor of one of them. The PFO also applies to the rental income or commercial income derived from 15 of those 22 properties. I understand that following variations, there are now 20 properties subject to the PFO. The value of those properties, leaving aside rental income, is estimated to be in the region of £6 million. Paragraph 10 of the PFO provides for a liberty to apply to the court to vary or discharge the order.

11 On 29 April 2016, an MRO under section 245E of POCA was made in respect of 13 properties subject to the PFO. That MRO is still in force. Ms Louise Brittain is the appointed management receiver.

12 In June 2016, Cranston J dismissed an application by the first applicant's mother, Sheila Davies, to vary the MRO to remove two properties from its ambit. He found that Sheila Davies had breached the PFO by withdrawing sums. On 28 March 2017, the first applicant issued an application for an exclusion to the PFO for legal expenses.

The Civil Recovery Order Proceedings

13 On 15 April 2017, the NCA issued the claim for a civil recovery order against a number of properties and the accrued rental income held pursuant to the PFO. The PFO therefore remains in force until the civil recovery proceedings ("the CRO proceedings") have been determined. The first applicant is the first defendant in the CRO proceedings and holds and controls a number of properties that are the subject of the NCA's claim. The second

applicant is the fourth defendant and holds one property, the subject of the claim, namely 59 New Terrace, Bath. The first applicant's mother, Sheila Davies, is the second defendant in the CRO proceedings. The trial of the CRO proceedings is now listed to be heard commencing on 28 October 2019 with a five-day time estimate together with two-day pre-reading.

The NCA's underlying case

14 Despite the fact that the applicants and others were acquitted at Bristol Crown Court, the NCA's case in the CRO proceedings is as follows. It contends that the first applicant has been involved in unlawful conduct for many years, including the supply of controlled substances in the Bath area, and that profits derived from that conduct has been invested in, and through, a large portfolio of properties. The properties which are the subject of the claim are, or represent, property obtained through unlawful conduct in that the deposits represent monies which are traceable to fraudulently obtained mortgages or can otherwise be inferred to represent the proceedings of unlawful conduct and the mortgages used to pay the balance of the purchase prices were obtained through fraud (including false statements about income, employment, other indebtedness, the purpose of the loan, and/or the true beneficial owner of the property). The NCA relies on the fact that the defendants collectively have a significant number of previous convictions, the manner in which the properties have been handled (including placing properties in the names of others) the absence of sufficient legitimate income to explain the purchases, and the absence of any credible explanation for the source of the monies. More detail of the NCA's case is set out at [5] to [9] of the judgment of McGowan J in *National Crime Agency v Davies & Ors* [2016] EWHC 899 (Admin) which, in fact, was set out and repeated in *National Crime Agency v SD* [2016] EWHC 2398 (Admin) at [3]. In that judgment, McGowan J refused the application to discharge the PFO made by Mr Davies and others.

15 The applicants defend the CRO proceedings and dispute the factual allegations made against them. They point in particular to a statement in evidence that there was no evidence of drug trafficking. Further, they rely on the discretion of the court to refuse to grant a CRO in the circumstances of the case. The applicants will also seek to contend that NCA's CRO proceedings breach the presumption of innocence, given the acquittals of the allegations that are now relied upon by the NCA in the CRO proceedings.

More procedural background

16 On 9 June 2017, in his fourth witness statement in support of his first legal expenses application, the first applicant stated that he had "no alternative source of income". On 5 October 2017, the first applicant made a further application for an exclusion in respect of legal expenses in order to over his costs of his amended points of defence and to attend the costs case management conference. In his 15th witness statement dated 20 October 2017, the first applicant made a further statement to the effect that there had been no change of circumstances in relation to his assets. The second legal expenses application culminated in a consent order being made, allowing for an exclusion of £10,500 to cover legal expenses.

17 The first application, that is the first application before me, initially came on for hearing on 1 October 2018. At that hearing, there was insufficient time to deal with the applications and an order was made by O'Farrell J giving directions for the service of further evidence. Since then, there has been a further adjournment; a hearing fixed for 18 January 2019 was adjourned at the request of the first applicant. On 24 January 2019, Master Thornett approved a costs budget for the applicant's costs of the CRO proceedings in the sum of £85,856.

18 As regards the FTT proceedings, the first applicant's appeal was lodged on 27 February 2017. On 15 May 2018, the FTT stayed the appeal proceedings until the High Court proceedings have been completed. It is not clear precisely how that stay came about nor whether the stay, suggested by one or both parties, was until the conclusion of the entire CRO proceedings or merely until determination of an application for exclusion for legal funds for the FTT proceedings. Regardless of that, the stay was lifted by September 2018 and case management directions have now been made. The stay was lifted at the behest of the first applicant. He wishes to obtain findings in the FTT proceedings adverse to the NCA which he can deploy in the CRO proceedings. More recently, on 14 February 2019, the first applicant declined the FTT's suggestion to stay the appeal pending this application for exclusion. He wishes to press on to a final hearing.

The relevant legal principles

19 The relevant statutory framework in relation to exclusions from a PFO is set out at section 245C POCA. The court has power to exclude assets frozen under a PFO for the purposes of enabling a respondent, in particular, to meet his reasonable legal and/or living expenses under section 245C POCA. Section 245C(1)(a) gives the court power to exclude property from the order. Section 245C(3)(a) allows an exclusion to be made for the purpose of enabling any person to meet his reasonable living expenses. Section 245C(5) covers an exclusion for the purpose of enabling a person to meet legal expenses that which he has incurred, or may incur, in respect of "proceedings under this Part". Section 245C(6) requires the court, when considering whether to make an exclusion for the purpose of enabling a person to meet legal expenses, to have regard to the desirability of the person being represented in proceedings. Section 245C(8) provides that, subject to subsection (6), the power to make exclusions must be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the NCA to recover the property obtained through unlawful conduct is not unduly prejudiced. In this way, the legal expenses exclusion takes precedence over the right to recover property. Paragraph 7A.4 of the Practice Direction in relation to Civil Recovery proceedings provides that the court will not make an order if the applicant has access to assets other than those the subject of a PFO from which he or she can reasonably be expected to bear his legal costs or living expenses.

20 I have been referred to a number of cases, most particularly the decision of the Court of Appeal in *Serious Organised Crime Agency v Azam* [2013] 1 WLR 3800 and subsequent cases: *NCA v Surin* [2013] EWHC 3784; *NCA v SD* [2016] EWHC 2398 (Admin), a case involving the first applicant's mother, Sheila Davies, in relation to the same PFO as is in issue in the present case; and then to the decisions in the related cases of *NCA v Oduwale* [2018] EWHC 3470 (QB) and *National Crime Agency v Oduwale and Yadav* [2018] EWHC 3903 (QB), the latter case being a decision of Popplewell J.

21 The principles to be applied on this application are those identified by Lloyd LJ in the *Azam* case. Whilst that case involves specifically legal expenses, it is common ground that the same principles ought to be applied in relation to an application for an exclusion in relation to living expenses. The principles are set out at [66] of the judgment of Lloyd LJ:

> *"66. Accordingly, it seems to me that the position is as follows:*
>
> *i) It is for the applicant to show that, in all the circumstances, it is just to permit him to use funds which are subject to the PFO in order to pay his legal expenses.*

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

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

iv) In coming to that conclusion I am aware that I differ from the way the point was put by Henderson J in Szepietowski at paragraph 41, as to the applicability to cases under the 2002 Act (in its present form) of the principles applying in the case of freezing orders to protect proprietary claims in ordinary civil proceedings, and as to the burden of proof lying on the defendant, in which he followed what Stanley Burnton J had said in Creaven, before the 2006 amendments to the 2002 Act. I hesitate before disagreeing with Henderson J on any point, but it seems to me that this point was not necessary for his decision and he did not have occasion to examine the issue so closely as we have had to. In my judgment the observations of Mitting J and Ouseley J are better indications as to the correct approach in this respect. For each of those judges the point was central to the case before him."

22 Specifically as regards available property which belongs to third parties and, in particular, friends or family, Lloyd LJ said this at [63]:

> *"...if there are other available assets, for example in a trust which is not itself tainted by connection with the alleged unlawful conduct, or untainted property belonging to family or friends who are willing to support the defendant, then that would be a good reason in a CRO case, as it would be in an ordinary civil case, not to allow the use of contested assets for legal expenses. But if the evidence does not allow the court to conclude, and does not give any specific substantial grounds for suspicion, that this is the case, then to cast the burden on the defendant of showing that there are no other available assets from which his expenses can be paid would be a more serious and difficult task in this kind of claim than it would be in an ordinary civil claim..." (emphasis added)*

23 It is important to bear in mind that, whilst the applicant ultimately must show that it is just to permit him to use funds in order to pay expenses, there is no specific burden of proof on the applicant to prove that there are no other available assets. The ultimate question is whether the applicant has shown that, in all the circumstances, it is just to permit him or her to use funds which are subject to the PFO.

24 The relevant questions therefore are as follows:

(1) Is the court satisfied that there are other available assets which may be used for the purpose sought, to whomsoever they might belong?

(2) If the answer to question (1) is 'no', is it likely that there are other available assets on the basis of the evidence before the court?

(3) If the court is in doubt as to whether it is likely or not, does the court have specific grounds for suspicion that the applicant has not disclosed all that he could and should about his assets or other assets which may be available from other sources?

(4) If the answer to question (3) is 'yes', then the court may conclude that it is likely that there are other assets available. If the answer to question (3) is 'no', then the court may not have an adequate basis for concluding that there are other available assets.

25 I make a number of further observations on this analysis. First, whether questions (2) and (3), as I have just identified them, are truly distinct may be a matter for some debate; see, for example, the judgment of Popplewell J in *Oduwale and Yadav* at [37] and [38]. Nevertheless, I follow this three-stage test here. Secondly, whilst paragraph 66(iii) of Lloyd LJ's judgment in *Azam* talks of suspicion of failure as regards disclosure about assets, the suspicion he refers to in paragraph 63 is expressed in somewhat different terms. In the light of paragraph 63, in my judgment, in a case of property belonging to others, question (3) is whether the court has specific substantial grounds for a suspicion that (a) there are assets belonging to family or friends, and (b) that they are willing to support the applicant. Finally, as regards the position under question (4), it is common ground that even if the court does have grounds for suspicion, the court still has a discretion to grant the exclusion. In *Oduwale and Yadav*, Popplewell J suggested (at [38]) that in such circumstances "it will usually not be just to allow the application for exclusion". In other words, usually the discretion will be exercised against the person applying for the grant of an exclusion.

26 Four further points emerged from the decision of Popplewell J in *Oduwale and Yadav*:

(1) In considering what constitutes reasonable living expenses under section 245C(3)(a), the court must consider the Article 8 rights of the applicant and his or her family.

(2) Reasonable living expenses may include accrued debts, certainly, in that case, as regards rent (see [30]).

(3) The judge considered that whilst extravagant living cannot be reasonable living expenses, in that case a sum of £62,000 over a period of twelve months was considered to be reasonable living expenses.

(4) I note that, in [14] of Popplewell J's judgment, in that case the NCA, by consent, allowed a sum of £5,000 for her legal expenses in defending tax proceedings brought against her; but I also note that subsequently those tax proceedings were stayed pending the outcome of the CRO proceedings.

Analysis - The Issues

The Issues

27 Three issues fall to be determined:

(1) Accommodation;

(2) Living expenses (including legal expenses in respect of the FTT proceedings);

(3) Legal expenses for the CRO proceedings.

28 I will deal with issue (1) first. I will then turn to issues (2) and (3) and for reasons which I will explain shortly, I will set out my conclusions on issue (3) before those on issue (2). In the course of the extensive evidence, a very substantial number of points of detail have been raised. In reaching my conclusions, I have considered all these points. In this judgment, I do not address each and every point of detail.

Issue (1) - Accommodation

29 The applicants seek an order which allows them to live at 23 Argyle Terrace. This property is currently subject to the PFO and the MRO. Essentially, they say that they are currently living at a property known as The Telephone Repeater Station ("the TRS") and that their living conditions at the TRS are wholly unsuitable for them and their two young sons. They say that living at the TRS has had an adverse impact on their physical and emotional health and upon the health and wellbeing of their children. They wish instead to be housed at 23 Argyle Terrace, another of their properties which is the subject of the MRO. As explained by Ms Brittain, 23 Argyle Terrace is currently subject to an assured shorthold tenancy and she, the management receiver, is not able to obtain possession of 23 Argyle Terrace until 1 August 2019. In any event, she says it is not appropriate for the applicants to move there given concerns that she has about the first applicant's behaviour and the risk that that poses to her efficient management of the properties for which she is responsible. Prior to the hearing on 1 October 2018, Ms Brittain suggested that there were two alternative properties subject to the MRO which could potentially be made available, namely 45 Sedgemoor Road, Fox Hill, Bath, and 59 New Terrace, Staverton.

30 The issue is whether 23 Argyle Terrace should be removed from the MRO so as to enable the applicants to live there or, alternatively, another of the properties should be removed from the MRO for the same purpose.

31 The NCA submits first that there are strong grounds to believe that the applicants are not living at the TRS at all. Secondly, there is no credible evidence that their living conditions at the TRS are precarious or otherwise unsuitable. Thirdly, 23 Argyle Terrace and any of the alternative accommodation subject to the PFO will, in any event, be recovered at the close of the CRO proceedings which are likely to conclude at the end of October. The NCA submits fourthly that even if it is necessary for the applicants to move into a new property, 23 Argyle Terrace is not the appropriate property because of the management receiver's concerns about managing the property whilst occupied by the first applicant. If any property is to be offered, it should be 45 Sedgemoor Road.

Are the applicants currently living at the TRS?

32 I am not satisfied that the applicants are not currently living at the TRS. The evidence suggests that they are living there. Whilst they have given various other addresses as their relevant addresses, I am satisfied with their explanations as to why this has been done. There is evidence of recent photographs of the TRS and that they are living at the TRS. There are certainly official documents which support the conclusion, for example, a vehicle registration document. Moreover, I place particular reliance on the heartfelt yet measured letter written by the second applicant's father, Robert Elley, as evidence of residence at the TRS. I note too that the NCA, which has not stinted in the investigations it has undertaken, does not appear to have made relevant enquiries of any neighbours to the TRS.

Are the living conditions at the TRS precarious?

33 The conditions at the TRS are certainly cramped and it is not a dwelling built for residential purposes. The applicants and their two sons share a bedroom. In this regard, Mr Robert Elley's letter speaks eloquently of the unsuitability of these living arrangements for the two children. There is also a letter from the second applicant's GP testifying to the impact of these living conditions upon the second applicant's emotional health. I accept this evidence and find that living at the TRS has an adverse impact upon the family.

34 On the other hand, the TRS is not an unhabitable. First, the applicants are content to remain at the TRS for another four months, until August, in order to move into 23 Argyle Terrace in circumstances where they have declined an offer of alternative accommodation. Secondly, whilst the applicants complain with justification that the boiler at the TRS does not work, there is evidence that the first applicant's mother, Sheila Davies, is prepared and keen to carry out repairs to the TRS. As regards the boiler, in the course of the hearing, the NCA has indicated that it will allow release of funds subject to the PFO to enable Mrs Davies to pay for the replacement boiler. Thirdly, moreover, if there are windows which are broken, there is no reason to think that the applicant's mother or the first applicant could not repair or arrange for the repair of these.

35 Fourthly, the NCA suggested that the applicants should approach local authority services for possible assistance. In response, the applicants state that they have not sought such assistance because, as property owners, they are not entitled to it. Whether or not this is, in fact, the case, they have not even made any enquiries in the course of which they would have been able to explain the effect of the PFO upon them. Whilst I do not know the precise legal position not having heard argument about it, local authorities do have specific duties in relation to children which may, in certain circumstances, result in the provision of accommodation. As regards the children, the applicants have confirmed in evidence that their children are not at risk and they have chosen not to put forward any medical evidence in relation to the impact of conditions at the TRS upon them.

Alternative accommodation

36 Mr Rainsbury for the NCA submits that the test for the variation of the MRO in these circumstances is whether it is necessary for it to be varied to enable the applicants to live at an alternative property. I doubt whether the test is as strict as so suggested. I will approach the matter on the basis of a wide discretion vested in the court. Is it appropriate and just in the circumstances to allow the variation, taking account, however, of the need to protect and preserve the property, which includes the right to income, which is the subject of the PFO and the subject of the CRO proceedings more generally?

37 In this regard, it is significant that the NCA and, in particular, Ms Brittain, the management receiver, has identified and indeed offered other properties which the family could move into and, in particular, 45 Sedgemoor Road. This suggests that, in principle, the NCA does not object to allowing the family to move to other accommodation and is some recognition of the unsuitable conditions at the TRS. In advance of the hearing on 1 October 2018, Ms Brittain indicated, for reasons explained below, that she was not willing to offer 23 Argyle Terrace. However, she identified two possible properties as alternative accommodation including 45 Sedgemoor Road. At the hearing on 1 October, the first applicant indicated that they would be happy to move into that property. Then in January 2019, the first applicant wrote again to Ms Brittain in terms which indicated that they were still content to move into 45 Sedgemoor. In response, by email dated 15 January 2019, the NCA expressly offered to vary the MRO to enable the applicants to reside at 45 Sedgemoor Road. However, two days later, the applicants changed their minds on the sole basis then expressed that they would not wish the current tenant of that property to be evicted.

38 The applicants maintain their opposition to moving into 45 Sedgemoor Road. They now say that 45 Sedgemoor Road is unsuitable on wider grounds. It is on a council estate, it is in bad condition, and they would be met with hostility on the estate. In addition, they refer to an incident in May 2018 when the second applicant and the two children were directly threatened with violence by a neighbour who it is said lives within 250 metres of 45 Sedgemoor Road. The applicants now contend that whilst aware of the threats in May 2018, they did not discover that the neighbour lived only 250 metres until November 2018. However, none of these objections had been raised until just before the hearing of these applications, on around 5 April. All of these objections were known by January 2019 when they were still indicating a desire or willingness to move to 45 Sedgemoor Road and everything, bar the physical proximity of the neighbour, was known on 1 October 2018. I therefore do not find the applicant's objections now made to 45 Sedgemoor Road to be credible. In my judgment, whilst 45 Sedgemoor Road may not be ideal, it is a realistic alternative home as the first applicant accepted not only at the last hearing but up until 15 January this year at the least.

39 On the other hand, as regards 23 Argyle Terrace, I accept Ms Brittain's reasons for not being willing to allow the family to move into that property. These reasons are explained in her second witness statement and, further, in her more recent letter of 24 January 2019. Her concern is that in the light of previous events in 2016 and again in September 2018, and in January 2019, the first applicant may seek to interfere with the management and running of tenancies at two neighbouring properties for which she is also responsible under the MRO. The applicants hotly dispute the facts in relation to those incidents. It is not possible for me on this application to resolve those disputed facts. However, I do take account, first, of the fact that there is an independent and relatively contemporaneous attendance note of the incident in May 2016. Secondly, as regards a photograph of 23 Argyle Terrace taken on 14 September by the first applicant, from my viewing of the photograph itself and the angle at

which it is taken, I have substantial doubts as to the veracity of the first applicant's explanation (in paragraph 15 of the applicant's 22nd witness statement) that the photograph had been taken by him with a zoom lens and without entering upon the property itself. The first applicant's desire to be involved in properties which were formerly under his control may be understandable. Nevertheless, whilst the MRO remains in place, he has no entitlement to be involved and Ms Brittain's concerns remain well founded.

40 Finally, the applicants point out that in her statement in September last year, Ms Brittain also expressed concerns regarding interference in relation to 45 Sedgemoor Road of a similar kind to those expressed in relation to 23 Argyle Terrace. However, first, since then, Ms Brittain has reconsidered the position in relation to 45 Sedgemoor Road and does not maintain that objection. Secondly, it is the case that unlike the position as regards 23 Argyle Terrace, the relevant property which is near to 45 Sedgemoor Road is a property owned by the second defendant, Sheila Davies, and not by the first applicant himself. So the risk of such interference is likely to be less. In my judgment, Ms Brittain's own assessment of the risks is a relevant consideration for this court to take into account.

41 In conclusion on issue (1), in my discretion, I conclude that it is not appropriate and just to vary the MRO so as to remove 23 Argyle Terrace from its scope. However, it should remain open to the applicants, if they so choose, to move into 45 Sedgemoor Road or, indeed, any other property which the NCA or, more particularly, the management receiver is prepared to offer. In the event that the applicant's exercise the choice to move into 45 Sedgemoor Road, then the MRO should be varied so as to remove that property from its scope.

Issues (2) and (3)

42 I turn to issues (2) and (3). Before looking at them in turn, I summarise the NCA's overall case because, to some extent, there is an overlap. Following this, I will address issue (3) first.

The NCA's case overall about available assets and about reasonable suspicion

43 The NCA submits as follows:

(1) The court can be satisfied that there are other available assets which may be used by the applicants to meet both living expenses and legal expenses:

(a) The applicants have only modest outgoings so that living expenses are limited.

(b) The applicants are in receipt of Universal Credit and child benefit (which are said to be in excess of £1,500 per month) which therefore covers the £250 per week which they are seeking.

(c) The applicants receive regular support from their family.

(d) There is reason to believe that they are able to access or benefit from funds in one or more accounts held in the name of Ms Rebee Elley, who is the second applicant's grandmother. I refer to the funds as "the Elley Funds".

(2) In any event, it is likely that there are other available assets. In addition to the evidence above, the NCA also relies upon:

(a) Expenditure evidence between November 2017 and July 2018;

(b) The "holiday" evidence; and

(c) Delay in bringing the application.

(3) In any event, there are specific grounds for suspicion that the applicants have not disclosed everything they could and should about assets. The NCA relies on the following points:

(a) Untruthful statements of assets;

(b) Falsehood about source of holiday monies;

(c) Nonsensical transactions;

(d) Failure to disclose bank statements for the Apple Tree Day Nursery since July 2018;

(e) Payment of large sums towards a storage facility; and

(f) Minimal banking documentation.

(4) In all the circumstances, the applicants have not shown that it is just to use the funds to pay for these expenses, taking account of the above and the fact that they have failed to show that they are unable to work.

44 As regards issue (3), legal expenses, the NCA accepts that the availability or otherwise of the Elley Funds is central to the outcome of the application. Absent those funds, it is common ground that there are no other available assets which would cover the legal expenses. In the case of living expenses, however, whilst the availability of the Elley funds might be relevant, the NCA submits that there are sufficient other available funds to meet those expenses in any event. Because the issue with the Elley Funds is relevant to both issues but is so central to issue (3), I address issue (3) first.

Issue (3) - CRO legal fees

45 In the light of the costs budget approved by Master Thornett, the sum required to meet legal expenses incurred in the CRO proceedings is £85,856. A further sum required to cover legal expenses involved in this exclusion application is also sought.

46 The NCA submits that there is reason to believe that the applicants will be able to use the Elley Funds. In considering questions (2) and (3) of the questions I have identified in the section on relevant legal principles, the NCA submits that the evidence is such that either it is likely that the Elley Funds are available, or at least that the court should have specific grounds for suspicion that Mrs Elley is willing to support the applicants. The evidence only very recently produced does not rebut the inference nor quell the suspicions that the Elley Funds are available to the applicants.

47 First, I accept the submission that given the relative complexity of the factual legal issues that will arise in the CRO proceedings and the psychological report which I have considered relating to the first applicant's personal difficulties, it is important, if not essential, that the applicants have appropriate legal representation at the trial of the CRO proceedings. Secondly, in my judgment, the position in relation to the exclusion for legal expenses is

significantly different from that relating to issue (2). The critical question in relation to the much more substantial sum required for these expenses is the availability of the Elley Funds.

The Elley Funds

48 The Elley Funds are funds held in three accounts by Mrs Rebee Elley. The funds are in excess of £500,000. Mrs Elley is now 87 years old. Her husband died in August 2017. Her children include Mr Robert Elley and Mr Stephen Elley, and Mr Robert Elley is the second applicant's father.

49 In its evidence, the NCA has set out details of amounts in these funds and detail of activity on at least two of the three accounts which involve multiple transactions. The detail of that evidence was first put forwards in Mr Byrne's 17th witness statement which was dated 4 April but I believe may not have been served until 5 April 2019. The NCA points to the fact that whilst before August 2017 there was very little activity on these accounts, since then there have been multiple transactions. On the basis of this evidence and in their skeleton argument, the NCA submitted that this showed that the accounts were being used by someone other than Mrs Elley, that that person was someone known to the applicants, and that the inference was that the applicants "are able to access or benefit from" the Elley Funds. They also relied upon the fact that no evidence had been served to rebut that inference.

50 The position has now changed. At the outset of the hearing, a three-page letter from Mr Robert Elley was handed up. Mr Robert Elley was also present throughout the first and main day of the hearing of these applications. That letter sets out a detailed explanation of the history relating to, and the use of, the Elley Funds over time, also explaining each of the transactions which Mr Byrne had identified in his 17th witness statement. Pertinently, the letter states, inter alia, as follows:

> *"My Lord, my Lady, I, Robert Elley, write this statement to categorically refute the NCA's supposition that monies held in Coventry Building Society accounts... [and he identifies the numbers] ... are available to Mr Shane and Mrs Rhianna Davies, they are not and neither do they have access to these accounts.*
>
> *These accounts belong to my mother, Mrs Rebee Elley, who, at the age of 87 years old is very fit and fully compos mentis. In the NCA statement, there appears to be a suggestion that she is being taken advantage of. This is simply not true.*
>
> *There is also a suggestion by the NCA that these accounts have been used by Mr Davies. Again not true, Mr Davies has never had nor will he ever have access and neither does my daughter, Mrs Rhianna Davies, have access to the accounts.*
>
> ...
>
> *I have listed those transactions [that is transactions referred to by the NCA] with a brief description of the use." (emphasis added)*

He then sets out, in his letter, transactions between June and October 2018 where large amounts were taken out of the accounts. Those amounts included cheques in substantial sums of £30,000 and £15,000 which were gifts to Mr Robert Elley and Mr Stephen Elley

respectively. There is also reference there to payments made to the second applicant totalling £2,600. The letter on page 2 continues in the following terms:

> *"As a consequence, my mother has been left with a tidy sum of money and she wants to use that to help her family when she chooses to and to see the benefit and joy it brings whilst she is still with us.*
>
> ...
>
> *Mr Davies has never had nor will he ever have access and neither does my daughter, Mrs Rhianna Davies, have access to the accounts mentioned above."*

He then goes on to explain the detail of the smaller everyday type transactions between August 2017 and November 2018. The letter concludes as follows:

> *"Again, I say I trust the above will allay Daniel Byrnes's suspicions that Mr and Mrs Davies have access to my mother's account, they don't, and as I have said previously, never will have."*

51 Then on the morning of the resumed hearing of the applications on Thursday last week, a witness statement, signed and verified by Mrs Elley herself was produced. I admitted this statement into evidence. In that statement, having identified the three accounts which comprise the Elley Funds, Mrs Elley stated this:

> *"I confirm that I do not agree for the funds held by me in these accounts to be used to pay for, or fund, Shane Davies's or Rhianna Davies's living expenses or any legal expenses."*

52 In the light of this evidence, the NCA's position now is that it accepts that I cannot be satisfied that the Elley Funds will be available. However, the evidence as at the opening of the hearing was sufficient to answer questions (2) and (3) in the NCA's favour. Further, Mr Elley's letter, in fact, support's the NCA's case by indicating large gifts made to the family and the letter did not say that the funds would not be available. Mrs Elley's witness statement then came at the eleventh hour and, given the circumstances in which this statement had effectively to be drawn out of her, the NCA submits that the suspicions remain.

53 Turning to the questions identified on the basis of *Azam*, question (1) is conceded by the NCA. As to question (2), on the evidence now before the court, I conclude that it is not likely that the Elley Funds are "other available assets". Even if I had doubts as to that conclusion, then in considering question (3), I do not have specific substantial grounds to suspect Mrs Elley would be willing to support the applicant.

54 In reaching this conclusion, I do not accept the criticism that the evidence which the applicants now rely upon has been produced so late in the day as to raise suspicions. Mr Elley's letter is a detailed response to evidence raised by the NCA for the first time a few days before the hearing. Secondly, there is no issue that the Elley Funds have been accumulated over time by Mrs Elley and her late husband through cautious and prudent saving over a lifetime. Thirdly, in his letter, Mr Elley gives a detailed and full explanation responding the factual points raised about the use of the Elley Funds since August 2017. I do not accept that what Mrs Elley has paid for in the past raises suspicions that they will be available for legal expenses in the future. Apart from a specific gift of £2,600 for the family

holiday, there is no evidence that Mrs Elley has helped the applicants more generally with their living expenses or with the debts which they have relied upon in these proceedings. Fourthly, I do not accept the contention that the wording of Mr Elley's letter referring to "access to the accounts" leaves open the suspicion that Mrs Elley might nevertheless volunteer to make sums "available". The term "access to the accounts" is the term used in the NCA's skeleton from the hearing and, in any event, in the first sentence of his letter, Mr Elley expressly denies that the funds "are available" to the applicants.

55 Whilst the Elley Funds are a large amount and Mrs Elley has, in the past, made substantial gifts to her sons, the second applicant, her granddaughter, is only one member of her large family. The inference that a natural familial relationship will mean that assistance will be provided is significantly weaker here than where the family member is a husband or wife. Finally, any residual doubt has been allayed by the witness statement from Mrs Elley which has now been produced.

56 I am not satisfied either that the Elley Funds constitute available assets to be used for the purposes of defraying these legal expenses, nor that it is likely that they would be so available. In this regard, even if it is the case that those Elley Funds are, in amount, more than sufficient to meet these legal expenses, there is no evidence that Mrs Elley would be willing for those funds to be used to pay for those expenses. Indeed, the evidence now is that she is not so willing. I therefore conclude that in relation to legal expenses for these proceedings, it is not likely that there are other available assets and the applicants have shown that it is just to permit them to use funds which are the subject of the PFO in order to pay their legal expenses involved in these proceedings.

Issue (2) living expenses and FTT legal expenses

57 The first question is what is the amount of living expenses for which the applicants can properly seek exclusion? The applicants seek exclusion in respect of an amount of £250 per week for living expenses and the specific sum of £8,010 for legal fees estimated to be incurred in the FTT proceedings. Whilst they seek living expenses, it appears that one of their main concerns is not to meet regular weekly outgoings but to meet existing accumulated debts. Initially, the applicants had sought £400 per week living expenses but they say that upon being informed by the NCA that the most that NCA would pay is £250, they have reduced their application accordingly.

58 As regards their monthly living expenses, they have put forward items of their regular recurrent expenses which total about £1,895. In addition, as regards their outstanding debts, a number of items have been identified including council tax debts and hire purchase payments. No specific overall figure has been given. On a rough estimate, the items seem to total in the region of £7,500. The largest amount is a council tax bill of £1,800 and what looks like ultimately a debt for retail purchases perhaps of £1,758. In addition, the first applicant seeks an exclusion in the sum of £8,010 for estimated legal proceedings for the FTT proceedings which are currently moving towards a final hearing.

Living expenses at £250 per week

59 I do not accept that the applicants' monthly expenditure is unreasonable nor am I satisfied that the applicants have been living an extravagant lifestyle. I do not accept the NCA's criticisms directed towards the six-week camping holiday that the family took last summer nor of the second applicant's spending pattern between November 2017 and July 2018. The requirement for living expenses to be reasonable does not require a defendant to live anything other than a normal life, in keeping with the life that they have led to date (see

Oduwale and Yadav at [28]). Nor do I consider that the amounts sought of £250 per week is unreasonable. Indeed, it appears that the NCA might not consider it to be unreasonable in its own terms, given what the applicants tell the court that the NCA told them about the figure of £250 per week.

60 I would also add that in applying section 245C(8) POCA and certainly in respect of the £250 sought for living expenses, which amounts to about £6,000 in total up to the date of the hearing of the CRO proceedings, an exclusion in such an amount would be unlikely to prejudice the NCA's right of recovery unduly given the value of the properties sought to be recovered. However, that does not resolve the issue in the applicant's favour because there is the prior question of whether there are other available assets to meet these expenses.

61 Turning to questions (1) and (2), the issue here is whether there are or are likely to be *other* available assets to meet those expenses. In relation to question (1), I am satisfied that there are available assets which may be used for these purposes in meeting some of these expenses. The applicants receive in the region of £1,350 per month in universal credit and child benefit. That goes some substantial way towards meeting the figure of £1,895 but it leaves a shortfall of about £550 per month for living expenses. In addition, there are their accumulated debts and the FTT legal expenses. I accept that neither applicant is currently fit to work to earn sums to meet these expenses. In particular, I have seen statements from their GP relatively recently produced to that effect and I take account of their current physical and emotional condition.

62 As regards the additional £550 per month living expenses, I conclude, however, on the basis of the evidence before the court that it is likely that there are other available assets to meet these expenses. In particular, the second applicant's parents, that is Robert Shaun Elley, have been paying for food, oil for heating, car insurance, and petrol, and funding travel to London for the hearings. Mrs Shaun Elley has also paid £5,000 in legal fees to the applicants' solicitors and £4,000 towards the outstanding balance on a car. Whilst the second applicant says that her parents simply do not have the funds, in this regard - and this is no criticism - I note that Mr Robert Elley, who has written eloquently and conscientiously about both the wellbeing of the family and in detail about his own mother's unwillingness to support the applicants, has not, in those letters or other ways, made similar statements about his own personal position as regards supporting his daughter. That, in my mind, raises at least a suspicion that he and his wife will make funds available to meet the shortfall. Moreover, insofar as she is able, I consider that it is likely that the first applicant's mother will also be willing to support the applicants. She has, in the past, paid towards his storage facility in Thailand and will pay for the boiler at the TRS. However, in view of the clear terms of Mrs Rebee Elley's witness statement, I conclude that it is not likely that she will provide support for living expenses, even though she did in the past give them sums for their holiday.

Accumulated debts

63 As regards the applicant's accumulated debts, it is not clear precisely what the amount is nor whether a weekly sum might be sufficient to discharge them if they were paid off in instalments. In any event here, again, I consider it likely that there are other available funds to pay off those debts. Most particularly, the evidence of Mrs Shaun Elley paying off other debts suggests that it is likely that she and her husband will meet those sums or give rise, at the lowest, to suspicions, that they will make sums available.

The FTT proceedings

64 The position as regards the legal fees for the FTT proceedings is more difficult. In principle, and taking account of Article 6 ECHR, an exclusion for the amount sought could be made - whether as living expenses or more generally under the general power in section 245C(1). Moreover, as indicated by the *Oduwale and Yadav* case, the NCA has, in the past, been prepared to allow an exclusion for legal fees in similar tax proceedings in relatively similar circumstances.

65 However, as I have already pointed out, in that case, in the event, the tax proceedings were stayed pending the outcome in the CRO proceedings. That is a relevant consideration on the facts here. The FTT proceedings were at one stage stayed and, on their face, stayed pending completion of these the CRO proceedings. That stay was lifted effectively at the behest of the first applicant and the expenses sought are to fund legal representation leading up to a final hearing before October this year, a hearing which the first applicant is pressing for. Mr Hodivala has helpfully explained that the first applicant wishes to proceed with the FTT proceedings because he wishes to secure findings adverse to the NCA in those proceedings which he might be able to deploy in the present proceedings. However, without detailed consideration of the issues in the two sets of proceedings, I am unable to assess the value of this approach or whether the points the first applicant wishes to make could be made in any event without the FTT proceeding to a hearing.

66 There is also a suggestion in the papers (and I say it is no more than a suggestion because I have heard no specific legal argument on it) that the first applicant may wish to obtain in those proceedings disclosure from the NCA of documents which he considers may be useful in these, the CRO proceedings. If, and I say 'if', that is a factor, then that material might equally be available by way of disclosure application in the present CRO proceedings.

67 If the FTT proceedings were stayed, whilst the first applicant would not have the benefit of a finding in those proceedings in his favour, those legal expenses would not be incurred. If he is then successful in these, the CRO proceedings, then he would be likely to have access to the property, the subject of the PFO to contest the FTT proceedings subsequently. On the other hand, if the NCA were to succeed in the present proceedings then the first applicant would not be entitled to access that property to fund the FTT proceedings legal expenses.

68 In addition, if the first applicant goes ahead with the FTT proceedings and given that I am going to permit an exclusion for his legal fees in these, the CRO, proceedings, on the basis that the second applicant's parents have already paid one legal bill in the sum of £5,000, I conclude that it is likely that they will be prepared to fund the costs of the FTT proceedings if it is believed that an adverse finding in those proceedings will be of substantial benefit to both applicants in these proceedings.

69 In my judgment therefore, the first applicant has not shown that, in all the circumstances, it is just to permit him to use funds which are subject to the PFO in order to pay his legal expenses in the FTT proceedings. I reach this conclusion on two grounds, first because these proceedings could have remained stayed and are going ahead only at the first applicant's insistence and secondly, and in any event, because I consider it likely that there are reasonable grounds to suspect that there are other available assets to meet those expenses.

Grounds for suspicion

70 Finally, as regards the NCA's overall case in question (3), grounds for suspicion, I am not persuaded by the NCA's case that there is sufficient evidence to show specific grounds for suspicion of non-disclosure of assets. Without going into the detail of each and every point

raised by the NCA, I am not satisfied on the evidence that the explanation concerning the lottery win was false nor that the second defendant's transfers between her two Halifax accounts in July 2018 made no sense, nor that she was not being transparent, nor that the accounts for the Apple Tree Day Nursery have been withheld.

71 In relation to the first applicant's statements in his two witness statements in June and October 2017, there are certainly questions marks about their reliability in relation to his income between April 2017 and June 2018. However, this does not establish that there has been non-disclosure about his assets nor is it sufficient for me to conclude that, going forward and given his current state, it is likely that he will be able to produce income for the family in the immediate future. Previous concealment is not sufficient by itself to show current concealment (see *Azam* at [66(3)]).

Conclusions

72 As regards the first application:

(1) The application in relation to 23 Argyle Terrace is dismissed but is allowed insofar as the applicant wishes to move to 45 Sedgemoor Road; and

(2) The application for an exclusion in relation to living expenses of £250 per week and £8,010 legal expenses in relation to the FTT proceedings is dismissed.

73 As regards the second application, the application for exclusion in relation to legal expenses in relation to the present proceedings is allowed in principle with the amount to be determined if not agreed.

74 Thank you very much.

L A T E R

75 My decision is that I am going to allow the applicants, subject to them having any legal costs, their costs in relation to the second application of this hearing. In other words, costs since whenever the hearing started - which is last Wednesday, but that is all, and in respect of the other costs of that application, there will be no order as to costs.

76 My brief reasons are that whilst ultimately the application has been successful, in my judgment, since October the applicants have been aware that the NCA was suggesting that the Elley Funds were other available assets. In December, it was drawn to their attention that there had been substantial lump sum payments out of those Elley Funds and the NCA's case of suspicion was put to them. Ultimately, whether or not that evidence was sufficient to raise a suspicion is not something I am to make a determination on.

77 I recognise that Mr Hodivala says it was still speculation but it was clear by then that the NCA was relying upon the Coventry accounts and what has been a significant game changer has been the production of Mr Elley's letter and the Mrs Elley's witness statement. They could have been produced earlier, it seems to me, and had they been produced earlier, it may be that this application may have been avoided. Nevertheless, once they were produced, I think the applicants are certainly entitled to their costs.

78 Finally, in relation to that, whilst Mr Hodivala seeks to draw a distinction between the strength of the inference that the NCA was seeking to draw based, on the one hand, on the sums paid out of the Coventry account and, on the other hand, the more recently disclosed

sums paid out of the Halifax account, which I refer to as the retail payments, my understanding of the NCA's case was that its case of reasonable suspicion was based equally on those two different sets of transactions. So those are the reasons for the order in respect of costs that I will make.

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CERTIFICATE

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Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

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