IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 175 OF 2015 (DDJ)

BETWEEN:

HARVEY RIVER ESTATE PTY LTD
FOUR LITTLE GIRLS PTY LTD
THE INDIVIDUALS AND COMPANIES LISTED AT SCHEDULE 4 OF THE ORDER DATED 2 NOVEMBER 2015

Plaintiffs

- and -

(1) PETER CLARENCE FOSTER
(2) ARABELLA LOUISE FOSTER
(3) BANKSIA HOLDINGS LIMITED
(4) THE PARTNERSHIP OF ANNE PATRICIA LARTER, ALAN JONES, MIRALESTE PTY LTD AND LEIGH JOHNSON TRADING AS "STC SPORTS TRADING CLUB"

Defendants

- and -

CAYMAN NATIONAL BANK

Discovery Respondent

- and -

JILL LOUISE FOSTER

Applicant

Before: The Hon. Justice David Doyle

Appearances: John Harris of Nelsons for the Applicant

Heard: 5 March 2024

Additional evidence and written submissions filed with leave of the court: 12 March 2024

Draft Judgment circulated: 13 March 2024

Judgment delivered: 14 March 2024

HEADNOTE

Determination of an inquiry as to damages – relevant law and procedure – lack of opposition – was the injunction wrongly granted – the two-stage process – exercise of discretion as to whether an inquiry as to damages should be ordered (the first stage) – the second stage considers quantum, causation, remoteness and mitigation of damage – the relevance of contractual principles – duty to mitigate – remoteness and foreseeability – causation – equitable jurisdiction and special circumstances – delay in making the application – Fiona Trust at first instance and on appeal – Sagicor General - determination of 3 issues (i) was order wrongly granted? (ii) remoteness and (iii) mitigation – the award of damages – service issue

JUDGMENT

Introduction

1. Jill Louise Foster (the "Applicant") in her Points of Claim dated 16 November 2023 seeks damages against the Plaintiffs in respect of what she says are loss and damage suffered as a result of the Plaintiffs obtaining an *ex parte* asset freezing injunction on 2 November 2015 (the "Asset Freezing Order"). She was not listed as a Respondent but she says that a bank account of her daughter (the Second Defendant) had been assigned to her shortly before the Asset Freezing Order was made. The account at Cayman National Bank was specified at paragraph (1)(d) of Schedule 3 to the Asset Freezing Order namely:

> "Account number 02229391 held in the name of Mrs Arabella Louise Foster."

2. It was not however until her application dated 21 October 2021 that the Applicant sought a variation to delete paragraph 1(d) of Schedule 3. I made an order on 2 December 2021 that the Applicant be joined as a party to the proceedings, and that paragraph 1(d) of Schedule 3 be deleted. I also ordered

the Plaintiffs to pay the Applicant's costs of her application to be taxed on the standard basis if not agreed. I did so for the reasons stated in a judgment delivered on 2 December 2021 (the "December 2021 Judgment"). I should record that the Plaintiffs did not oppose the Applicant's application to vary the Asset Freezing Order to delete paragraph (1)(d) of Schedule 3. Harneys were the attorneys on record but made no appearance and put forward no opposition by way of evidence, skeleton argument or otherwise.

3. It may assist the reader if, by way of further background, I set out paragraphs 8-20 of the December 2021 Judgment:

> "8. As long ago as 2 November 2015, Chief Justice Smellie granted on an ex parte basis an asset freezing order (the "Asset Freezing Order") against the respondents. There was also a disclosure order and leave given to the applicants to use any information obtained in proceedings that had been issued in Australia or were about to be issued in Australia. Paragraph 9 provided that the respondents or anyone notified of the Asset Freezing Order may apply to the Court at any time to vary or discharge the Asset Freezing Order, but they must first inform the applicants' attorneys in writing on at least three days' notice.
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> 9. On 9 June 2016, Justice Mangatal continued the Asset Freezing Order until further order of the Court.
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> 10. From the judgment of Justice Mangatal provided in the documentation placed before the Court it appears that the Plaintiffs commenced proceedings in Australia in respect of the Sports Trading Club and they were obtaining the Asset Freezing Order in aid of such foreign proceedings.
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> 11. It appears that judgment was granted on 9 June 2017 in Australia for - I assume that is Australian dollars - $7,903,189.50 plus interest at $1,845,025.68 against the 6th, 10th, and 11th defendants. The 11th defendant was Arabella Louise Foster ("Arabella") and further judgements were granted in 2019. Copies of such judgments have not been made available to me. I am informed that enforcement action was taken against Arabella but not against the Cayman National Bank account the subject of the application presently before the court. I am informed that Arabella was declared bankrupt on 28 April 2018 and a trustee appointed. I am further told that the bankruptcy was discharged on 21 April 2021.
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> 12. By summons dated 21 October 2021, the Applicant applied to be joined as a party and for an order that the Asset Freezing Order, be "amended and that paragraph 1(d) of Schedule 3 to the said Order be deleted" and that the Plaintiffs pay her costs of the summons.

13. The summons is in effect an application to vary the terms of the Asset Freezing Order so that it does not cover an account (number specified) held in the name of Ms. Arabella Louise Foster ("the Account"). The Applicant seeks an order simply deleting paragraph 1(d) of Schedule 3.

14. The Applicant says that she is the mother of the Second Defendant Arabella and the sister of the First Defendant. The Applicant says the Account was originally opened by Arabella but was assigned to the Applicant on 30 October 2015. The Applicant says that she has been a signatory of the Account since September 2015.

15. The Applicant says that on 30 October 2015 she instructed the bank to make four payments out of the Account, totalling USD$ 350,000.00, leaving a balance of USD$ 339,951.45. These payments were made. On the same date she says she instructed the bank to make two further payments, one of USD$ 150,000.00 to the Applicant's mother and one of USD$ 100,000.00 to the Applicant.

16. Before these payments were made, the bank were informed of the Asset Freezing Order and the Account was frozen.

17. The Applicant says she "did see" the Order made by the Chief Justice on 2 November 2015 and the judgment of Justice Mangatal delivered on 9 June 2016 but she does not specify when.

18. It is curious that the Applicant did not immediately contact the bank in early November 2015 to say that the payments should be made in view of the fact that the Account had been assigned to her, and she could have produced evidence in support of that to the bank and agreed, or an application could have been made to vary the Order then. She says she became seriously ill at the time of "these events". She says that she was not served with any papers relating to these proceedings and "only learned about them much later." That may partly explain the position and the lack of an application in November 2015 or shortly hereafter.

19. The Applicant refers to Arabella's bankruptcy being discharged on 21 April 2021and the trustee in bankruptcy making no claim against the Account "having accepted that the Account had been properly assigned to" the Applicant. No evidence from the trustee bankruptcy has been placed before me.

20. The Applicant adds that she understands that funds held in other accounts which were the subject of the Asset Freezing Order have been paid out pursuant to judgments obtained against Arabella. The Applicant is of ill health and wishes access to "her funds in the Cayman Islands" to assist in the discharge of her medical care."

The Evidence

4. The only evidence presented to the court at the hearing on 2 December 2021 as to why the Applicant had not applied earlier for a variation of the Asset Freezing Order to delete paragraph (1)(d) of

Schedule 3 was contained in the Applicant's affidavit sworn on 15 October 2021 where at paragraph 18 she says that "At the time of these events, I had become seriously ill and my relationship with Arabella (the Second Defendant) was very poor." There was exhibited to the affidavit a medical report dated 11 October 2021 from Dr O Rejda. It refers to heart surgery in 2015 and hospitalization four times in 2021 for surgery for nerve damage. There is reference to the Applicant being house-ridden and often bed-ridden and in need of constant live-in care 24/7. It is stated that the Applicant suffers from Leukemia CML, Fibromyalgia, Hepatitis C, Depression, Chronic migraines and nerve damage to her back and foot which has affected her ability to walk and care for herself.

5. In her second affidavit sworn on 15 May 2023 the Applicant at paragraph 5 says that from "2 November 2015 until 2 December 2021, a period of over six years, I was prevented from accessing my funds in my CNB Account pursuant to the terms of the Injunction Order". At paragraph 10 she adds that "due to ill-health and a lack of funds to pay legal fees, I was unable to apply for the lifting of the injunction until 2021". She adds that she attempted to have the Plaintiffs "consent to the lifting of the injunction from 2019 onwards" but gives no details and exhibits no relevant correspondence in that respect. The Applicant adds:

> "13. It is my case that the Injunction Order should never have been made as regards the CNB Account, or in the alternative that the Plaintiffs wrongfully failed to apply to discharge it within a reasonable time.
>
> 14. As a result of my funds being frozen for more than six years I suffered substantial loss. The funds in the CNB Account constituted the main part of my available funds at the time and, as a result of their being frozen I was evicted from my rented home and experienced severe difficulty in securing alternative accommodation. I was unable to complete the planned purchase of a residential property and was forced to rent thereafter.
>
> 15. I was forced to sell my vehicle to raise funds to meet my accommodation and living expenses. This was at a time when I had severe medical issues, which continue to this day, and details of which are set out in first affidavit. Those medical conditions were worsened by the stress and anxiety caused by the withdrawal of my funds, and my inability to pay for necessary home care.
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> 16. I was also required to seek legal advice and assistance in Australia which was not recoverable as inter partes costs.
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> 17. Further, the lack of access to my funds caused loss both as a result of the funds being frozen in a non-interest bearing account, and from lack of use of those funds

for other investment purposes.

18. I was also required to pay bank costs of CI$5,000 associated with the discharge of the injunction."

6. In her third affidavit sworn on 22 August 2023 the Applicant stated that she remained seriously ill and was to attend hospital for a bone marrow procedure on 30 October 2023. She added that she was no longer able to pay for her private medical insurance and exhibits an email from HCF requesting a payment of $180.40 before 18 September 2023.

7. The Applicant in her fourth affidavit sworn on 30 January 2024 states:

"4. As result of the making of the Freezing Order my bank account numbered 022-29391 (the "CNB Account") held at Cayman National Bank was frozen and I was deprived of the use of approximately $400,000 until the injunction was removed on 2 December 2021. See bank statement JLF4 page [1].

5. The background to this matter is set out in my first, second and third affidavits sworn on 15 October 2021, 15 May 2023 and 22 August 2023.

6. Particulars of the loss and damage which I suffered as a result of the Freezing Order are set out in my Points of Claim filed on 16 November 2023. I am advised that the Plaintiffs have failed to file any pleading in reply, or to make any other response to the Points of Claim. I set out below further details in support of each head of loss.

Introduction

7.

(a) While my funds were frozen for some six years from 2 November 2015 until December 2021, I was placed into a most serious situation financially. Although I did receive a small old age and disability pension from the Australian government, I was in effect deprived of my entire life savings.

(b) This was caused by the actions of a group of people I had never met, and had no knowledge of, as a result of false and baseless 'guilt by association' allegations.

(c) These false allegations were made by a single private investigator who had taken payments from a large group of aggrieved on-line gamblers, and whose motivation was to seize my money for himself, or as it later became apparent, use an injunction as a weapon to fin effect blackmail me into a settlement and hand over a huge part of my savings as a result of my financial desperation. In short, the injunction was a cynical weapon to wrongly deprive me of my own money.

(d) The reason I was placed in such dire straits was because:

- I was unable to work due to age and a number of debilitating serious health issues which rendered me bed-ridden and requiring constant care and frequent hospitalisation.

- My pension was insufficient to allow me to rent a property in which I could live with my aged mother, who was herself in serious decline, and in the final years of her life, and my beloved pets who are my sole comfort and consolation.

- Many of my medical expenses, scans and x-rays, therapies and physio, were not covered by the government public health system, and I was required to pay personally for personal nurses and home care which the government pension did not cover.

- My retirement plan to buy a small home and become rent and mortgage free was frustrated by being deprived on my savings. See JLF4 (2,3,4) It also had the effect that I was unable to take out an equity loan or borrow bridging funds due to age, a lack of assets to use as security, and a lack of income with which I could service such a loan until my funds were eventually unfrozen. The result of this was that I was constantly threatened with eviction and actually evicted several times, which I found very traumatic and hugely humiliating.

- In the past I had sometimes been able to borrow from friends and family, but during this time I was not in communication with my brother, who had his own financial problems, and I was alienated from my daughter mainly due to her inability to understand why I was now destitute.

- Most of my friends who are still alive are elderly pensioners and I did not feel it would be fair to press them for loans when they themselves were not wealthy people. I was just grateful that they sometimes visited me with food or helped by driving me when I could not afford ambulances or taxis.

- I found my poverty confusing, humiliating, and embarrassing. My reaction was that I became seriously depressed and distressed and did not want to see anyone. My doctor tried to counsel me, and confided later he was concerned I might attempt an overdose and so he restricted my medication as much as possible, which resulted in serious pain issues for much of the time.

- With the passage of time and the fact that I have had to move home multiple times, and have spent extended periods in hospital, I have been unable to locate much of the paperwork relating to my losses. There have been occasions where others have dealt with my relocation for me because I was medically unable to do so, and in the process many of my records have been lost. I have included reference to those documents I have been able to locate, but in many instances have to rely on my memory.

Interest and bank charges

8. As at the date of the Freezing Order, the funds on the CNB Account totalled US$399,951.45. See JLF4 [1] The amount remitted to my attorneys on 13 December 2021 following the setting aside of the Freezing Order was $394,222.36. I have only been provided with a statement from 31 October 2021 (1] onwards but it appears that bank charges of $14.40 were applied for 'inactive account fees' and a fee of US$5,585 was applied in respect of the bank's legal and administrative costs in dealing with the application to set aside the Freezing Injunction. By my calculations, this means that the net interest earned on the account over the 6 years and 1 month for which the funds were frozen was US$139.61.

Accommodation costs

9. In December 2015 I was living in rented accommodation at Sovereign Island. Rentals are very high all over this area but I needed to be close to my doctors and the hospital. The rental was $1,200 per week ($5,200 per calendar month) and I had been paying it from a combination of my disability and age pension, government pension advances and hardship grants, my mother's old age pension and some small savings she had, and the sale or pawning of gifts and family heirlooms, including some of my mother's treasured inherited jewellery, which caused her great grief due to their sentimental value to her.

10. I intended to purchase a property using the funds in the CNB Account, and identified a suitable property at 6 Lucania Court, Tambourine Mountain, which was on the market for AUD$522,000 (approximately USD$375,000 at the time, applying the then exchange rate of 1.38). See JLF4 [2,3,4)

11. I anticipated that owning a home, and without ongoing accommodation costs, I would be able to live indefinitely, if modestly, on my pension.

12. With the freezing of my Cayman funds I was no longer able to progress the purchase of Lucania Court, and indeed was unable to meet the rental payments on Sovereign Island. I was forced to leave in 2017 and incurred legal costs and expenses associated with the move.

a.	Rental bond	AUD$7,200.00
b.	Removal costs	AUD$8,650.00
c.	Private ambulance	AUD$1,300.00
d.	Solicitor's costs on eviction	AUD$2,500.00

13. Since 2015 I have had to move house repeatedly as my financial situation has left me unable to make regular rental payments.

14. But for the freezing of the CNB Account, I would have been able to complete the purchase of Lucania Court, which is now worth about AUD$1 million (see JLF4 [2,3,4]. I would not have been obliged to incur rental costs since then, which I estimate have been around AUD$1,700.00 per month or AUD$120,000.00 since the freezing of the account. This is an average figure for my share of rent with my

late mother only, as it is impossible to rent any place in this city for that rental. My rent at Sovereign Islands was three times that figure but I downsized as much as I could after eviction and when I was unable to immediately access my savings in the Cayman Islands.

Transport costs

15. Following the freezing of the CNB Account I was left desperately short of funds and had to sell my Honda car at a loss, in order to obtain cash to meet essential household and medical expenses. I have never been able to buy a replacement car since. As a result, I incurred increased transport costs which I estimate at AUD$180.00 per week.

Health effects and medical expenses

16. The impact of this affair on my health has been disastrous in a number of ways. The stress and worry of being left destitute, of trying to reorganise my life to reflect my altered financial circumstances, and of dealing with the protracted legal dispute, has had a profound effect on my health.

17. I suffer from leukaemia, fibromyalgia and hepatitis which are profoundly debilitating, require frequent in-patient treatment and will eventually result in my death. I also have a number of other related conditions, including a neurological disorder which has compromised my ability to walk and care for myself.

18. With the freezing of my funds I found it increasingly difficult to meet my medical expenses and was eventually unable to pay for the in-home care which I had been previously receiving. This care was withdrawn in January 2019 for non-payment.

19. In 2019 I suffered an injury at home and broke the same foot again (from a previous failed surgery in 2011 and a subsequent break in 2015) which would not have occurred if I were still able to access in-home care.

Australian legal costs

20. I required local legal assistance to deal with this matter, given my poor health and frequent confinement in hospital. The costs of my Cayman counsel have been taxed and I am in the process of attempting to recover them from the Plaintiffs. However, I am advised that the Court has discretion to also award the costs of my Australian lawyers, on the indemnity principle. My Australia lawyer Chris Hannay of Hannay lawyers has provided a letter setting out the costs I incurred in Australia in the course of making the Court application for the lifting of the injunction. See page 10 and 11 of Exhibits (JLF4 [8,9,10,11]"

8. The third affidavit of Israel Hydes sworn on 12 March 2024 exhibits what is stated to be open correspondence during the period October 2019 to November 2021 between the Applicant's Cayman attorneys and the Plaintiffs' Cayman attorneys (Harneys).

9. The Applicant's attorneys wrote to Harneys on 24 October 2019 referring to the assignment of the bank account and requested "consent to the discharge of the freezing injunction so that she may recover access to her funds." By letter dated 14 November 2019 Harneys requested clarification in respect of the identity of the bank account and such clarification was provided on 13 January 2020.

10. Harneys responded on 22 January 2020 stating that they had seen no evidence of the assignment and requested further clarification and explanations. The next correspondence is a letter dated 15 October 2021 to Harneys enclosing a copy of the summons issued by the Applicant and a request that Harneys indicate whether it was opposed. Harneys respond by letter dated 26 October 2021 seeking further clarification and Nelsons provide such on the same day.

The pleadings

11. The Applicant's Points of Claim read as follows:

> "1. By Order dated 1 November 2023 the Court ordered that:
>
> 1. *There be an enquiry into any loss and damage which the Applicant has suffered as a result of the Plaintiffs obtaining an order on 2 November 2015 (and continued by order of Mrs Justice Mangatal on 9 June 2016) and whether the Plaintiffs are liable to compensate the Applicant for any such loss and damage.*
>
> 2. *The Applicant do before 3pm on 16 November 2023 file and serve Points of Claim.*
>
> 2. On 2 November 2015 the Plaintiffs obtained an ex parte Injunction Order (the "Freezing Order") ancillary to proceedings in the Supreme Court of New South Wales. The effect of the Freezing Order was to freeze various assets of the Defendants together with an account at Cayman National Bank numbered 022-29391 (the "CNB Account"). As at the date of the making of the Freezing Order, the balance standing to the credit of the CNB Account was US$399,951.45.
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> 3. The Freezing Order contained at Schedule 1 an undertaking by the Plaintiffs in the following terms:
>
> 1. *If the Court later finds that this Order has caused loss to the Respondents, and decides that the Respondents should be compensated for that loss, the Applicants will comply with any order the Court may make.*

4. *The Applicants will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this Order including the costs of ascertaining whether that person holds any of the Respondents' assets and that if the Court later finds that this Order has caused such a person loss, and decides that the person should be compensated for that loss, the Applicants will comply with any Order the Court may make.*

5. (sic)The funds in the CNB Account were beneficially owned by the Applicant.

6. Subsequent to the making of the Freezing Order the Plaintiffs took no steps either to enforce any claim against the CNB Account, or to discharge the Freezing Order in so far as it related to the CNB Account.

7. On 2 December 2021 the Court ordered that the Freezing Order be varied so as to remove the CNB Account from the scope of the Freezing Order.

8. On 13 December 2023 the Applicant's attorneys received payment from Cayman National Bank of the sums then standing to the credit of the CNB Account, in the sum of US$394,222.36 (net of an administration fee of US$5,585.00 charged by the bank).

9. In the premises, the Applicant was wrongfully denied access to her funds for a period of 6 years and 41 days, and suffered loss and damage as a result.

Particulars of loss and damage

(a) The bank fee of US$5,585.00 was incurred solely as a result of the bank's internal and legal costs of responding to the Applicant's summons for variation of the Freezing Order and thereafter in respect of processing the release of the funds.

(b) As a result of the loss of use of the funds in the CNB Account the Applicant was unable to pay the rent on her accommodation at Sovereign Island and was evicted, was unable to complete the planned purchase of a residential property and was obliged to obtain alternative rented accommodation. In this regard the Applicant claims:

a. Loss of rental bond in the sum of AUS$7,200.00;
b. Removal and associated costs in the sum of AUS$8,650.00;
c. Private ambulance in the sum of AUS$1,300.00;
d. Legal costs in respect of eviction proceedings AUS$2,500.00;
e. Liability for rent which would not have been incurred but for the aborted purchase of the Applicant's intended residential property, in the sum of AUS$120,000.00;
f. Lost increase in value of the intended purchase property over the period during which the Applicants funds were frozen, in the sum of AUS$160,000.00.

(c) The Applicant was obliged to sell her motor vehicle at a loss to raise funds for living expenses, and thereafter incurred increased travel and private ambulance costs estimated at AUS$180.00 per week or AUS$18,720.00 in total.

(d) The Applicant's health is very poor and was adversely affected by the stress and anxiety caused by the financial difficulties into which she was placed by the freezing of her funds. This included the withdrawal of home medical care as a result of the Applicant's inability to pay, which resulted in the Applicant suffering an injury at home.

(e) The Applicant incurred legal costs in Australia in connection with the Freezing Order, in addition to the costs of her Cayman counsel in the sum of AUS$82,140.00.

(f) Damages for stress, emotional trauma and anxiety.

10. And the Applicant claims:

10.1. Damages as particularised above;

10.2. Further or in the alternative, damages to be assessed;

10.3. Interest at such rate and for such period as the Court considers fit; and

10.4. Costs"

The position of the Plaintiffs

12. No appearance by or on behalf of the Plaintiffs was made at the hearing on 5 March 2024 but I am satisfied that they were duly notified of the hearing date when a copy of the Order made on 1 November 2023 was forwarded to their then attorneys on record namely Harneys, on 1 November 2023. I should add that Harneys came off the record on 27 February 2024.

13. The Plaintiffs failed to comply with the order made, on the papers, on 1 November 2023 which provided:

"1. There be an enquiry into any loss and damage which the Applicant has suffered as a result of the Plaintiffs obtaining an order on 2 November 2015 (and continued by order of Mrs Justice Mangatal on 9 June 2016) and whether the Plaintiffs are liable to compensate the Applicant for any such loss and damage.

2. The Applicant do before 3pm on 16 November 2023 file and serve Points of Claim.

3. The Plaintiffs do before 3pm on 15 December 2023 file and serve Points of

Defence.

4. The Applicant do before 3pm on 12 January 2024 file and serve any Points of Reply.

5. The parties do before 3pm on 31 January 2024 exchange any evidence upon which they intend to reply.

6. The parties do file and serve duly paginated bundles before 3pm on 9 February 2024.

7. The parties do exchange and file skeleton arguments and authorities before 3pm on 20 February 2024 and such skeleton arguments where they refer to documents within the bundles should include the paginated page references.

8. The parties do file before 3pm on 27 February 2024 an agreed list of issues for the hearing.

9. The hearing shall commence at 10am on 5 March 2024 with one day allocated."

14. The Plaintiffs failed to file their Points of Defence. They did not provide any evidence. They did not file a skeleton argument and authorities. They did not participate in the filing of paginated bundles or an agreed list of issues for the hearing.

15. Mr Harris did however fairly and properly draw to my attention an email dated 31 August 2023 which was duly exhibited to the second affidavit of Israel Hydes sworn on 29 February 2024 and which stated:

> "We refer to Mr Harris' request that this matter be dealt with on the papers without the need for a hearing. Notwithstanding that Harneys does not have instructions to appear or take any steps on our clients' behalf, we respectfully submit that an application of this nature should be considered in open Court. Further, Harneys feels obliged to set out some pertinent information for the Court to consider before it determines the application.
>
> As the Court will be aware, the Plaintiffs were the victims of the Sports Trading Club (*STC*) fraud perpetrated by Peter and Arabella Foster. As set out in the various affidavits of Kevin Gamble, funds from the STC fraud were transferred from STC Australia to STC Hong Kong, then to Bella Development and East Ocean, and then the Second Respondent and the Third Respondent. The CNB Account 022-20391 (*CNB Account*) was opened in Arabella Foster's name. Between 7 October 2014 and 22 October 2014, US $749,915.60 was deposited into the CNB Account by East Ocean.
>
> On 21 September 2015, Jill Foster was added as a signatory to the CNB Account. On 30 October 2015, Jill Foster made four payments totalling US$350,000 out of the CNB

Account, leaving a balance of US$399,951.45. The very same day, Jill Foster and Arabella Foster purportedly entered into a deed of assignment (the *Deed*) whereby Arabella assigned the CNB Account to Jill Foster. Jill Foster claims that Arabella Foster owed her a US$500,000 contribution made by Jill on Arabella's behalf in relation to a failed joint venture agreement in Fiji that was entered into in October 2008. Arabella Foster would have been approximately 22 years old in 2008. According to the Deed "accounting for some repayments subsequently made to Jill subsequently" Arabella and Jill agreed the debt was (conveniently) capitalised at US$400,000. On 2 November 2015, the CNB Account was frozen pursuant to the injunction. On 9 June 2017, the Plaintiffs obtained judgment against (amongst others) Arabella Foster. Judgment was not sought or obtained against Jill Foster.

Regardless of the validity or otherwise of the assignment of the CNB Account to Jill Foster, the uncontested evidence filed in these proceeding indicates that the funds held in the CNB Account were the proceeds of the STC fraud and therefore the funds stolen from the Plaintiffs. Jill Foster now has the benefit of the remaining balance of $399,951.45. Similarly, no explanation was provided by Jill Foster for the four payments she made totalling US$ 350,000 on 30 October 2015 (referenced Loan 1, 2, 3 and 4). Notwithstanding Harneys' inability to obtain instructions from the Plaintiffs, which we understand arise from the Plaintiffs' impecuniosity (which in part was caused by the fraud perpetrated on them) we would observe that in our view, it would be unconscionable for the Plaintiffs to suffer further losses at the hands of the Fosters for restraining money that they were defrauded of. Similarly, it would be unconscionable for Jill Foster to profit from the restraint of the fraudulently derived funds (whether or not she was involved in the fraud).

These observations are made without instructions and for the benefit of the Court and the administration of justice."

16. I also note the Applicant's undated written submissions in respect of the summons for an inquiry and her responses to the points made by Harneys. She says:

"14.1. The Email is based on affidavits filed in Court by a Mr Kenneth Gamble, the contents of which have been disputed by the Applicant in her own evidence. Far from Mr Gamble's evidence being unconstested, as Harneys claim, it is the Applicant's rebuttal of that evidence which has not been contested, because the Plaintiffs have declined to appear.

14.2. It would have been open to Mr Gamble- or any other representative of the Plaintiffs – to file affidavit evidence in response to the Summons, but they elected not to do so. In the circumstances the Court should not allow the Plaintiffs the benefit of unverified, undefended assertions made by counsel.

14.3. As the Email admits, "judgment was not sought or obtained against [the Applicant]". The Court is entitled to infer that the reason no such judgment was sought was that no case against the Applicant could be made out.

14.4. The statement that "the funds held in the CNB Account were the proceeds of the STC fraud and therefore the funds stolen from the Plaintiffs" is without any evidential basis in these proceedings. If the Plaintiffs were able to substantiate such a claim, they would have sought to enforce against the funds in the CNB Account. They did not.

14.5. Likewise, there is no evidence to support Harneys' statement that their lack of instructions stems from their 132 clients' impecuniosity. There is no evidence of this. It is far more reasonable to assume that the STC investors have accepted that their claim against the Applicant and the CNB Account was unjustified from the start.

14.6. Harneys go on to state that it would be 'unconscionable' for the Applicant to recover damages from the Plaintiffs, or for the Plaintiffs to "suffer further losses at the hands of the Fosters". There is no proper basis for Harneys to seek to associate the Applicant with her brother's fraud, given the Plaintiffs' failure ever to advance a claim against her."

17. Harneys in the email dated 31 August 2023 hint at an illegality defence. I note that the Applicant is the sister of the First Defendant and the mother of the Second Defendant but I should make it plain that the Applicant was not a Defendant and I have seen no pleaded allegations of fraud against her or any evidence to support them.

The issues for determination

18. Belatedly on 29 February 2024 Mr Harris filed a list of issues for determination by the court:-

"1. Whether the Applicant is entitled to rely on the undertakings provided to the Court by the Plaintiffs recorded at paragraph 4 of schedule 1 to the injunction Order.

2. Whether the undertaking ought to be enforced.

3. Whether the Applicant has suffered any damage by reason of the granting of the injunction.

4. Whether the various heads of claim advanced by the Applicant meet the ordinary tests of causation, remoteness and foreseeability.

5. Whether the Applicant should be awarded interest whether as damages, in lieu of damages, on damages, or at all.

6. Whether the Applicant is entitled to her costs of the present application.

7. Whether the Court should make provision for alternative means of service of any order made at the present hearing."

The submissions

19. The following are extracts from Mr Harris's belatedly filed skeleton argument dated 28 February 2024:

"Damages claimed

9. Jill has filed a pleading and evidence to the effect that she has suffered loss including: 9.1. Bank fees; [6 paras 8, 9(a)] [75 para 18, 115 para 8, 119] 9.2. Rental, eviction and removal costs and lost profits as a result of the forced abandonment of a planned property purchase; [6 para 9(b)] [75 para 14, 114-115 paras 7(d), 116 paras 9-14, 120- 122] 9.3. Travel expenses; [6 para 9(c)] [75 para 15, 116 para 15] 9.4. Damage to her health, the withdrawal of at-home medical care and resulting injury; [6 para 9(d)] [75 para 15, 107-111, 117 paras 16-19, 123-125 9.5. Local legal costs in dealing with the injunction; [6 para 9(e)] [75 para 16, 117 para 20, 126-129] 9.6. Stress, emotional trauma and anxiety; [6 para 9(f)] [75 para 15, 117 paras 16-19] 9.7. Interest for loss of use of the funds in the CNB account [6 paras 9, 10.3]

10. Jill acknowledges that there will be some element of overlap in some of these heads of claim. For example as between damages for loss of profit on her planned house purchase and interest for loss of use of funds.

Submissions

11. The Court must assess whether Jill has sufficiently proved her case and consider issues of causation, remoteness and mitigation.

12. Jill's evidence is the only material before the Court. Her evidence is unchallenged. Despite the Plaintiffs' having had ample opportunity to file material to rebut her claim, they have chosen not to do so. It is the best evidence available to the Court. Absent any manifest falsehood it should be accepted at face value.

13. Jill accepts that her evidence is largely unsupported by contemporaneous documents, but this is understandable within the context of her personal position. (see especially the final paragraph of [115 para 7(d)]. The Court is reminded that, per *Fiona Trust*, 'an over eager scrutiny of a defendant's evidence and minute criticism of its methodology will not be appropriate.'

14. Jill's evidence makes clear that the losses claimed flow directly from the making of the injunction and were caused entirely by the lack of access to her funds. Those losses were easily foreseeable. It is to be expected that when a private individual's

funds are frozen they will lose the ability to meet their ordinary living costs, and that natural consequences will flow from that.

15. It is clear from the authorities referred to above that the Court should adopt a liberal approach when assessing Jill's claim.

16. The Court should also bear in mind that Jill is a stranger to the dispute between the parties in these proceedings, against whom no claim has ever been advanced, and is an involuntary litigant."

20. I have considered the oral submissions of Mr Harris which form part of the court record and which it is not necessary to set out in detail in this judgment. I have also considered the concise supplementary written submissions dated 12 March 2024.

The Law

21. Having provided a brief introduction and dealt with the evidence, the pleadings, the position of the Plaintiffs, the issues for determination and the submissions I now turn to the relevant law.

22. In respect of he relevant law, Mr Harris included just two authorities in his bundle of authorities namely *Sagicor General Insurance (Cayman) Limited v Crawford Adjusters (Cayman) Limited* 2011 (1) CILR 130 and *Fiona Trust v Privalov (No 2)* [2016] EWHC 2163 (Comm). I should also record that an appeal from such judgment was dismissed – see [2017] EWCA Civ 1877 and I have considered the judgment of Beatson LJ delivered in the Court of Appeal of England and Wales and make further reference to it below.

Was the injunction wrongly granted?

23. Chapter 11 "The undertaking in damages" of *Gee on Commercial Injunctions* (7th edition, Sweet & Maxwell 2021) contains a useful summary of the relevant law and practice, its history and development and is a useful starting point. In respect of an inquiry as to damages the initial question is whether the injunction was "wrongly granted." In *Yukong Line Ltd v Rendsburg Investments Corp* [2001] 2 Lloyds' Rep 113 Potter LJ at paragraph 32 added: "That term is in my view preferable to 'improperly obtained', because impropriety seems to me to carry connotations of improper conduct by the applicant, such as non-disclosure of material facts, whereas the terms 'wrongly granted' covers the far wider circumstances in which the injunction may be discharged

and an inquiry ordered. In respect of those wider circumstances it is necessary, for the purposes of the argument in this case, to distinguish between the position where the order is attacked on the grounds that the court lacked jurisdiction to make it and the position where the court makes an order within its jurisdiction but which is subsequently demonstrated or conceded to have been too wide in its scope or unjustified or inappropriate on the facts."

The two-stage process

24. There appears to be a two-stage process.

The First Stage

25. First, the exercise of discretion as to whether an inquiry as to damages should be ordered (the "First Stage"). At that initial stage the applicant must produce some credible evidence that the applicant has suffered loss as a result of the making of the Order and show an arguable case that the sustained loss falls within the wording of the undertaking. Potter LJ in the *Yukong* appeal stated that: "The court will not order an inquiry if it appears to be pointless to do so because the intended claim for damage is plainly unsustainable. That may be because it is clear that the order is no more than the factual context for loss which would have been suffered regardless of the granting of the order, or it may equally be clear that the damage is too remote." However at the First Stage the court should not hear protracted argument on whether the claimed loss will be recoverable. Potter LJ at paragraph 35 added: "If the defendant shows that he has suffered loss which was *prima facie* or arguably caused by the order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making of the order in practice passes to the defendant and an inquiry will be ordered ….".

26. In *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 the Court of Appeal of England and Wales held that the court had an unfettered discretion, to be exercised on ordinary equitable principles, whether or not to enforce an undertaking as to damages in all the circumstances of the case. Where it was determined that the interlocutory injunction should not have been granted, the court would ordinarily exercise its discretion in favour of enforcing the undertaking. Where an interlocutory injunction was discharged and an application made for the enforcement of the undertaking as to damages before the trial, the court could enforce the undertaking forthwith and

address the damages immediately, or determine that the undertaking should be enforced and order an inquiry as to damages or adjourn the application to trial on further order or refuse it but (per Neill and Mann LJJ) ought not to order an inquiry as to damages before determining whether the undertaking should be enforced.

27. Peter Gibson LJ in the *Ricketts* appeal at page 1556 referred to *Griffith v Blake* (1884) 27 Ch D 474 and 477 and the comment that if an interlocutory injunction is found to have been wrongly obtained, for example through failure to disclose material evidence or through error or misapplication of law then save for "special circumstances" the court will exercise its discretion in favour of the respondent by enforcing the undertaking. Peter Gibson LJ at page 1557 stated "If the respondent delays unduly in seeking an inquiry as to damages, he may be refused."

28. Peter Gibson LJ at page 1558 added:

> "The court will of course first consider whether or not the injunction was wrongly granted, and in so doing it will confine itself to the facts available at the time of the order. But all the circumstances of the case must, in my judgment, be considered when the court decides whether to exercise its discretion as to the enforcement of the undertaking …"

29. In *Fiona Trust v Privalov* [2014] EWHC 3102 (Comm) [2014] 2 CLC 551 Andrew Smith J at paragraph 12 stated:

> "… prima facie a person who has suffered loss as a result of an interim order being wrongly made against him is entitled to be compensated for his loss: indeed in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430 Neuberger LJ said that he can normally expect an enquiry as to damages "virtually as of right" (at paragraph 42)".

30. Andrew Smith J at paragraph 21 added:

> "The court might refuse an inquiry to a person who does not have clean hands or on some other principled basis (for example, because the applicant has been guilty of laches in seeking to enforce the undertaking). But equity never interpreted the 'clean hands' maxim to preclude equitable relief whenever a person was guilty of misconduct: 'The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for'…'".

31. In considering whether to enforce the undertaking as to damages two important factors will be

whether the plaintiff succeeded on the merits of the claim and whether there was a real risk of dissipation of assets.

The Second Stage

32. The second stage is the hearing of the inquiry as to damages itself where the main focus will normally be on quantum, causation, foreseeability, remoteness and mitigation of damage issues (the "Second Stage").

The relevance of contractual principles

33. In determining losses incurred as a result of an injunction the court at the Second Stage normally carries out an assessment with reference to ordinary contractual principles (*Fiona Trust & Holding Corp v Privalov* [2016] EWHC 2163 (Comm), [2017] EWCA Civ 1877; *F.Hoffmann-La Roche & Co AG v Secretary of State* [1975] AC 295 at 361 per Lord Diplock; *Sagicor General Insurance (Cayman) Limited and others v Crawford Adjusters (Cayman) Limited and others* 2011(1) CILR 130 per Henderson J).

34. Andrew Smith J in *Fiona Trust v Privalov* [2014] EWHC 3102 (Comm) at paragraph 35 stated:

> "The damages to be paid on an application of this kind are, the authorities say, to be assessed 'by analogy' on the same basis as for breach of contract … Thus, the order must be an effective cause of the loss, and damages cannot be recovered if they result from a failure to take proper steps to avoid or to mitigate loss, including taking reasonable steps to apply for a variation of an order, for example to allow a business to continue… there may be cases in which the analogy would be applied with some flexibility as far as concerns the principles about remoteness of damages. Here, as it seems to me, that the analogy is imperfect in that:
>
> > (i) The rules in *Hadley v Baxendale* are presumably applied by reference to the knowledge of or attributed to those who obtained the interim relief and gave the cross-undertaking, and not that of both parties to the undertaking (the applicants and the court) or both parties to the subsequent inquiry (not least because the interim order might have been obtained without notice to the other party to the inquiry).
> >
> > (ii) The principles are to be applied … not only by reference to knowledge at the time that the undertaking was given but also by reference to knowledge while the interim order was continuing."

35. The English Court of Appeal (Arden, McCombe and Vos LJJ) in *Abbey Forwarding Ltd (in liquidation) v Hone (No 3)* [2014] EWCA Civ 711; [2015] Ch 309 held that on an inquiry as to damages on the enforcement of a standard cross-undertaking in damages in a freezing order, the assessment of whether a particular loss resulting from the freezing order is recoverable is made on the same basis, by analogy, as that on which damages for breach of contract is assessed, save that logical and sensible adjustments may be required because the court is not awarding damages for breach of contract but compensating for loss for which the defendant should be compensated. For a loss to be recoverable, the remoteness rules only require that the claimant giving the undertaking should have reasonably foreseen loss of the type which was actually suffered by the defendant and not the particular loss within that type. If the claimant has knowledge of special circumstances giving rise to a potential type of loss, or other actual knowledge of a particular loss, it will be recoverable, but what amounts to such knowledge will be intensely fact-sensitive. Claimants are not liable for loss which they could not have foreseen when the injunction was granted. The jurisdiction of the court also allows for some flexibility. Labels such as "common law damages" and "equitable compensation" are not useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.

36. It was also held that in an appropriate case, general damages can be awarded on a cross-undertaking in respect of an inappropriately obtained freezing order for upset, stress, loss of reputation, general loss of business opportunities, and general business and other disruption including adverse effects of the inappropriate policing of the injunction on the injunctees. Such damages should be realistic compensation for what has occurred, neither "modest" nor "generous".

37. It was also observed that courts must be realistic as to the dilemma facing a defendant when served, out of the blue, with a freezing order. Some claimants are far from reasonable in practice. Applications for variation are not simple, take time to prepare and are not without cost. Approaches to claimants to agree variations, or to provide suitable written indications to banks or other third parties that particular payments are not caught by the order, are often not straightforward. If, in such circumstances, a defendant is shown to have suffered an unusual loss the claimant should not be surprised if the court orders him to pay for it.

38. Sometimes at the Second Stage the decision made at the First Stage may, if necessary and appropriate, be revisited. For example in *Balkanbank v Taher* [1995] 1 WLR 1056 a consent order directing an inquiry as to damages sustained by the defendant "which the plaintiff ought to pay", when no argument was addressed to the court on whether the undertaking ought to be enforced was construed as not precluding the plaintiff from subsequently contending that as a matter of discretion the undertaking should not be enforced. It was in that case that Staughton LJ made his memorable comments at page 1063:

> "Even the unarguable is sometimes argued at great length, as somebody once said. But I will not tell you of which counsel."

39. At the Second Stage the starting point for assessment of damages under the undertaking is a similar basis to assessing damages for breach of contract as if the undertaking was a contract that the plaintiff would not prevent the defendant from doing what he was restrained from doing by the terms of the injunction. What is to be awarded by way of compensation, if anything, is limited to what is covered by the undertaking.

Duty to Mitigate

40. It is often said that the applicant is under a duty to mitigate his loss.

41. It is well established in contract law that a person cannot recover damages for any part of his loss consequent upon another's breach of contract that such person could have avoided by taking reasonable steps (*Chitty on Contracts* Volume 1 General Principles Thirty-fourth edition at paragraph 29-096). It is not a "duty" to mitigate but rather a restriction on the damages recoverable, which will be calculated as if the party had acted reasonably to minimise his loss. The onus of proof is on the contract breaker who must show that the person claiming damages ought, as a reasonable person, to have taken certain steps to mitigate his loss, and that the loss or a part of it could have thereby been avoided. Any loss which is directly caused by a failure to meet this standard is not recoverable (Chitty paragraph 29-098). The question as to what it was reasonable for a person to do in mitigation of damage is not a question of law but one of fact in the circumstances (Chitty paragraph 29-099). Sometimes the impecuniosity of an applicant may be relevant if the applicant is unable to mitigate for lack of funds and such was in the plaintiff's reasonable contemplation (Chitty paragraph 29-100).

42. As soon as the applicant discovers, or ought to have discovered, the breach of contract the applicant should take reasonable steps to mitigate loss (Chitty paragraph 29-104).

43. The courts however must consider how realistic a variation application would be in the particular circumstances of the case. Arguments that an applicant should have avoided the claimed loss by applying for a variation are sometimes met with scepticism (*Hone v Abbey Forwarding* [2014] EWCA Civ 711; [2015] Ch 309 at [65] and *SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corpn) v Privalov* [2017] EWCA Civ 1877 ; [2018] WLR 5623at [55]-[57] per Beatson LJ).

Remoteness

44. I was not addressed in any meaningful detail on the basic contractual principles of damages but have revisited *Hadley v Baxendale* (Chitty paragraphs 29-124 to 29-128). The term "remoteness of damage" refers to the legal test used to decide which types of loss caused by the breach of contract may be compensated by an award of damages (Chitty paragraph 29-124). The classic statement is contained in *Hadley v Baxendale* (1854) 9 Ex. 341. Alderson B at 354-355 stated:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual curse of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

45. Losses that arise "in the usual course of things" are within the first rule or limb of *Hadley v Baxendale* and those that are recoverable only because they were contemplated by the parties fall under the second rule. The effect of subsequent cases may be summarised as follows. A type or

kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question) it was within their reasonable contemplation as a not unlikely result of that breach (Chitty paragraph 29-128).

46. The applicant's impecuniosity will be relevant if the second rule in *Hadley v Baxendale* is satisfied namely at the time of contracting if the contract-breaker had actual knowledge of special circumstances under which a breach was likely to cause the applicant greater or different loss from that to be normally expected under normal circumstances. The applicant's impecuniosity could be a "special circumstance" if within the knowledge of the contract-breaker. The applicant must act "reasonably" in mitigation but what is reasonable for an applicant known to be impecunious may be different from the case of a person with financial resources (Chitty paragraph 29-101).

47. A plaintiff will not normally be liable for loss which is too remote, taking into account what types of loss could reasonably have been contemplated by the plaintiff at the time the undertaking was provided. The principles of remoteness will usually apply (*Abbey Forwarding Ltd v Hone (No 3)* [2015] Ch 309). As a matter of fairness the court will as a matter of practice usually only award damages for loss which was reasonably foreseeable at the time the undertaking was provided, and which would be recoverable in an assessment of damages for breach of contract. With freezing injunctions damages may include damages in respect of emotional damage. Damages for upset, stress, loss of business opportunities, loss of reputation and other disruption may be claimed. However the damage needs to be shown to be caused by the injunction itself, as opposed to the stigma of the underlying claim (*Hone* at [104]-[110] and [150] – the measure of damages in that case was £15,000 per respondent).

48. Potter LJ in *Yukong* appeal at paragraph 36 stated:

> "The question of what is the appropriate test of 'remoteness' in the context of a claim for damages on a cross-undertaking is a point which has not been fully explored in the English cases … the court should adopt similar principles to those relevant in a claim for breach of contract … However, it is not necessary to go into the niceties of that question for the purposes of deciding this appeal."

Causation

49. The burden of proof is on the defendant to prove that the loss was suffered as a result of the injunction. It is normally sufficient if the injunction was an effective cause of the loss (*SCF Tankers*

Ltd (formerly Fiona Trust and Holding Corp) v Privalov [2018] 1 WLR 5623 at [40]-[46] (EWCA)). An injunction which prevents a defendant from dealing with his assets may be the cause of loss.

50. Before any issue of remoteness can arise causation must first be proved: there must be a causal connection between the breach of contract and the applicant's loss. The applicant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of loss (Chitty at paragraph 29-073). The courts should be guided by common sense in the circumstances and on the facts of each case.

Equitable jurisdiction and special circumstances

51. The court is exercising an equitable jurisdiction. It is for the applicant to plead and prove its loss (see *Hone v Abbey Forwarding Plc* [2014] EWCA 711; [2015] Ch 309). It is for the applicant to show that the damage sustained would not have been sustained but for the injunction. The injunction need not be the sole or exclusive cause of the loss in question but it must be an effective cause (*Fiona Trust v Privalov* [2016] EWHC 2163 (Comm) at [47] per Males J). There should be no over-sophisticated causation arguments and the courts should adopt a "common sense" approach. Contractual principles apply by analogy but with logical and sensible adjustments where necessary. A plaintiff should not be saddled with losses that no reasonable person could have foreseen (*Hone* at [64]).

52. Lord Diplock in the *Hoffman-La Roche* case [1975] AC 295 at 361 stated that "… the court retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so."

53. Nearly 100 years earlier in 1877 James LJ in *Graham v Campbell* (1877) 7 Ch D 490 at 494 had stated:

> "The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless, under special circumstances) effect ought to be given".

54. In *Barratt Manchester Ltd v Bolton Metropolitan Borough Council* [1998] 1 WLR 1003 Sir Brian

Neill at page 1015 stated:

> "In the ordinary case where it is shown that an interlocutory injunction has been wrongly obtained, the court, in absence of special circumstances, will exercise its discretion in favour of enforcing the undertaking. But the cases … show that a cross-undertaking would not be enforced if the court did not consider that it would be just to do so."

Delay in making the application

55. Unnecessary delay in making an application to the court to enforce the undertaking can result in the court declining to enforce it. For example see *Societe Generale v Goldas Kuymculuk Sanayi Ithalat Ihracat SA* [2019] 1 WLR 346 where an appeal was granted against a first instance order directing an inquiry when there had been delay of eight years. The English Court of Appeal stated that "Delay in asking for an inquiry is a hugely important consideration…" (paragraph 45). The application should normally be made at the time of the discharge or promptly thereafter.

56. There was a delay in making an application for an inquiry as to damages of some 2 years and 9 months after the judge had ordered an inquiry as to damages in *Eliades, Panix Promotions Limited v Lennox Lewis* [2005] EWHC 2966 (QB). The application was finally made on 9 November 2004. Nelson J was not satisfied that there was any "substantial reason" for not issuing the application for an enquiry from the end of 2002 and concluded on the delay issue as follows at paragraph 89:

> "I have taken this delay into account in considering the question of discretion. I have not considered it a sufficient reason in itself to justify requiring to enforce the undertaking."

57. In *Smith v Day* (1882) 21 Ch D 421 it was held that the court is not bound to grant an inquiry as to damages whenever the defendant has sustained some damage by the granting of the injunction; but it has a discretion, and may refuse any inquiry if the damage is trivial or remote or if there has been a great delay in making the application. Jessel MR at pages 425-426:

> "… the application is one which should be made speedily, and not after the Court has forgotten the circumstances …"

58. Brett LJ at page 427 added:

> "I think he ought to make it within a reasonable time after the dissolution of the injunction,

and that what is a reasonable time depends on the circumstances of the case."

59. Cotton LJ at page 430 added:

> "As regards the time of the application, there is no doubt that a failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking … I think that a long delay might of itself be fatal to the application. In the present case I do not think that there has been such delay as that … We have, however, an unexplained delay of eight or nine months after the trial."

60. In *Barratt Manchester Ltd v Bolton Metropolitan Borough Council* [1998] 1 WLR 1003 the Attorney General, having been joined as a defendant, was granted a stay of an order pending appeal on his cross-undertaking in damages. Following refusal of leave to appeal an order for an inquiry as to damages under the cross-undertaking was made by consent. The plaintiff subsequently failed to serve documents setting out its claim and the Attorney General applied to dismiss the inquiry for want of prosecution. The judge found that there had been inordinate and inexcusable delay but dismissed the application because he was not satisfied that substantial prejudice had been caused. The Attorney General appealed and it was held that where delay in applying for or prosecuting the inquiry had occasional significant prejudice to the other party, or where there had been excessive and prolonged delay even though it could not be shown to have occasioned any prejudice to the other party, it would almost always be right to dismiss the inquiry and discharge the cross-undertaking; that the judge had therefore erred in concluding that the Attorney-General's inability to demonstrate that the plaintiff's delay had occasioned prejudice was fatal to his application; but that the plaintiff's delays had not caused prejudice to the Attorney-General and its conduct could not be regarded as so unreasonable as to merit the discharge of the cross-undertaking and the resultant loss of its substantial claim, and so the court would exercise its discretion in favour of allowing the inquiry to proceed.

61. Millett LJ at page 1012 stated:

> "The enforcement of the cross-undertaking should be regarded as being conditional on the inquiry being applied for promptly and prosecuted with reasonable diligence. This would allow for a desirable degree of flexibility. Just as the court may decline to enforce the cross-undertaking if the plaintiff does not apply to enforce it with reasonable promptitude,

> so it ought to be willing to discharge it where the plaintiff does not conduct the enforcement proceedings with reasonable diligence …".

62. Having dealt with the general principles I now drill into the detail of the two cases relied upon by the Applicant.

Fiona Trust at first instance

63. The Applicant relies on a judgment of Males J at first instance in *Fiona Trust & Holding Corporation v Privalov (No 2)* [2016] EWHC 2163 (Comm). In that case Males J at paragraph 2 stated:

> "If loss can be proved to a sufficient standard, he is entitled to be compensated".

64. From paragraph 46 onwards Males J dealt with the applicable principles as explained by Lord Diplock in the *Hoffmann-La Roche* case. At paragraph 47 Males J raised the issue as to whether the court retains a discretion to withhold an equitable remedy even where an inquiry as to damages had previously been ordered:

> "Subject to that, however, the defendants are entitled to recover damages for the losses suffered by them as a result of the freezing orders (not as a result of the litigation), assessed by reference to ordinary contractual principles, including principles of causation, mitigation and remoteness, although these principles may need to be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact: *Abbey Forwarding Ltd v Hone (No 3)* [2015] Ch 309, paragraphs 38-44 and 63."

65. At paragraph 48 Males J stated that "the freezing order need not be the sole or exclusive cause of the loss in question, but must be an effective cause; the burden is on the party who obtained the freezing order to demonstrate a failure to mitigate; and the type of loss (but not the particular loss within that type: the *Abbey* case [2015] Ch 309, paragraph 66) must be within the reasonable contemplation of the parties … a realistic approach will be taken to a submission that a defendant should have approached the claimant or made an application to the court for a variation of a freezing order … "some claimants are far from reasonable in practice" and an application for a variation is often "far from straightforward"."

66. Males J at paragraphs 49-51 referred to the debate on whether a "liberal assessment" of damages

was appropriate. At paragraph 50 Males J referred to English cases (*Les Laboratoires Servier v Apotex Inc* [2009] FSR 3 Norris J endorsed by the Court of Appeal in *Astrazeneca AB v KRKA add Nov Mesto* (2015) 145 BMLR 188 paragraph 16) and Norris J's statement, endorsed by the Court of Appeal that although it is for the party seeking damages to establish its loss, the court should not be over eager in its scrutiny of the evidence or too ready to subject its methodology to minute criticism, in part because the very nature of the exercise renders precision impossible. Kitchin LJ in the Court of Appeal referred at paragraph 16 to the need for a "liberal but fair assessment of loss". Males J at paragraph 51 added:

> "These were not freezing order cases and part of Norris J's reasoning is inapplicable to such cases. Nevertheless I consider that a liberal assessment of the defendant's damages should be adopted, provided that it is clear what this means. It does not mean that a defendant should be treated generously in the sense of being awarded damages which it has not suffered. It does mean, however, that the court must recognise that the assessment of damages suffered as a result of a freezing order will often be inherently imprecise, for example because the defendant cannot say precisely what it would have done with its funds but for the freezing order; that this problem has been created by the claimant obtaining of an injunction to which it is not entitled; that in the light of these factors the kind of over eager scrutiny of a defendant's evidence and minute criticism of its methodology to which Norris J referred will not be appropriate; and that it is not an answer for a claimant to say that damages cannot be awarded because the defendant's business venture was to some extent speculative and might have resulted in a loss. Thus the defendant is not absolved from proving its damages, but these factors must be borne in mind in determining whether it has succeeded in doing so."

67. At paragraph 52 onwards Males J deals with a submission that as a matter of law damages cannot be awarded if the defendant would have used its funds in a way which might have resulted in a loss, which he ultimately dismisses.

68. From paragraph 82 onwards Males J deals with causation, mitigation and remoteness. At paragraph 84 Males J comments to the effect that it was "unrealistic" to think that an application to the court for the removal of a prohibition imposed by the injunction would have been "straightforward". There was "no need to speculate" as the defendants had "sought its removal" but "without success". Males J refers to the difficulties in that case and comments that the claimants "would have undoubtedly have resisted vigorously any application to vary … They had expressly reserved the right to do so … had strong prospects of being able to set off successfully any such application. The duty to mitigate is only a duty to act reasonably. Any failure by the defendants to make a further application which would have taken time, would have been strongly resisted, and which

had only moderate prospects of success, was not unreasonable. There was here no failure to mitigate."

69. At paragraph 86 Males J concluded that it "was within the reasonable contemplation of the parties that, if free to do so, the defendants would wish to invest the proceeds of sale of the Hyundai and Daewoo vessels in further shipping ventures."

70. At paragraph 133 Males J declines to decide the issue (as he considers it unnecessary to do so) as to whether, once an inquiry as to damages has been ordered, the court retains a further discretion to withhold relief. Males J stated insofar as the "unclean hands" doctrine applies "it can only apply to new material and not to matters which have already been fully taken into account in deciding to enforce the undertaking in damages."

Fiona Trust on appeal

71. When the case went to the English Court of Appeal ([2017] EWCA Civ 1877; [2018] 1 WLR 5623) Beatson LJ delivered the leading judgment and helpfully dealt with "the application of the principles governing the award of damages against a person who has given cross-undertakings in respect of an interlocutory injunction he obtained where the claims which were the basis of the interlocutory relief are subsequently dismissed at trial." (paragraph 1). There was reference to arguments as to "causation, mitigation, and remoteness" (paragraph 5). In Part VI of the judgment the appellate judge dealt with his analysis of the submissions of the parties and his conclusion as to why the appeal should be dismissed. In a nutshell Beatson LJ considered that the judge at first instance did not err in his conclusions and that the failure of the Standard Maritime parties to apply to the Court for the release of funds "neither broke the chain of causation nor was an unreasonable failure to mitigate their loss" (paragraph 7). Beatson LJ also observed that "a number of the submissions made in support of the appeal differed significantly from those made at the hearing below." Beatson LJ dealt with the relevant law from paragraph 40 onwards and for present purposes the main points can be briefly summarised as follows:

(1) the purpose of the cross-undertaking in damages and liability under it is to protect a party who is subjected to such an injunction preventing him from doing something but who subsequently prevails at the trial of the action from the loss caused by the injunction (paragraph 40) or I would add in the present context where

the relevant part of the order is discharged. The court has a discretion whether or not to enforce a cross-undertaking in damages;

(2) the party seeking to enforce the undertaking must show that the damage he has sustained would not have been sustained but for the injunction, that the freezing order was the effective cause of the loss. The court seeks to approach and deal with questions of causation in a common-sense way (paragraphs 41, 42 and 43);

(3) freezing orders and orders ancillary to such are designed to do "pragmatic justice at an interim stage" and "the question whether a person is required to embark on litigation, whether in the context of causation or in the context of mitigation, is an intensely fact-specific inquiry" (paragraph 51);

(4) it must be borne in mind that the court must be realistic as to the dilemma facing a defendant when served, out of the blue, with a freezing order. Some claimants are far from reasonable in practice. Applications for variation are not that simple. They take time to prepare and not without cost. Approaches to claimants who agree variations, or even to provide suitable written indications to banks and other third parties that particular payments were not caught by the order, are often far from straightforward. If, in such circumstances, a defendant is shown to have suffered an unusual loss, then the claimant should not be surprised if the court orders him to pay for it (paragraph 56). That statement is primarily relevant to mitigation and remoteness but also fits with the prior judicial statements that questions of causation should be treated in a common-sense way and that, once a party has established a prima facie case that the damage was caused by the order then in the absence of other material to displace that prima facie case the court can draw the inference that the damage would not have been sustained but for the order (paragraph 57).

Sagicor General

72. The well established principles in respect of inquiries as to damages, derived in the main from English law (which in turn has been influenced by Australian common law - for example the High

Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 and Beatson LJ in *SCF Tankers* (formerly *Fiona Trust*) at paragraph 41), are also applicable in the Cayman Islands. I take just one example to make that point good, mamely *Sagicor General Insurance (Cayman) Limited and others v Crawford Adjusters (Cayman) Limited and others* 2011 (1) CILR 130, an authority heavily relied upon by the Applicant. In that first instance judgment Henderson J dealt with damages pursuant to the undertaking given to obtain an asset freezing injunction at paragraph 92 onwards. Henderson J at paragraph 92 applied the well-known English authority *Hoffmann-La Roche* and stated "Such damages are to be assessed on much the same basis as damages for breach of contract …". Those seeking damages are entitled to be put as nearly as possible in the same position as they would have been if they had not suffered the wrong for which they are claiming compensation. At paragraph 95 Henderson J stated that the burden of proof rests with those seeking damages that they say they have suffered was indeed caused by the injunction and not by any other event or circumstance. At paragraph 96 Henderson J appeared to reject a submission that those seeking damages must show that the injunction was the exclusive cause of the loss that they suffered. There is reference to the "but for" test. What has to be shown was that, *prima facie*, the loss would not have happened without the injunction. The injunction does not have to be the exclusive cause. Henderson J concluded on causation at paragraph 103 as follows:

> "My approach towards causation cannot be an overly rigid application and must rely upon a common-sense assessment of the evidence. If the Mareva injunction and the proceedings were both contributors to damage that was suffered, I will not exclude that damage from consideration but ask whether the injunction was a "significant determinant" or operating cause of it."

73. From paragraph 105 onwards Henderson J dealt with the failure to mitigate. In that case Sagicor argued that certain parties failed to mitigate their loss because they should have applied to discharge the injunction or sought a variation of its terms. Henderson J at paragraph 105 stated:

> "… I accept that in principle the claimant is under an obligation to do what is reasonable in all of the circumstances to reduce the magnitude of the loss to the same extent as in a breach of contract action."

74. At paragraph 106 Henderson J stated that "The burden of proving a failure to mitigate rests with the party alleging it …" and that "it is well established that a claimant is not to be judged too

rigorously on this question …" and at paragraph 107 adds "… a claimant is under no duty to embark upon complicated and difficult litigation …". I remind myself that the Plaintiffs have not alleged a failure to mitigate by the Applicant and have produced no evidence in opposition to the relief claimed by the Applicant.

75. At paragraph 111 Henderson J referred to various minor variations of the injunction being sought and obtained and at paragraph 113 made reference to legal advice being received in respect of the likelihood of expert evidence being required to obtain a discharge of the injunction and that a hearing was "likely to be long and costly." Henderson J felt that such seemed "unduly pessimistic" but concluded:

> "Nevertheless, I consider that they have discharged their mitigation burden by taking legal advice as they did. Commencing an application to set aside the injunction which appeared (to them, at the time) to be a lengthy and costly undertaking was not a reasonable measure they were bound to pursue. It is not unreasonable for the subject of an injunction to refrain from what promises to be a drawn out and costly legal process after having been so advised by an attorney."

76. In respect of general damages the judge awarded to two individuals the sum of CI$35,000 each for damage to personal reputations (and an additional CI$50,000 each as aggravated damages) and CI$70,000 to a company for damage to business reputation. At paragraph 130 the judge held that a company was entitled to interest on the court rates on his award to it.

Determination

77. Having dealt with the relevant legal principles and the caselaw I now refer to my determinations.

Summary

78. I determine the various issues listed for determination of the court as follows:

(1) The Applicant is entitled to rely on the undertaking provided to the court by the Plaintiffs and recorded at paragraph 4 of Schedule 1 to the Asset Freezing Order which provided in

fairly standard terms as follows:

> "The Applicants will pay the reasonable costs of anyone other than the Respondents which have been incurred as a result of this Order including the costs of ascertaining whether that person holds any of the Respondents' assets and if the Court later finds that this Order has caused such person loss, and decides that the person should be compensated for that loss, the Applicants will comply with any Order the Court may make." (the "Undertaking").

Such wording is wide enough to cover the Applicant who was not a Respondent.

(2) No reason has been put before the court, or occurs to the court, as to why the Undertaking should not be enforced. The Undertaking ought to be enforced.

(3) The Applicant has suffered damage by reason of the granting of the Asset Freezing Order.

(4) I deal below with the quantum of damages that should be granted in this case.

(5) The Applicant should be awarded interest on the amount frozen for the period it was frozen and again I deal with this below and allow the sum of US$141,838.24 as now claimed.

(6) The Applicant is entitled to her costs of her present application to be taxed on the standard basis in default of agreement.

(7) I deal below with whether the court should at this stage "make provision for alternative means of service" of the orders made pursuant to this judgment and it will be seen that my answer is in the negative for the reasons stated below.

Lack of challenge to Applicant's case

79. I am conscious that the Plaintiffs have not opposed the claim for damages and that they have not challenged the evidence presented by the Applicant. The only evidence before the court is evidence provided by or on behalf of the Applicant. Newey LJ in *Kireeva v Bedzhamov* [2022] EWCA Civ 35; [2023] Ch 45 at paragraph 34 applied *Coyne v DRC Distribution Ltd* [2008] BPIR 1247 at

paragraph 58; [2008] EWCA Civ 488. The basic principle is that, until there has been cross-examination it is ordinarily not possible for the court to disbelieve the word of a witness in her affidavit and it will not do so. This is not an inflexible principle. It may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. The Plaintiffs have put no evidence whatsoever before the court. I appreciate that such does not absolve the court from carefully considering the evidence filed by the Applicant and satisfying itself that she has proved her claim for damages and that there is sufficient evidence to justify the amounts claimed and that such should be allowed as a matter of law.

3 issues of initial concern: (i) was order wrongly granted? (ii) remoteness and (iii) mitigation

80. When I was first reading into the material in preparation for the inquiry as to damages hearing, and not being assisted by any evidence or submissions from the Plaintiffs, I confess that I was initially concerned in respect of 3 main issues. Firstly, whether it could be said that the Asset Freezing Order had been wrongly granted as much of it was still in existence and the Plaintiffs had apparently been successful in the Australian proceedings. Secondly, issues of remoteness and foreseeability, thirdly, whether the Applicant had failed to mitigate her losses in not making the application for the variation much earlier. I raised these 3 issues with Mr Harris at the outset of the hearing and granted him a short adjournment to consider them and then heard his oral submissions in respect of them. Mr Harris sought to rely on certain open correspondence which was not exhibited to any evidence before the court so, somewhat reluctantly, I gave him seven days to file additional evidence exhibiting such correspondence and any relevant concise additional written submissions dealing with the concerns I had raised during the hearing.

81. I start from the fact that the Plaintiffs have not raised any of these 3 issues and have not filed any evidence or skeleton argument in opposition and have not appeared or caused an appearance to be entered at the hearing. The inquiry as to damages is unopposed but as Mr Harris sensibly recognised the Applicant is not entitled to a "free ride" and must satisfy the court as to her damages claim and its quantum.

Part of the Asset Freezing Order was wrongly granted

82. Having heard from Mr Harris I am satisfied that it can properly be said that the Asset Freezing Order was wrongly granted insofar as it concerned paragraph (1)(d) of Schedule 3 and the Applicant.

The foreseeability issue

83. Moreover it was reasonably foreseeable (and the Undertaking contemplates this) that a loss could be caused to non-parties.

No failure to mitigate

84. Furthermore, having reflected on the point and having heard from Mr Harris and considered the recent filings, I do not think that it can be said that the Applicant unreasonably failed to mitigate her losses by not making an application for a variation much earlier than she did. The correspondence from October 2019, now made available to the court, confirms that a variation application would not have been straightforward.

85. Mr Harris submitted that notwithstanding two years of correspondence (much of which he said was privileged from disclosure) it ultimately proved necessary for the Applicant to apply to the court for a variation of the Asset Freezing Order to "unfreeze her funds" (paragraph 4 of the Applicant's supplemental written submissions dated 12 March 2024). The correspondence certainly does not evidence an intention on the part of the Plaintiffs to assist and co-operate in respect of an agreed variation. Far from it, they seem to have presented obstacles throughout, initially in the form of repeated requests for clarifications and information which further delayed matters. Having said that, it would have been helpful if the Applicant had attached a copy of the assignment to her attorney's letter dated 24 October 2019. Be that as it may, it is clear that an application for a variation was not going to be straight forward.

86. I also note the evidence in respect of the poor state of health of the Applicant and her difficult financial position. I do not think it can fairly and reasonably be said that she failed to mitigate her loss and therefore on that basis should be deprived of all or some of her damages. The uncontested

evidence reveals that the Applicant was in very poor health and had limited access to funds. She lived many miles away from the Cayman Islands, on the other side of the world, and initially had to engage Australian lawyers to assist her in difficult circumstances. Moreover when her Cayman attorneys entered into protracted correspondence with the Plaintiffs' Cayman attorneys to seek a variation to the Asset Freezing Order they were not met with co-operation and agreement. The application for a variation proved difficult and could not reasonably be described as quick, simple and straightforward.

87. There was no failure by the Applicant to reasonably mitigate her loss and the damages claimed should not be reduced in that respect.

The award of damages

88. The Applicant puts her claims on "Interest as damages" and "Rental and lost profit on abortive property purchase" in the alternative (see a summary of the Applicant's claims on the last page of the Applicant's supplemental written submissions dated 12 March 2024).

89. I am satisfied on the evidence that the bank fee of US$5,585.00 (which appears on the bank statement) and the loss of interest on the amount frozen (US$399,951.45) were caused by the Asset Freezing Order and reasonably foreseeable. Such loss cannot be described as too remote. I am content to award interest at the rate of 5% compounded monthly (noting the Australian evidence in that respect). The interest from 2 November 2015 to 13 December 2021 (a total of 6 years and 41 days) amounts to US$141,838.24. I should record that I have considered an additional authority brought to the attention of the court by Mr Harris, namely *Sempra Metals Ltd v IRC* [2007] UKHL 34; [2008] 1 AC 561 and am content, in the particular circumstances of this case, to award compound interest in respect of the loss of the use of the Applicant's funds.

90. Although there is little corroborative evidence, I accept what the Applicant says at face value and allow eviction costs in the total sum of AUS$19,650 (being loss of rental bond AUS$7,200, removal and associated costs AUS$8,650, private ambulance AUS$1,300 and legal costs in respect of the eviction proceedings in the sum of AUS$2,500 as pleaded at paragraph 9(b) a-d of the Points of Claim and supported by the Applicant's evidence). I also allow the transport costs in the sum of AUS$18,720 as pleaded at paragraph 9(c) of the Points of Claim and supported by the Applicant's evidence.

91. I am satisfied that an amount in respect of the Australian legal costs and litigation support consultants should be allowed. I note the letter from Hannay Lawyers dated 30 January 2024 (which provides some brief detail as to the costs incurred) and paragraph 9(e) of the Applicant's Points of Claim which claims AUS$82,140.00 in respect of legal costs incurred in Australia in connection with the Asset Freezing Order. I will allow KYD$35,000.00 for that head of claim.

92. There is very little independent evidence to support the claim for "stress, emotional trauma and anxiety" but I note what the Applicant says in that respect and accept it at face value. No medical evidence specifically in support of this head of claim has been presented although I note the generalised reference to "Depression" at paragraph 2 of the one page medical report dated 11 October 2021 from Dr O Rejda. I allow KYD$10,000.00 in respect of that head of claim. In my judgment this is realistic compensation. It is neither "modest" nor "generous".

No unreasonable delay

93. I should add that I am not satisfied that there has been any unreasonable delay, in the particular circumstances of this case, by the Applicant in applying for an inquiry as to damages. The Plaintiffs have not raised this point but I have nevertheless considered it. On 2 December 2021 I made an order joining the Applicant as a party to these proceedings and an order that paragraph 1(d) of Schedule 3 to the Asset Freezing Order be deleted. By summons dated 16 May 2023 the Applicant applied for an enquiry as to damages. The uncontested evidence before me is that the Applicant suffered from very serious health problems which no doubt made it difficult for her to progress legal matters many miles away from her home expeditiously. In other circumstances a 17 month delay may have been fatal to the application but not in this somewhat exceptional case, especially when the point has not been raised by the Plaintiffs.

Costs

94. I am content to make an order that the Plaintiffs do pay the Applicant's costs of and incidental to the application for the inquiry as to damages, such costs to be taxed on the standard basis in default of agreement, and not to include time spent on the service issue which I now refer to.

Service issue

95. Mr Harris made a somewhat clumsy and unhelpful attempt to persuade the court to exercise what he described as its inherent jurisdiction to "make reasonable provision for service on the Plaintiffs of any Order arising from this enquiry" and suggested service via Harneys or the Plaintiffs' Australian counsel Nelson McKennon or Kenneth Gamble (who the Applicant understands to be the individual with the conduct of the matter on the Plaintiffs' behalf and who swore the affidavit in support of the application for the Asset Freezing Order).

96. No relevant rules or caselaw appeared in the skeleton argument dated 28 February 2024 but in oral submissions Mr Harris prayed in aid Order 65 rule 4 of the Grand Court Rules.

97. In his skeleton argument dated 28 February 2024 Mr Harris had at paragraph 17 stated "There are 132 separate Plaintiffs, in respect of whose contact details Jill has no prior or current knowledge" and at paragraph 19 stated that to require the Applicant to effect personal service on 132 parties "none of whose whereabouts are known to her" would be "disproportionate and unfair." In oral exchanges with the bench he admitted in effect, without descending into the detail, that the Applicant was aware of the whereabouts of certain of the Plaintiffs: "We have found some of them."

98. Despite judicial discouragement at the hearing, Mr Harris renewed his misconceived attempt at paragraphs 13-16 of his supplemental written submissions dated 12 March 2024, again without reference to any of the relevant authorities or any evidence in support.

99. If the Applicant is seeking an order for substituted service she must do so by way of a proper application supported by sufficient evidence and a focused skeleton argument dealing with the relevant authorities and arguments. It is perhaps understandable why Mr Harris was keen to force the court into taking a shortcut but the rules and proper procedures must be followed. To do otherwise could risk possible injustice and unfairness arising and may end up wasting more time and money including the time and money spent on correcting any procedural errors by way of any appeals. Judges at first instance must be on guard in respect of desperate pleas from attorneys to exercise any "inherent jurisdiction" to take a short cut under the guise of the overriding objective and on the false basis that such will justifiably and properly save time and costs. Shortcuts in legal

proceedings are rarely a good idea and are sometimes treacherous. The safest and most appropriate course is to stick to the rules and follow the correct procedures. Attorneys, as responsible officers of the court, should not attempt, without evidence and law in support, to bounce the court into an unjustifiable and improper shortcut.

Order

100. Counsel should let me have a draft order reflecting the determinations contained in this judgment within the next 7 days. The order should be in one single currency, either Cayman or US dollars.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT