Neutral Citation Number: [2020] CA (Bda) 15 Civ

Case No: Civ/2020/9

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. CHIEF JUSTICE CASE NUMBER 2019: No. 491

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 11/06/2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
SIR MAURICE KAY, JA
and
DAME ELIZABETH GLOSTER DBE, JA

- - - - - - - - - - - - - - - - - - - -

Between:

ANDREW CRISSON

Appellant

- and -

MARSHALL DIEL & MYERS LIMITED

Respondents

Mr. Cameron Hill of Westwater Hill & Co. for the Applicant

Mr. Jai Pachai of Wakefield Quin Ltd. for the Respondent

Hearing date(s): 20 November 2020

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JUDGMENT

Contents

Introduction **2**

The Procedural History **2**

The grant of an extension of time within which to seek permission to appeal **23**

Summary of the parties' arguments on the substantive appeal **25**

The relief sought in Mr Crisson's notice of appeal **27**

Discussion and determination **28**

Was MDM entitled to assert a solicitor's lien over the US$400,000, paid to Mr Crisson by the Trustee? **28**

Should the Chief Justice have discharged the freezing order made by Stoneham J in any event? **38**

Disposition **41**

GLOSTER JA:

Introduction

1. This is an appeal by the appellant, and the defendant in the action, Andrew Crisson ("Mr Crisson"), against the decision of Chief Justice Hargun dated 7 May 2020 ("the May 2020 judgment") whereby the Chief Justice refused Mr Crisson's application to vary a freezing injunction ("the freezing injunction") previously made against him by Stoneham J on 13 December 2019 ("the December 2019 order") at the suit of the claimant in the action, and the respondent to this appeal, Marshall Diel & Myers Limited ("MDM"). The Chief Justice rejected an application by Mr Crisson to vary the December 2019 order so as to allow for payment for living expenses, legal fees and other liabilities, in accordance with the decision in *Iraqi Ministry of Defence v Arcepey ("the Angel Bell"*) [1981] 1QB 65. The Chief Justice refused the application on the basis that the December 2019 order had not been made under the *Mareva* jurisdiction, but pursuant to the court's jurisdiction under Order 29 Rule 2(1) for the purposes of preserving the funds, until such time as MDM's "interest in the funds could be determined by the Court". In other words, the Chief Justice appears to have taken the view that the injunction which had been granted by Stoneham J was in fact a proprietary injunction, to which the *Angel Bell* exceptions were not applicable, and accordingly that there was no basis for any variation in its terms.

2. On 16 November 2020 this Court (the President, Sir Christopher Clarke, Justice of Appeal, Sir Maurice Kay and Justice of Appeal, Dame Elizabeth Gloster DBE) granted Mr Crisson leave to appeal out of time against the May 2020 judgment, after refusal by Justice of Appeal, Mr Geoffrey Bell, sitting as a single judge of this Court. The reasons why we considered it appropriate to do are set out below.

3. The appeal was heard before us on 20 November 2020, in a virtual video hearing. Mr Cameron Hill of Westwater Hill & Co appeared as counsel for Mr Crisson; and Mr Jay Pachai of Wakefield Quin Ltd appeared as counsel for MDM. We are grateful to both counsel for their helpful oral and written submissions.

The Procedural History

4. The current proceedings relate to the attempts by MDM to collect what it alleges are outstanding legal fees due from Mr Crisson, arising out of its representation of him during matrimonial ancillary relief proceedings between him and his wife during the period 2012 to 2019. Winchester Global Trust Co Ltd ("the Trustee") as trustee of the A Fund, and other trusts known respectively as the B Fund, the C Fund, the D Fund and the X Trust, had been joined as second respondent to a supplemental application for ancillary relief brought by the wife, which sought variation of settlement in relation to those trusts. During the relevant time, Mr Crisson was represented by Mrs Georgia Marshall ("Mrs Marshall"), a partner in MDM, in the ancillary relief proceedings. The Trustee, as trustee of the A Fund, held a property known as "Mirabeau", the former matrimonial home.

5. The following summarises the salient steps in the litigation for present purposes.

6. It appears that, by January 2018, Mr Crisson owed MDM a sum in excess of $280,000 on account of legal fees incurred by him relating to the divorce and ancillary relief proceedings. Indeed, in January 2018 MDM applied to be removed as attorneys of record on behalf of Mr Crisson on account of non-payment of outstanding fees. An order of the Supreme Court dated 11 January 2018 confirmed this point. It was, however, never served and MDM remained as the attorneys of record for Mr Crisson.

7. Mr Crisson was keen to retain the services of MDM and on, or about, 22 January 2018 he signed an agreement ("the Acknowledgement Agreement") in the following terms in relation to his outstanding legal fees:

> *"Acknowledge of Debt Due and Payment Agreement to Marshall Diel & Myers Limited*
>
> *The following Payment Agreement is associated with the outstanding debt to Marshall Diel & Myers Limited ("the Firm"), with respect to Georgia Marshall representing me, Andrew L. Crisson in my divorce proceedings (Andrew L. Crisson and Christine H. Crisson) to date, i.e., to January 2018. In which case, I, Andrew L. Crisson ("the Respondent"), acknowledge that my current debt is BD$288,417. I am committed to paying this debt by means of the following, and in this order:-*
>
> *1. With respect to the above stated debt, I confirm that I will begin making weekly payments of BD$346.26 (based on BD$1,500 per month annualized) until the Judgment of the court is rendered. The payments will be made by way of an attachment of earnings so that the funds are paid by the payroll clerk of Crisson Limited directly to the Firm. My first payment will be arranged on or prior to January 31, 2018.*
>
> *2. I guarantee that upon completion of the case and rendering of the Judgment,* ***I will ask that the Trustees of the Andrew L. Crisson Trust, to exercise their discretion to release to the Firm from the net equity of Mirabeau, sufficient funds to clear off my debt to the Firm. If there are Insufficient funds received from the sale of Mirabeau or if the Trustees do not exercise their discretion in my favor, then a Guarantee from the owners of the New York apartment will be relied upon[1],*** *in accordance with the "Charge Over Security Guarantee" dated [sic]*
>
> *3. Please see the attached "Charge over Security Guarantee", with respect to the New York apartment.*
>
> *4. Any sum which remains outstanding after paragraph 2 above and the fulfilment of the "Charge Over Security Guarantee" will be paid from my other resources, but in any event in a sum of not less than $1,500 per month."*

[1] Emphasis in bold in this judgment is supplied.

8. The correspondence leading up to the signing of the Acknowledgement Agreement, and the affidavit evidence of Mrs Georgia Marshall, the barrister and attorney, and a director of MDM, acting for Mr Crisson in the proceedings, shows that the agreement also included terms that:

9. MDM would cap its fees for the ongoing proceedings to conclusion of the case, but not including appeal work after judgment, in a sum of $50,000;

10. and that that sum would be paid by Mr Crisson by the end of January 2018[2].

11. The Charge over Security Guarantee in relation to the New York apartment was indeed provided to MDM by Mr Crisson's mother and daughter in a deed dated 25/26 January 2018. So far as material, it was in the following terms:

> *"**Charge Over Security Guarantee***
>
> *We the undersigned Anja E. Crisson and Helen C. Crisson, joint owners of the property known as apartment 8E, 333 East 55th street New York, United States of America ("the Property"), hereby acknowledge that we have been given full opportunity to seek and obtain independent legal advice on this Charge Over Security Guarantee and grant this Security freely. This Charge Over Security Guarantee is granted to Marshall Diel & Myers Limited in consideration of the natural love and affection which the undersigned, mother and daughter respectively of Andre Crisson bear towards him and in our desire to assist him in securing a portion of the outstanding legal fees which are due and owing to his said attorneys, the total of which is understood to be approximately $288,000 and by so doing secure ongoing representation for him by the Firm.*
>
> *The following **Charge Over Security Guarantee (the "Charge Over") is only [sic] the proceeds from the sale of the Property**, which is presently being placed on the market for sale. The Charge Over is subject to Georgia Marshall, of Marshall Diel & Myers Limited ("the Firm"), continuing to represent Andrew Crisson to conclusion before the Supreme Court of Bermuda, of the ongoing Divorce Matter 2012 No 65, which is intended to be listed for hearing in 2018.*
>
> *The extent of the Charge Over shall be limited to the sum set out hereunder and shall be paid upon the sale of the Property to the extent that there are monies, which remain due and owing to the Firm, which have not been paid from any other source.*
>
> *In the event that the Property is sold prior to the conclusion of the Divorce Matter 2012 No 65, the sum of $150,000 will be paid into the Firm and shall be held in escrow pending the conclusion of the matter before the Supreme Court in relation to Divorce matter 2012 No 65.*

[2] See paragraph 40 of the second affidavit of Georgia Marshall dated 18 February 2020. It was indeed paid by Mr Crisson.

The undersigned, Anja E. Crisson and Helen C. Crisson, confirm and commit and hereby grant to the Firm a Charge Over secured against the Property in the Sum of $150,000 and hereby commit to expeditiously marketing the Property for sale no later than immediately following the conclusion of the proceedings being Matrimonial Matter 2012 No 65. Upon sale, such amount which remains outstanding in relation to the fees owed to the Firm by Andrew Crisson which have not been paid from any other source shall be paid to the Firm to the extent of $150,000 or such lesser sum as i-Is required to fully extinguish the debt. For the avoidance of doubt, the Charge Over Is limited to $150,000 irrespective of whether the full debt owed to the Firm is fully extinguished by payment of this sum."

12. On 7 November 2019, Stoneham J delivered her judgment in the matrimonial proceedings in relation to ancillary relief issues arising in the divorce ("the November 2019 judgment"). The ancillary relief hearing actually started in September 2016 and only concluded on 31 May 2018. It was not until 17 months later, on 7 November 2019, that Stoneham J delivered her judgment on the case.

13. It is relevant for the purposes of this appeal (and, indeed, was likewise relevant for the purposes of the Chief Justice's analysis of the relevant facts) to consider Stoneham J's decision in the ancillary relief proceedings. It was clear that she accepted the evidence of Mr Crisson that he had substantial debts which he needed to discharge, in an amount of just under $1 million. So far as relevant for present purposes, what she had to deal with was the variation of the trusts of the A Fund, a discretionary trust established for the benefit of Mr Crisson, his wife and their children, but which was subject to various debts. At paragraph 139 ff of the November 2019 judgment Stoneham J said:

"139. I therefore find the Husband's evidence[3] relating to his inability thereafter to service his ongoing monthly mortgage obligations, personal loans and credit card debits, entirely cogent. I am satisfied that the Wife was oblivious to such financial circumstances of the Husband. …….

141. The stark reality in this case is that there has been a substantial change in the Husband's financial circumstances resulting, amongst other things, in neither the Wife nor Husband living at the standard enjoyed during the marriage

……

[3] This evidence was summarised at paragraphs114 and 115 of her judgment as follows: "The Husband contends that he is now in a dire financial situation. The Husband presented evidence of this total current debt to include such matters as: 6 Outstanding credit cards $69,060.14, 3 Overdraft facilities $69,536.65, Outstanding Legal fees $285,587.00, Shortfall of mortgages crystalized $446,000.00 upon the sale of two residential properties. 115. The Husband's evidence is that the total of his current debts amounts to more than $2 million dollars of which approximately (i) $902,656.00 is owed to arm's length third parties, (ii) $400,000.00 is owed to various family members, (iii) $100,000.00 is owed to The Business (which he repays via weekly deduction from his salary), and (iv) $800,000.00 is owed in respect of the outstanding mortgage on the FMH."

145. It is further agreed that the only asset of the A Fund capable of variation is the [family matrimonial home]. The only issue now is how the remaining proceeds of sale of the Property roughly estimated to be $700,000 should be fully and finally distributed.

……

149. No doubt, both the Husband and the Wife will be looking for payment of their legal fees which this court is aware, are substantial. It is clear on a simple mathematical analysis that all of the wishes of the Husband and Wife cannot be met out of the balance remaining of the sale proceeds. I am mindful that the two children of the family are also beneficiaries of the A Fund.

……

152. ***I have no doubt that the Husband's need to meet a portion of his hard debt estimated to be some $902,656.00 can be met by $400,000 of out of the sale proceeds.***

…….

153. The balance remaining after meeting the above needs of the Wife and Husband can be applied to meet the Wife's future accommodation in Bermuda or such other jurisdiction of her choice. The Wife can obtain some form of employment to contribute to meeting her needs.

……

167. The Husband and Wife shall each be responsible for their respective legal costs. There shall be liberty to apply in respect of the implementation of this decision."

14. On 7 November 2019 Stoneham J made an order to give effect to her decision. In the order the wife is referred to as "the Petitioner, Mr Crisson as "the Respondent" and the Trustee as "WGCTL". In so far as material, it was in the following terms:

"UPON Notice of Application for Ancillary relief filed by the Respondent on 24 October 2014, seeking an order for the Petitioner's claims for periodical payments, lump sum provision and property adjustment order to be determined so that his financial obligations towards the Petitioner may be determined fully and finally;

WHEREAS by Supplemental Application for Ancillary Relief dated 14 September 2016 the Respondent sought a variation of settlement in relation to the 'A Fund', the 'B Fund', the 'C Fund', the 'D Fund' and a Declaration that the 'X Trust' is not an ante-nuptial or post-nuptial settlement subject to the Court's Jurisdiction pursuant to section 28(1) (c) of the MCA 1874;

UPON Application for Ancillary Relief filed by the Petitioner on 13 September 2016 the Petitioner sought maintenance pending suit, periodical payment order, lump sum provision and variation of the 'A Fund' for the benefit of herself and the dependent child of the family;

WHEREAS by Supplemental Notice to Proceed with Application for Ancillary Relief dated 20 September 2016 the Petitioner sought maintenance pending suit, periodical payments, lump sum provision, variation of the 'A Fund' and the 'X Trust' such that she shall be entitled to all income from the real property known as 'the FMH' during her lifetime or until remarriage and that the trustees of 'X Trust' continue to be responsible for and to pay all costs, expenses and payments due in respect of the FMH Inclusive of the mortgage payments, the land tax and Insurance and the maintenance thereof;

WHEREAS by Consent Order dated 25 January, 2017 Winchester Global Trust. Company Limited ("WGTCL"), as Trustee of the 'A Fund' and the 'X Trust' were joined as a party to the proceedings;

WHEREAS by Order dated 9 May 2018 WGTCL in its capacity as trustee of the 'A Fund' was granted permission to sell the FMH and did so garnering a net sum of $948,000 upon sale;

WHEREAS by Order of the Court WGTCL was appointed to represent the minor beneficiaries and the lives yet unborn in relation to the 'A Fund' and the 'X Trust';

UPON the Court being satisfied that there is no evidence to support that The Y No. 1 Trust and The Y No. 2 Trust are financial resources or likely financial resources of the Respondent; and

UPON HEARING Counsel for the Respondent and counsel for WGTCL and the Petitioner in person; and

IT IS HEREBY ORDERED as follows:-

1. The Petitioner's immediate future needs comprise the following:

a) $2,000 per month for her personal expenses whilst residing outside of Bermuda with the son of the Petitioner and Respondent ("B") over the next 3 years;

b) $3,000 per month to meet the cost of rental accommodation and utilities for so long as B resides with her and continues his education outside of Bermuda, up until his 18th birthday;

c) In the event that B secures an alternate boarding education placement (in the US, Canada, or the UK) or is enrolled locally in a private school, the Petitioner's circumstances shall be reviewed by this court.

The above sums shall be extendable by this Court.

2. The Respondent's needs are to meet a portion of his hard debt (estimated at some $902,656 in total) which can be met by a lump sum of $400,000.

3. The needs of the Petitioner as set out in paragraph 1 hereof and the needs of the Respondent set out in paragraph 2 hereof shall be met out of the balance [sic] proceeds of sale of the FMH held by the Trustees of the 'A Fund'.

4. The Respondent shall pay to the Petitioner a sum of $800 per month in relation to the direct and indirect needs of the child of the family, B until he shall attain the age of 18 years whereupon the said monthly sum shall cease.

5. The balance remaining in the "A Fund' after meeting the above needs of the Petitioner and the Respondent may be applied to meet the Petitioner's future accommodation In Bermuda, or such other Jurisdiction of her choice, noting that the Petitioner can obtain some form of employment to contribute to meeting her needs.

6. The Respondent shall continue to ensure the elite tier health insurance coverage (via The Business group policy) Is maintained for the Petitioner and B until further order.

7. The Petitioner and the Respondent shall each be responsible for their respective legal costs.

8. There shall be liberty to apply in respect of implementation of this decision.

IT IS FURTHER HEREBY DECLARED THAT

9. ……..

10. ……..

11. Further, no form of judicial encouragement is given to the Second Respondent to assist the Respondent to meet his obligations to the Petitioner."

15. It is relevant to note that no order was made to the effect that the costs of the respective lawyers acting for Mr Crisson, his wife or for the Trustee should be paid out of the A Fund.

16. Subsequently, on 12 December 2019 MDM issued a specially endorsed writ of summons and statement of claim seeking repayment of the fees said to be owing by Mr Crisson to MDM ("the Fee Action"). At the same time MDM also issued an *ex parte* summons for a freezing injunction pursuant to Order 29 Rule 2 (1) of the Rules of the Supreme Court 1985 against Mr Crisson. Paragraphs 5 to 9 of the statement of claim pleaded as follows:

> *"5. On 22 January 2018 the Defendant executed an Acknowledgement of Debt and Payment Agreement whereby the Defendant admitted that he owes the Plaintiff the amount of $288,417.*
>
> *6. The Defendant further agreed, inter alia, that upon the conclusion of the entrance of a judgment in his matrimonial proceedings, he would ask that the trustees of the Andrew L. Crisson Trust exercise their discretion to release to MDM the net equity of the sale of a property sufficient funds to clear off his debt to MDM.*
>
> *8. The judgment was entered on 7 November 2019. The Plaintiff made demand for payment pursuant to the Acknowledgment of Debt and Payment Agreement.*
>
> *9. On or about 12 December 2019, and without the knowledge or consent of the Plaintiff, the Defendant had the funds transferred from the trust to his personal HSBC ($USD) savings account in breach of the Acknowledgement of Debt and Payment Agreement.*
>
> *10. To date, the Defendant has refused or neglected to make payment pursuant to the Acknowledgement of Debt and Payment Agreement.*
>
> *AND THE PLAINTIFF CLAIMS:-*
> *1. Judgment in the sum of $282,457.99*
> *2. Interest;*
> *3. Costs;*
> *4. Such further or other relief that this Honorable Court considers just."*

17. The application for an injunction was made *ex parte* by Mrs Marshall to Stoneham J on 13 December 2019, in the above proceedings. In her affidavit in support of the application dated 12 December 2019, Mrs Marshall stated as follows:

> *"4. I make this affidavit in support of the Summons whereby Marshall Diel & Myers Limited ("MDM") seeks a freezing injunction in accordance with the provisions of Order 29 Rule 2(1) of the Rules of the [4]Supreme Court 1985. The full extent of the relief to which I am seeking is set out in the draft injunction which is exhibited to the Summons, but, in particular, includes the following:*

a. That until further order of the Court, the Defendant ***must not in any way dispose of, deal with, or diminish the funds in the sum of $400,000 held in his personal HSBC savings account until the Plaintiff's financial interest in the above-mentioned funds is resolved****."*[5]

Outstanding Debt and Unjustified Dealings by the Defendant

14. Upon receipt of the Judgment and as set forth in the Agreement, I confirmed with the Defendant that payment would be transferred by the trustees from the Andrew L. Crisson Trust to MDM to meet the balance of the outstanding legal fees owed by the Defendant.

15. The Defendant was scheduled to attend MDM for a meeting with me on 12 December 2019 to discuss the organization of the transfer of the said fees to MDM.

16. On the morning of 12 December 2019, my assistant received notice from the Defendant that he would not be attending the meeting and that he had received funds from the trustees.

17. I called the Defendant who confirmed that he had organized for the trustees to transfer the total sum of $400,000 into his sole HSBC ($USD) savings account. He indicated that he was assessing his financial position and would determine what sum he would pay against his fees. I informed the Defendant by telephone call of the sum of his outstanding fees and that he needed to pay the said fees by the close of business on 12 December 2019, failing which we would be filing a Writ with the Supreme Court the following day.

18. I also emailed the Defendant by email dated 12 December 2019 at 9:32AM stating as follows:

> *"Dear Andrew,*
>
> *Per our conversation of today, this is to confirm that your outstanding fees with this firm amount to $$256,250 to the conclusion of the proceedings. In addition thereto a sum of $18,858 has been billed since the conclusion of the hearing in relation to the Mandamus application as well as the drafting and perfecting of the Order.*
>
> *As you are aware, I fully expected to receive the lump sum payment of $400,000 into this office and to have your fees extinguished at that time. That was our agreement. Your arrange with the Trustee direct to pay the funds directly to your account is, in my view is a show of bad faith on your part.*

[5] Emphasis in Bold in this judgment is our emphasis.

In the circumstances I advised you and reiterate that unless the outstanding AIR is cleared off by close of business today, I will be filling a Writ in the Supreme Court tomorrow.

I await your confirmation that the fees have been paid and that the transfer has been made in accordance with our agreement."

……

19. The Defendant replied by email dated 12 December 2019 at 12:15 pm stating:

"Hello Georgia, I understand the urgency of addressing this. I have 5 issues happening at once today, and trying to deal with everything as quickly as I can.

I will come back to you shortly. Thanks,
Andrew"

…….

20. I wrote to the Defendant by email dated 12 December 2019 at 12:15pm referring him to the email from myself to the Defendant of 15 January 2018 and which set out the basis upon which I agreed to come back on the record in January 2018, in particular, that the Defendant would pay the sum of $1,500 per month by attachment of earnings and would pay off the balance when the judgment was rendered from his portion of the equity i Mirabeau if such funds are sufficient to meet the outstanding fees. ……

21. 1 again wrote to the Defendant by email dated 12 December 2019 at 12:32pm providing him with a copy of the Agreement and stating:

"Further to my prior email,

Please see the attached signed Agreement dated 22 January 2018. By paragraph 2 of that Agreement you are bound to pay from the proceeds due to you for the trustees, which you have now received, your outstanding fees. It is only where the lump sum from the trustees is insufficient to meet the outstanding fees that the sale of the New York apartment is relevant. I hope that this refreshes your recollection of what our agreement was upon which I relied in order for me to continue with your case.

In addition to that, I agreed to complete the case of $50,000. The actual fees incurred were double that but I have stuck to my end of the bargain and have not sought to recover the excess."

……

22. The Defendant's total debt owed to the Plaintiff for outstanding legal fees are $282,457.99 as at 12 December 2019, which does not include the costs of this application and the costs of preparing the Writ filed on today's date, 12 December 2019.

23. It is noted that, as indicated above and agreed between myself and the Defendant, the fees incurred in the underlying divorce proceedings were capped at $50,000. MOM wrote off over $60,000.00 in fees in keeping with the said agreement.

24. Since the above communications with the Defendant on the morning of 12 December 2019, the Defendant has not made any payment towards these fees and the Defendant has not made any proposal for payment of these fees.

25. It is believed that the Defendant communicated with the trustees to have the funds ($400,000.00) transferred into his sole HSBC savings account to bypass the Agreement made between the parties and to avoid payment of the legal fees incurred by the Defendant that are due and owing to MOM.

26. Based on the Defendant's conduct as set out above, in particular, his arrangement with the trustees without the knowledge or consent of myself and contrary to the agreement between us that the funds be paid to his personal account, I am gravely concerned that the Defendant will seek to dissipate the same thereby undermining or defeating MDM's ability to be paid from the said funds. I am not aware that the Defendant's financial position is any different than what he indicated to the accounts department save for receipt of the lump sum of $400,000.

27. Based on the aforesaid, I therefore seek an urgent order in the terms set out in the draft injunction which is exhibited to the Summons for the reasons that I set out herein.

Conclusion

28. Accordingly, I am bringing this application to preserve the funds transferred into the Defendant's sole bank account in order to ensure payment of the outstanding legal fees in accordance with the Acknowledgement of Debt and Payment Agreement to Marshall Diel & Myers Limited dated 22 January 2018.

29. I further seek an order that the Defendant should pay the costs of this application."

18. The transcript of the *ex parte* proceedings before Stoneham J on 13 December 2019 demonstrates that the following additional and, for present purposes, relevant points were made by Mrs Marshall in her oral submissions to the Court:

(1) that it was a term of the Acknowledgement Agreement that she would cap the fees for bringing the matter to a conclusion to $50,000; Mrs Marshall stated that in fact a further $60,000 in fees was incurred but was not billed, because she was "bound by" the Agreement;

(2) that she had notified the Trustee on 28 February 2019 of what she referred to as Mr Crisson's "guarantee" under the Acknowledgement Agreement; however, she had received no response from them;

(3) that on 12 December 2019 Mr Crisson had paid the sum of $100,000 into MDM's bank account in reduction of MDM's fees;

(4) that, nonetheless, MDM was seeking a freezing injunction freezing *all* Mr Crisson's bank accounts, not merely an order preserving the funds received from the trustees into his USD account, in the sum of $ 242,457.99, on the basis that since, according to Mrs Marshall, Mr Crisson had breached the Acknowledgement Agreement which she referred to as a "guarantee", she was proposing to recover the $60,000 that MDM had written off – or as she put it I didn't write it off; I just didn't bill it to him";

(5) that after her affidavit had been filed, Mrs Marshall did receive an email from Mr Crisson saying that he acknowledged that he continued to owe the debt and proposed to pay it off a level of $25,000 per month with the sale of the New York apartment sometime in the spring.

19. The application for a freezing (sic) injunction was made pursuant to Order 29 Rule 2 (1) of the RSC, which refers to the preservation of property, and Mrs Marshall's affidavit referred to a draft of the injunction sought as prohibiting disposal of $ 400,000 held in the Defendant's HSBC account "until the Plaintiff's financial interest in the above-mentioned funds is resolved". Further, in paragraph 26 she said that she was concerned "that the Defendant will seek to dissipate the same thereby undermining or defeating MDM's ability to be paid from the said funds". And at paragraph 28 she says that she is bringing the application in order to "preserve the funds transferred into the Defendant's sole bank account in order to ensure payment of the outstanding legal fees". This is, or is close to, the language to be used for a preservation claim. But neither in the statement of claim nor in her oral submissions, did MDM/Mrs Marshall make any claim to, or assertion of, a lien over the funds to be received by Mr Crisson from the trustees; i.e. the $400,000. Further the reference to a "financial interest" is not in terms a reference to any form of proprietary interest, and, in any event, even if that be too technical an approach, she gave no explanation as to how any proprietary interest was said to arise.

20. The order made by Stoneham J was precisely that which had been sought by Mrs Marshall in her oral submissions, namely a freezing order in the following terms:

> *"Until further order of the Court, the Defendant must not in any way dispose of, deal with or diminish any funds held in any bank account in the Defendant's name, whether held solely or jointly, save for funds in excess of the amount of $242,457.99"*

21. As is apparent that order was not in fact the order, to a draft of which Mrs Marshall had referred in her affidavit, and which she said was being sought. It was in Mareva form.

22. It is trite law that a freezing injunction, which used to be called a *Mareva* injunction, is in concept a different type of injunction from an injunction under Order 29 Rule 2 (1) which preserves, and in that sense could be said to freeze, monies standing to a bank account or other property which "is the subject-matter of the cause or matter" and which is claimed by the parties seeking the injunction to be their property. A freezing injunction on the other hand is not directed at preserving specific funds in specific bank accounts, which are the subject matter of a proprietary, or other claim in the action, but is rather a general injunction freezing all the assets of the defendant, or assets up to a particular amount, so that there will be a fund to meet the plaintiff's claim after judgment, on the basis that there is a risk that the defendant will remove or dissipate his assets, so as to render judgment nugatory. The Chief Justice dealt with this in paragraph 16 of his May 2020 judgment where he correctly summarised the position as follows:

> *"As I noted in Dawson-Darner v Lyndhurst Limited [2019] SC (Bda) 8 Civ, there are important differences between a Mareva injunction and the freezing order under 0. 29 r. 2(1). In particular, in making a preservation order, the Court is not seeking to restrain a party from dissipating its own assets so as to evade enforcement of the judgment, but is merely seeking to ensure that the subject matter of the claim is preserved pending identification of the rightful owner. Furthermore, as the English Court of Appeal noted in Polly Peck International pie v Nadir and Ors. (No.2) [1992] 4 All ER 769 a freezing order under 0. 29 r. 2(1), it is not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal fees, or the like. As Scott LJ noted: "There is, in general, no reason why defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses".*

23. By summons dated 18 February 2020 by Mr Hill, Mr Crisson sought an order that "the Mareva injunction Order, granted by Stoneham J sitting as a judge of this Honourable Court, made in these proceedings on 14 December 2019 be set aside on the grounds set out in the First Affidavit of Andrew Crisson".

24. In his First Affidavit, Mr Crisson stated that he was of the view that the application for the *Mareva* injunction was defective "at its very core" because it failed to disclose a cause of action, there allegedly having been no breach, or accepted breach, of the fee agreement (i.e. the Acknowledgement Agreement) dated 22 January 2019. In addition, Mr Crisson stated that there

was no allegation made that he had any intention of placing his assets beyond the reach of all his creditors and made the point that the bare assertion that Mrs Marshall had such a belief was not sufficient without providing any grounds for that belief. In the May 2020 judgment, paragraph 8, the Chief Justice made the following comment in relation to Mr Crisson's application:

> *"It is apparent that Counsel for the Defendant, Mr Hill, appears to be under the impression that the Order of 13 December 2019 was made under the Mareva jurisdiction."*

I comment that it was perhaps not surprising, given the wording of the order dated 13 December 2019, that Mr Hill was indeed under that impression.

25. In the meantime, there were other procedural developments in the case. Thus:

26. On 18 February 2020 MDM issued a summons seeking summary judgment against Mr Crisson in the amount sought in the specially endorsed writ dated 12 December 2019, namely $282,457.99.

27. On 3 April 2020, Mr Hill sent the Chief Justice a long letter, setting out various administrative and substantive complaints in relation to Mr Crisson's application to set aside the December 2019 order on a timely basis. The letter complained, *inter alia*, that "the *Mareva* order" did not provide for the normal exceptions on account of living expenses and the payment of legal fees by the Defendant. Having considered that letter, the Chief Justice directed that all the matters raised in the letter, to the extent relevant to the application to set aside the injunction, should be raised at the *inter partes* hearing. He further directed that the Court would be willing to consider an application for variation of the Order on account of living expenses and legal fees on the papers, but that for such an application the court required a summons, supporting affidavit and written submissions. In his judgment the Chief Justice stated that he gave that direction on the assumption, as represented by Mr Hill in his letter, that the Order of 13 December 2019 was indeed a *Mareva* injunction. The Chief Justice said:

> *"11 …At that time, it seemed to me, that an application for the Angel Bell exceptions should be determined on an urgent basis, and given the Covid 19 constraints, should be determined on papers only. Nothing said in this Ruling is intended to affect or prejudge the anticipated applications relating to (a) the removal of Mr Hill as Counsel for the Defendant; (b) Defendant's application to set aside the Order of 13 December 2019; and (c) the Plaintiff's application for summary judgment."*

28. In the light of that direction Mr Crisson apparently[6] filed a summons on or around 10 February 2020 seeking to vary the December 2019 order so as to allow him to make the following payments and/or make provision for future expenditure or payments, and/or to meet necessary payments in the ordinary course of business or for his day-to-day living expenses, and or in fulfilment of what were said to be legitimate obligations to third parties:

[6] See paragraph 12 of the May 2020 judgment

"Butterfield Bank (loan arrears)	*$25,000*
HSBC Overdraft Production	*$20,000*
Unpaid Condominium Expenses Arrears	*$6, 298.95*
Legal Fees (accrued and to be accrued)	*$60,000*
Personal expenses (four months' salary)	*$32,000*
Future Living Expenses	*$12,000 pcm".*

29. Shortly thereafter[7], on 6 April 2020 MDM wrote to Mr Hill requiring him to remove himself as attorney of record in the Fee Action in order to avoid "further unnecessary litigation against him" personally. MDM stated that if they did not receive confirmation "of this position by close of business on Wednesday, 8 April 2020 then we will make the necessary application to obtain an injunction to prevent your Mr Hill from acting further".

30. There was considerable discussion in the correspondence about the issue but ultimately on 24 April 2020 MDM issued proceedings ("the Conflict action") seeking an injunction against Mr Hill personally restraining him from continuing to act on behalf of Mr Crisson in the proceedings commenced by MDM against Mr Crisson on the basis that Mr. Hill had acted for MDM in 2015 and 2016 and was alleged to be in possession of confidential information which might be relevant in the Fee Action to the disadvantage of MDM, which thereby gave rise to a conflict of interest. In the light of that application, Mr Hill undertook personally in correspondence that, until the termination of the application against him, he would only advise Mr Crisson in relation to the then pending variation application for expenses to be allowed out of the funds in the accounts.

31. By email dated 21 April 2020 to MDM and Mr Hill at Westwater Hill, the Registrar of the Supreme Court stated that the Chief Justice had directed as follows:

> *"In the exceptional circumstances (where exparte [sic] injunction was granted in December 2019) the CJ directs that the variation application (for living expenses and legal fees) should proceed as previously directed. MDM shall file any evidence and submissions limited to these issues by this Friday, 24 April.* ***Save for this variation application, no further steps will be taken in these proceedings until the issue of restraining Mr Hill from acting in these proceedings has been determined by the Court.*** *In that regard, MDM should file the relevant pleadings as in a fresh action where Mr Hill is named as a Defendant."*

[7] According to Mr Hill, these proceedings were threatened and then issued when it became apparent that the set-aside summons was likely to be heard on an expedited basis, notwithstanding that by this date Mr Hill had been acting as Mr Crisson's Attorney for nearly 5 months.

32. In April 2020, Mr Crisson's application to vary the December 2019 order so as to allow him to make the above payments in accordance with the *Angel Bell* principle, was considered on the papers by the Chief Justice. In the course of his written submissions, Mr Hill for Mr Crisson contended that the correct characterisation of that order was that it had been made under the *Mareva* jurisdiction. Conversely, Mr Adam Richards, of MDM, then acting for MDM, contended that the order had in fact been made pursuant to the jurisdiction set out in RSC Order 29 r. 2(1) dealing with injunctions aimed at "the detention, custody and preservation of any property which is the subject matter of the cause of action". In addition, he relied upon a draft Amended Specially Endorsed Writ of Summons, which MDM intended to file after the application to remove Mr Hill as counsel had been determined, which expressly pleaded that MDM asserted that MDM had a solicitor's lien over the funds, being funds recovered in the ancillary relief proceedings pursuant to the principles confirmed by the Supreme Court in *Gavin Edmonds Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21. Paragraph 12 of MDM's submissions dated 24 April 2020 stated as follows:

> *"12. On the latter point MDM have now prepared a draft amended Writ. The amended document has not yet been filed in light of the application to have Mr Cameron Hill cease to act for the Defendant* ***but is attached to these submissions.*** *Nonetheless, the Defendant has been on notice since the outset of proceedings and certainly since the letter of MDM dated 18 February 2020 that this was MDM's position. The Writ will specifically plead and assert a solicitor's lien and accordingly the Plaintiff contends that the injunction should continue but as a proprietary injunction. MDM undertake to file the amended writ upon the conflict issue being determined and once they have taken independent legal advice Different considerations and safeguards apply in the circumstances. In the alternative, MDM say that the Mareva injunction was granted appropriately and should continue without modification at this stage."*

33. In response, in paragraph 37 of his reply submissions, Mr Hill submitted as follows:

> *"Furthermore, the last-minute concoction of a proprietary right enforceable against funds in the hands of the Plaintiff as a species of proprietary Lien-in and over the proceeds of litigation should be dismissed on the grounds that:*
>
> > *a. No fund to which Order 29 rule 2 could attach is not [sic] featured in the Writ which was the only pleading, and remains the only pleading, before the Court (leave being required before the amendment might become relevant), and;*
> >
> > *b. No mention is made of any such fund in either of the Plaintiff's affidavits in the financial relief proceedings, nor is any such mention made in the submissions and the judge identifies a debt for legal fees in the sum claimed and recorded…*

d. The development of the theory of the proprietary claim is a transparent attempt to establish a cause of action that would entitle the Plaintiff to avoid the consequences of the requirement for the inclusion of Angel Bell exceptions and a good arguable case as a gateway to the entitle to the Plaintiff to any relief."

34. There was a dispute in this Court as to whether Mr Hill or Mr Crisson had, prior to the May 2020 judgment, actually had sight of the draft amended writ and statement of claim, said to have been attached to MDM's submissions. That is not something which we need to resolve for the purposes of this appeal.

35. In his May 2020 judgment, the Chief Justice, having referred to various passages in Mrs Marshall's evidence, and the proposed draft Amended Specially Endorsed Writ of Summons, referred to above, dismissed Mr Crisson's application to vary the *ex parte* injunction against him to permit payments to be made in respect of Mr Crisson's other obligations, on the grounds that the order was not made pursuant to the *Mareva* injunction, but was made for the purposes of preserving the funds until MDM's "interest in the funds could be determined by the court. As such, the *ex parte* Order was not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal fees, or the like". The Chief Justice concluded as follows:

"24. The draft Amended Specially Endorsed Writ of Summons, which the Plaintiff intends to file after the application to remove Mr Hill as counsel has been determined, now expressly pleads that the Plaintiff asserts a solicitor's lien over the funds, being funds recovered in the ancillary relief proceedings pursuant to the principles confirmed by the Supreme Court in Gavin Edmonds Solicitors Limited v Haven Insurance Company ….

25. Subject to any further arguments to be advanced at the application to set aside Order of 13 December 2019 or the application for summary judgment, it certainly seems arguable that the Plaintiff's claim on account of unpaid fees is in the nature of an equitable charge over the sums which have been transferred by the Trustees to the Defendant, consistent with the Judgment of Stoneham J, and which appear to have been transferred in breach of the personal obligation undertaken by the Defendant under the agreement dated 22 January 2018. The fact that MDM at one stage ceased to act for the Defendant does not lead to the conclusion that a solicitor' s lien could never arise (See Healy LLP v Partridge [2019] EWHC 2471). Likewise, subject to further argument, the existence of alternative security does not necessarily preclude the existence of a solicitor's lien. As the decision of the UK Supreme Court in Gavin Edmonds makes clear it is not a necessary condition that the funds be in the possession of the solicitor before a solicitor's lien can arise. Possession of the funds is not a necessary precondition.

26. Leaving aside the reliance on the solicitor's lien, the thrust of what is said by Mrs Marshall in her First Affidavit (paragraphs 4, 17, 18, 21, 25, 26, 28); and

her Second Affidavit (paragraphs 41, 47 to 53) is that the Defendant has acted in breach of paragraph 2 of the agreement dated 22 January 2018, which paragraph was intended, depending upon the Judgment of Stoneham J, to provide security to MDM in respect of the debt acknowledged by the Defendant in that agreement. In the circumstances, it appears to be suggested, that MDM have a proprietary interest in that sum up to the amount of the acknowledged debt. The precise route which gives rise to the proprietary interest is not articulated with any precision but it seems to me, that it is arguable that the conduct of the Defendant in diverting the funds to his personal account in breach of the obligation undertaken by him in paragraph 2 of the agreement, is capable of giving rise to a remedial constructive trust in respect of the funds transferred up to the amount of the Defendant's indebtedness to MDM.

27. In the circumstances, the Defendant's application to vary the terms of the Order of 13 December 2019 so as to provide for the Defendant's living expenses, liability for legal costs and other liabilities set out at paragraph 8 above, falls to be determined on the basis that the Order of 13 December 2019 was made pursuant to the jurisdiction under 0. 29 r. 2(1) and for the purposes of preserving the funds until the Plaintiffs interest in the funds could be determined by the Court. In particular, contrary to the submissions made on behalf of the Defendant, this application to vary the terms of the Order of 13 December 2019 is not to be determined on the basis that the Order was made under the Mareva jurisdiction. It follows, as noted by Scott LJ in Polly Peck, the Order of the 13 December 2019 is not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal fees, or the like. In my judgment, Mr Hill's submissions based upon The Angel Bell exceptions are not applicable to a proprietary injunction and the facts of this case. ***Accordingly, the Order of 13th December 2019 will continue to apply to the funds transferred by the Trustees to the Defendant's bank account at HSBC up to an amount equivalent to the outstanding fees claimed in these proceedings or such other sum as agreed upon by the parties.***

28. My provisional view is that MDM should have the cost of this application but will hear any application to the contrary if made by the Defendant within the next 21 days.

29. In relation to the issue of costs generally, I note the observations of the Defendant made in his First Affidavit dated 10 February 2020. At paragraphs 21 and 22, the Defendant complains that Mrs Marshall set about defending each and every application with aggression and in doing so paid little or no regard to the costs being incurred. He says that all understanding of proportionality was lost, and vast sums were expended in defending the claim that would never amount to more than a few hundred thousand. The Defendant states that the total bill to his lawyers eventually reached $650,000 and he understands that his ex- wife incurred fees that exceed $500,000 in respect of a combined asset pool that amounted to some $900,000 at the time of the trial and mere $800,000

at the time the judge rendered her Judgment. The Defendant expresses the view that the proceedings turned into a feeding frenzy for lawyers, paralegals and accountants and became an unedifying spectacle.

30. In relation to the current application the Defendant is seeking the sum of $60,000 on account of Mr Hill's costs at this early stage of the litigation. No doubt similar legal expenses have been incurred by the Plaintiff. The anticipated applications include (a) the removal of Mr Hill as Counsel for the Defendant; (b) the application to set aside the Order dated 13 December 2019; and (c) the application by the Plaintiff for summary judgment. If the summary judgment is unsuccessful and the matter proceeds to trial, the Defendant has indicated that he anticipates producing expert evidence in relation to the legal representation provided to him by MDM.

31. In these circumstances I am bound to state that unless there is a pause for some serious reflection, Mr Crisson appears once again to be embarking upon litigation where there is a serious risk that his liability for legal fees is likely to exceed the amount which he presently owes to MDM."

36. It is unfortunate that there appears to have been no order formally recording the decision made by the Chief Justice in dismissing Mr Crisson's application. I reiterate, as I have done on previous occasions, the need for orders reflecting decisions reached at first instance to be drawn up and formally entered on the record.

37. The subsequent procedural steps in the proceedings were as follows.

38. On 24 June 2020 Wakefield Quin Ltd went on the record as attorneys acting for MDM in the proceedings against Mr Crisson, in place of MDM itself.

39. On 8 July 2020, the Chief Justice heard the application by MDM in the Conflict action for an interlocutory injunction in terms of the writ of summons, seeking to restrain Mr Hill, and his firm Westwater Hill & Co, from acting for Mr Crisson, with the understanding that, in practical terms, the outcome of the interlocutory application would determine the matter.

40. On 12 August 2020 the Chief Justice delivered a judgment in which he refused to grant MDM an injunction restraining Mr Hill from acting on behalf Mr Crisson in the Fee Action. He concluded:

"Having regard to my conclusions that (a) the affidavits filed in the 2015 and the contempt proceedings are now open to public inspection and any confidential information appearing therein has ceased to be confidential; (b) the confidential material relied upon in paragraph 12 is not relevant to any of the issues in the Fee Action; and (c) there was material delay in objecting to Mr. Hill's representation in the Fee Action, I refuse to grant the injunction restraining Mr. Hill from continuing to act on behalf of Mr. Crisson, the Defendant in proceedings commenced by MDM in the Supreme Court of Bermuda, case number 2019: No. 491."

41. On 18 August 2020 MDM, acting by Wakefield Quin, issued a summons seeking leave to file an amended specially endorsed writ of summons and statement of claim in the Fee action against Mr Crisson. That amended statement of claim included for the first time a claim for constructive trust and the assertion of a solicitor's lien. . The summons was served on Mr Hill by email on 19 August 2020.

42. On 21 August 2020 Stoneham J gave directions for the filing of evidence and ordered that MDM's summons for summary judgment dated 18 February 2020 and Mr Crisson's summons to set aside the freezing injunction obtained by MDM *ex parte* on 13 December 2019 should be consolidated and heard together; and that the matter should be listed for a two day hearing, preferably before Stoneham J if available.

43. On 24 or 26 August 2020 Westwater Hill & Co, on behalf of Mr Crisson, issued an Originating Notice of Motion in the Court of Appeal seeking an extension of time in which to seek leave to appeal against the Chief Justice's May 2020 judgment in which he refused to grant the variation of the December 2019 order. The Originating Notice of Motion was accompanied by a draft notice of appeal and an affidavit of Mr Hill which was subsequently sworn on 3 October 2020, with the Notice of Appeal exhibited and dated 24 September 2020.

44. On 1 October 2020 the Chief Justice made an order giving leave to MDM, acting by Wakefield Quin, to file an amended specially endorsed writ of summons and statement of claim in the Fee action in the form attached to MDM's summons dated 18 August 2020. The order recites that the Supreme Court heard counsel for the plaintiff, MDM, but there is no suggestion that Mr Crisson, or anyone on his behalf, attended the hearing.

45. It is relevant to set out the material provisions of the amended statement of claim, which were as follows (the red type demonstrating the amendments):

> *"7. The ~~Defendant further agreed~~ Agreement[8] provided, inter alia, that upon the conclusion of the entrance of a judgment in his matrimonial proceedings, the Defendant would ask that the trustees of the Andrew L. Crisson Trust exercise their discretion to release to ~~MDM~~ the Plaintiff from the net equity of the sale of a property sufficient funds to clear off his debt to the Plaintiff ~~MDM~~ pursuant to the Agreement ("the funds"). It was an express term of the Agreement that the Plaintiff would cap their fees for additional future professional services undertaken at $50,000 for completion of the case subject to payment of that sum of $50,000 being paid on or before the end of January 2018. Payment was duly made and the Plaintiff continued to act for the Defendant. The Defendant further committed to making monthly payments of $1,500 per month towards the outstanding debt to the Plaintiff.*
>
> *8. The trustees of Andrew L. Crisson Trust were put on notice of the Agreement by way of a letter sent from the Plaintiff to the trustees.*

[8] This was the Acknowledgement Agreement.

9. The judgment in the matrimonial proceedings was entered on 7 November 2019. The Plaintiff made demand for payment pursuant to the Agreement.

10. On or about 12 December 2019, and without the knowledge or consent of the Plaintiff, the Defendant in breach of the terms of the Agreement failed to ask the trustees to make payment of such funds as were necessary to pay to the Plaintiff the agreed outstanding legal fees and instead specifically requested that the funds in the sum of $400,000 be transferred from the trust to his personal HSBC ($USD) savings account in breach of the ~~Acknowledgement of Debt and Payment~~ Agreement.

11 On 13 December 2019 the Defendant paid the Plaintiff the sum of $100,000 in part payment of the outstanding debt but to date despite requests has failed to pay the balance.

12. The Plaintiff asserts a solicitor's lien over the funds, being a fund recovered by the Defendant in the Ancillary Relief proceedings pursuant to the principles confirmed by the Supreme Court in Gavin Edmonds Solicitors Limited v Haven Insurance Company Limited [2018) UKSC 21.

~~12.~~13. Accordingly, the Defendant holds the said funds in constructive trust for the Plaintiff for all sums claimed herein.

~~13.~~14. To date, the Defendant has refused or neglected to make payment of the balance in breach of the ~~Acknowledgement of Debt and Payment~~ Agreement and in breach of the aforesaid constructive trust.

~~14.~~15. Further or in the alternative, the Defendant has breached the Acknowledgement of Debt and Payment Agreement and in such circumstances the Plaintiff should no longer be held to the terms of the Agreement and is entitled to recover the full amount of its legal fees billed for all work undertaken and which remain outstanding in the sum of $236,098.49.

AND THE PLAINTIFF CLAIMS:-

1. 1. Judgment in the sum of ~~$282,457.99~~ $ 236,098.49

~~2.~~ 2. In the alternative, Judgment pursuant to the terms of the Agreement and the aforesaid constructive trust in the sum of $165,250.49

~~3.~~ *3. A declaration that the Plaintiff has a solicitor's lien over the funds that were in the Andrew L. Crisson trust, such funds being limited to the amount owing to the Plaintiff.*

4. Interest;
5. Costs;
6. Such further or other relief that this Honorable Court considers just."

46. On 2 November 2020, Mr Crisson's application to this court for an extension of time within which to apply for leave to appeal against the Chief Justice's decision dated 7 May 2020, came on for hearing before Bell JA, sitting as a single Justice of Appeal of this court. Bell JA refused the application on the grounds that he held that:

> *"The question on this application is whether there exist "good and substantial reasons for the failure to appeal within the prescribed period" per Order 2 Rule 4 (2) of the Rules of the Court of Appeal for Bermuda 1965. In my judgment no such good and substantial reasons have been made out."*

47. He held that the email sent by the Registrar of the Supreme Court on 21 April 2020 did not constrain Mr Hill from continuing to act in the variation proceedings by filing a timely notice of appeal following delivery of the Chief Justice's ruling on 7 May 2020 in relation to the decision of Stoneham J.

48. By a Notice of Motion dated 9 November 2020, Mr Crisson renewed his application for an extension of time in which to apply for permission to appeal to the full court (the President, Sir Christopher Clarke, Sir Maurice Kay and Dame Elizabeth Gloster, DBE, Justices of Appeal). That application was heard by the full court on 17 November 2020 and the extension of time was granted, with directions for the appeal and the application for permission to appeal to be heard together on 20 November 2020.

49. On 20 November 2020 the full court (Sir Christopher Clarke P, and Justices of Appeal Sir Maurice Kay and Dame Elizabeth Gloster) heard the application for permission to appeal and the appeal on a rolled-up basis.

The grant of an extension of time within which to seek permission to appeal

50. There was no dispute that, in the normal course, Mr Crisson should have applied, by Notice of Motion, for permission to appeal[9] the May 2020 judgment on the variation application within 14 days of the delivery of the Chief Justice's judgment, i.e. on or before 21 May 2020; see Rule 2/3 of the Rules of the Court of Appeal for Bermuda ("the Rules"). For the reasons already given, Mr Crisson did not do so – or rather Mr Hill on his behalf did not do so. It was therefore necessary for Mr Crisson to support his application for an extension of time by an affidavit "setting forth good

[9] Permission to appeal was required since his order was an interlocutory order; see section 12(2) of the Court of Appeal Act 1964.

and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which *prima facie* show good cause why the appeal should be heard." Interestingly, neither the Act nor the Rules actually impose the conditions in relation to which the Court of Appeal itself has to be satisfied before it grants an extension of time. Bell JA clearly took the view that it could be inferred from the requirement that the proposed appellant had to provide an affidavit stating "good and substantial reasons for the failure to appeal within the prescribed period" per Order 2 Rule 4 (2) of the Rules, that the Court itself had to be satisfied that there were indeed "good and substantial reasons for the failure to appeal within the prescribed period" before it granted leave. I accept that that is normally what is required but, in my view, the Court has a discretion, in an exceptional case, to give leave if it takes the view that there is good cause why the appeal should be heard notwithstanding there is some inadequacy in the reasons for the delay. There are two questions (a) whether there is good reason for the delay and (b) whether there are grounds which show good cause why the appeal should be heard. The absence of the latter would mean that leave should not be given. But if (b) is established the fact that the reasons for delay are less than "good" is not inevitably fatal.

51. As I have already stated, on 17 November 2020 the full Court granted Mr Crisson an extension of time within which to apply for leave to appeal. Our reasons may be summarised as follows.

52. First, the full Court considered that, objectively, Mr Hill was entitled to take the view that there was some ambiguity in the direction given by the Chief Justice, as set out in the Registrar's email to the parties dated 21 April 2020, as referred to in paragraph 26 above, as to whether the order that:

> *"Save for this variation application ……no further steps will be taken in these proceedings until the issue of restraining Mr Hill from acting in these proceedings has been determined by the Court"*

…prevented the issue of an application for leave to appeal by Mr Crisson against the May 2020 judgment. Mr Hill stated in his first and second affidavits that, upon MDM filing the separate Conflict action, he agreed that "he would only advise Mr. Crisson in relation to the then pending variation application and provided an undertaking to this effect" although no wording was ever forthcoming, other than the Registrar's direction. His affidavits show that he clearly took the view that his undertaking - that he would only advise in relation to the pending variation application - prohibited him taking any steps in relation to an appeal[10]. Of course, it would have been open to Mr Hill to have obtained the agreement of MDM to the postponement of the lodging of a Notice of Motion pursuant to Rule 2/3 seeking leave to appeal until 14 days after the determination of the Conflict action, or, failing agreement, to have applied to the Chief Justice for a stay of that 14 day time period for lodging notice of appeal until the determination of the Conflict action. In our view Mr Hill should at the least have applied to MDM for its consent and can be criticised for not having done so. Although it is fair to say that, given the tenor of some of the correspondence (for example MDM's apparent suggestion that Mr Hill was not even entitled to apply for a transcript of the hearing before Stoneham J - see Mr Pachai's email dated 26 May 2020), Mr Hill may have taken the view that to have done so would have been a waste of time.

[10] See paragraphs 8-11 of his first affidavit dated 3 October 2020; and paragraphs 8-14 of his second affidavit dated 9 November 2020.

53. Nonetheless, unlike Bell JA, we took the view that on its face the wording of the direction could be construed as excluding the taking of any further steps in connection with a proposed appeal so that, in one sense, Mr Crisson was entitled to take the benefit of that direction, given that he was also subject to its burden. However, we do not agree with Mr Hill that the Chief Justice was *functus* in relation to consequential matters such as an application to him for permission to appeal his refusal to vary the terms of the injunction, or in relation to an application that time should stop running in relation to such an application pending the determination of the Conflict action. Nor do we consider that there is any utility, given our overall view on the application for an extension of time, to reach any decision as to whether technically the application to this Court for permission to appeal out of time was to be regarded as part of the "variation application" for the purposes of the prohibition. There was always the possibility (as is the normal course) of making such an application to the Chief Justice in the first instance.

54. Second, because we took the view that, as will be clear from the judgment below, there is considerable merit in Mr Crisson's appeal, in relation to an order which amounts to a very serious interference with his right and ability to service his debts, it would not, in the particular circumstances of this case, be just or proportionate to prevent him from pursuing his appeal on the grounds of his counsel's error in not applying to the Chief Justice either for permission to appeal or for a stay of the 14 day period, if , as Mr Hill thought, he was prevented from acting in connection with an application for leave to appeal. That is not to say that this Court underestimates the importance of compliance with time limits. However, there will be exceptional cases, of which this is one, where a failure to comply with time limits, especially when counsel believed that an order of the Court prevented him from doing so, should not be the determinative factor in a decision whether or not to grant permission to appeal out of time.

55. Third, there was no suggestion that MDM had suffered any prejudice as a result of the delay or the late filing of the notice of appeal. It was the author of the unsuccessful application to remove Mr Hill from acting in the case, which appears to have been at least one causative factor for the delay, and it should bear, at least in some part, the consequences of the delay to which such application gave rise. Moreover, the appeal in reality could not have come on any earlier than it did in the November 2020 session.

56. For the above reasons we granted Mr Crisson an extension of time within which to apply to this Court for permission to appeal.

Summary of the parties' arguments on the substantive appeal

57. Mr Hill, on behalf of Mr Crisson, exhibited an extensive, and unnecessarily diffuse, draft Notice of Appeal to his first affidavit dated 3 October 2020. His skeleton argument for the substantive hearing before this Court, summarised those grounds more briefly as follows:

> *"A summary of the main ground of complaint is that in reaching his conclusion that the Injunction Granted by the Learned Family Puisne Judge, made on 13th December 2019, was proprietary in nature, he ought to have examined the*

various documents available to him and established that the Plaintiff had ***[not]***[11] *established a good arguable case in relation to a proprietary interest based on a solicitor's lien triggered by a breach of that certain agreement dated 22nd January 2018 and headed and known as the Acknowledgment of Debt (the "Acknowledgement").*

2. The Appellant's claim boils down to the following relatively simple and well-established principles:

> *(a) The Statement of Claim, set out in the Specially Endorsed Writ of Summons does not disclose a cause of action because it does not disclose or even allege a breach of the Acknowledgement, and/or*
>
> *(b) The execution of the Acknowledgement had the effect of terminating the rights and obligations of the Parties under the retainer and replacing those rights with the rights contained in the Acknowledgement. The Respondents have never relied on the Retainer.*
>
> *(c) In the event of breach, even where damages flowed from that breach, which is expressly denied in this case, no proprietary or equitable right would arise, and/or*
>
> *(d) In the event that the conduct complained of in the Specially Endorsed Writ of Summons amounted to a breach of the Acknowledgement, which is not accepted, it was not repudiatory, and/or*
>
> *(e) Even if the breach was of such a nature as to be repudiatory the Respondent/Plaintiff did not accept that breach and, on the contrary, confirmed the subsistence of the Acknowledgement. In doing so the Respondent Affirmed the subsistence of the Acknowledgement and the performance by the Parties of the obligations it contains in the manner therein contained2, and/or;*
>
> *(f) The measure of any damages is the difference between the contract being performed in accordance with its terms and the financial consequence that flows from the breach, since under the terms of the Acknowledgement the Respondent/Plaintiff is entitled to the payment of $150,000.00 upon the sale of the Manhattan apartment the sum that would stand unpaid following those two events is likely to be below $10,000.00, and/or;*
>
> *(g) As a consequence of Clause 4 of the Acknowledgement the Appellant/Defendant has expressly agreed with the Respondent that he will make payment on the shortfall in the amount of $1,500.00 per month, and/or*

[11] My insertion in order to correct what I assume is an error on Mr Hill's part.

> *(h) There are no damages consequential upon the alleged, but denied, breach. Since they will be paid in full precisely in accordance with the terms of the Acknowledgement.*
>
> *3. Thus, in the first instance these submissions deal with the Cause of Action as established by the Writ, supported by the additional evidence of Mrs. Marshall, whose status in this litigation is no more than a witness. It is unfair to allow the Respondent to cure the serious defects that existed on day one by filing successive supposedly curative affidavits. The fact that no proprietary claim was included in the initial application and had to be cured thereafter, if it was, bespeaks their understanding that they were not relying on the lien."*

58. Mr Hill also complained, in relation to paragraph 2 a. above, that the amended statement of claim was "allowed on the *ex parte* application and the application was unsupported by an affidavit asserting that the inserted averments were true." I assume that "the *ex parte* application" is a reference to the hearing of the summons to amend which, as I have already said, was served on Mr Hill at Westwater Hill. I assume that Mr Hill did not attend because of the Registrar's direction.

59. In response, Mr Pachai sought to uphold the decision of the Chief Justice in the May 2020 judgment for the reasons which the latter gave, namely that the application to vary the December 2019 order was not to be determined on the basis that it had been made under the *Mareva* jurisdiction, but rather on the basis that MDM had established a prima facie case to a proprietary claim by way of equitable lien or charge against the funds.

The relief sought in Mr Crisson's notice of appeal

60. The relief sought by Mr Crisson in his Notice of Appeal is as follows:

> *"(1) An order setting aside the decision of the Supreme Court dated 7 May 2020; and*
>
> *(2) An Order setting aside the Order of the Supreme Court made by Stoneham PJ on the grounds that the pleadings and affidavit before her disclosed no cause of action, which was a finding that ought to have been made by the Chief Justice, as a jurisdictional threshold test, and/or that having made such a finding he did so in error,*
>
> *(3) Costs be provided for, and;*
>
> *(4) Such other orders as may be just and appropriate."*

61. In other words, Mr Crisson was not merely seeking an appeal against the Chief Justice's refusal to grant a variation order, but was also seeking an order setting aside the injunction made by Stoneham J.

Discussion and determination

62. In my judgment, the Chief Justice was wrong to approach this case on the basis that the claimant, MDM, under the terms of the Acknowledgement Agreement had, or retained, a proprietary lien or claim over the funds paid to Mr Crisson by the Trustee from the A Fund. That meant that the Chief Justice should, on any basis, have acceded to the variation application on *Angel Bell* grounds. Moreover, and perhaps more importantly, I conclude that the Chief Justice, if approaching the matter in the correct manner, should *not* have allowed the *Mareva* injunction, imposed by the December 2019 order of Stoneham J, to stand on any basis. In my judgment that was the position, notwithstanding that he had directed that the application to discharge the injunction should come on at a later date. For these reasons, it therefore follows that I would grant leave to appeal.

63. In coming to this conclusion, I consider it appropriate to approach the matter on the basis that MDM's claim is as formulated in its amended specially endorsed writ of summons and statement of claim, which it was granted permission to serve on 1 October 2020 by the Chief Justice. I take that approach, notwithstanding that the amended pleading was not formally before either Stoneham J or the Chief Justice, because I consider it appropriate to look at the revised claim as now put forward by MDM, not least because the statement of claim has now been formally amended, but more importantly because, leaving aside the issue of costs below, that is the basis on which the case was argued before this Court.

64. My analysis, which leads me to reach these conclusions, is as follows.

Was MDM entitled to assert a solicitor's lien over the US$400,000, paid to Mr Crisson by the Trustee?

65. The first issue to address is whether MDM was entitled to assert a solicitor's lien over that proportion of the proceeds of the family matrimonial home as paid to Mr Crisson by the Trustee from the A Fund on or about 12 December 2019. I remind myself that the order of Stoneham J dated 7 November 2019 provided as follows:

> *"2. The Respondent's needs are to meet a portion of his hard debt (estimated at some $902,656 in total) which can be met by a lump sum of $400,000.*
>
> *3. The needs of the Petitioner as set out in paragraph 1 hereof and the needs of the Respondent set out in paragraph 2 hereof shall be met out of the balance [sic] proceeds of sale of the FMH held by the Trustees of the "A Fund."*

66. The nature of a solicitor's equitable lien, or charge, over the fruits of litigation has been recently restated in the decision of the Supreme Court in *Gavin Edmondson Solicitors Ltd v Haven Insurance Company Ltd* [2018] UKSC 21 (18 April 2018) per Lord Briggs JSC (with whom the other members of the court agreed) as follows:

> *"1. This appeal tests the limits, in a modern context, of the long-established remedy known as the solicitor's equitable lien. In its traditional form it is the*

means whereby equity provides a form of security for the recovery by solicitors of their agreed charges for the successful conduct of litigation, out of the fruits of that litigation. It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit. It is called a solicitor's lien because solicitors used to have a virtual monopoly on the pursuit of litigation in the higher courts. Nothing in this judgment should be read as deciding whether the relaxation of that monopoly means that the lien is still limited only to solicitors.

2. Solicitors have, since time immemorial, been entitled to a common law retaining lien for payment of their costs and disbursements. That is an essentially defensive remedy, which merely enables them to hold on to their clients' papers and other property in their actual possession, pending payment. It affords no assistance where there is nothing of value in the solicitor's possession, and is powerless where, in a litigation context, the defendant to the claim pays the judgment debt or agreed settlement amount direct to the solicitor's client, the claimant. But equity deals with that deficiency in the common law by first recognising, and then enforcing, an equitable interest of the solicitor in the fruits of the litigation, against anyone who, with notice of it, deals with the fruits in a manner which would otherwise defeat that interest.

3. Originally the fruits of the litigation were first identified in the judgment debt. Later this was extended to the debt due under an arbitration award and, later still, to the debt due to the claimant under an agreement to settle the claim. Each of those types of debt was identified as a form of property, a chose in action, in which equity could recognise and enforce an equitable interest in favour of the solicitor. It was called a lien because the chose in action represented the fruits of the solicitor's work. But it is better analysed as a form of equitable charge. Traditionally, the solicitor's interest could not be identified as a beneficial share in the chose, because that would have offended the laws against maintenance and champerty. Rather it was, from the earliest times, recognised as a security interest, enforceable against the fruits of the litigation up to the amount contractually due to the solicitor, in priority to the interest of the successful client, or anyone claiming through him. It did not depend upon the fruits of the litigation including a specific amount for party and party costs, such as a judgment for costs, or an element in a settlement sum on account of costs.

4. In the ordinary course of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant's solicitor to the claimant's solicitor. Or the claimant's solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely

to hold on to the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor's charges again, direct to the solicitor, leaving the payer to such remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced in personam against anyone whose conscience is affected by having notice of them, either to prevent him dealing inconsistently with them, or by holding him to account if he does.

……

36. The authorities on the solicitors' equitable lien (including many of those summarised above) were recently reviewed by the Court of Appeal in Khans Solicitors v Chifuntwe [2014] 1 WLR 1185. The fund in question consisted of a debt arising from the agreement of the Home Secretary to settle pending judicial review proceedings by a payment of a specific sum on account of the claimant's costs. The payment was made direct by the Treasury Solicitor to the claimant (by then acting in person) after express notice from the claimant's former solicitors that they claimed a lien. The Home Secretary was ordered to pay the settlement sum a second time to the solicitors, less an amount already paid by the client on account. Sir Stephen Sedley provided this summary, at para 33:

> *"In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection ought to be preventative but may in a proper case take the form of dual payment."*

37. I consider that to be a correct statement of the law. It recognises that the equity depends upon the solicitor having a claim for his charges against the client, that there must be something in the nature of a fund against which equity can recognise that his claim extends (which is usually a debt owed by the defendant to the solicitor's client which owes its existence, at least in part, to the solicitor's services to the client) and that for equity to intervene there must be something sufficiently affecting the conscience of the payer, either in the form of collusion to cheat the solicitor or notice (or, I would add knowledge) of the solicitor's claim against, or interest in, the fund. The outcome of the case

also recognised that the solicitor's claim is limited to the unpaid amount of his charges. Implicit in that is the recognition that the solicitor's interest in the fund is a security interest, in the nature of an equitable charge."

67. However, it is clear from well-established authority, recently considered by the Court of Appeal of England and Wales in the case of *Candey v Russel Crumpler* [2020] EWCA Civ 26, that a solicitor's lien may be waived by inference if the holder of the lien enters into a new security arrangement with the debtor when the terms of that new arrangement are inconsistent with the terms of the lien he already holds. It is useful to quote the following paragraphs from the Court of Appeal decision in *Candey* which summarises the position on the authorities in relation to the circumstances in which waiver will be found or inferred:

"35. Generally speaking, a person will not be treated as having waived his rights unless he makes an unequivocal representation either by words or by conduct that he forgoes those rights. At the time of making the representation, the person must be aware of the facts that give rise to the rights that are being forgone. The kinds of conduct that can amount to the waiver of a lien include where the parties enter into a new arrangement to provide the creditor with security for the debt already secured by the lien. Waiver can arise by inference if the holder of the lien enters into a new security arrangement with the debtor when the terms of that new arrangement are inconsistent with the terms of the lien he already holds. In Bank of Africa v Salisbury Gold Mining Company Ltd [1892] AC 281, the articles of association of the company provided that where a shareholder was indebted to the company, the company had a 'first and paramount lien' over his shares so that his disposal of those shares was subject to the approval of the directors. A shareholder who was indebted to the company purported to transfer his shares to a third party and that third party then sought to compel the company to register that transfer. The Privy Council held that the lien was effective and that the company was therefore justified in refusing to comply. Lord Watson giving the judgment of the Board of the Privy Council said: (at 284 – 285)

> *"Their Lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. An agreement giving the creditor new and special powers with respect to part of the subjects covered by his original lien may be conceived in such terms as to imply that he is not to have recourse against the remaining subjects."*

36. The courts have always regarded a solicitor's equitable lien as rather more prone to being waived than other rights. The leading authority is Re Taylor, Stileman & Underwood [1891] 1 Ch 590 ('Re Taylor'). In that case a Mrs Payne Collier engaged solicitors to manage the income due to her under a trust, receiving the monies on her behalf and making payments to her. When

she asked them to deliver the papers back to her, they claimed a lien over the papers for their unpaid fees. She argued that their lien had been waived when she and her husband had earlier given the solicitors a joint and several promissory note, payable on demand and bearing interest at 5 per cent to secure what was due from her, together with a charge on a life assurance policy. The issue was whether the solicitor's lien over the documents had been abandoned by the taking of the new security. Lindley LJ held first that the solicitors' lien covered only the fees assessed by the taxing master to be due, not the whole invoiced amount. As to whether the lien had been waived he said: (at p. 597)

> *"In considering this point, we must be careful.* ***Whether a lien is waived or not by taking a security depends upon the intention expressed or to be inferred from the position of the parties and all the circumstances of the case.*** *In this particular instance we are dealing with a solicitor and his client.* ***It strikes me that if a solicitor takes from his clients such a security as this solicitor took the prima facie inference is that he waives his lien. That appears to be the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do.*** *In the case of a banker, I should not draw the same inference, since a banker has not a similar duty towards his customer.*[12]*"*

37. He therefore held that the lien had been waived by the taking of the additional security. Lopes LJ agreed. He said: (at p. 598)

> ***"It appears to me that in each case the question whether the lien is waived by taking security must be decided according to the particular circumstances. I do not mean to say that taking a security necessarily imports an abandonment of the lien; but if there are circumstances in the taking of the security which are inconsistent with the continuance of the old security, it is to be inferred that the solicitor intended to abandon his lien."***

38. Lopes LJ then referred to a number of inconsistencies between the equitable lien and the new security. The promissory note was payable on demand with interest; there was also the charge on the life assurance policy. The promissory note was given by the husband as joint surety. Under those circumstances he held that it was a fair inference to draw that there was an intention between the parties to give up the old security of the lien and to rely on the new security. Kay LJ also held that the true rule was that: (pp. 600-601)

[12] The judgment in Candey does not cite the last sentence of Lindley LJ's judgment in this paragraph. He said "Bearing in mind the position of the parties, and having regard to the decision of Sir John Leach in *Robarts v Jefferys,* we are justified in saying that in the absence of evidence to the contrary, the true inference from the circumstances is that the lien was waived."

"… in every case where you have to consider whether a lien has been waived you must weigh all the circumstances of that particular case, and that it is an important consideration that we are here dealing with the transaction between a solicitor and his own client. A solicitor has a duty to perform towards his client to represent to his client all the facts of the case in a clear and intelligible manner and to inform him of his rights and liabilities, and where you find a solicitor dealing with his client and taking from him such a security as was given in this case, not expressly reserving his right of lien, I quite agree that the inference ought to be against the continuance of the lien."

39. In the later case of Re Morris and others [1908] 1 KB 473, the Court of Appeal also referred to the difference between the position of a solicitor waiving his lien with that of a creditor who is not a solicitor. In that case the solicitors had acted for the client in a number of matters over about two years. The client deposited securities with the firm for the purpose of securing all sums which then were or should thereafter become due from him to them in respect of their fees. The Court found on the facts that the securities had not been intended to cover the solicitors' fees but only to secure counsel's fees and other disbursements so that as a matter of fact the lien was not abandoned. The comments of the court on whether the lien would have been abandoned if the new security had been intended to cover the solicitors' fees were therefore obiter. Lord Alverstone CJ said that the result of the authorities cited to the court was as follows:

> *"Prima facie a solicitor has a lien for his charges upon the papers of his client. This lien may be lost, released, or waived in the same way as the liens which other persons possess. The main difference between the case of a solicitor's lien and those other liens is that, where a solicitor takes any security which is in any degree inconsistent with the retention of the lien, it is his duty to give express notice to the client if he intends to retain the lien, and that, should he not do so, his lien will be taken to be abandoned."*

40. Buckley LJ at the start of his judgment said:

> *"Where a solicitor entitled to a lien takes from his client security upon property already included in the lien, or where such a one takes a security which gives time (say for a period of three years), or which gives a right to interest which would not otherwise be payable, it may well be that the lien is gone. In such case there is a new arrangement between creditor and debtor which, within Lord Watson's words in Bank of Africa v Salisbury Gold Mining Co, is incompatible with the retention of the lien. The existence of the security is inconsistent with the continued existence of the lien."*

> *41. He also agreed that the case of a solicitor differs from that of other persons holding a lien for example, an innkeeper who is entitled to hold on to his guest's luggage until his invoice is paid. This difference 'arises from the fact that it is the duty of the solicitor to explain to his client the effect of that which the client is about to do.' (p. 477). Buckley LJ also confirmed that properly read, the judgments of the Court of Appeal in Re Taylor did not go so far as to say that the taking of any additional security without reservation of the lien would amount to an abandonment of the lien.* ***The facts of the case need to be looked at to see whether the solicitor has taken a security incompatible with the retention of the lien or has made with his client an arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced: see p. 479.*** *Kennedy LJ agreed with the result but applied a broader principle. His inclination was to hold that the fiduciary duty owed by the solicitor to his client meant that whatever the nature of the security, its acquisition in addition to the lien must be an advantage to the solicitor and the taking of something of value from the client. The solicitor must therefore either by express words or by necessary implication make that intention known to his client by reserving the lien. If the solicitor fails to prove that reservation, he should be treated as having abandoned his lien."*

68. The judgment in *Candey* then went on to consider in some detail whether, in the circumstances of that case, there was an inconsistency in material respects between the rights conferred on Candey by the new security arrangements and the security conferred on it by the solicitors' lien. I do not consider it is useful to analyse the decision of the Court of Appeal on the specific facts of that case which were very different from the present.

69. I turn therefore to consider whether, in the present case, the arrangements which were entered into on 22 January 2018 under the terms of the Acknowledgement Agreement were inconsistent with the solicitor's lien which MDM undoubtedly prior to that date had in respect of the fruits of the ongoing ancillary relief proceedings. In summary, as set out above, the arrangements agreed between MDM and Mr Crisson as to how the outstanding debt to MDM should be paid were as follows, in the sequence set out in the Acknowledgement Agreement:

(1) weekly payments, amounting to $ 1,500 per month until the judgement of the court was rendered, secured by way of an attachment of earnings over Mr Crisson's salary;

(2) payment from the net equity of the family matrimonial home (which in fact were the funds within the A Trust), if, after a request by Mr Crisson to the Trustee "to exercise their discretion to release to the Firm [i.e. MDM]" from the equity of the former matrimonial home "sufficient funds to clear off my debt to the Firm", the Trustee paid MDM their fees;

(3) if the Trustee did not do so, or there was not enough to pay the outstanding fees from the equity, then payment would come from the enforcement of the charge over the New York apartment; and,

(4) if the proceeds of sale from enforcement of charge over the New York apartment were not sufficient, monthly payments of not less than $1,500 from Mr Crisson himself.

70. In my judgment, it is clear that this arrangement was, on its express terms, inconsistent with the continuance of the equitable lien/charge which MDM might previously have been entitled to assert over the proceeds of any funds released to Mr Crisson from the A Fund as a result of the claim in the ancillary relief proceedings to have the trusts of the A Fund varied. It is to be observed that such a lien, if it had indeed continued to exist, would have been binding on the Trustee, if it had received notice of such lien. In other words, the Trustee would have been *obliged*, when required by the order of Stoneham J varying the trust to pay $400,000 to Mr Crisson, not to pay that sum to him but to pay the same to MDM *pro tanto* in satisfaction of their outstanding fees; see paragraphs 30-37 of the Supreme Court's judgment in *Gavin Edmondson* supra. The Trustee had indeed been given notice of the Acknowledgement Agreement by Mrs Marshall (see above), and thus, if the lien persisted, if it had failed to pay MDM out of the $400,000 awarded to Mr Crisson an amount equivalent to MDM's fees outstanding at the date of such payment, it would have been liable to have made a second payment to MDM.

71. But the provisions of the Acknowledgement Agreement clearly did *not* impose any requirement on the Trustee to pay MDM under the terms of any lien or any prospective lien. It provides, in effect, that the fees will be paid out of the proceeds of the matrimonial home *if, but only if*, following a request to the Trustee by Mr Crisson, the Trustee *agreed* to release to MDM sufficient funds to clear off the debt. If that did not happen, the payment of funds was to come from the proceeds of the New York apartment and, if that was not enough, by payments by Mr Crisson of not less than $1500 per month. Thus, it was clear from the terms of the arrangement (which expressly envisaged the possibility that the Trustee *might not* exercise its discretion in MDM's favour), that any lien over fruits of the litigation in this respect was not to continue and that MDM was being granted substantial security in addition to the possibility that the Trustee might exercise its discretion as requested.

72. In my judgment, such terms are wholly inconsistent with MDM retaining or reserving any entitlement to a continuing solicitor's lien over Mr Crisson's fruits of the ancillary relief litigation. My conclusion is supported by the following additional matters:

73. There was no suggestion anywhere in the correspondence, or in evidence from Mrs Marshall and Mr Crisson, that MDM at any time suggested to Mr Crisson, when it was obtaining the substantial additional security afforded by the Acknowledgement Agreement, that it was, despite that agreement, expressly preserving or retaining its solicitor's lien over any proceeds of the ancillary relief proceedings. The absence of any such explanation, is, in my judgment, a strong indicator that there was indeed no intention on the part of MDM to retain what otherwise might have been its solicitor's lien. The alternative analysis is that MDM acted in breach of its fiduciary and professional duty to explain the consequences to Mr Crisson, something which I am not prepared to assume against MDM in the absence of evidence to that effect. As the Court of Appeal made clear in *Candey,* at paragraph 56 of its judgment, the client needs to be made aware that, even though he is being asked to grant security over the litigation proceeds on the terms of the new arrangements, the solicitor will still have a first call on any recoveries.

74. Second, there is nothing in the judgment of Stoneham J in the ancillary relief proceedings, or in the terms of the 7 November 2019 order made in those proceedings, which suggests that MDM was asserting, or continuing to assert, a proprietary lien against Mr Crisson. In my judgment, had MDM indeed retained its lien, notwithstanding the Acknowledgement Agreement, it would have been incumbent on MDM to inform Stoneham J, in the course of the ancillary relief proceedings, that in fact the $400,000 was not available to meet Mr Crisson's debts generally, but, on the contrary, was subject to a prior and preferential security in favour of MDM. It is inconceivable, in circumstances where the judge was clearly addressing the issue as to all the "hard" liabilities which Mr Crisson had to meet, that she should not have been informed of that fact by his own solicitors, if it were the case that they retained a lien by way of security over that $400,000. It was clear from the order that her intention was that Mr Crisson should be in a position to meet all his debts, albeit on a proportionately reduced basis, from the monies provided from the A Fund. Neither the judgment nor the order contemplated the idea that a substantial proportion of the $400,000 would have to be used to satisfy an equitable lien/charge in favour of the solicitors. There is no mention at any stage of a secured debt to MDM, and it is not recorded in the list of debts in the proceedings or in the order, the only reference being to the legal fees of both husband and wife. In my judgment it is inconceivable that, if indeed it were the case that MDM had an equitable lien or charge over those funds, no mention of that fact was made in Mrs Marshall's submissions to Stoneham J during the course of the ancillary relief proceedings. That, in my judgment, is strong supporting evidence that no equitable lien or charge subsisted. Further, it is difficult to see how the payment by the Trustee to MDM of a substantial amount of the $400,000 provision could be regarded as giving effect to the judge's ruling that his needs to meet a portion of his hard debts should be met out of the balance of the proceeds of sale. If the judge had really thought that was going to happen, she might have made an order under section 28 (c) of the Matrimonial Causes Act 1974 varying the nuptial settlement so as to provide for by payment to creditors direct.

75. Third, it is clear from the order of Stoneham J of 7 November 2019 (see paragraph 11 of that order) that she was not encouraging, or imposing any obligation on, the Trustee to comply with requests made by Mr Crisson to assist him "to meet his obligations to the Petitioner." If there was indeed any obligation on the Trustee to comply with the request on the part of Mr Crisson to pay MDM, it is surprising that this did not feature in the order.

76. Fourth, there is nothing in the evidence before Stoneham J on the *ex parte* application for an injunction, or in the submissions of Mrs Marshall as appear from the transcript, or her evidence, to suggest that there had been an express reservation of the solicitor's lien, despite the new arrangements concluded under the Acknowledgement Agreement. On the contrary, the thrust of Mrs Marshall's evidence and submissions is that she was relying on an alleged breach of the Acknowledgement Agreement to obtain a *Mareva* injunction to freeze *all* Mr Crisson's bank accounts below the relevant sum.

77. It follows that I cannot, with respect, agree with the analysis of the Chief Justice. There was no "Guarantee" or promise, on the part of Mr Crisson that the Trustee, if requested by him, would indeed exercise its discretion to pay the funds to MDM. The entirety of the circumstances relating to the Acknowledgement Agreement, and the manner in which the parties subsequently behaved, in my view clearly demonstrate that MDM and Mr Crisson (and no doubt the Trustee and the grantors of the Charge of the New York apartment) were operating under those new arrangements.

That, it appears to me, was wholly inconsistent with an entitlement on the part of MDM to look to the proceeds, once received by the Trustees, or by Mr Crisson, for payment of its outstanding fees; and, at the least, is an arrangement which sufficiently indicates the intention of the parties that the pre-existing lien should no longer be available.

78. There are a number of points that I should mention at this stage. First, it is unclear what exactly Mr Crisson said to the Trustees. Paragraphs 38-41 of his first affidavit indicate that he put pressure on them to pay out of the proceeds of sale; that they "began to evince a certain squeamishness about paying such a large sum to my lawyers" and "in the circumstances" he asked them to transfer his share of the net proceeds to his HSBC account. That would appear to indicate that the question of paying the lawyers was raised with them, and that they were unhappy about it, but whether he asked them in terms to pay MDM is not apparent. Whatever ambiguity there may be in the evidence however, what is demonstrably clear is that the Trustee was under no obligation to exercise its discretion in MDM's favour and that the evidence shows not only that the Trustee was reluctant to do so, but also that it did not in fact do so. Moreover, the Acknowledgement Agreement contained no obligation on Mr Crisson's behalf to pay to MDM such money as he may have received from the Trustee.[13]

79. Secondly, it is clear that MDM acted on that refusal on the part of the Trustee and proceeded to take steps to enforce its charge over the New York apartment, on the basis that the Trustee had *not* exercised its discretion in MDM's favour and therefore it was entitled to exercise its rights under clause 3 of the Acknowledgement Agreement. Thus, by letter dated 27 January 2020[14], sent by email and by process server to Mr Crisson, Mr Peter Crisson and Ms Helen Crisson, Mrs Marshall of MDM wrote as follows:

> *"Re-: Marshall Diel & Myers Limited and Andrew Lundin Crisson*
> *Civil Jurisdiction 2019: No. 491*
> *Apartment 8E, 333 55th Street New York*
>
> *We refer to the Charge Over Security Guarantee dated 26 January 2018 executed by Mr Peter Crisson and Mr Andrew Crisson under Authority of an Enduring Power of Attorney given on the 2nd day of February 2017 by Anya Elizabeth Crisson, the joint owner of Apartment 8E, 333 55th Street New York United States of America, and by Helen C Crisson joint owner of the said property. I attach hereto a copy of the said Guarantee for your ease of reference.*

[13] Although Mr Pachai, rightly, did not press the argument before us, we cannot agree with the Chief Justice's suggestion at paragraph 26 of his judgment that "it is arguable that the conduct of the Defendant in diverting the funds to his personal account in breach of the obligation undertaken by him in paragraph 2 of the agreement, is capable of giving rise to a remedial constructive trust in respect of the funds transferred up to the amount of the Defendant's indebtedness to MDM." There are numerous reasons why such an argument would fail; we need only mention that not only did Mr Crisson have no obligation to MDM to pay such sums as he might have received from the Trustee to MDM, but such obligations as he might have to MDM, whether under the terms of the Acknowledgement Agreement or under his retainer of MDM, were not fiduciary obligations, the breach of which could have given rise to a claim in constructive trust.

[14] See pages 189-198 of Exhibit ALC-02.

> *I regret to advise you about Mr Andrew Crisson is in default of his obligations under the Acknowledgement of Debt Due and Payment Agreement to Marshall Diehl & Myers Limited. As such,* ***the purpose of this letter is to activate the Charge Over Security Guarantee and to request that the property located at Apartment 8E, 333 55th Street New York be place [sic] on the market for immediate sale*** *so that the Guarantee to the extent of $150,000 may be met."*

80. We were also told by Mr Hill that MDM had enquired when a sale was anticipated.[15]

81. MDM was clearly not approaching the matter on the basis that Mr Crisson's inability to obtain the Trustee's exercise of its discretion in favour of MDM (whether such inability was in breach of his obligation to request it, or simply because the Trustee refused to exercise such discretion) was a repudiatory breach of the Acknowledgement Agreement. That being so, whilst it is arguable, that MDM might have a claim for damages against Mr Crisson for not complying with his obligation under the Acknowledgement Agreement to request the Trustee to exercise its discretion, it is difficult to see what loss sounding in damages that could result in, since the evidence appears to show that the Trustee was not prepared to pay the funds to MDM. More importantly, even if Mr Crisson had been in breach, such breach does not support or demonstrate any preservation or retention of a right of lien on the part of MDM, let alone a reinstatement of that lien. If the lien was waived, that happened in 2018; and a failure on Mr Crisson's part to make the correct request in 2019 cannot lead to a revival of the lien.

82. Thus, in conclusion, in my judgment, there was no basis on which the Chief Justice could justifiably have concluded that MDM was entitled to a proprietary lien or equitable charge over the $400,000 paid into Mr Crisson's account. So, I would allow the appeal on that ground, in any event, and, subject to the next point, conclude that the Chief Justice should, at the least, have considered whether it was appropriate to grant *Angel Bell* relief to Mr Crisson, given that, on any basis, the injunction should have been characterised as a *Mareva* injunction.

83. But before any consideration of whether *Angel Bell* relief should have been granted, it is necessary to consider whether, as sought in Mr Crisson' Grounds of Appeal, the Chief Justice should in any event have discharged the injunction when it first came back before him on an *inter partes* basis. It is to this issue that I now turn.

Should the Chief Justice have discharged the freezing order made by Stoneham J in any event?

84. In my judgment, it is clear from the evidence before this court, that there was no basis on which Stoneham J should have granted an *ex parte* freezing injunction in the first place, and certainly no basis on which the Chief Justice should have maintained the *ex parte* injunction when it came back before him on an *inter partes* basis, in the absence of a valid claim by MDM to a proprietary lien or charge. In the absence of any entitlement to a preservation injunction on the grounds of an equitable lien or charge, MDM would have needed to show, both before Stoneham J and before the Chief Justice, that there was a real risk of dissipation. But on the evidence no such risk had been demonstrated. Mrs Marshall's submissions to Stoneham J, were, as Mr Hill pointed out in

[15] See paragraph 25 of his skeleton argument for this appeal

his skeleton argument, squarely (and wrongly) based on an allegation that Mr Crisson had "guaranteed" to Mrs Marshall that the Trustee would pay MDM's fees out of whatever was held to be his equity in the former matrimonial home; for example, see the following passages from the transcript of Mrs Marshall's submissions in the *ex parte* hearing:

> "Having quoted paragraphs 1 and 2 of the Acknowledgement Agreement, Mrs Marshall went on to say:
>
> ***Mrs. Marshall:*** *So in the first instance, the--**the guarantee that he was giving me—***
>
> ***Stoneham PJ:*** ***Mm-hmm.***
>
> ***Mrs. Marshall:*** ***--was that the trustees from whatever his entitlement to the equity of--of, uh, Mirabeau would pay the outstanding fees.*** *If there wasn't enough, then, um, I could look to, um, the charge over the New York property. And I might add that--*
>
> ***Stoneham PJ:*** *And that New York property is the apartment owned by the--the mother and brother now, yes?*
>
> ***Mrs. Marshall:*** *It's--it's the mother and the daughter."*

85. But, of course, the actual obligation was very different from how Mrs Marshall described it. There was never any guarantee that the Trustee would pay any sum to MDM as Mrs. Marshal alleged in the above citation.

She then went on to describe the alleged obligation as follows:

> *"Mrs. Marshall: So where I say at paragraph 24 that the defendant has--has not made any payment towards these fees, um, that is now superseded. It is acknowledged that he paid $100,000.00 yesterday. The--the concern, um, Judge, is that aside from these funds, it is unlikely that Mr. Crisson's position as he had described it to my, uh, colleague in my accounts department, which is that he's bankrupt, that there are no other monies **and that once Mr. Crisson does with this money as he wishes, he will effectively have breached the agreement and the guarantee and I will be--and my firm will be--extremely prejudiced. It is for this reason that I bring, uh, this urgent application**, um, seeking injunctive relief, um, and an order in the terms of this proposed injunction. I have amended the figure. What--what we seek is to injunct a sum--and you'll see on page two, paragraph one--a sum of $242,457.99."*

86. Again, the reality was, as is clear from the evidence and the contemporaneous correspondence, that not only had Mr Crisson paid $100,000 to MDM shortly before the *ex parte* application but that he was also intending to use the balance of the funds to pay his other substantial creditors - *precisely* what had been envisaged as to the application of that $400,000 in Stoneham J's judgment. Such conduct hardly, in my view, demonstrates an intention on Mr Crisson's part to place his assets beyond the reach of his creditors; on the contrary, it demonstrated Mr Crisson's proper appreciation of his responsibility to *all* his unsecured creditors and the requirement that they should be treated on a *pari passu* basis. There was no evidence, beyond the bare assertion that Mrs Marshall had such a belief (which was not evidence at all), to support an intention to place assets beyond the reach of creditors or of any risk of dissipation. The thrust of Mrs Marshall's submissions before Stoneham J, and MDM's repeated submissions before the Chief Justice, were based on the incorrect assertion that, under the terms of the Acknowledgement Agreement, not only was Mr Crisson in breach of an obligation to ensure that the necessary sums were made available by the Trustee to ensure payment in full of MDM's outstanding fees, but also that (at any rate before the Chief Justice) MDM had a proprietary lien or charge over the $400,000. Moreover, no appropriate credit was given, apparently, for the $100,000 paid by Mr Crisson in December 2019, Mrs Marshall apparently seeking to resurrect a claim for additional fees which had clearly been written off previously or compromised, as a term of the Acknowledgement Agreement deal.

87. Accordingly, had the Chief Justice considered the case on the basis that MDM held no lien or charge, as, in my judgment, he should have done, and appreciated that Mr Crisson's obligations under the Acknowledgement Agreement were limited to requesting the Trustee to do something which it had no obligation to do (viz pay the $400,000 to MDM), the Chief Justice should not have granted or continued either a preserving injunction under Order 29 Rule 2 or a freezing order under the *Mareva* jurisdiction.

88. This Court, on an appeal, which is a rehearing[16], has wide powers to make such order as the Court may consider just, in addition to allowing or dismissing the appeal[17]. This is emphasised by Rule 2/25 of the Rules which provides that:

> *"2/25* ***Power of Court to give any judgment and make any order***
>
> *25 The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision."*

89. In my judgment, for the reasons which I have given, this case requires not simply that the appeal should be allowed, but also that the injunction against Mr Crisson, restraining him from disposing of, dealing with, or diminishing "any funds held in any bank account in the Defendant's name,

[16] See section 15 of the Court of Appeal Act 1964.
[17] See section 13 of the Court of Appeal Act 1964.

whether held solely or jointly, save for funds in excess of the amount of $242, 457.99", should immediately be discharged In those circumstances it is not necessary for this Court to consider what might have been the appropriate terms of any *Angel Bell* relief.

Disposition

90. It follows that I would grant permission to appeal, allow the appeal and discharge the December 2019 injunction made by Stoneham J and continued by the Chief Justice. Subject to any submissions to the contrary being received within 14 days of the publication of this judgment I would also award Mr Crisson his costs both of the proceedings in this Court and of, and incidental to, the hearing before the Chief Justice.

KAY JA:

91. I agree.

CLARKE P:

92. I also agree.