IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 138 OF 2023 (MRHCJ)

BETWEEN

MAARIT OVASKAINEN

PLAINTIFF

AND

JARI OVASKAINEN

FIRST DEFENDANT

BLUE 1H LTD

SECOND DEFENDANT

IN CHAMBERS

Appearances:	**Ms Yvonne Mullen of Hampson & Co. for the Plaintiff** **Mr. Jonathon Milne and Ms Tonicia Williams of Conyers Dill & Pearman LLP for the Defendant**
Before:	**The Chief Justice, The Hon. Justice Ramsay-Hale**
Heard:	**26 August 2024**
Draft Judgment circulated	**12 September 2024**
Judgment handed down	**19 September 2024**

Freezing Injunction - exceptions for living expenses and legal fees - no exception where there are other free funds proved to be available to meet the expenditure

JUDGMENT

INTRODUCTION

1. This is the decision on the application of the Defendant, Jari Ovaskainen, for a variation of a freezing order made by this Court on 24 May 2024 on the application of the Plaintiff, Maarit Ovaskainen.

BACKGROUND

2. The background to the making of the freezing order is set out in previous judgments of this Court dated 21 June 2023 and 29 December 2023.

3. In the course of this decision, I will refer to the parties, as I have in previous decisions, as Husband (H) and Wife (W) for convenience, notwithstanding they have been divorced for some time.

4. I set out the background briefly to provide the context for the present application. A freezing order was made in aid of W's claim in these proceedings for the common law enforcement of a judgment of the Swiss Federal Supreme Court which awarded her the sum of CHF 115,871,422 plus interest at 5% per annum from 31 August 2021 being her share of the parties' marital assets. The assets which were the subject of W's claim arose, in part, from the sale of shares in a successful video game development company in which H had been an angel investor and in respect of which H received some CHF 235 million, a sum equivalent to USD 252 million more or less.

5. W's attempts to enforce the judgment in Switzerland proved fruitless. The only assets she was able to identify in Switzerland were two properties which had been heavily mortgaged. The debt collection process she instituted in Switzerland was derailed when H changed his domicile to the Cayman Islands[1].

6. W subsequently applied to this Court for an injunction freezing H's Cayman assets which included a small sum of some USD 2.5 million held in Cayman bank accounts - small relative to H's massive payout of USD 252 million - and a condominium at the Kimpton Seafire Resort.

[1] W' s Affidavit 10 May 2023 para 25(f)-(g)

The Court, satisfied that there was a real risk of dissipation having regard to H's conduct post-judgment, granted the order sought. H has applied for leave to appeal that decision. The initial freezing order dated 5 June 2023 (the "Order") allowed the sum of $20,000 per week for living expenses and $30,000 for legal advice and representation.

7. The Order was revised on 23 May 2024 and the exceptions removed subsequent to an *ex parte* hearing at which the Court granted W's application to extend the freezing injunction to the Second Defendant, Blue 1H, which was joined to the proceedings (the "Supplemental Order'").

8. At that hearing, the Court was advised that, W, having considered various publicly available share transactions at Companies House in the United Kingdom, formed the view that H was the beneficial owner of shares in a UK registered company known as Newcleo Limited which was in the business of designing and building the next generation of nuclear reactors and that he had transferred his shares to a BVI company known as Bluehold 5 Limited.

9. Searches from various open-source materials confirmed that, in fact, 11 Bluehold companies had been established in the BVI (together, the "Bluehold companies") of which a Mr. Nigel Rowley, H's legal adviser, was a director.

10. Pursuant to a *Norwich Pharmacal* Order made in the BVI on the application of W, a representative of the registered agent of the Bluehold companies swore an affidavit in which he stated that:

> "*The documents [exhibited to the affidavit] detail the current and former shareholders and directors of the Company (sic). To the best of my knowledge, information and belief, [H] is the ultimate beneficial owner of the [Bluehold] Companies. [H] is the settlor and primary beneficiary of a Cayman Star Trust known as the Blue Trust. There may be other beneficiaries of the Blue Trust of which l am not aware. The Blue Trust is the sole owner of Blue 1H Limited, a Cayman incorporated company. Blue 1H Limited is the sole owner of the Companies."*

11. I was satisfied on the evidence that there was a good arguable case that Blue 1H Ltd held assets which were beneficially owned by H and that it was necessary to make the order to aid in the enforcement of the judgment which might be made by this Court.

12. Blue 1H Ltd subsequently applied to set aside the freezing order on the ground that H had no beneficial interest in The Blue Trust, which was the sole owner of Blue 1H Ltd, as confirmed by the registered agent who had sworn a fresh affidavit correcting the contrary assertion appearing in his original affidavit obtained under the *Norwich Pharmacal* Order in which he had also erroneously stated that The Blue Trust was a Cayman STAR Trust.

13. The Court refused the application for reasons which are set out in a decision dated 7 August 2024. Blue 1H Ltd has applied for leave to appeal that decision.

THE VARIATION APPLICATION

14. H applies for a variation of the Supplemental Order reinstating the exceptions to allow him to pay what are described as vital living expenses, and also to ensure that he has legal representation to defend himself against actions brought by W in multiple jurisdictions.

15. In his affidavit sworn in this application, H states that he has no monies available to him to continue to pay his living and legal expenses, other than those held in his Cayman Islands bank accounts.

16. The balances in those accounts which are set out in his affidavit as follows:

(i) US$1,661,658.43 (together with any interest) held with CIBC First Caribbean Bank ("CIBC");

(ii) Cl$99,003.41 (together with any interest) held with CIBC; and

(iii) Cl$3,066.04, US$1,198.75 and EU$2,190.55 held with Scotiabank & Trust (Cayman) Ltd.1

17. H acknowledges the two properties in Switzerland against which W previously tried to enforce the judgment of the Swiss Court. He states that he holds shares in a Swiss company called Kizy Tracking, a supply chain management company in which he invested CHF 1.8 million and owns approximately, 40,000 shares.

18. In his First Affidavit sworn in the BVI proceedings, which he relies on in these proceedings, he set out his Cayman assets which were subject to the freezing order dated 5 June 2023 made by this Court as follows:

a. A condominium at 801 Seafire, Kimpton Residences, 45 Tanager Way, Grand Cayman, together with its contents. In June 2023, the condominium and its contents were valued at USD $4,100,000.
b. An Audi RS Q8 automobile, kept in the parking complex at the Condominium, purchased for CI $152,000 in October 2021.
c. Deposits held on deposit in various local financial institutions:
(i) USD $830,295.02, together with any additional interest payable since June 2023,
(ii) CI $16,243.64, together with any additional interest payable since June 2023),
(iii) USD $1,661,658.43, together with any additional interest payable since June 2023),
(iv) CI $99,003.41, together with any additional interest payable since June 2023),

19. Relevantly, with respect to certain English and Welsh assets, H disclosed his ownership of:

a. 69,448 ordinary shares in a company whose principal business activity is "licenced clubs" which he says is not performing well and where the total value of the shares is currently unknown;

b. An interest in a company known as Invstr Limited whose sole share is held by a Jersey based company;
c. One ordinary share in Consultancy company incorporated in March 2023 and which has never traded;
d. four hunting shotguns (x 2 "Over and Under" and x 2 "Side by Side") of uncertain value;
e. Clothes in storage in London. Of unascertained value.
f. A sum of money held to the account of solicitors for work done on his behalf.

20. With respect to his bank accounts outside the Cayman Islands, H identified the 19 accounts held in Switzerland, Jersey and Singapore. The balances on the accounts are for the most part undisclosed.

21. H offers this explanation for not providing that information:

> *"I am waiting for up-to-date balances on these accounts which l have not been able to obtain in the time but l believe they are almost all zero balance or overdrawn. Indeed, because of the way the banks work, some may also have been closed."*

22. This information was provided to the BVI Court on 31 May 2024. Although H said then that he was waiting for updated balances, he does not condescend to provide any evidence in this application - even from the Bar - of the actual balances in those accounts or any reason why they remain unavailable to him.

23. H listed substantial assets in Israel, but the value of those assets is opaque. H claims the value of his shareholdings in Israel were impacted by the effect of the worldwide freezing order granted on W's application in the BVI. The order has been discharged. What remains unclear is whether these assets could be liquidated and what capital sums could be realized if they were. He has substantial assets in Finland and has received over € 3 million in distributions.

24. H also disclosed that he lives in a rented accommodation in Monaco which he has furnished to the value €100,000. He says he is unsure that any particular item is worth more than €10,000.

25. That is the substance of his disclosure. The matters I have left out take his evidence no further.

26. With respect to Blue 1H Ltd and The Blue Trust, of which H was the Settlor, H maintains that he has no beneficial interest in the Trust, which is an issue to be tried.

THE LAW

27. I take the law from H's written submissions as the legal principles are not in dispute.

28. H relies on the decision of Smellie CJ, as he then was, in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch* (Unrep) 16 May 2008[2], in support of what he describes as the starting point, which is that a respondent to an injunction should be entitled to pay for legal representation of his own choosing and to maintain the style of life to which he is reasonably accustomed.

29. In *TMSF,* the learned Chief Justice set out the principles to be applied in relation to the exception for legal expenses to be paid out of injuncted assets, which Mr. Milne on behalf of H summarises as follows:

a. a defendant should be entitled to legal representation of his own choosing, and may pay for that representation from injuncted assets, provided that the cost of it is reasonable;
b. such a defendant's attorney should be remunerated on an attorney and own client basis, not constrained by the formal process of taxation;
c. a balance should be struck between any potential injustice that may result to a plaintiff (who, it must be remembered, has no priority over any other party with a claim to those assets), caused by the unjust dissipation of the assets, with the injustice that would result to a defendant who is not given the opportunity to defend himself properly, by limiting the competence and experience of the representation that he can afford;
d. there is a burden on the defendant to satisfy the Court that he cannot pay his costs out of any other available funds, not subject to the injunction;
e. the Court must consider the consequences of not allowing the defendant access to the injuncted assets; and
f. while the Court will not act as a taxing body, it has a responsibility to ensure that any use of the assets is reasonable, and therefore it may, when appropriate, make a general assessment of any costs, or refer them to the Taxing Officer who may undertake an informal assessment to assist the court.

30. That the principles are applicable even where the plaintiff asserts a proprietary claim to the injuncted assets as noted by Smellie CJ at para 15 of the judgment where he said this:

> "*15. Even in a more straightforward case where the plaintiff's claim against the injuncted assets is proprietary in nature, the Court may nonetheless, in the exercise of discretion, allow the payment of a defendant's legal fees. See CalaCristal SA and Others v Al-Borne and Others, The Times, 6 May 1994. The position must be a fortiori here, where the claim against the injuncted assets is not proprietary in nature."*

31. Smellie CJ also relied on the decision of the Jersey Court of Appeal in *Armco Inc., and Others -v- Donoghue and Others* [1998] JLR Notes 12A to which, the Jersey Court of Appeal set out a number of principles which are to be applied in deciding whether to allow payment of a respondent's legal costs out of injuncted funds. The principles which are to be extracted from the notes of the judgment are as follows:

[2] [2008] CILR Note 12

"The following principles are to be applied when deciding whether to allow payment of the defendant's legal costs out of enjoined funds, in circumstances in which the plaintiff asserts a proprietary claim to the funds (the list is not exhaustive):

1. *Only in an exceptional case, in which the merits can be gone into for the purpose of satisfying a court that the proprietary claim is well founded at an interlocutory stage, should a defendant not be free to draw on the enjoined funds to finance his defence.*

2. *In non-exceptional cases in which a proprietary claim is made, a careful judgment has to be made as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence.*

3. *A defendant should not be allowed to draw on a fund which may belong to a plaintiff for the purpose of paying the defendant's legal costs until he has satisfied the burden of showing that he has no funds of his own available for that purpose.*

4. *The court will look to the reality of what would occur if no order were made. If the costs would in practice be paid by a third party, then the court will take this into account.*

5. *The court will not normally concern itself with the quantum of the individual items of costs, although it may well fix a limit to the overall amount to be allowed for this purpose pending further application to the court: it will not act as a form of provisional taxing body for the purposes of scrutinizing the defendant's legal fees.*

6. *The court may impose safeguards, e.g. an undertaking by the defendant that he will make good, out of the funds to which the plaintiff has no proprietary claim, any sums spent on costs which are subsequently found to have come out of property to which the plaintiff has a good proprietary claim."*

32. In relation to H's application for an exception for his living expenses, Mr. Milne prays in aid the decision of the English Court of Appeal in *Vneshprombank v Bedzhamov* **[**2019] EWCA Civ 1992 at paras [51] and [69] which state as follows:

"[51] …. the living expenses exception must be applied in the light of the purpose of the freezing order jurisdiction; that the jurisdiction is not intended to prevent a defendant from living as he has always lived and paying bills such as he has always incurred; that 'reasonable' living expenses refer simply to the expenses which the defendant has in fact been incurring as part of his normal way of life and do not require the court to make an assessment whether they are 'objectively' reasonable; that it is 'unjust' for a defendant to be compelled to reduce his standard of living when there is, as yet, only a claim against him; and that the court must be alert to prevent the abuse of such orders as a means of exerting illegitimate pressure on a defendant.

> *[69] … the ordinary living expenses exception is intended to allow the defendant to maintain his pre-freezing order standard of living."*
> (emphasis added)

33. Mr. Milne relies on the interpretation of the expression "*ordinary living expenses"* by Skinner J in *T.D.K. Tape Distributor (UK) Ltd. v Videochoice Ltd. and Ors* [1986] 1 WLR 141, who said this at page 146:

> *"In my judgment it is certainly possible to aggregate expenses like a monthly account with the grocer, rates' bills and fuel bills, recurrent expenses of that sort; but I think it is impossible to argue that a bill to a lawyer for a defence against a serious criminal charge amounting to £10000 is an ordinary living expense. Ordinary living expenses, in my judgment, mean ordinary, recurrent expenses involved in maintaining the subject of the injunction in the style of life to which he is reasonably accustomed. It does not include exceptional expenses like (an example given by Mr. Jacob) the purchase of a Rolls Royce or the equivalent in legal terms of the private employment of a Queen's Counsel to defend you against a serious criminal charge. That is not an ordinary living expense, and if it had been desired to create an exception from the injunction to cover that sort of expense, then an application to the court was necessary to effect it."*

34. Mr. Milne also cited the decision of the English Court of Appeal in *Regina v Luckhurst (Golding intervening)* at [33] acknowledging the principle *"applicable to civil freezing orders, both proprietary and non-proprietary, that where a defendant has assets available to meet living or legal expenses which are not caught by the restraint, he is expected to resort to that availability and he will not be allowed, to that extent, to draw on the restrained assets."*

35. Counsel for W, in her legal submissions, lays emphasis on the principle set out in the authorities that no exception for legal expenses should be made where it appears that the respondent has or may have other assets (for example, assets abroad not subject to the freezing order) from which his legal expenses may be paid or where it appears that legal expenses are likely to be met by a third party.

36. She cites the decision of Andrew Smith J *in Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2014] EWHC 551 (Comm) in which he undertook a review of the applicable principles and stated at paragraphs 26 et seq:

> *"26. Sir Anthony Clarke, with whom Brooke LJ and Buxton LJ agreed said in [Serious Fraud Office v X [2005] EWCA Civ 1564] at paragraph 35:*
>
> *"If a defendant against who a restraint order has been made wishes to vary the order in order to enable him to use funds and assets which are the subject of the order, which I recall "the restrained assets" in order to pay for his defence, it is for him to persuade the court that it would be just for the court to make the variation sought. I would call that the burden of persuasion. For example, if it were clear that the defendant had assets which*

were not restrained assets, the court would not vary the order, because it would not be just to do so, consistently with the underlying purpose of the restraint order."

27. More directly relevant for present purposes, in his judgment Sir Anthony Clarke reviewed the authorities about freezing orders. Having cited AvC with approval, he referred to the decisions of the Court of Appeal in Campbell Mussels v. Thompson [1984] 135 NLJ 1012 and Southern Cross v. Martin (unreported, 11 February 1986) in which Sir John Donaldson MR said this:

"It is quite clear that the court will not allow expenditure to be channelled into funds which are subject to a Mareva injunction, where there are other free funds proved to be available to meet the expenditure. It is also clear that the court should exercise a healthy scepticism over claims that the only monies available are in the funds which are subject to a Mareva injunction."

28. Sir Anthony also referred to the Atlas Maritime case in terms that make it clear that it did not turn on its own particular facts:

"The cases on freezing injunctions also show it may be appropriate to consider whether there are reasonable grounds for thinking that, if the variation is refused, the defendant will in practice have recourse to other funds in order to fund his defence even though he may not have a legal right to those funds. …"

DISCUSSION

37. In his submissions on behalf of Mr. Ovaskainen, Mr. Milne relied on H's affidavit to say that the assets in the Cayman Islands are the only assets available to H. He referred to my comment in Counsel's note of an earlier *ex parte* hearing, that the funds held in the Cayman Islands belong to W, and suggested that I fell into error.

38. He reminded me that, even where the claim is a proprietary one, a respondent to an injunction is entitled to his ordinary living expenses and to be permitted funds so he can defend the actions brought against him.

39. The comment I made with respect to the ownership of the funds within the jurisdiction of the Court was too broad, but what I was seeking to emphasise is that W's claim in the Swiss proceedings was to a share of jointly owned marital assets. Her claim has been determined by the Swiss Court and the money she seeks to recover from H is hers. I think it important not to lose sight of the fact that there is no issue remaining between H and W as to whether the funds awarded to her by the Swiss Court are hers. The judgment of the Swiss Court is not subject to any further appeal. The action here is for enforcement of the judgment, not to establish her claim. All the actions which W has brought against H in the United Kingdom and elsewhere which he has had "to defend," and for which he seeks the exceptions in order to draw upon the funds in the Cayman Islands, are enforcement actions, as W seeks to find assets which are hers, which H has

refused to pay over. Although it is not a proprietary injunction, the Order made by me is in very real terms aimed at restraining H from dissipating of W's assets - her share of their marital assets as quantified by the Swiss Court - which are in his hands. The judgment of that Court means that just over CHF 115 million or USD130 million held by H or to his account belongs to W.

40. He has not paid it, and he has not explained what has become of it.

41. It strains the credulity of this Court that the only liquid funds H has at his disposal are the paltry sums - paltry relative to the USD 252 million payday - held in the Cayman accounts.

42. More particularly, with respect to H's evidence, he has not provided an update on the balances on the accounts listed at paragraph 20 *supra* of his evidence filed in foreign proceedings. I am not content to accept that there are no balances on these accounts or that "*because of the way the banks work, some may also have been closed."* Ms Mullen, in her submissions on behalf of W, noted that correspondence from Counsel for H had disclosed that there was a balance in at least one of the listed accounts.

43. H has not explained the current status of his Israel investments or explained why, now that the worldwide freezing order has been discharged, he is unable to realise any of the several investments managed by the family office which were as he put it "*effectively mothballed"* by the freezing order.

44. He does not say when the 3 million euros from his Finnish investments were realised or what has become of that sum.

45. He does not say from what fund he has up until now paid the rent for his Monaco home.

46. H has brought or threatened action against W in New York and other jurisdictions for defamation based on matters set out in her affidavit sworn in these proceedings, which W's attorneys suggest, with some force, was done with the purpose of putting her to expense and to persuade her to *"resolve"* matters between them. No evidence has been provided as to the source of the funds to pay for the associated costs. In my view, it is just as likely as not that the funding came from some undisclosed source of funds which is still available to H. H has suggested the funds for these legal actions have been provided by third parties. There is no evidence to show that such third-party funders, if they exist, are no longer inclined to continue to fund H's legal expenses in respect of the enforcement proceedings.

47. In resolving the application in front of me, I bear in mind the observation of Sir John Donaldson MR in *Southern Cross v. Martin (unreported, 11 February 1986)* cited by Andrew Smith J in *Fortress* at paragraph 27, that:

"It is quite clear that the court will not allow expenditure to be channelled into funds which are subject to a Mareva injunction, where there are other free funds proved to be available to meet

the expenditure. It is also clear that the court should exercise a healthy scepticism over claims that the only monies available are in the funds which are subject to a Mareva injunction."

48. The law makes it plain that H bears the *"burden of persuasion"* that there are no other funds at his disposal to meet his necessary living and legal expenses. In my view, the evidence he has provided goes no distance to successfully meeting that burden, with the consequence that I am not persuaded that the only assets he has available to him are the assets captured by the domestic order made by this Court. I decline therefore to vary the injunction to permit H to channel expenditure into the funds subject to the freezing order.

49. The application is dismissed with costs.

DATED DAY 19TH DAY OF SEPTEMBER 2024

Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE OF THE GRAND COURT