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Case No:
CO/2690/2022 & CO/2941/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

BETWEEN:

The King on the application of

NATIONAL CRIME AGENCY	**Claimant**
- and -	
WESTMINSTER MAGISTRATES' COURT	**Defendant**
(1) INGLISTON MANAGEMENT LIMITED **(2) LODGE SECURITY TEAM LIMITED** **(3) PETR OLEGOVICH AVEN**	**Interested Parties**

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The King on the application of

(1) INGLISTON MANAGEMENT LIMITED **(2) LODGE SECURITY TEAM LIMITED**	**Claimants**
-and-	
WESTMINSTER MAGISTRATES' COURT	**Defendant**
(1) NATIONAL CRIME AGENCY **(2) PETR OLEGOVICH AVEN**	**Interested Parties**

Jonathan Hall KC, Lyndon Harris & Alex Davidson (instructed by the Legal Department of the National Crime Agency) for the **NCA**

Adrian Waterman KC & Tim James-Matthews (instructed by Hickman & Rose) for **Ingliston Management Ltd & Lodge Security Team Ltd**

Hugo Keith KC & Rachel Scott (instructed by Gherson LLP) for **Petr Olegovich Aven**

Hearing date: 27th September 2022

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Approved Judgment

Mrs Justice Collins Rice :

Introduction

1. Mr Petr Olegovich Aven is a Russian and Latvian national, and long-term UK resident. He has substantial financial interests and assets, here and abroad. He owns valuable real estate in the UK, including three residences (in London and Surrey). But he has never held (in his own name) a UK bank account.

2. Earlier this year, following the escalation of armed conflict in Ukraine, Mr Aven was sanctioned by the EU, and then the UK. The sanctions limit his freedom to deal with his assets.

3. Ingliston Management Ltd (IML) and Lodge Security Team Ltd (LST) are UK-registered companies owned and managed by a Mr Stephen Gater. Both have UK bank accounts, including with HSBC. IML is a 'service company' which has been running Mr Aven's three UK residences and managing the domestic and personal costs of Mr Aven and his family living there. Mr Aven supplied the funds for that. IML employed domestic staff, subcontracted for services, met household bills and expenses, and paid for the family's food, travel, school fees and so on. It gets its name from Ingliston House, Mr Aven's Surrey residence, said to be its 'largest function'. LST provides security services, for the properties and also the family members personally. Although it has other clients, the Ingliston House contract is said to be its 'largest'.

4. Near the time sanctions were imposed on Mr Aven, the National Crime Agency (NCA) was alerted by several banks to an 'unusual' pattern of activity in nine UK bank accounts held by six individuals and companies connected to Mr Aven. The HSBC accounts of IML and LST were among them. The NCA obtained from court, on a without-notice basis, freezing orders in relation to all nine accounts, and then a search warrant, and began further investigations.

5. IML and LST then went to court to try to have the orders freezing their accounts set aside and/or varied. The District Judge refused to set them aside, but did vary them to permit the accounts to be used for the benefit of Mr Aven and his family.

6. By these judicial review proceedings, the companies challenge the lawfulness of the refusal to set the orders aside, and the NCA challenges the lawfulness of the decision to vary them.

Legal Framework

7. Two, distinct, legal regimes provide the framework for the decisions challenged.

(a) The Russia (Sanctions) (EU Exit) Regulations 2019

8. The 2019 Regulations have their origin in the international response to the Russian annexation of Crimea in 2014. Their stated purpose (Regulation 4) is '*encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine*'.

9. They contain a power for the Secretary of State to designate 'involved persons', according to specified criteria relating to that stated purpose. A designated person becomes subject to financial and/or immigration restrictions.

10. Regulation 11 provides for an 'asset-freeze' in relation to persons designated for the purpose of attracting financial restrictions. It makes it a criminal offence for anyone to '*deal with funds or economic resources owned, held or controlled by a designated person*' if they know or have reasonable grounds to suspect that they are doing so. There is a compendious definition of 'dealing with' in regulation 11(4)-(5). Regulation.11(6)-(7) expands on 'owned, held or controlled', which includes situations where assets are owned by a company and it is reasonable to expect that the designated person could, if they chose, achieve the result that the affairs of the company are conducted in accordance with their wishes.

11. Regulation 12 makes it a criminal offence for anyone to make funds available, directly or indirectly, to a designated person if they know or have reasonable grounds to suspect that they are doing so. Regulation 13 also makes it a criminal offence for anyone to make funds available to any other person for the benefit of a designated person on the same basis.

12. By regulation 19 it is a criminal offence intentionally to '*participate in activities knowing that the object or effect of them is (whether directly or indirectly) to circumvent … or to enable or facilitate the contravention of* any of these criminal prohibitions.

13. Regulations 64 and 66 and Schedule 5 provide for a system whereby the Treasury may in some circumstances issue a licence to a particular person, the effect of which is that doing things which would otherwise be prohibited by these provisions is no longer a crime. Schedule 5 lists the purposes for which a licence may be issued. These include (paragraph 2) to enable the 'basic needs' of a designated person and their financially dependent family to be met. Basic needs are non-exhaustively defined to include matters such as food, tax, insurance, rent/mortgage and utility payments.

(b) The Proceeds of Crime Act 2002

14. POCA constitutes a substantial and complex legal regime for the control and recovery, by law enforcement agencies such as the NCA and/or through the courts, of property connected in specified ways to the commission of crime.

15. By section 303Z1, it makes provision for the NCA to apply to a magistrates' court for an account freezing order (AFO) '*if an enforcement officer has reasonable grounds for suspecting that money held in an account maintained with a relevant financial institution (a) is recoverable property*' – that is, in effect, the proceeds of crime – *'or (b) is intended by any person for use in unlawful conduct*'. An AFO prevents withdrawals and payments being made from the account.

16. By subsection (4) of that section, an application for an AFO may be made without notice '*if the circumstances of the case are such that notice of the application would prejudice the taking of any steps under this Chapter to forfeit money…*'.

17. Section 303Z3 sets out the test a court must apply in deciding whether to make an AFO. It may make an AFO '*if satisfied that there are reasonable grounds for suspecting that*

money held in the account (whether all or part of the credit balance of the account) (a) is recoverable property or (b) is intended by any person for use in unlawful conduct'.

18. Section 303Z4 empowers a court at any time to set aside or vary an AFO. Section 303Z5 provides that that power includes a power to make exclusions from the prohibition on making withdrawals or payments from the frozen account (and that exclusions may also be made from the outset). Exclusions '*may (amongst other things) make provision for the purpose of enabling a person by or for whom an account is operated (a) to meet the person's reasonable living expenses, or (b) to carry on any trade, business, profession or occupation*'. An exclusion may be made subject to conditions. By subsection (8), the power to make exclusions must be exercised:

> with a view to ensuring, so far as practicable, that there is not undue prejudice to the taking of any steps under this Chapter to forfeit money that is recoverable property or intended by any person for use in unlawful conduct.

19. An AFO is a preliminary, and necessary, step in the investigatory procedures set out which may ultimately lead to the forfeiture of money in the frozen account (see section 303Z14). It is, for example, one of the preconditions for enabling the issue of a search and seizure warrant (section 352).

Outline of Events

(a) The imposition of sanctions and the opening of the NCA's investigation

20. The current armed conflict in Ukraine, begun in Crimea in 2014, was subject to major escalation by Russia from 24th February 2022, to a level not seen in Europe since the Second World War. The immediate response in Europe and beyond included the imposition of sanctions on certain prominent Russians, including by way of restricting access to and use of assets held outside Russia.

21. On IML and LST's account of matters, a decision was made 'in late February' that a payment of £3.7m would be made from the Austrian bank account of a trust of which Mr Aven was the sole beneficiary, to IML in the UK. They say this was a normal funding stream for IML, and the sum represented an advance payment of six months' worth of regular funding. An invoice was raised accordingly on 27th February, and instructed shortly after midday on 28th February. Mr Aven was made subject to EU sanctions on the evening of 28th February. The transfer was credited on 2nd or 3rd March.

22. According to the NCA, on 1st March, Mr Aven's wife opened a new account into which IML paid £20,000. On 3rd March, IML paid out in the region of £1m to a personal account Mr Gater held with HSBC, a further £1m to the LST account, and another £1m to a third HSBC account linked to Mr Aven. Between 3rd March and the end of the month, Mr Gater made payments out of his personal HSBC account to a second personal account he held with Monzo, at a rate of £40,000 per day to a total of £350,000. Between 8th and 28th March, Mr Gater transferred £140,000 back from his Monzo account to his HSBC account.

23. On 7th March, HSBC bank suspended dealings to and from ('administratively froze') the accounts of IML and LST.

24. Mr Aven's sanctioning by the EU, and the possibility of the UK following suit, was widely reported and discussed here, including in Parliament. On 15th March 2022, the Secretary of State designated Mr Aven under Regulation 5 of the 2019 Regulations, subjecting him to both the financial prohibitions and a travel ban. The following reasons were given:

> PETR OLEGOVICH AVEN is a prominent Russian businessman and pro-Kremlin oligarch. AVEN is or has been involved in supporting the Government of Russia as a Director of Alfa-Bank (Russia), the fourth largest bank in Russia, and its holding company ABH Holding, which are entities carrying on business in the financial sector, which is a sector of strategic significance to the Government of Russia. AVEN is also associated with PUTIN who is or has been involved in destabilising or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, by engaging in, providing support for, or promoting any policy or action which destabilises Ukraine or undermines or threatens the territorial integrity, sovereignty or independence of Ukraine.

25. On the same day, Mr Gater paid over £200,000 to two accounts associated with luxury car dealers. On the evening of the following day, March 16th, the sanctions documentation was served on Mr Gater. The next day, Mr Gater's account received approximately £170,000 from an account associated with a holiday rental company. Other substantial transactions involving Mr Gater's personal accounts, and other accounts of IML and/or LST, are said by NCA to have taken place in the course of March.

26. In late March (23rd-25th) HSBC disabled a number of accounts, including IML's and LST's, on the basis that it considered them to be ultimately funded and controlled by Mr Aven. A series of 'suspicious activity reports' by HSBC and Monzo followed, indicating the banks' suspicions that funds were being moved between these and other accounts to circumvent the sanctions imposed on Mr Aven or were intended to assist with sanctions evasion.

27. On 6th May 2022, the NCA applied to the Magistrates' Court in Reading, ex parte and without notice, for nine AFOs, including for the accounts held by IML and LST with HSBC. The Court granted the applications and imposed AFOs effective for 12 months. The NCA thereupon applied to the Crown Court in Reading for search warrants relating to one of Mr Aven's properties and to Mr Gater's residence. The warrants were obtained, and executed on 9th May. Approximately £80,000 in cash, in eight different currencies, was seized, mostly from Mr Gater's address. An application to court for detention of the cash was made on notice, and heard and granted on 12th May.

(b) The Treasury licences

28. On 4th April 2022, two applications were made to the Treasury's Office of Financial Sanctions Implementation (OFSI) for licences under the 2019 Regulations, to decriminalise activities which would otherwise be prohibited by the sanctioning of Mr Aven.

29. The first was by Mr Aven himself, and made a case based on his 'basic needs' and those of his dependent family. The second was by Mr Gater, IML and LST, relating to steps they wished to take to meet those needs.

30. A limited licence was granted on 27th April, to exempt from sanctions the payment of school fees for one of Mr Aven's children, for the following summer term. The sum was specified, and covered a single transaction from IML to the school.

31. A second licence was granted on 14th June ('the June licence'). This exempted from sanctions certain payments specified by the applicants - from Mr Aven's trust fund's Austrian bank account to IML's bank account and then from IML out again (to LST among others) – to meet the family's 'basic needs'. The exempted payments were subject to maximum limits. The limits were a cap just short of a total of £60,000 per month, plus maximum one-off payments to clear utility and other arrears to a total of some £388,000 (plus VAT).

32. By the time the June licence was issued, the AFOs obtained by the NCA were in place. The amount of funds in the frozen IML and LST accounts stood at £214,757.06 and £113,044.21 respectively – a total of £327,801.27. The licence exempted the transactions in question from the criminal consequences of the sanctions imposed on Mr Aven under the 2019 Regulations. But it did not exempt them from the effects of the AFOs obtained under POCA powers. So no practical action was enabled by the licence alone.

(c) The Applications for discharge and variation of the AFOs

33. IML and LST thereupon applied to Westminster Magistrates' Court, on 23rd June, on notice to the NCA, to vary the terms of the two out of nine AFOs which affected their respective HSBC accounts. The application said it was being made 'simply to allow the licence to take effect'.

34. The application was substantially opposed by the NCA. It did not object in principle to IML receiving Mr Aven's Austrian funds and the use of those funds for utilities and other living costs payments, but it did object – in principle and in practice – to the variation of the AFOs to achieve that. It said to do so would, given the figures involved, expose the accounts to the complete drainage of assets so the funds could never be forfeited, thus defeating the POCA purposes, and that Mr Aven had other means than these particular accounts for meeting his living expenses. A directions hearing on 1st July made provision for any statements of assets and other evidence to be filed by 5th July, but it appears that no evidence was in fact filed by the applicants. The applicants indicated at the conclusion of the hearing that they also intended to apply to have the AFOs set aside in their entirety.

35. Both applications, made on an alternative basis, came before a District Judge at Westminster Magistrates' Court on 8th July 2022. Submissions were made for the applicants that the NCA's ex parte application had been 'muddled, misleading and inadequate'; that the NCA had failed in its duty of candour; that had the true facts been before the court, it would probably not have agreed to proceed ex parte; and that it would have been irrational to impose the AFOs had the full facts been before the court. Although no evidence had been filed pursuant to the applications, the applicants took issue with the factual account and the chronology that the NCA had put to the court at

the time, and made extensive submissions as to the 'true facts'. In particular, they criticised the NCA for telling the court that Treasury licences had been applied for, but not that one had already been granted at the time, and that it had been positively misleading about payments for a 'hairdresser'. The applicants submitted that an application for variation in the circumstances of the licence did not need to be accompanied by any statement of Mr Aven's assets, citing, in support, the decision of the Court of Appeal in *Serious Organised Crime Agency v Azam [2013] EWCA 970*.

36. The Judge rejected the applications to set aside the AFOs. But he made an order varying them. The effect of the variations was to *permit* the same transactions, on the same terms, as set out in the June licence, to be put through the otherwise frozen accounts. The applicants were thereby free, in law, to make payments capable of emptying the accounts, without being under any obligation to make any payments into them.

(d) The Judicial Review challenges

37. The NCA issued Judicial Review proceedings on 26th July 2022 to challenge the variation order. By Order of Swift J of 28th July the variation order was stayed pending determination of permission. On 4th August, Linden J granted permission on three grounds and extended the stay.

38. The NCA's grounds of challenge are:

> 1. The District Judge erred in failing to apply the 'other available assets' principle.
>
> 2. The Judge erred in his approach to the evidence, or absence of evidence.
>
> 3. The Judge took into account an irrelevant/erroneous consideration, namely the 'overlap' between the POCA and sanctions regimes

39. IML and LST issued Judicial Review proceedings on 12th August 2022 to challenge the decision not to set aside the AFOs. By Order of 12th September, Heather Williams J granted permission on one ground, and ordered permission on two other grounds to be considered on a rolled-up basis.

40. The ground on which permission was granted was:

> 1. The District Judge was wrong in law to conclude that a change of circumstances was a legal precondition to the power to set aside an AFO, pursuant to s.303Z4 POCA.

41. The remaining grounds are:

> 2. In any event, the District Judge was wrong in law to conclude that the subsequent identification of a material misrepresentation and/or failure in disclosure, or the provision of corrective information, did not constitute a 'change of circumstances' entitling the court to exercise its power to set aside an AFO, pursuant to s.303Z4 POCA.

3. The District Judge erred in law in refusing to set aside the AFOs, because there were material failures by the NCA in the discharge of the duty of candour.

Analysis

42. Both sets of challenges are to the outcome and reasoning of the District Judge's judgment on the IML and LST application, dated 18th July. Although the applicants had originally asked for variation in the *alternative* to setting aside, they now say, in effect, that the Judge was wrong to have ordered variation after all, and ought to have set aside. And the NCA say he was wrong to have ordered variation because he ought to have refused both applications.

43. The judgment below, in its own terms, is the necessary starting point in these judicial review proceedings. I am of course concerned not with the merits of the Judge's decisions (much less with rehearing the application before him) but with their lawfulness - whether it appears, on the grounds put forward or any of them, that the decision discloses errors making it unsustainable as a matter of public law.

44. I begin accordingly by examining the sustainability of the Judge's refusal to set aside the AFOs. Although the second challenge in time, it is the more fundamental of the two applications before me.

(i) The refusal to set aside the AFOs

(a) The correct approach to an application to set aside an AFO

45. It is not controversial between the parties that, on an application made under s.303Z4 POCA for the setting aside of an AFO, the threshold test to be met for the court's power to arise is the same as that for the equivalent power to make an AFO in the first place. That is the test set out in s.303Z3. A court must decide whether it can be satisfied that *there are reasonable grounds for suspecting* that money held in the account is (on the basis the NCA relies on in the present case) *intended by any person for use in unlawful conduct*. Only if it is so satisfied may it make, or continue (that is, refuse to discharge), an AFO.

46. A test of 'reasonable grounds for suspecting' requires a court to examine the basis put forward for suspicion, and the factual and evidential matrix relied on, and perform an evaluative exercise in assessing whether it can be satisfied that reasonable grounds are made out. The court needs to consider the forward-looking, and potentially conditional, nature of the 'intention' component of the test. It will bear in mind the unconstrained quality of 'any person'. And it will need to consider the mixed questions of fact and law involved in the identification of the 'unlawful conduct' which is the object of the intention. That is all plain on the face of the statutory provisions.

47. It is also not controversial that, on a set-aside application, a court considering the application of the threshold test may need to bear in mind the dynamic nature of the law enforcement investigations provided for, and that that may in turn require the evaluation of the factual matrix not to be backward-looking only, or confined to review of the original decision. The court may have to examine afresh, by considering an

evolving picture and *updated* evidence, whether it can *now* be satisfied that there are reasonable grounds for suspecting – or not.

48. Again, it is plain that, if the threshold test is passed, it gives rise to a power rather than a duty for the court to make (or refuse to set aside) an AFO. In exercising that power, a court must have regard in the first place to the legislative scheme of POCA, within which it has its place and purpose. And there may be other considerations relevant to whether a court makes or maintains an AFO where its power to do so arises. It is not controversial between the parties, for example, that the conduct of the NCA, and wider considerations of fairness, may in an appropriate case come into play and result in the court refusing to make or uphold an AFO even although it is satisfied that reasonable grounds for suspicion are properly made out. On a set-aside application, and particularly where an AFO has been obtained ex parte in the first place, a court will certainly need to be alive to examine the merits of any challenge that the AFO was improperly obtained, or the granting court misled. The court will look at all the circumstances of the matter in such a case. It must, in other words, exercise the power – if it arises on the threshold test – properly and fairly, for the purposes for which it was conferred, in the interests of justice, and on ordinary public law principles.

(b) The Court's statement of the threshold test

49. With that in mind, I turn to the set-aside decision now challenged. The judgment of 18th July extends to 108 paragraphs in total. It sets out the provisions of ss.303Z1-303Z3, 303Z14(4), and some of the relevant definition provisions, of POCA. It outlines the main provisions of the sanctions regime. It briefly rehearses some of the litigation history. The analysis of the setting-aside issue is then addressed from paragraphs [37]-[56].

50. The starting point was this:

> [37] I am satisfied that the relevant standard is the standard to be applied when first making an AFO: ie whether there are reasonable grounds for suspecting that money held in the account is within subsection 1(a) or (b) of s.1.

I accept that can fairly be taken as a reference to the correct legal threshold test. (The reference to 'section 1' does not speak for itself. It may be a reference to s.303Z1(1) POCA, and the test of whether *the NCA* has reasonable grounds for suspecting that money held in a bank account is 'recoverable property' or intended by any person for use in unlawful conduct. The test for whether *a court* may make an AFO is set out at s.303Z3(2). But the substance is the same, and the shorthand reference to the same test for a first application and a set-aside application is in my view sufficiently clear.)

51. The Judge therefore addressed himself to the correct threshold test for the power to set aside. He also had in mind that the two AFOs before him had been obtained on the basis of an ex parte application, that is, on the evidence and submissions of the NCA alone. The two companies and Mr Aven were now represented before the Court: the Court had received full submissions from all the parties, and a fuller and more up-to-date account of the facts was (at least potentially) available to it. So the scene was set for the necessary analysis along the lines set out above.

52. What follows in the judgment is, however, agreed among the parties to be unexpected. It sets out, from [38]-[49], '*two examples of other statutory schemes which may be analogous*' – s.108 of the Sexual Offences Act 2003 and Civil Procedure Rule 3.1(7) – and a certain amount of the caselaw on each. The Court had heard no submissions or argument on any of this material; it appears to have been a product of the Judge's own reflections or researches. It led to this:

> [50] **Setting aside an AFO**
>
> I am satisfied that there must be some restrictions on the circumstances in which an application for setting aside (and indeed a variation) may be entertained. There are good reasons of principle identified throughout the authorities that the power to set aside should be read as being subject to a test of '*change of circumstances*'.
>
> a. This is an application of what Lord Neuberger called '*a matter of ordinary principle*' (Thevaraj v Riordan & ors [2015] UKSC 78 at [18]).
>
> b. A requirement for '*change of circumstances*' would not deprive the claimants of a remedy should they wish to challenge a decision of the court by way of proceedings in the High Court.
>
> c. I am satisfied that where a party wishes to argue that an order should never have been made, that is 'a fortiori' '*in substance and appeal … against the scope of the original order*' (Sadler v Worcestershire Magistrates' Court [2014] EWHC 1715 (Admin).
>
> d. If applications could be made to set aside without a change of circumstances, there could be no limit to the number of times that the subject of an AFO could run the same argument on the same facts, before different tribunals. The potential multiplicity of proceedings cannot be squared with the principle of finality (Tibbles v SIG Plc [2012] EWCA Civ 518 at [39(vii)]; R v Spencer [2013] EWCA Crim 2286 at [13]) or the need to use court time proportionately.

53. In the next paragraph the Judge returned to *Sadler* and quoted with approval that *when the application is to discharge, it seems to me that a change of circumstances is a necessary requirement*.

54. A number of points arise about this analysis. The first is that, although the Judge was intending to be helpful to the parties, it was unfair to have reached such a conclusion *of principle* by reference to *analogy* without giving the parties an opportunity to address and test the strength, if any, of the analogy before being subjected to the principle.

55. The second point is that, on a closer examination of the 'analogous' powers and authorities cited, they do not support the conclusion reached. The read-across from one statutory power to another is rarely simple. Each must always be considered in its full and proper statutory context and it is the comparability or otherwise of those contexts, as well as the precise language, which will determine whether any two powers are truly analogous or not. Here, the proposed analogy between an order imposed on conviction for certain sexual offences, and the general case management powers of a court, on the one hand, and AFOs on the another, is unexplained and far from self-explanatory. It is particularly hard *in general* to infer an analogy between setting aside inter partes, and/or final, orders, on the one hand, and ex parte orders made in a dynamic context which gives them an interlocutory character on the other. And even on its own terms, ***Tibbles*** is clear authority that the principle which is drawn from the analogical reasoning in this case – that change of circumstance is always a necessary hurdle to be cleared on a set-aside application – is unsustainable; the decision clearly sets out *other* bases on which a set-aside application may be granted.

56. The third point is that the judgment appears to read a test of change of circumstances into the threshold test for the power to set-aside in s.303Z4 of POCA arising at all. Change of circumstance is described as a *restriction* on the circumstances in which an application for setting aside *may be entertained*. That is to be distinguished from the entirely orthodox proposition that a court being asked to set aside an AFO needs to look at the factual matrix then before it in considering whether reasonable grounds for suspicion (still) exist. It is instead to import into the s.303Z4 power a restriction which is simply not there.

57. Doing so is not supported by the scheme of POCA. On an application to set aside an AFO obtained by the NCA without giving notice, a court *must* consider, on an unrestricted basis, whether it is satisfied, on *all* the materials and submissions before it, that the test of reasonable grounds to suspect is met. That is the case whether or not the NCA investigation has yet thrown up new material and whether or not the applicants have themselves introduced new evidence. It is an important opportunity for an applicant to challenge the case that was originally made in its absence, simply on its own terms. If the court is not satisfied that the test is met, then it will discharge the AFO. If it is satisfied, it will go on to consider the merits or otherwise of setting-aside, in all the relevant circumstances, within the scheme of the Act, and within the ordinary framework of public law. There is no basis or support within the Act, in the decided authorities, or in principle, for reading a restrictive requirement for change of circumstance into s.303Z4 of POCA. Doing so is a clear error of law. I concur with all the parties in reaching that conclusion.

(c) The court's application of the threshold test

58. Where the parties diverge, however, is as to the effect of that error on the decision below, and as to what can or should be done about it in consequence. IML, LST and Mr Aven say the error is fundamental, even jurisdictional, and fatal. But the NCA says it was not the test the Court in the end applied anyway, and in any event there was no proper basis for setting aside before it, so it could not properly have reached any other decision.

59. Turning first to what the Court actually decided, the judgment went on to summarise in [52] the basis of the applicants' case for setting aside. Here we find three points in three

numbered subparagraphs – that the original application should not have been entertained ex parte at all, that the NCA had failed in its duty of candour, and that the AFOs would not have been made had the true position been understood. The next three paragraphs then set a typographical puzzle. [53] begins with '*In respect of the above points:*' and leads into a subparagraph (i). That subparagraph, beginning '*The NCA said…*', summarises the NCA's answer to the ex parte point. There then follow two paragraphs numbered [54(ii)] and [55(iii)]. The former deals with the immateriality of any failure to inform the court about the April licence, and the latter with the correctness of the court having made the orders on the information it did.

60. The applicants say [53]-[55(iii)] should be read as a summary of the NCA's answer to the three points in the application summarised at [52]. The NCA say they should be read as a summary of the Judge's own conclusions, and hence that these were the reasons for the final conclusion which followed. That conclusion was this:

> [56] Having absorbed the detailed submissions and the documentation relied upon by the parties, I am **not** satisfied that it is appropriate, just or in the interests of justice to set aside the AFOs made by the Berkshire Magistrates Court. The Respondent is to be allowed to continue to investigate matters for the period set out in the Order of the Reading Court.

61. As to the way in which [53]-[55(iii)] should be read, it seems plain enough to me that these are indeed intended to be a summary of the NCA's submissions, as a counterbalance to the preceding summary of the applicants'. The argument that the NCA now makes that these are the Judge's own reasons is unpersuasive. A layout putting all three points as subparagraphs within a single paragraph would surely have put the matter beyond doubt. At its highest, the typography does no more than introduce a degree of arguable ambiguity about the matter which, even if accepted as such, would itself be an unsatisfactory basis for rescuing the preceding analysis from the clear error of law it discloses.

62. Nor am I persuaded that '*having absorbed the detailed submissions and documentation*' can be regarded as effective to perform that rescue either. Having cited the POCA test (reasonable grounds for suspecting that money held in the account is intended for use in unlawful conduct), and then gone on to introduce a further requirement for change of circumstances, the judgment records no findings of fact, or any express conclusion, about either. There is no account of the POCA test being applied to the facts before the court at all.

63. The NCA says nevertheless it can and must be inferred that the court *was* satisfied that the threshold test of reasonable grounds was met, and for the reasons they had submitted. But if a case could *ever* be made for inferring the accomplishment of an exercise requiring the consideration and evaluation of facts and evidence, and a reasoned conclusion, on quite so slender a basis, then the fully articulated error of law in the statement of the test being applied must mean this is no such case.

64. All that appears in the judgment is a bare conclusion that it is not appropriate, just or in the interests of justice to set the AFOs aside. These are relevant considerations to be brought to bear in the latter part of a court's task on a set-aside application, having decided that it was satisfied that the threshold test was passed. The disputed matters

before the court, had that stage been reached, would have related to the conduct of the NCA (and the granting court) in proceeding ex parte, and the allegations of material non-disclosure and of misleading the court. But the judgment does not deal with any of that: it makes no findings of fact, records no evaluation of the merits, gives no further reasons, and states no further conclusions.

(d) The sustainability of the decision not to set aside

65. The combination of clear error of law in the statement of the test, and the absence of findings and reasons in the application of the test, is a powerful indication of the unsustainability of this decision. I turn finally, therefore, to the NCA's submission that the refusal to set aside may nevertheless be upheld as being inevitable – the only decision the court could properly have made.

66. Here, the fact that the threshold test before the court (reasonable grounds for suspecting) required the consideration and evaluation of facts and evidence, and was time-sensitive, is significant. It is relevant that two months had passed between the making of the AFOs and the decision not to set aside – during which there had been significant developments in the NCA's investigations (including as to the search and seizure of cash). It is also relevant that a further two and a half months have passed since.

67. It is significant too that the specific points of challenge raised by the companies and Mr Aven themselves required evaluative engagement with the facts. As an example, the test in s.303Z1(4) POCA for proceeding ex parte involves the original court considering whether proceeding on notice 'would prejudice' the taking of steps with a view to ultimate forfeiture. I have not been shown a transcript of the original application proceedings (there is a note by an NCA officer), but on an application like this to set aside, a court needs to look at the evidence and explanation for prejudice given, and form a view about whether the NCA proceeded properly and/or whether the court was 'wrong' to have granted the orders sought.

68. Again, the applicants relied significantly on a number of particularised respects in which it says the NCA did not tell the original court matters which it ought to have done, and which could or would have led to the ex parte application having been refused on its merits. The NCA says it complied with its duty of candour, and any oversights were unintentional and immaterial. The matters in dispute involve considering what the NCA knew or ought to have known, and what difference if any it would have made had they acted differently. These are fact-sensitive and evaluative matters.

69. The applicants had raised a factual and fairness case against the NCA and the NCA had responded. The court had to address itself to, and decide between, the parties' cases. In all these circumstances, the NCA does not come close to persuading me that the court *could* not have made a lawful decision to set the AFOs aside. It was a decision with an inherent range of imaginable outcomes dependent on the facts, how the court weighed the relevant factors and evidence, and how it finally evaluated all the circumstances and the balance of justice.

70. The same goes for the other parties' opposite case that it was impossible for the court to have made a lawful decision to *maintain* the AFOs. It was said against the NCA, for example, that no court could properly be satisfied that there were reasonable grounds for suspecting that money held in the two accounts was 'intended by any person for use

in unlawful conduct' when the accounts had already been frozen by the banks and then became subject to sanctions, so that they could not be used unlawfully or at all. But again, intention is an issue of fact, evidence and inference. It is necessarily predicated on the counterfactual of the funds not being subject to an AFO. It otherwise requires evaluation of the prospects of the bank reversing its own administrative freeze and/or of the parties contravening the criminal prohibitions in the 2019 Regulations, whether by operating on the accounts without a Treasury licence, or by obtaining a licence and making transactions which are either not in accordance with it or otherwise contravene the remaining criminal prohibitions in the 2019 Regulations.

71. It is impossible in all these circumstances to say there was in July – or is now – only one legitimate decision open to the court on IML and LST's application to set aside. The fact that both parties continue to offer diametrically opposed versions of what that sole legitimate decision might be rather underlines the point. In any event, I consider the errors and omissions I have identified in the decision under challenge to be fundamental to the extent of making it wrong, unfair and excessively speculative to uphold it on any basis. The Court did not properly address itself to or undertake the task required of it at all. The application to set aside the AFOs needs to be considered afresh, and the decision taken properly.

(e) Conclusions

72. For the reasons given, the challenge brought by IML and LST on the ground for which they were given permission for judicial review – namely that *the District Judge was wrong in law to conclude that a change of circumstances was a legal precondition to the power to set aside an AFO, pursuant to s.303Z4 POCA* – succeeds. The Court did not apply the correct approach to the determination of the applications before it. Not only did it wrongly modify the threshold test for its power, it did not apply that test – as modified or at all – to the facts and evidence before it, make the necessary findings, go on to consider the set-aside application on its merits, and come to a properly reasoned conclusion. The decision to refuse the application must be set aside.

73. For completeness, I deal with IML and LST's application for permission for judicial review on two further grounds as follows.

74. I refuse permission for judicial review on the second ground – that *the District Judge was wrong in law to conclude that the subsequent identification of a material misrepresentation and/or failure in disclosure, or the provision of corrective information, did not constitute a 'change of circumstances' entitling the court to exercise its power to set aside an AFO, pursuant to s.303Z4 POCA.* For the reasons given, it is not arguable that the Judge ought to have embarked on an evaluation of change of circumstance as part of the threshold test at all: to have done so would itself have been an error of law. Reading the judgment does not support a conclusion that he did so in any event.

75. The third ground – that *the Judge erred in law in refusing to set aside the AFOs, because there were material failures by the NCA in the discharge of the duty of candour* – was variously characterised in the submissions on behalf of the claimants and Mr Aven, including as a procedural challenge, as a rationality challenge to the decision on its merits and as a point going to remedy. So far as the first two are concerned, this ground is, in light of my decision on the first ground, superfluous. Since the decision falls to

be set aside in any event, the question of its challengeability on other grounds need not be determined. Whether or not there were material failures of disclosure was not addressed and determined by the Court at all; the question would only have arisen had it decided that the threshold test was properly passed, and no such sustainable decision was made. I would refuse permission on this ground also. So far as the latter point, remedy, is concerned, the logic of the decisions I have already made is as follows.

76. Although I did have developed submissions before me going some way into the merits of the matter, I was not rehearing the application to set aside the AFOs in substance. A reviewing court has no access to the tools necessary for evaluating evidence and making the findings of fact which necessarily precede proper judgment on whether tests such as 'reasonable grounds for suspecting', 'would prejudice' or 'material' are met. I was taken to some, but not all, of the evidence before (or available to) the court below. But in any event the threshold test for a decision on whether or not to set aside the AFOs requires proper evaluation of the factual and evidential matrix *now*. That was not fully before me, and although the NCA had provided some later material by way of updated evidence (about some of the detail around the earlier history), it is clearly required by the scheme of POCA, and the public interest to which it gives expression, that the NCA be afforded a proper opportunity to put the current facts before the court, and of course that the other parties have an opportunity to address them.

77. I did not receive full oral submissions on remedy. It perhaps suffices for present purposes, therefore, to indicate that I am minded in all the circumstances I have set out to quash the decision and remit the application to set aside the AFOs for a fresh hearing de novo in the Magistrates' Court.

(ii) The decision to vary the AFOs

78. Since the issue of variation necessarily presupposes that there is something to vary, and the Judge's decision to vary the orders itself necessarily depended on the decision not to set aside which I am now quashing, the question of the sustainability of the decision to vary becomes largely theoretical, or at least conditional.

79. The parties did not make specific submissions on what should happen to the variation decision in the event that the set-aside decision was itself set aside. What follows therefore is directed to two purposes. The first is to explain why in my view the variation order must also be set aside in any event, and why I am minded to remit the variation application (if still pursued) for a fresh hearing along with the set-aside application. The second is to make some observations about the correct approach to variation applications, should the parties and the Magistrates Court consider them to be of assistance in due course.

(a) The power to make exclusions

80. The power to vary so as to make exclusions differs from the power to set aside in some important respects. The court is not being asked on an application for variation to address itself to the same threshold test as applies to original applications for AFOs and for applications to set aside (reasonable grounds for suspecting). The power is instead governed in key respects by s.303Z5 POCA.

81. First, on an exclusions application the court is directed, where appropriate, to the *purpose of enabling a person by or for whom the account is operated (a) to meet the person's reasonable living expenses* or *(b) to carry on any trade, business, profession or occupation*. And second, the court has a *duty*, under subsection (8) of that section, to exercise the power *with a view to ensuring, so far as practicable, that there is not undue prejudice* to the taking of *any* steps under the forfeiture chapter of the Act.

82. These tests again require close attention to the factual matrix and an evaluative decision to be taken in all the circumstances, including giving careful attention to the scheme of the Act. What constitutes someone's *reasonable living expenses*? What, apart from the absence of a variation order, is stopping the person being *enabled* to meet those expenses? What would be the *prejudicial* effect of making exclusions on the taking of taking further steps towards forfeiture? And if there is a prejudicial effect, does the court assess it to be *undue*, and if so why?

83. So in the first place, these constitute another set of evaluative and fact-sensitive considerations which require a full examination of the evidence and which a reviewing court is not equipped to make. Secondly, they make the whole context of the granting of (or declining to set aside) an AFO relevant to the consideration of variation and exclusion. If the set-aside application is to be reconsidered, as in this case, and in the event that the AFOs are *not* set aside or materially varied in other respects, the reasons for the new decision should properly inform consideration of the application for exclusions. In other words, the quashing and reconsideration of the set-aside decision suggests that the exclusions decision ought to be reconsidered in any event. Or to put it another way, the variation decision in this case cannot properly survive independently of the quashing of the set-aside decision on which it was in important respects dependent.

84. The quashing of the set-aside decision makes it undesirable, in these circumstances, to speculate too far on the outcome of the NCA's challenge to the variation decision had I come to a different view about the set-aside decision. I did not come to, or come close to, a different view. Having said that, however, the NCA was granted permission for judicial review of the variation decision on three distinct grounds which I consider to have considerable force in relation to the decision below, and to which the following more specific observations are directed.

(b) The variation decision below

85. The first ground on which the NCA obtained permission was that *the District Judge erred in failing to apply the 'other available assets' principle*. The language of s.303Z5 requires close attention in this context. In particular, the '*purpose of enabling*' is an indicator that before exclusions are made, proper consideration should be given of the disability the applicant would face in the alternative. And the *duty* of the court to exercise the power to vary with a view to ensuring, so far as practicable, no *undue* prejudice to continuing steps towards forfeiture, requires a proper evaluation of the balance of the interests the parties represent, within the overall scheme of the Act, being mindful of the circumstances and reasons for which the AFO was granted (or upheld) in the first place.

86. I was taken by the NCA to a line of authority crystallising out an 'other available assets' principle which it says is another way of thinking about this kind of decision. Put

simply, it points the decision-maker to considering whether or not someone subject to an AFO is *able* to meet their living expenses by having recourse to other available (unfrozen) assets; if so, that will be relevant to whether any prejudice caused to law enforcement by variation is likely to be *undue*.

87. The line of authorities includes *A v C no.2 [1981] QB 961* at 963; *SFO v X [2005] EWCA Civ 1564* at [35]-[36]; *Director of the Assets Recovery Authority v Creaven [2006] 1 WLR 182* at [22]-[23]; *Serious Crime Agency v Azam [2013] 1 WLR 3800* at [53]-[66]; *R v Luckhurst [2021] 1 WLR 1807* at [31]; and *NCA v Davies [2019] EWHC 1282 (QB)* at [19]-[26]. There is detailed guidance here on the relevance of 'other assets' and the proper approach of courts to applications for the release of frozen or injuncted funds. There is room for debate, and legal submissions no doubt, on how to apply that guidance to the specific powers and facts engaged by the present case. But the language of s.303Z5, and such direction or assistance as the authorities supply, has to be engaged with.

88. In the judgment of 18th July 2022, the Court directed itself to the *Azam* and *Davies* cases, and reached this conclusion at [77]: '*Clearly if an applicant has other funds from which he can meet his living expenses other than the funds subject to a property freezing order, the court may decide, in its discretion, not to make the exclusion*'. I do not agree that that is either a general principle derivable from the cases cited, or a full and accurate statement of the applicable law, the correct approach, or the s.303Z5 exercise on which the Court needed to be engaged. The suggestion of a general discretion does not grapple with the statutory language or the duty of the court, and such grappling is entirely necessary.

89. The second, and related, ground on which the NCA was granted permission for judicial review was that *the Judge erred in his approach to the evidence, or absence of evidence*. This ground has particular reference to the Court's approach to evidence of 'other available assets'. The Court had declined, at the directions stage, to *oblige* any of the parties to provide statements of assets. And in the event, the applicants for variation did not provide any evidence about other available assets. There was some information of potential relevance to that question in the material provided by the NCA. But the Court considered it to be of limited interest, declined to 'speculate' on what other funds might be available, did not engage with the applicants' failure to provide evidence, and did not make clear findings, evidential or inferential, about 'other assets'.

90. That appears to have been largely because of a line of reasoning to which the third ground of permission is directed: that *the Judge took into account an irrelevant/erroneous consideration, namely the 'overlap' between the POCA and sanctions regimes*. This line of reasoning proceeded on two premises, the validity of which was maintained before me on behalf of IML, LST and Mr Aven, and disputed by the NCA. The first premise is that, to go back to the terms on which the variation applications were made, the exercise the Court was properly engaged on was making exclusions *to give effect to the June Treasury licence*. The second premise is that there were no other available assets *because everything else was subject to the sanctions regime*.

91. These two premises are opposite sides of the same coin. They present as simple and obvious propositions. But they cannot be allowed to go unexamined by a court on a variation application. It is essential, in particular, not to lose sight of the fact that the

decision of OFSI to grant a licence, and the decision of a court to make an exclusion from an AFO, are entirely distinct decisions, made by different kinds of bodies, for different purposes and with different effects.

92. When OFSI grants a licence, it does so in response to material set out in a relatively detailed form by an applicant and does so for the purpose of exempting the specified transactions from the criminal consequences of the prohibitions in the 2019 Regulations. It does not confer any power or duty to make those transactions which does not otherwise exist. And it does not mean that, *as a matter of law*, those transactions cannot be undertaken with the intention by any person for use in unlawful conduct. Whether there is a power or duty to make the 'licensed' transactions must be sought elsewhere. And whether those transactions, or the money in any account, may be intended for use in any unlawful conduct by anyone must be determined on the facts.

93. An applicant for exclusions from an AFO, in terms coterminous with a Treasury licence, is asking for a legal power they do not otherwise have and which is not conferred by the licence. The licence does not bind the court considering the application, limit its powers, or absolve it from making its own assessment, in accordance with the terms of s.303Z5 POCA, as to the exercise of its powers to make exclusions.

94. Part of the court's consideration of the proper exercise of that power is to address its mind to the position of the applicant, and their potential ability to meet their reasonable living expenses, if the exclusion requested is *not* made. That is not a matter for speculation, it is a matter of evaluating the evidence that is, and is not, put before the court by all of the parties. To state the obvious, an absence of *evidence* of other (potentially) available assets cannot simply be equated by a court with an absence of other assets. Rather, it is a live evidential issue with which a court must engage.

95. Where some or all of an applicant's assets are subject to sanctions, that is not necessarily an end of the matter. It may, in an appropriate case, be relevant to consider the prospects that other Treasury licences, not yet applied for, could permit the availability of funds *not* subject to AFOs for meeting 'basic needs' and 'reasonable living expenses'. A case where an applicant has considerable wealth and complex arrangements for applying it, may be an appropriate case. In any event, a court always needs to be astute to the possibility that an applicant, by *choosing* to apply for a 'basic needs' licence so as to deal with assets which are, or become, subject to an AFO, rather than assets not subject to an AFO, is engaged in an exercise in attempting to assert autonomous control over the 'other available assets' the court may take into account, and in making a direct, if collateral, challenge to the purpose, existence and effectiveness of the AFO in the first place. A Treasury licence is not a blade for hollowing out AFOs, and the sanctions regime is not a shield for protecting 'other assets'.

96. These, I emphasise, are entirely general observations. Their potential application in any particular case is a matter for consideration of the evidence by the court dealing with an exclusions application. I am, of course, not to be taken to be expressing any view about their potential relevance on the particular facts and circumstances of this case. It is no part of my function to do so.

Decision

97. The judgment of the Court handed down on 18th July 2022, and the Order of Variation of the same date, are set aside.