Neutral Citation Number: [2014] EWCA Civ 711

Case No: A3/2013/0840

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
His Honour Judge Pelling (sitting as a Deputy High Court Judge).
HC09C00296

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2014

Before :

LADY JUSTICE ARDEN
LORD JUSTICE McCOMBE
and
LORD JUSTICE VOS

- -

Between :

(1) RICHARD JOHN HONE **(2) PATRICK DANIEL OWEN** **(3) WILLIAM JAMES OWEN**	**Appellants**
- and -	
(1) ABBEY FORWARDING LIMITED (In Liquidation) **(2) HER MAJESTY'S REVENUE AND CUSTOMS**	**Respondents**

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- -

Philip Coppel QC and Paul Marshall (instructed by **Banks Kelly Solicitors Ltd**.) for the Appellants
Stephen Nathan QC, Sarah Harman and Ruth Hughes (instructed by **Howes Percival**) for the Second Respondent on the main appeal, and for both Respondents on the Costs Appeal

Hearing dates: 18, 19, and 20 February 2014

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal by the above named Appellants (hereafter called collectively "the Appellants" and individually "Mr Hone", "Mr P Owen" and "Mr W Owen") from a judgment and order of 19 March 2013 of His Honour Judge Pelling QC, sitting as a Deputy Judge of the High Court. By his order the judge ordered the First Respondent ("Abbey") to pay to Mr Hone £8000, to Mr P Owen £11,463.41 and to Mr W Owen £8,000. Such orders were made by the judge in respect of the losses which the judge found that those Appellants had suffered, by reason of a freezing order obtained by Abbey, which the judge considered that Abbey should pay pursuant to the "cross-undertaking in damages" in that freezing order. I put the phrase "cross-undertaking in damages" in inverted commas because the use of that description belies a long legal story, material to the present dispute, to which I have to return below.

2. The judge also ordered that the Appellants should pay to Abbey its costs (less £10,000) of the inquiry conducted by him, to be assessed (if not agreed) on the standard basis up to 21 August 2012 and thereafter on the indemnity basis. He also made orders for interim payments of costs which are stayed pending the present appeals.

3. The Appellants contend that the judge was wrong to have confined his orders in their favour to the sums which I have mentioned and was wrong, in any event, to make the costs orders which he did. They appeal in those respects by permission granted by Lady Justice Gloster on 4 October 2013.

4. By a Respondent's Notice, the Second Respondent ("HMRC") brings a cross-appeal by which it seeks to reverse the judge's order to the extent that nothing should be awarded in the Appellants' favour at all and to reverse, in particular, the award of £3,000+ to Mr P Owen, as special damages, over and above the awards of £8,000 that the judge made to all the Appellants. HMRC's cross-appeal is brought with permission granted by Lady Justice Gloster on 28 January 2014 in respect of the awards of £8,000 to all the Appellants. However, she refused permission to appeal in respect of the additional sum awarded to Mr P Owen. HMRC's application for permission to appeal against that aspect of the judge's order is now renewed before us. We refused permission to appeal on this point during the course of the hearing and my own reasons for this appear below.

5. We also had before us an application by the Appellants to adduce fresh evidence on their appeals. We refused that application during the course of the hearing. Again, I set out my own reasons for refusing the application later in this judgment.

(B) Background Facts

6. The proceedings have a long history. That history begins for present purposes in February 2009 when Abbey was carrying on a freight forwarding and warehousing business from a substantial warehouse with 23 staff. Its business, which initially traded under the name "W.V. Davies", was a family concern established in 1971 by

the father of Messrs W and P Owen. Both his sons went straight into the business from school. They were joined in about 2003 by Mr Hone, who had known the Owen family for many years. The business was acquired at that stage by Abbey. In February 2009 the Owens and Mr Hone owned one-third each of the 100 issued shares of Abbey (Mr W Owen owning the odd additional share, giving him 34 out of the 100 shares). The Owens, Mr Hone and a Mr Richard Mills were the directors of Abbey.

7. In May 2002 Abbey had begun to operate a bonded warehouse business, in addition to its traditional activities, and it was from the dealings in that part of the business that the problems arose. Between January 2008 and February 2009 HMRC raised 9 assessments against Abbey for sums totalling £7,547,359. The majority of this amount was made up of two assessments, issued on 2 February 2009, totalling £5,965,704. The assessments were based upon 301 movements of duty suspended alcohol removed from Abbey's warehouse, which (it was said) had not reached the destination bonded warehouse (or warehouses) in France. HMRC contended that the contents of these shipments had been sold in the UK without duty having been paid.

8. On 4 February 2009, HMRC made an *ex parte* application to Blackburne J for the appointment of a provisional liquidator of Abbey. The application was based upon the assessments and HMRC's contention that Abbey would be unable to pay the amounts claimed. The application was granted and the liquidator, then of Baker Tilly, chartered accountants (later of Deloittes) ("the liquidator"), was appointed to the office. Her counsel was present in court during the application and, immediately upon the judge making the order for the appointment of a provisional liquidator, he applied on her behalf (in Abbey's name) for worldwide freezing orders against the Appellants. The allegations made against the Appellants (in summary) were that the Appellants had either dishonestly or negligently broken their duties to Abbey in permitting it to become subject to the assessments.

9. The freezing order was in substantially standard form and it will be necessary in the course of this judgment to refer to some of its detailed terms. However, importantly for present purposes, the order contained (in Schedule B) the usual "cross-undertaking" by Abbey in these terms:

> "If the court later finds that this order has caused loss to the Respondent and decides that the said respondent should be compensated for that loss, the Applicant will comply with any order the court may make."

10. The order, unusually however, included (in Schedule C) an undertaking to the court by HMRC in these terms:

> "HM Revenue and Customs will provide an indemnity to the Applicant in respect of the Applicant's cross-undertaking in damages as set out in paragraphs 1 and 4 of Schedule B."[1]

[1] The reference to paragraph 4 refers to common form potential liabilities of Abbey to third parties affected by the order.

Obviously, on HMRC's case before Blackburne J, Abbey was insolvent and, without some additional security in respect of the cross-undertaking, the freezing order would have been unlikely to be granted.

11. The trial of Abbey's claims against the Appellants came before Lewison J (as he then was) between 6 and 20 July 2010. On 30 July the judge dismissed Abbey's action and discharged the freezing order with effect from 10 September 2010 (to allow for the expiry of an extended time in which to apply for permission to appeal to this court). There was no application for permission to appeal and accordingly the freezing orders stood discharged. Paragraph 5 of Lewison J's order provided that,

> "The Defendants have permission to proceed to an inquiry as to what, if any, damages have been caused by the Freezing Order…"

He gave directions for statements of case on the inquiry and the trial of the Appellants' claims came, in due course, before Judge Pelling on various dates between 20 November 2012 and 15 February 2013.

12. It is, to my mind, of some residual significance to note what happened after Lewison J's judgment, and before the inquiry conducted by Judge Pelling, in respect of the assessments raised upon Abbey that had been the entire basis of HMRC's claim to appoint the Liquidator and Abbey's claim against the Appellants. I derive the following from the Appellants' statement of the facts, set out in Counsel's skeleton argument, but corrected in certain small respects by a note from Counsel for HMRC.

13. The Appellants invited the Liquidator to appeal against the assessments. She refused to do so. Accordingly, the Appellants brought an application under the Insolvency Act 1986 for permission to conduct an appeal against the assessments on Abbey's behalf. The Liquidator opposed that application which came before the court in November 2010. On the second day of the hearing before Warren J, the Liquidator acceded to the application and consented to the Appellants conducting the appeal. In January 2011 the appeals came before the First-tier Tribunal for a pre-trial review. HMRC asked the Tribunal to direct a hearing of the appeals in 2012. The judge, however, directed an expedited hearing of the matter, owing to the significant financial difficulties by then facing the Appellants. The case was fixed for hearing in September 2011. The evidence filed with the Tribunal by HMRC consisted of much of the same evidence as that deployed by Abbey before Lewison J, but with some additions.

14. In conducting Abbey's appeals the Appellants applied to strike out HMRC's case on "abuse of process"/res judicata grounds. On 4 August 2011, two business days before the hearing of that application, fixed for 9 August 2011 HMRC filed a notice of withdrawal of opposition to the appeals. The assessments, which had underpinned the entirety of the proceedings leading to the trial, were accordingly vacated. Not surprisingly Abbey sought its costs. Judge Walters QC, who had had conduct of the Tribunal proceedings throughout, ordered HMRC to pay the costs and made an order for interim payment of £215,000 (inclusive of VAT), including the following among his reasons:

> "VIII…..The Appellants' business was closed down and the former directors (and others) deprived of their livelihoods by

> the Respondents on the basis of allegations which could not be substantiated in the misfeasance proceedings and which the Respondents have chosen not to defend in appeal proceedings before the Tribunal. This indicates *prima facie* a serious injustice to the Appellant and its former Directors.
>
> …..
>
> XIII. The Tribunal further considers that its conclusion that there has, *prima facie*, been a serious injustice inflicted on the Appellant and its former directors by the Respondents in their conduct of this matter entitles it to resolve in the Appellants' favour any uncertainty as to the possibility of an interim payment of £215,000 inclusive of V A T being excessive."

15. By order made on 2 October 2012 HMRC was made a party to these proceedings and took over their conduct in opposition to the Appellants' claims.

(C) Judge Pelling's Judgments

16. In paragraph 19 of his careful judgment of 11 December 2012, Judge Pelling set out the claims advanced by the Appellants before him as follows:

> "i) Loss of profits that each of the Defendants would have made from purchasing in or around March 2010 further shares in "Don't Lean Back Limited" ("DLB"), a company that each of the Defendants had already invested in at the time that the Freezing Order was made;
>
> ii) Loss of profits that each of the Defendants assert they would have made from selling chairs at a profit to DLB;
>
> iii) Loss of profits that each of the Defendants say they would have made from purchasing marble from China to be sold to wholesale customers in the UK;
>
> iv) Loss of profit that Mr Hone asserts he would have made through buying and selling shares. Mr Hone alleges that but for the Freezing Order he would have been able to buy and sell shares and would have made a profit from so doing, as he had done previously;
>
> v) Surcharges that Mr P Owen incurred to HMRC as a result of his being unable to pay his tax liability within the prescribed time. Mr P Owen asserts that but for the Freezing Order he would have been able to pay his tax liability on time and so avoid the surcharges. It is this claim that is not disputed by HMRC;
>
> vi) Loss of the profits that each of the Defendants would have made from buying and selling various residential properties including in particular properties at:

a) 73 Frensham Road, Lower Bourne, Frensham, Farnham, GU10 3HU ("the Farnham Property");

b) 45 Carlton Hill, Herne Bay ("the Herne Bay Property"); and

c) 2 Woodside Cottages, 1 London Road, Harbledown, Kent, CT2 9AX ("the Harbledown Property");

The Defendants allege that but for the Freezing Order they would have carried out this business from August 2009;

vii) Damage to the Warehouse (which it is common ground was owned at all relevant times by Wingpitch) as a result of the Defendants being unable to pay security costs for that property. The Second and Third Defendants allege that but for the Freezing Order they would have been able to provide the funds needed to pay for these security costs. This claim was in respect of a loss that it is common ground was suffered by Wingpitch not the Defendants and was one of the claims that I struck out at the outset of the trial;

viii) Loss of rental income as a consequence of the Warehouse being unfit to let following vandalism to the property. Had the security been in place it is alleged that the vandalism would not have occurred, and had it not occurred, the Defendants allege that the Warehouse could have been let to a third party tenant. Since this claim is in relation to a loss suffered by Wingpitch not the Defendants, I struck it out at the start of the trial;

ix) Loss of dividend income resulting from the forced sale of Mr P Owen's shares in Barclays Bank plc. But for the Freezing Order, Mr P Owen asserts that he would not have had to sell his shares in Barclays Bank plc;

x) Encashment losses in respect of Mr P and Mr W Owen's pension funds. But for the Freezing Order, it is asserted that they would not have had to encash their pension funds.

xi) Valuation losses in respect of Mr Hone's classic car. But for the Freezing Order, Mr Hone alleges he would not have suffered these valuation losses.

xii) Loss of the profits that each of the Defendants allege they would have made from purchasing in or around February 2009 further shares in Knowledgecenter Limited. The Defendants had already invested in this company at the time of the making of the Freezing Order. There is an issue concerning the beneficial ownership of the Knowledgecenter shares that I will have to resolve and consider further below;

> xiii) Loss of profits that Mr Hone sustained in respect of a public house called "Treleigh Arms." But for the Freezing Order, Mr Hone alleges that he would have funded the construction of a conservatory extension to the restaurant area of the public house which would have resulted in increased profits being made of which he would be entitled to a share."

17. The judge rejected all of these claims save for (a) a claim by Mr P Owen under head (iii) in respect of one consignment of Chinese marble which, as the judge held, Mr P Owen had been prevented by the order from purchasing and selling to wholesale customers in this country and (b) a claim by all the Appellants to general damages under paragraphs 11 to 14 of the Particulars of Claim. It will be necessary, in due course, to examine the precise range of this latter claim and the judge's approach to it which underlies the fourth ground of the Appellants' appeal before us. Under (a) the judge awarded £3,100, at which sum the claim was described by the judge as having been "compromised" (paragraph 2 of his Quantum Judgment) and under (b) the judge awarded £8,000 to each Appellant.

18. At the start of the trial, the judge had struck out the claims under items (vii) and (viii) as being losses suffered not by the Appellants but by Wingpitch Limited. There is no appeal against that order.

19. The judge made a number of specific factual findings in respect of the individual claims in rejecting them as heads of proper claim under the cross-undertaking. In view of the limited relief sought by the Appellants on this appeal, it is only necessary to focus now upon three of these, namely heads (i), (iii) and (xii). Those heads of claim relate to alleged losses of profit arising from potential purchases of Knowledgecenter Limited ("KCL") shares, further consignments of marble from China and Don't Lean Back Limited ("DLB") shares. The order sought on the appeal is in these terms:

> "1. That there be judgment for the Appellants on their claims for loss in respect of loss of profits from purchase of : (a) further Knowledgecenter Ltd shares; (b) marble from China for onward sale; (c) Don't Lean Back shares.
>
> 2. That there be an assessment of the above losses by a Judge of the High Court.
>
> 3. A declaration that the Appellants are entitled to an award of general damages in an amount to be determined by the Court of Appeal, but in any event not less than £20,000 per Appellant.
>
> 4. That the Respondents jointly and severally pay the Appellants' costs in the High Court and Court of Appeal.
>
> 5. That the Respondents do jointly and severally pay the Appellants such sum as found upon the above assessment."

20. With regard to the KCL losses, in summary, the judge found that the loss was not reasonably foreseeable and that the order was not the effective cause of any loss: see paragraph 108 of the judgment. He held that the Appellants had made no attempt to

carry through the investment after the Liquidator's appointment; they had given no notice to the Liquidator of wishing so to invest and that they had chosen not to invest because they wished to "garner their resources" to meet the litigation costs and living expenses. Further, he held that the purchase of such shares would have been within the "ordinary course of business" exception within the freezing order and would not, therefore, have required the Liquidator's consent.

21. As I have already mentioned, the judge awarded compensation to Mr P Owen in respect of an agreed sum for the loss of profit on one consignment of Chinese marble, in respect of which he found that the Liquidator had refused permission to proceed in a case in which her permission was required under the order. However, he held that claims to future losses were without foundation: paragraph 71 of the judgment. There had been no notice to the Liquidator that there might be such future trading at the time when the initial consent was sought or thereafter.

22. With regard to the alleged lost opportunity to purchase rights issue shares in DLB, the judge found that the Appellants had not shown, on the facts, that they or any of them were the beneficial owner(s) of the original shares giving rise to the rights and that accordingly any loss was not incurred by them or any of them: paragraph 58 of the judgment. The judge went on to find that, if he were wrong about this, the loss alleged was not foreseeable because the Appellants' interest in DLB was not known to the Liquidator and no notice was given to her of any opportunity on the part of any Appellant to buy further shares in that company: paragraphs 60 and 61 of the judgment.

23. The principal attacks mounted by the Appellants upon the judge's decision are based on arguments of law as to the principles upon which compensation is given by the court under a cross-undertaking such as the present. It was to these principles that the main thrust of the parties' arguments before us was directed and I find it convenient to turn now to the grounds of appeal and to come back to the facts of the individual heads of claim that remain relevant after presenting my conclusions on this aspect of the case.

(D) The Appeal: the applicable law

24. Mr Philip Coppel QC (with whom Mr Paul Marshall appears) for the Appellants argues, under the first two grounds of appeal, that the judge adopted a wrong approach, first, as to "compensability" of loss and, secondly, as to mitigation of loss. He presented a full frontal attack upon any idea that it was a necessary element of recovery of compensation under a cross-undertaking of this type that the loss for which compensation is claimed should be within the rules as to foreseeability of damage and remoteness, whether under rule in *Hadley v Baxendale* (1854) 9 Ex. 341 or otherwise.

25. Alluding for a moment back to the facts of this case, the general point for the Appellants is that they are entrepreneurial businessmen who have a history, over several years, of making money in a number of commercial transactions and investments of differing types and were in fact prevented by this order from doing that for a period of 20 months. They should, therefore, be compensated for any loss shown to have been caused in a material way by the order, irrespective of the foresight which the Liquidator actually had, or reasonably ought to have had, of such loss. As they put

it, in the penultimate of 19 written propositions helpfully summarising their case for the Appellants, Mr Coppel and Mr Marshall wrote,

> "Provided that the injunctee can show that the injunction caused the loss, there is no requirement that the loss have been foreseeable to the injunctor, whether specifically or in kind. There is no policy requirement to transpose into this non-consensual relationship the contractual constraints on recoverability of loss, given that they are constraints that derive from the consensual assumption of risk in a contract.[2] "

26. It will be necessary to refer again in what follows to certain other of the Appellants' counsel's 19 propositions. However, I hope that I will be forgiven in presenting independently, as best as I can my understanding of the law. In doing so, for my part, I would pay tribute immediately to the skill, erudition and industry displayed by all counsel in the written and oral arguments that were advanced before us.

27. Since at least 1851[3], it has been the practice of the Chancery courts (and from very shortly thereafter of all the courts), when granting an interim injunction pending trial, restraining the defendant from doing some act, to require the plaintiff/claimant to give to the court a "cross-undertaking in damages". The traditional form of undertaking was as follows: an undertaking by the claimant,

> "to abide by any order which the court may make as to damages in case this court is hereafter of opinion that the defendant or any other persons served with notice of this order have suffered any by reason of this order which the plaintiff [claimant] ought to pay."

This undertaking has now "morphed" into the form of undertaking given by Abbey in this case, which I have set out above. It was not suggested by anyone before us, in my view rightly, that the change of wording has any substantive effect on the consequences of the undertaking for an unsuccessful claimant on an inquiry such as the present, save to the extent that Mr Coppel noted that the undertaking now refers to "loss" rather than to "damages", suggesting perhaps obliquely that traditional rules as to remoteness of damage might not be apposite. I rather suspect that the change in the standard form order was more likely to have been driven by a desire to modernise language, rather than to effect either a change of principle or to give any indication of the natures of losses that might be recoverable.

28. The task for the court, in deciding whether to order an inquiry and, if so ordered, in conducting it, is to decide what sum (if any) should be paid by the unsuccessful claimant to the successful defendant for the defendant having been wrongly restrained

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[2] Reference is made to *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61, per Lord Hoffmann at [9], [11]- [13] [21]-[23], Lord Hope of Craighead at [31]-[33] and Lord Walker of Gestingthorpe at [31]-[33] and Honore & Hart on Causation in the Law pp.312 ff, especially 314-5, 320 and 321.

[3] The date seems to derive from the order made on 18 December 1851 by Knight-Bruce VC in *Novello v James* (1854) 5 De G M. & G 876: see per Aicken J in *Air Express Ltd v Ansett etc.Ltd.* (1979-1981) 146 CLR 249, 260, although by the time the *Novello* case reached the Lords Justices in December 1854, it was already being described as "the usual undertaking".

from doing certain things between the grant of the injunction and its discharge after trial.

29. Not surprisingly, the judge in the present case took, as his starting point for the principles as to the recoverability of compensation under such undertakings, the final sentence of the dictum of Lord Diplock in *Hoffmann-La Roche & Co. AG v Secretary of State* [1975] 1 AC 295, 361, which (in rather fuller terms than quoted by the judge) was as follows:

> "The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It 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, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff wound *not* prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see *Smith* v. *Day* (1882) 21 Ch.D. 421 *per* Brett L.J., at p.427."

30. Since 1974, Lord Diplock's dictum, with its cross-reference to *Smith v Day* (1882) 21 Ch D. 421, has also been the starting point for most judges and practitioners in approaching questions of compensation for loss in these cases[4]. However, in few of the reported cases have questions of foreseeability been directly in issue. In recent years, the question has arisen in a number of cases in the High Court as to whether Lord Diplock's dictum truly represents the law, or at least all of the law.

31. Of course, the injunction creates no contract and that gives rise to certain uncontroversial propositions. They are, in effect, stated in the first three and in the fifth of the propositions, presented by Mr Coppel and Mr Marshall, as follows. The undertaking is given to the court and not to the injuncted party. Non-performance of the undertaking is a contempt of court, not a breach of contract. The undertaking is, in effect the "price" which the applicant for the injunction pays in return for the grant of the injunction. It is designed to protect the injuncted party from loss arising from the injunction, which is caused by the order, and which the court decides ought to be paid by the party who obtained it. The application of contractual principles is, therefore,

[4] In their skeleton argument, at paragraphs 52 and 53, Counsel for HMRC referred to four cases in this court and thirteen at first instance in which this approach was adopted.

"by analogy", which one sees from the very case to which Lord Diplock referred, namely *Smith v Day* (supra).

32. Before the decision in *Smith v Day* this court had decided the case of *Graham v Campbell* (1878) 7 Ch. D. 490 in which an inquiry as to damages had been refused by the Vice Chancellor, on the discharge of an interim injunction at trial. The Vice Chancellor's decision was upheld on appeal. The court held that the only conceivable loss suffered by the wrongly injuncted party was delay in receipt of money, for which an award of interest would suffice. In disagreeing with the Vice Chancellor's decision that there had been wrongful conduct by the defendant, the court said that the defendant should be entitled to damages, if any were established. James LJ, giving the court's judgment (for himself, Cotton and Thesiger LJJ) said:

> "As to the other subject of appeal, the inquiry as to damages, we think the Defendant *Campbell* is clearly entitled to have all damage sustained by him by reason of the injunction. 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. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who had been without just cause made so."

33. Mr Coppel relies on that statement to indicate that the gist of the principles of compensation lies in causation rather than in foreseeability. Clearly, however, the court's remarks in that case were obiter dicta.

34. In *Smith v Day* the plaintiff obtained an injunction to restrain building so as to prevent an alleged infringement of rights to light. The plaintiff gave the cross-undertaking. After certain vicissitudes, this court (on 21 June 1881) dismissed the plaintiff's action and the defendant applied (on 16 February 1882) for an inquiry as to damages. The Vice Chancellor refused the application, the damage alleged being the loss of an agreement to let part of the property, with the new buildings erected on it, to a tenant. The Vice Chancellor found that there was no proof of a binding agreement and found that the injunction did not interfere with the erection of the proposed building.

35. In this court, there was a difference of opinion between Jessel MR and Cotton LJ whether an inquiry could be ordered where the injunction had been wrongly granted owing to a mistake of law by the judge, without misrepresentation or suppression by the plaintiff. Brett LJ expressed no opinion on the point.[5] All the members of the court were of the view that the application had been made late and that that was a factor in refusing an inquiry.

36. On the issue of "remoteness" of damage, Jessel MR said, at p. 426:

[5] That point was ultimately decided in line with Cotton LJ's view in *Griffith v Blake* (1884) 27 Ch D 474, namely that the cross-undertaking will be enforced in an appropriate case even without misrepresentation or suppression of relevant facts by the claimant.

> "Apart form this, I am of opinion that there is no sufficient proof of any damage having been sustained, and that if any was sustained it is too remote for the present purpose. I might, indeed, say too remote for any purpose."

Brett LJ, at pp.427-8 said,

> "In exercising this discretion the Court should act as nearly as may be on fixed rules, or by analogy to fixed rules. Now in the present case there is no undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue, and let us examine the case by analogy to cases where there is a contract with, or an obligation to the other party. If damages are granted at all, I think the Court would never go beyond what would be given if there were an analogous contact with or duty to the opposite party. The rules as to damages are shewn in *Hadley v Baxendale* (1). If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of a contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless as in *Hadley v. Baxendale,* notice had been given to the opposite party, of there being some particular contact which would be affected by the breach."

Cotton LJ said this, at p. 430,

> "Now the Court has a discretion; it is not bound to grant an inquiry because some damages have been sustained, they may be trivial. The only damages suggested are that the Defendant lost the advantage of a beneficial lease which he had agreed to grant. It is not proved that there was a binding agreement to take a lease, and I agree with Lord Justice *Brett* that if there had been one, damages could not be recovered on that ground. I think that the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice, as for instance a claim by the builder in consequence of the injunction compelling the Defendant to break his contract with him. In the present case no damages have been suggested except the loss of the tenancy, and after such delay I do not think that we ought to presume that there has been other damage."

37. It is clear to me that all members of the court in *Smith v Day* declined to grant an inquiry on two grounds: first, because of the delay and, secondly, because the damage alleged was too remote. The Master of the Rolls gave no expression to his thoughts upon how remoteness was to be tested. Brett LJ was clearly of the view that "fixed

rules" were to be applied in exercising the discretion on the grant or refusal of an inquiry, but part of those rules involved an application by analogy of the rules as to proximity and "natural damages", applying for this purpose *Hadley v Baxendale*. Cotton LJ expressed his agreement with Brett LJ and said that the damages had to be confined to loss which was the "natural consequences of the injunction".

38. For my part, I consider that *Smith v Day* constitutes a decision of this court that, in considering whether to grant an inquiry as to damages, the court will consider whether the damages claimed are too remote to warrant being assessed upon the proposed inquiry. This formed part of the grounds upon which the decision of Bacon VC to refuse the inquiry was upheld. All three judges expressed that view. Brett LJ said that the contract rules applied by analogy and Cotton LJ agreed that the particular damage proposed to be claimed in that case was too remote, as I read his judgment, because the alleged damage was not the natural consequence of the injunction. The learned Lord Justice was clearly speaking in terms recognisable as constituting the first limb of the rule in *Hadley v Baxendale*. I am inclined to think, therefore, that the ratio of the court's decision was indeed that contractual principles should be applied by analogy in cases in which the cross-undertaking in damages is being enforced.

39. In my judgment, however, the next case goes yet further in deciding the present issue of law so far as this court is concerned. That case is *Schlesinger v Bedford* (1893) 9 TLR 370.

40. The case turned upon interesting facts. The claimants were the personal representatives of the famous author, Wilkie Collins. They sought to restrain the defendant, an actor, from performing on tour his own dramatized version of Collins' famous novel, "The Woman in White", a novel from which Collins had also written a play. On 6 December 1889, the claimants obtained an injunction restraining performance of the play, against their cross-undertaking in damages. At the trial on 11 December 1890, the judge dismissed the action and directed an inquiry as to damages. The inquiry was conducted initially by the Chief Clerk who assessed damages at £600, making allowance for a salary actually earned by the defendant in the last half of the period of the injunction. The claimants applied to vary the Chief Clerk's certificate as to the loss, on the basis that the defendant had spent the time, when he could have been earning as an actor on tour, working instead as his own solicitor in preparation of his defence of the action. Kekewich J reduced the damages by a further £100 in respect of what the defendant might have earned if he had "devoted to his profession the time which he spent in conducting the litigation". The claimants appealed further to this court, contending that the certified loss should be reduced further. The court (Lindley, Lopes and AL Smith LJJ) allowed the appeal, reducing the damages to £250.

41. Lindley LJ (as he then was), with whom Lopes and AL Smith LJJ agreed, said,

> "The real nature of an undertaking of this kind and the extent to which damages ought to be awarded thereunder were carefully explained by the late Master of the Rolls in the well-known case of "Smith v. Day" (21 Ch. D., 421). That case was instructive for this reason, that it showed that all the remote consequences of obtaining an injunction which was afterwards dissolved, were not to be taken into account in assessing the

> damages to be paid to the defendant under the plaintiff's undertaking. It would be unduly straining such undertaking to include in it damages which did not naturally flow from the injunction.
>
> ……
>
> "That case was followed by *Ex parte Hall*" (23 Ch. D., 644), where a receiver obtained an injunction restraining a man from the selling certain goods, and damage resulted from the receiver restraining him from removing the goods. The Court held that the man against whom the injunction was obtained was not entitled to recover any damage except such as resulted naturally from his being restrained from selling and that the damage was too remote. So here the plaintiffs ought not to be exposed to damages which were not fairly consequential upon the injunction, and which they could not have foreseen when the injunction was granted."

42. The claimant in *Schlesinger's* case was not liable, therefore, for the loss that was not fairly consequential upon the injunction and which they could not have foreseen when the injunction was granted, namely the loss of all the profits that would have been made by playing on tour the pieces other than the adaptation of "The Woman in White".

43. In my judgment, that is a clear decision of this court that the "remote consequences" of obtaining an injunction are not to be taken into account in assessing damages and "it would be unduly straining such undertaking to include in it damages which did not naturally flow from the injunction". Equally, it was expressly held that the claimants were not liable for loss which "they could not have foreseen when the injunction was granted".

44. Therefore, even though Lord Diplock's dictum in *Hoffmann-La Roche* (supra) was not part of the *ratio decidendi* of that case, it is firmly based upon authority at least as far as this court, which (as I see it) is binding upon us. I do not think, however, that those authorities take the matter beyond requiring "analogy" with the principles of remoteness of damage in contract. I also do not think that they preclude the possibility that there may be cases in which the court's jurisdiction would have to allow some flexibility.

45. Mr Nathan QC (with whom Miss Harman and Miss Hughes appeared) for HMRC, in urging upon us the normal application of the contractual rules, accepted that analogy with contract must allow for "logical and sensible adjustments" (his words) in appropriate cases. Without tying himself, he was prepared to accept, for example, that a claimant might have to accept a greater risk of losses incurred by a defendant in the period between the making of an order on an *ex parte* application and the return date, before the defendant has had the chance to alert the claimant or the court to serious and imminent losses and before there is any sensible chance to apply to the court for a discharge or variation of the order. It is not useful to attempt further examples or speculation.

46. I consider that Mr Nathan's reservation in this respect was correctly made. The cases speak of analogy and analogies are necessarily imprecise comparators.

47. While *Schlesinger's* case may have been a regrettably neglected decision of this court (perhaps because of the brevity and location of the report), it was cited by Aicken J in giving the judgment of the High Court of Australia, exercising its original jurisdiction, in *Air Express Ltd. v Ansett Transport Industries (Operations) Proprietary Ltd.* (1979-1981) 146 CLR 249. His judgments on remoteness of damage, like so many of the decided cases on this subject, was entirely obiter as he decided the issue before him against the defendant on the basis of causation. The same is true of the four judgements given in the High Court of Australia on this question on the appeal from Aicken J. I think, however, that Aicken J (with respect) was correct, so far as the law of England and Wales is concerned, in noting the equitable origin of the injunction and of the cross-undertaking (at p.261) and that he may have the "touchstone" of the matter when he said, at pp.266 to 267 of the report, this,

> "In a proceeding of an equitable nature it is generally proper to adopt a view which is just and equitable, or fair and reasonable, in all the circumstances rather than to apply a rigid rule. However the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one which will be just and equitable in the circumstances of most cases and certainly in the present case. No doubt the view as expressed in the two decisions of the Court of Appeal does not constitute a rigid rule and circumstances may sometimes require a different approach. However it will in my opinion be seldom that it will be just or equitable that the unsuccessful plaintiff should bear the burden of damages which were not foreseeable from circumstances known to him a the time."

48. It is necessary to say a little more about some of the remaining cases in the English courts.

49. *Cheltenham & Gloucester BS v Ricketts & ors* [1993] 4 All ER p. 276 raised the question of the timing of the court's decision on whether or not to order an inquiry as to loss following the discharge of an interim injunction pre-trial. The judge who discharged the injunction before the trial in that case ordered an immediate inquiry as to damages. The claimant society appealed against that part of the order and this court allowed the appeal. It set aside the order for the inquiry, holding that the matter should be left over to the trial judge.

50. Neill LJ set out a number of principles relating to the enforcement of the cross-undertaking, most of which are uncontroversial in this case. With regard to the question before us, the learned Lord Justice said (at page 282 d – f),

> "(8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in *Air Express Ltd v Ansett Transport Industries (Operations) Ltd* (1979) 146 CLR 249 Aicken J in

> the High Court of Australia expressed the view that it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'. This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract."

Peter Gibson LJ said this (at pages 284 g – 285 a, and 285 b – d)

> "The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for its grant was originated by the Court of Chancery as an adjunct to the equitable remedy of an injunction. There is an obvious risk of unfairness to a respondent against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have been ascertained. The order might subsequently prove to have been wrongly made but in the meantime the respondent by reason of compliance with the injunction may have suffered serious loss from which he will not be compensated by the relief sought in the proceedings. The risk of such injustice is the greater when the interlocutory injunction has been granted ex parte. The risk is particularly great with Mareva injunctions, granted as they are almost invariably ex parte, and frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets: such injunctions can have the effect of ruining a thriving business or of otherwise causing substantial loss to the respondent and were vividly described by Donaldson LJ in *Bank Mellat v Nikpour* (1985) 2 FSR 87 at 92 as being, with the Anton Piller order, one of the law's 'two nuclear weapons'. The courts are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse.
>
> ……
>
> The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way. The power to enforce the undertaking being incidental to the power to grant an injunction (see *Re Hailstone* (1910) 102 LT 877 at 880), the discretion will be exercised in accordance with ordinary equitable principles (see, for example, Spry *Equitable Remedies* (4th edn, 1990) pp 638-645). The undertaking is given to the court and not the respondent, who can ask the court to enforce it but has no right to its enforcement or any right to damages until the discretion is exercised in his favour and damages are awarded. "

Mann LJ agreed with both judgments.

51. In that case, of course, the question of remoteness of damage was not for decision.

52. There then followed four decisions in the Chancery Division of the High Court in which the application of the contractual principles for the assessment of remoteness of damage in this field has been called into question. The cases are as follows:

    i) *R v The Medicines Control Agency, ex p. Smith* [1999] RPC 705 (Jacob J, as he then was) ("*Medicines*");

    ii) *Apex Frozen Foods v Ali* [2007] 6 Costs LR 818 (Warren J) ("*Apex*");

    iii) *Les Laboratoires Servier v Apotex Inc.* [2009] FSR 3 (Norris J) ("*Servier*");

    iv) *Lilly Icos LLC & ors v 8PM Chemists Ltd. & ors.* [2009] EWHC 1905 (Ch) (Arnold J) ("*Lilly Icos*").

53. Of these cases, the judge said (at paragraph 30),

> "These decisions have not persuaded me that it is appropriate to depart from what appears to me to be the conventional approach."

He considered *Lilly Icos* to have been decided *per incuriam* earlier decisions of appellate courts and that the statements in the others were either obiter dicta (*Medicines* and *Servier*) or on the facts were distinguishable (*Apex*).

54. In *Medicines* the defendant Council granted to a company called Primecrown Limited ("P") a "product licence (parallel import)" to import into the UK a drug called Ditropan. The grant of the licence was challenged in judicial review proceedings by Smith & Nephew Pharmaceuticals Limited ("S&N") who made and sold the drug here, also by licence from the Council, through another member of its group of companies. An interim injunction was granted suspending the licence granted to P, against a cross-undertaking in damages from S&N. That injunction was lifted by a later order and an inquiry as to damages followed. In those proceedings it emerged that, if the licence had been allowed to run, the trade in Ditropan would have been run by another company, in common ownership with P, called Necessity Supplies Limited ("N"). S&N contended that it could not be liable for losses not suffered by P, the party whose licence had been suspended, but by N. Jacob J upheld that contention, but had observations to make about the basis of compensation of the wrongly injuncted party. He reviewed the principal authorities, from England and Australia, except for *Schlesinger's* case, and said this (at p.724, lines 33-50),

> "I have much sympathy with the view that the contract basis for assessment is or may be too narrow in some cases. After all, even if the injunctor is no wrongdoer, as compared with the wholly wrongly assailed injunctee, he stands a notch down. It was he who (as it turned out) wrongly assailed the injunctee. He was the "voluntary litigant" as James L.J. put it. There is a lot to be said for the view that the paying party should pay for all the damage directly caused to the injunctee by the wrongful injunction – that he must take his victim as he finds him. Of

> course if, once he knows of the injunction, the injunctee does not spell out to the injunctor any special circumstances causing direct but, to the injunctor, unforeseeable damage, he may not be allowed to recover for that damage. Equity would be apt to blame an injunctee who stood by, letting the injunctor build up a liability on the cross-undertaking of which he had no knowledge."

55. In another case in which the true losses caused by the injunction in question had been suffered by third parties, not the defendant, Jacob LJ (as he had by then become) repeated his view that, "the notional contract basis [of assessment of compensation] may be too narrow in some cases": see *SmithKline Beecham plc v Apotex Europe Ltd.* [2007] Ch. 71, 99D.

56. In *Apex*, Warren J had to consider the ambit and extent of a cross-undertaking, given in support of an injunction obtained in favour of a company, by its provisional liquidator. The undertaking was that "[RS] as provisional liquidator of the applicant will comply with any order the court may make". Argument arose as to whether the undertaking included elements of costs suffered by the successful defendant. The judge decided that, like Jacob J in *Medicines*, he did not have to decide whether the "contract approach" to the recoverability of loss under such a cross-undertaking was too narrow. However, the judge said this,

> "14. It is, in any case, a difficult question whether the contract basis for assessment is too narrow. Jacob J considered the question, but did not need to decide it, in *R v The Medicines Control Agency ex parte Smith & Nephew Pharmaceuticals Ltd* [1999] RPC 705, expressing much sympathy with the view that it is too narrow. He referred to the Australian case of *Victorian Onion and Potato Growers v Finnigan* [1922] VLR 819 where the judge (Cussen J) thought that "damage" in the undertaking is to be given a very general meaning and not necessarily the same meaning as "damages" when used in connection with breaches of contract. It seemed to Cussen J that "damages" meant real harm rather than any strictly defined meaning. It is perhaps worth noting in similar vein that Lord Diplock refers to the "normal" undertaking which, in his day, used the word "damage" or "damages" rather than "loss" which is what appears in the undertaking in question in the present case and which may have a wider meaning. After all, a claim to recover under the cross-undertaking is not actually a claim for damages at all. There is, in addition, a decision of the Ontario Court of Appeal, *James v Canadian Trust of the Church of Latter Day Saints* (1998) 165 DLR (4^{th}) 227, where the court held that the undertaking (referring to "damages") did indeed include costs.
>
> 15. I should, however, say that even if the contract basis of assessment is correct, I doubt that it would be right to incorporate all the principles which apply in relation to an assessment of damages. The staring point must surely be the true construction of the particular undertaking in question. That

> is to be judged against the background and purpose of the undertaking which is required by the court to be given in order to ensure that a mechanism is available to make good any detriment suffered by a defendant against whom injunctive relief is obtained when it is subsequently established that there should not be an injunction. I think that there is much to be said for the view that the wording of the undertaking would be wide enough to subsume costs even if it had been given by Foods, and *a fortiori* wide enough to do so since it was in fact given by a third party, Mr Smailes."

57. In *Servier*, Norris J had charge of an inquiry as to damages in a case in which the claimants had obtained an injunction in support of a patent which the trial judge held was invalid, and which, as Jacob LJ said in this court, "…was invalid. And very plainly so. It is the sort of patent which can give the patent system a bad name…" (at p. 8, paragraph 3). Norris J set out some initial principles for assessing compensation, including,

> "The approach to assessment is *generally* regarded as that set out in the obiter observation of Lord Diplock in *Hoffmann-La Roche*…" (my emphasis).

58. The judge went on to state that the defendant had been trying to enter a new market; the opportunity was denied and the outcome of the intended market exploitation was "attended by many contingencies", necessitating an application of the principles emerging from *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Ltd. v Simmons & Simmons* [1995] 1 WLR 1602. He concluded that the guidance offered by Lord Diplock in *Hoffmann-La Roche* was "sufficient to enable [him] to determine the issues that arise". He continued,

> "For my own part, I think it should be recognised that the award is equitable compensation (not of damages strictly so called) and that there may be occasion to examine whether such equitable compensation should be fettered by rigid adherence to common law rules, and further, that if common law rules are to be applied, whether those relating to contract are more appropriate than those relating to tort or some other breach of duty (in which connection it will be noted that the judgement of Brett L.J. upon which Lord Diplock founded his view referred to "[a] contract with or duty to the opposite party"). The difference between the two sets of common law rules would be important, for example, in the context of aggravated or exemplary damages for a blatant or cynical interference with a defendant's right to enter a pharmaceutical market with a generic drug by means of a second generation patent that is a "try on" (to adopt the language of Jacob L. J.)."

Finally, before turning to the facts, the judge said this,

> "…whilst it is for Apotex to establish its loss by adducing the relevant evidence, I do not think I should be over eager in my

> scrutiny of that evidence or too ready to subject Apotex' methodology to minute criticism."

After a passage to which I shall have to refer a little later, Norris J, went on to say this,

> "…….In the analogous context of the assessment of damages for patent infringement, in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd (No.2) [1975] 1 W.L.R. 819;[1975] F.S.R. 273;[1976] R.P.C. 197 HL* at 212 Lord Wilberforce said:
>
> > "There are two essential principles in valuing the claim: first, that the plaintiffs have the burden of proving their loss: secondly, that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants."
>
> The principle of "liberal assessment" seems to me equally applicable in the present context. Although a party who is granted interim relief but fails to establish it at trial is not strictly a "wrongdoer", but rather one who has obtained an advantage upon consideration of a necessarily incomplete picture, he is to be treated as if he had made a promise not to prevent that which the injunction in fact prevents. There should as a matter of principle be a degree of symmetry between the process by which he obtained his relief (an approximate answer involving a limited consideration of the detailed merits) and that by which he compensates the subject of the injunction for having done so without legal right (especially where, as here, the paying party has declined to provide the fullest details of the sales and profits which it made during the period for which the injunction was in force)."

59. The approach taken by Norris J was adopted and expanded upon by Arnold J in *Lilly Icos*. He agreed with Norris J that the remedy under a cross-undertaking in damages was properly to be regarded as equitable compensation and not common law damages: see paragraph 20. He regarded the remarks of Brett LJ in *Smith v Day*, on assessment of compensation, as obiter. He cited at paragraph 14 a part of the passage from Brett LJ's judgment in that case (quoted above) and said that this left open the possibility of assessment by reference to a non-contractual duty, such as a fiduciary duty. No reference was made to *Schlesinger's* case.

60. For my own part, I consider that Arnold J was not correct in thinking that Brett LJ had in mind a breach of fiduciary duty. The learned Lord Justice, Master of the Rolls and Cotton LJ, were concerned with issues of remoteness of damage. Brett LJ said (as already quoted) that,

> "The case then is to be governed by analogy to the ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from

> such a breach, unless as in *Hadley v Baxendale* notice has been given to the opposite party, of there being some particular contract which would be affected by the breach."

Such language seems to me to take Brett LJ away from any reference to breach of fiduciary duty. Assessment of loss by analogy with equitable compensation for breach of fiduciary duty seems also to be a long way away from the view of the law taken by this court in *Schlesinger's* case which does not appear to have been cited to Arnold J.

61. At paragraph 40 of his judgment in *Lilly Icos*, Arnold J reached this conclusion:

> "40. In my judgment, the general contractual rule is not applicable to the case of a claim under a cross-undertaking. The defendant will usually (although not always, as discussed below) sustain the loss claimed after the date of the notional breach of contract, i.e. the date of the injunction. Often, the loss will be a continuing one down to the date of discharge of the injunction. Furthermore, it would be artificial to regard the assessment as valuing the loss of a contractual benefit of which the defendant has been deprived. Rather, the defendant is being compensated for being prevented from carrying on it business in the way in which it normally would have done. Accordingly, I consider that the correct approach is that adopted by equity when awarding compensation for breach of fiduciary duty, namely to consider the position with the benefit of hindsight."

62. In my judgment, that passage is not consistent with binding authority in this court, for the reasons which I have already given.

63. In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in *Hoffmann-La Roche*, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated" (to apply the words of the undertaking). Labels such as "common law damages" and "equitable compensation" are not, to my mind, 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.

64. In my judgment, the law also meets the justice of the matter. A defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if a loss, not usually foreseeable, arises before a defendant has had any real

opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation.

65. In mentioning this possible example, 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 – the present case provides a very clear example (see below). Applications for variation are not that simple. They take time to prepare and are not without cost. At the same time, under the terms of the order, the defendant will be limited as to costs and living expenses and will, no doubt, also be under requirements to identify and verify his assets. In addition, he will be seeking quickly to assess, with his lawyers, the claimant's evidence, both with regard to whether to oppose continuation of the order on the return day (or perhaps to apply for variations) and with regard to the ultimate defence of the action. Approaches to claimants to agree variations, or even to provide suitable written indications to banks and other third parties that particular payments are 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 in my judgment the claimant should not be surprised if the court orders him to pay for it.

66. In the context of the present case, and before turning to factual issues, I would add that I accept Mr Coppel's submission that, 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 that was actually suffered by the defendant and not the particular loss within that type: see (again by analogy) Chitty on Contracts, 21st Edn. Vol. 1 paragraph 26-113, p.1828.

67. I do not consider that the judge misstated the principles applicable, as the Appellants contend, when he said (at paragraph 27 of the judgment) that the rules rendered,

> "…recoverable either loss suffered by the Injunctee that falls within the first or second rule in *Hadley v Baxendale* and arises from circumstances that were either actually known to the injunctor or deemed to have been known to the injunctor at the time when the injunction is granted…"

Nor do I think the judge was in error (in paragraph 29) when he said that,

> "…the cardinal point remains this: absent express notice of *special circumstances* [my emphasis] arising after the date when the injunction is granted, the conventional approach is that compensation will not be recoverable for events occurring after the grant of the injunction that could not be foreseen at the time when the injunction was granted…"

68. In my judgment, these passages were not indicating that the judge required proof of "actual notice of the actual circumstance" creating the loss before compensation for it was recoverable (c.f. paragraph 66 of the Appellants' skeleton argument). If a claimant has knowledge of special circumstances, giving rise to 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. However, as will appear below, I

do think that in respect of one of the claims, the judge did wrongly require proof of "actual notice of the actual circumstance" creating the loss.

69. I would, therefore, reject the Appellants' first ground of appeal, concerning the general application (by analogy) of the contract rule.

(E) The Law as applied to the facts in this case

70. The Appellants' further grounds of appeal attack the judge's approach to, and findings of, the facts in this case. As already indicated, they contend that the judge was wrong to reject heads of loss arising from three particular potential dealings or types of dealing and that he was wrong in the limited extent of the award of general damages.

71. At the outset of these arguments, the Appellants complain that the judge adopted a mistaken view of how the Liquidator's attitude to administration of the freezing order, in real terms, caused them loss. They say that, after a time, they did not bring to the Liquidator's specific notice individual investment or earning possibilities of which they may have taken advantage, because she had adopted (largely through her solicitors) an intransigent approach to *any* proposals that they might make. In their terms they were simply "knocked back" by the Liquidator. This argument (now ground 2 of the appeal) became known in the proceedings, and was referred to before us, as the "knockback theory". The factual analysis turns upon an examination and evaluation of lengthy exchanges of correspondence between the solicitors in the relevant period.

72. As far as the law is concerned, it seems to me that it is necessary to enquire whether the Appellants ought to have been held to have demonstrated that the losses for which they claimed were of a type which were reasonably foreseeable at the time of the grant of the order or were of a type which were within other circumstances which were known to the Liquidator as likely to give rise to the relevant loss: see above.

73. In considering these points, it must be recognised that the "knockback theory" was advanced by the Appellants themselves only as "an application of the principles of mitigation": see the Appellants' skeleton paragraph 96. This, in turn, was based upon the Appellants' construct of the rules as to remoteness, which (with respect to the able argument in support of it) I have rejected. The Appellants' contention was that it was not necessary for them to bring themselves within the contractual rules as to remoteness (applied by analogy), and that, therefore, subject to proper mitigation of damage, they were entitled to recover all losses which were in fact caused by the order, known or unknown, foreseen or unforeseen. Accordingly, the argument on "knockback" meant that they could not be criticised for failing to mitigate loss by failing to enter the specific transactions. All the losses were, they contended, recoverable whether reasonably foreseeable or not.

74. When seen through the "prism" of the remoteness rules, however, the exercise is rather different. It becomes necessary to ask whether the circumstances overall gave rise to the conclusion that the Liquidator should have realised that her attitude to the "policing" of the order was likely to inhibit proper transactions of a type which the Appellants might have undertaken in the natural order of things or which, from her knowledge of the circumstances, she ought to have appreciated that they might have

undertaken, and whether the Appellants would in fact have entered into such transactions.

75. The judge sets out a good working summary of the course of the inter-solicitor correspondence in issue in paragraphs 33 and following of his judgment I do not intend to repeat that summary. The judge reached the conclusion that there were areas in which the letters from the Liquidator's solicitors were to be criticised as taking points which were "wrong in principle" or "seriously misplaced" and could be said in places to be "imprudently and intemperately worded" or "over-aggressively expressed" or "objectionable and misconceived".

76. All these descriptions are well justified, in my view. However, the judge decided, on the facts, that the correspondence did not indicate that the Appellants' experienced solicitors were contending that business opportunities were being lost by the attitude of their opposite number or their client: see paragraph 34 of the judgment. Further, apart from the single "marble transaction" no specific business opportunities were brought to the Liquidator's attention. In accepting that he had to review the "substance of the correspondence as a whole", rather than individual items in isolation (paragraph 39), he did not consider it gave rise to the inference that opportunities to take up new business were or would have been rejected unreasonably.

77. For my part, conducting the same review as the judge, I find it difficult to express with sufficient moderation my disapproval of the approach taken by the Liquidator's solicitors to some of the day to day administration of this freezing order. Apart from other matters, they took wholly unjustifiable approaches to the questions of living expenses and legal costs. At one stage they suggested that the ceiling for legal costs provided for by the order was a mere £5,000 (when it did nothing of the sort) (letter 6 July 2009) and at another they even indicated that they would unilaterally advise that the fund-holding banks be notified that a mere £500 per month living expenses should be permitted, notwithstanding the court's order permitting very significantly larger expenditure for such purposes (letter 1 September 2009).

78. The Appellants' skeleton argument at paragraph 96 cites a number of further examples of statements by the solicitors that might, at lowest, be described as "seriously misplaced", using just one of the number of apt epithets employed by the judge. Perhaps of most significance in the present context is the solicitors' reaction to Mr P Owen's seeking consent to purchase the one consignment of marble. The letter of 27 August 2009 included the following passage:

> "Our client's manager has had a very odd call form Patrick Owen today seeking £14,000 to buy a container of marble. She directed him to address any requests via you to us.
>
> Mr Hone recently called our client direct to ask for some £8600 to buy a car for his son's 17th birthday. She refused.
>
> We have repeatedly said, in writing, and verbally to you, that your clients appear not to take the freezing orders seriously. Further, that the source of their assets is wholly murky. We have had no proper or truthful replies.

> We have repeatedly tried to ascertain what your clients are doing in terms if [sic] work or income. Their "ordinary course of business" on the basis of information thus far supplied via you is "unemployed". Thus clearly no releases can be made for any trading."

79. Cripps Harries Hall ("CCH"), the Appellants' solicitors at the time, who dealt with all this correspondence with exemplary moderation in circumstances of significant provocation, responded to the passage quote above, in a letter of 28 August 2009, as follows:

> "The request made to your client's manager by Mr Patrick Owen in relation to the marble should not be considered to be in any way "odd". This was a business opportunity that our clients wished to take up. As with most business opportunities they are time critical and cannot wait for our clients to inform us, for us to inform you, for you to inform your client and then potentially, your clients to inform you, you inform us and us our clients of any decision.
>
> This will effectively prevent our clients from taking up business opportunities as they arise."

This response was supplemented in a further letter of 11 September 2009 (which dealt with a number of matters) in these terms:

> "…our clients, by virtue of the liquidation of their company and the freezing injunction are unable to obtain employment in the industry which they have worked in for most of their lives. Nor are they able to earn money from ancillary activities in view of your client's unwillingness to allow our clients to use their own money in any speculative venture."

80. I agree with the Appellants that this correspondence indicates clearly that the Liquidator had a strong (and probably unjustifiable) hostility to any proposal by the Appellants to invest their money in private venture companies or in trading activities, whether these were properly to be regarded as transactions within any appellant's "ordinary and proper course of business", and thus permitted under the standard exception in paragraph 10 (2) of the order (subject still in practice to getting a suitable written consent from the Liquidator to the release of funds), or whether it required a variation, strictly so called, under paragraph 10 (3) of the order.

81. However, I do not consider that this would allow the court to compensate the Appellants for a specific loss of the character for which claim is now made that might have arisen out of an individual transaction or series of transactions, the nature of which was never mentioned to the Liquidator. Apart from anything else, the failure to raise such a matter seems to me to raise serious questions of whether, on the facts, the Appellants would truly have entered into those transactions, absent the order but with the reality of the litigation hanging over them. Nowhere in this correspondence is there a clear statement that the Appellants had taken the decision not to seek consent to further use of funds for share investments because of a perception that such consent

would inevitably be refused or that correspondence on such issues was seen by the Appellants and/or their advisers to be a waste of resources.

82. It seems appropriate to consider, in the light of these considerations, the arguments raised by the Appellants in challenge to the judge's factual findings in relation to the specific transactions still in issue. This is, in effect, the third ground of appeal. It is argued that the judge adopted a wrong approach to the issues of causation arising in the case.

DLB Shares

83. The specific loss of opportunity in issue here was the alleged chance for the Appellants to acquire shares arising under a rights issue decided upon by DLB by a resolution passed in January 2010. The person controlling DLB was a Mr Wates, a long-standing friend of the Appellants and of Mr Hone in particular. The shares giving rise to the "rights" entitlement were registered in the name of the daughter of Mr P Owen, Miss Kelly Owen. The purchase money for those shares had been provided in a rather complicated way, explained by CHH in a letter of 16 October 2009 as follows:

> "" The position in relation to [DLB] is as follows:
>
> - £50,000 in value of shares was purchased in this company in December 2008 by Wingpitch
>
> - The money for the purchase came from Abbey Forwarding Limited. Wingpitch Limited issued a credit note to Abbey …..in this sum (to be credited against the money owing from Abbey ….to Wingpitch…in relation to rent);
>
> - This shareholding was considered to be an investment on behalf of the families of Messrs Owen and Hone but it was undecided as to how the shares should ultimately be held. Accordingly, the shares were registered in the name of the daughter of Mr [P.Owen];
>
> - In due course the appropriate accounting adjustments would have been made to reflect initial purchase of the shareholding by Wingpitch Limited…. "

The judge noted what he called "a number of difficulties about all this…". In paragraph 55 of the judgment, he said,

> "55. There are a number of difficulties about all this. First, there is no formal lease between Wingpitch and Abbey. Secondly the "credit note" referred to in the letter has never been produced. The credit note was apparently issued by Wingpitch in favour of Abbey. Wingpitch is not in liquidation and remains in the control of its directors. It is unclear therefore why the credit note has not been produced. Thirdly, the sum of

> £50,000 does not divide into the rent ostensibly due from Abbey to Wingpitch each month of £33,000. Fourthly, the accounts for Wingpitch for the period ending 31st December 2009 record a turnover of £49,5000, a depreciation in the value of fixed assets in 2009 when compared to 2008 (which is not consistent with the acquisition of new assets at a price of £50,000, a view that is supported by Note 4 to the accounts which makes clear the only property held by Wingpitch is the Warehouse), and nowhere within the accounts either for this or the subsequent financial period is there a reference to a credit note being issued to Abbey. Fourthly [sic], if the purchase was by or on behalf of Wingpitch (a company controlled by the Owen Family in which Mr Hone had no interest), it is not at all clear why the shares were not allotted to and registered in the name of that company."

84. The judge concluded that the shares were owned beneficially by either Abbey or Wingpitch Limited and that, therefore, the rights were not those of the Appellants for the taking. The Appellants' do not challenge the finding as to the beneficial ownership of the base shares, but contend that neither Abbey (in liquidation) nor Wingpitch would have taken up the rights and, therefore, that the opportunity would in fact have been available to the Appellants: see their skeleton argument, paragraph 133.

85. In the alternative, if wrong on those facts, the judge held that the damage alleged was too remote as the opportunity was unknown to the Liquidator.

86. For my part, I do not consider that it is possible for this court to go behind the judge's finding of fact that the base shares were not beneficially owned by the Appellants or any of them, with the result that the rights were not theirs to exercise. I do not think we are justified in entering into the speculation now as to what would have happened if the true beneficial owner was unwilling or unable to exercise the rights. Certain it is that Miss Owen, as registered owner, and through her the Appellants would in fact have had notice of the potential availability of the rights shares. I consider that it is telling that no suggestion is made in the correspondence that a valuable investment opportunity was being missed. "Knockback theory" or not, one would have expected any such real investment opportunity to have been mentioned, even if it was thought that it was fruitless to argue in correspondence or in court about whether the investment should be permitted.

KCL shares

87. This was a company owning rights in a software product marketed to the insurance industry for which further applications were envisaged but which required more investment. The company was controlled by a Mr Osborn. The judge found that the Appellants in 2007 had become the beneficial owners of shares in the company, registered in the umbrella name "Purland House". A company called "Purland House Limited" was incorporated over a year later, but the shares were never transferred to it nor was there any declaration of trust in its favour. The Appellants' interests in "Purland House Limited" were declared in their statements of means, made in compliance with the freezing order. The judge rejected the argument of HMRC that the shares should be treated as held on trust for the company.

88. It was clear, therefore, that the Appellants had made an investment in KCL prior to the proceedings and the evidence was that in late 2008 they had "pledged" (as the judge put it, in the inverted commas) a further investment of £250,000 in the company in return for a 10% of its issue share capital. This was confirmed by Mr Osborn in written and oral evidence. For the Appellants it was argued that this opportunity to invest remained open throughout 2009 and, but for the order, it would have been taken up.

89. The judge held that,

> "108. …The reality is that the Defendants chose not to invest further. That was likely to be because they wished to garner their resources in order to meet the two most pressing matters for them – their respective living expenses and the cost of defending the substantive proceedings brought against them in circumstances in which what was on any view the main source of their income – Abbey – had been placed in liquidation.
>
> 109. In my judgment had the Defendants wished to proceed, the further investment would have been one that fell within the ordinary course of business exception. I say this because the Defendants had invested heavily, and planned to invest further, in KcL prior to the commencement of these proceedings. There can be no doubt that such investment was in the course of business. These were not investments held by them privately but were held by them collectively for business purposes. Thus, as is submitted by HMRC it was open to them if they chose to do so to proceed with the transaction. Thus I am not satisfied that the Defendants have proved that the effective cause of the failure to invest was the Freezing Order.
>
> …….
>
> The first mention of KcL to the liquidator was in an interview of Mr P. Owen that took place on 3rd July 2009. There was no mention of the further investment at that stage. It is simply not the case that knowledge of the existence of a shareholding in a closely-held company leads to the knowledge that an injunctee might wish to invest further but will be precluded from so doing by a freezing injunction which incorporate provisions such as those in Clause 10(2) and (3) of the Freezing Order."

90. In my judgment, these are also findings of fact which cannot sensibly be challenged on appeal to this court from a judge who heard the oral evidence on the subject. On the Appellants' case, this potential investment was live at the date of the freezing order. For some time thereafter debate continued between CCH and the Liquidator's solicitors about the terms of the freezing order and indeed, on 5 June 2009 in correspondence with the court about a trial date, CCH wrote,

> "…the order has a significant impact on the ability of our clients to engage in new business and we anticipate that we shall need to make requests in this respect in due course…".

Notwithstanding this, no request was made for release of funds to make the suggested investment which, it is said, was live for the rest of that year. It is hard to say that any "knockback theory" could have arisen on the facts between February and 5 June 2009. Yet the matter of a potential investment in KCL was not even raised at any time during that period. In my judgment, the judge must have been entitled to make the finding that he did, summarised in the passages quoted above.

Marble

91. This was the one area of the claim in which the judge awarded damages for loss incurred in relation to a specific transaction. He was clearly right to do so. Mr P Owen had raised the matter expressly with the Liquidator's office. He was rebuffed in a wholly unreasonable fashion by the letter of 27 August 2009 from which I have quoted above.

92. HMRC sought permission to appeal against the judge's award of damages in this respect. Permission was refused by Gloster LJ and, as already mentioned, the application was renewed before us. Gloster LJ held that the amount involved was disproportionately small and the judge had made detailed findings of fact on the matter. For my part, I agreed entirely with that assessment and so agreed with my Lady and my Lord that HMRC's renewed application for permission to appeal should be refused.

93. The Appellants, however, now appeal (with permission) against the judge's refusal to award further damages for the prospective losses arising from further opportunities to purchase marble for re-sale which they contend would have been open to them in 2009 and 2010. The claim was advanced in respect of three further such opportunities, one more in 2009 and two in 2010.

94. In my judgment, the judge did fall into error in his assessment of the evidence about (and perhaps of the legal consequences of) the potential future transactions of this nature.

95. The judge rejected the claim to compensation for the loss of future trades simply by reference to the fact that the Liquidator was not informed of the possibility of such trades in Mr P Owen's approach to the liquidator's office on 27 August 2009.

96. In my judgment, however, the approach gave to the Liquidator the clearest possible notice that Mr P Owen at least was desirous of entering into a transaction *of this type*. The reaction was a point blank refusal in the most unreasonable of terms to which CHH responded that such refusal "will effectively prevent our clients from taking up business opportunities as they arise". The Liquidator's reaction to the request killed off the first possible transaction and, in my judgment, this is a case where the "knockback theory" is well and truly established.

97. The evidence of the opportunity available was given in clear terms by Mr W Owen in his witness statement of 10 May 2012, paragraphs 11 to 18, and especially as to

forecast future potential in paragraph 18. Cross-examination occurred directed to the issue of whose opportunity the marble business truly was and on whether the Liquidator was specifically informed of the potential for continuing business of this nature. However, there was no significant cross-examination, that I have been able to detect, as to whether the future potential really existed: see in the appeal bundles B/515-6, 518, 523 and 545. The witness statement evidence of Mr W Owen appears to have been cogent and unchallenged. There was no contrary evidence to refute it from HMRC.

98. Further, as the Appellants point out in paragraph 125 of their skeleton argument, Mr W Owen was cross-examined by Mr Nathan at one stage on the specific basis that the first transaction was "…not, as it were, a one-off business opportunity…"

99. In my judgment, the judge was wrong to reject this claim on remoteness grounds for these reasons.

100. I would add that, in my view, the approach taken by Norris J in *Servier* to the assessment of damages in these cases is of some materiality here. At paragraph 9 of his judgment, the learned Judge in that case, in the passage which I mentioned earlier, said:

> "9….whilst it is for Apotex to establish its loss by adducing the relevant evidence, I do not think I should be over eager in my scrutiny of that evidence or too ready to subject Apotex' methodology to minute criticism. That is so for two reasons, quite apart from an acceptance of the proposition that the very nature of the exercise renders precision impossible. (a) Whilst, in order to obtain interlocutory relief, Servier will not have had to persuade Mann J. that it was easy to calculate Apotex' loss in the event of the injunction being wrongly granted, it will have had to persuade him that that task was easier than the calculation of its own loss in the event that the injunction was withheld. The passages I have cited from its skeleton argument and evidence show that it did so. Having obtained the injunction on that footing it does not now lie in Servier's mouth to say that the task is one of extreme complexity and that the court should adopt a cautious approach. Having emphasised at the interlocutory stage the relative ease of the process, it should not at the final stage emphasise the difficulty."

101. In my view this part of the appeal should be allowed to the extent of awarding further compensation of three-times the agreed compensation (£3,100) in respect of the one specific transaction on which the judge found in the Appellants' favour, i.e. an additional £9,300. I would be inclined to award this sum to the Appellants collectively. I am not sure why, in the light of Mr W Owen's evidence and his own findings, the judge found that the loss on the first transaction had been suffered by Mr P Owen alone. However, that is not contested by anyone. I see no point in remitting the precise question of damage to the High Court as the Appellants Notice invites. In my judgment, it will be disproportionate to do so.

(F) General Damages

102. On this part of the appeal (ground 4) the Appellants raise two points: first, they say that the judge's award of general damages was far too low, and secondly, that the judge, while rejecting the specific heads of lost opportunity claims, should have awarded a sum for "opportunity losses" in general. The Appellants had claimed general damages and also aggravating factors which, it was submitted justified an award of aggravated damages.

103. As already mentioned, HMRC argue that the judge was wrong to award any compensation at all under this head.

104. The judge's initial approach to this issue appears in paragraphs 113-114 of his main judgment on liability. It was as follows:

> "113. General damages for breach of contact are generally not recoverable to compensate for injury to reputation, feelings or mental distress. The general principle was recently restated in Johnson v. Gore-Wood & Co [2002] 2 AC 1 following Addis v. Gramophone Co Ltd [1909] AC 488. This general principle is to be read subject to the exception summarised in Watts v. Morrow [1991] 1WLR 1421 at 1445 namely that where "…*the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."*. It was that exception that was applied by HH Judge Diamond QC who was upheld by the House of Lords in Ruxley Electronics and Construction Limited v. Forsyth [1996]AC 344.
>
> 114. In assessing the compensation due pursuant to a cross-undertaking in damages the court proceeds as I said much earlier in this judgment as if the undertaking had been a contract between the claimant and the defendant that the claimant would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction – that is on the facts of this case as if there had been a contract between Abbey and the Defendants that Abbey would not prevent the Defendants from disposing, dealing with or diminishing the value of their assets up to a value of £5.95m or removing their assets up to that value from England and Wales.
>
> 115. I do not see why the notional contract by reference to which compensation is to be assessed is not a contract the very object of which "*….is to provide freedom from molestation…"* or, when an Inquiry as to the compensation due under a cross-undertaking has been ordered, why a court should be precluded form awarding compensation on the basis that *"…the contrary result is procured instead…"* It is very difficult to see how preventing an individual from dealing with his or her assets is anything other than molestation or why the contrary result is

> not the consequence of a (wrongly made) order that prevents such activity."

105. HMRC appeal against the judge's award of general damages, contending that the award infringes the principle that damages for distress and anxiety are not usually recoverable in contract. They refer in their skeleton argument to the well-traversed contract cases on this subject.

106. Authority on this aspect of compensation under a cross-undertaking is sparse indeed.[6] However, as already stated, contract rules are to be applied by analogy, where appropriate, and not purely automatically. For my part, I consider the judge's approach (quoted above) accords with principle. He concluded that the Appellants were in principle entitled "to recover a sum by way of general damages to compensate them for the consequences of the order that cannot be claimed as special losses" (paragraph 129). I agree.

107. Jack J reached a similar conclusion in principle in *Al-Rawas v Pegasus Energy Ltd.* [2008] EWHC 617 (QB). In paragraphs 35 to 39 of his judgment, he said this:

> "[35] I consider that there is a close analogy between the stopping of a cheque by a bank and the obtaining of a freezing order. In each case there is an interference with the party's ability to use its money as it wishes. It goes to the heart of the party's ability to use the banking system, which is at the heart of trade. To be on the wrong end of a freezing order is undoubtedly a stigma-see the *Booker McConnell* case referred to above at [32]: it suggests that the defendant has failed to pay its debts and has been found likely to try to dissipate its assets.
>
> [36] In the New Zealand case, *Bonz Group (Pty) Ltd v Cooke* [2000] NZCA 44 the claimant obtained a search and seizure order against the defendant on the basis that she had infringed rights by making and selling hand-knitted woollen garments. The order was executed at her home. The order was set aside on terms that the defendant make clear that her goods were not the claimant's. In consequence in part of the order the defendant had discontinued her business. At trial the claimant failed entirely. The New Zealand Court of Appeal upheld the judge's award on the cross-undertaking of $NZ72,990 for financial loss relating to her business and $NZ5,000 for emotional distress. The latter sum was not contested on the appeal. Mrs Cooke claimed $NZ75,000 under that head.
>
> [37] In *Tharros Shipping Co Ltd v Bias Shipping Ltd* [1994] 1 Lloyd's Rep 577 the court was concerned with whether the conduct of the defendant's bank when served with a freezing order which caused the defendants an exchange loss was too remote. It was held that it was. In the course of his judgment

[6] We were referred to *Al-Rawas v Pegasus Energy Ltd.* [2008] EWHC 617 (QB) (Jack J) and to *Bonz Group (Pty) Ltd v Cooke* [2000] NZCA 44.

> Waller J quoted with approval a passage from the judgment of Saville J in *Financiera Avenida v Shiblaq* (1988) times, 14 January. There Saville J quoted with approval from the judgment in the Australian decision *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 325 per Mason J. The following was relied on by Mr Graham ([1994] 1 Lloyd's Rep 577 at 582):
>
> > "The object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim relief. It is no part of the purpose of the undertaking to protect the defendant against loss of damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted. Consequently , it is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction.
> >
> > [2009] 1 All ER 346 at 359.
>
> [38] Mr Graham pointed to the fact that no case had been found in which general damages had been awarded on a cross-undertaking where there was no evidence of the adverse effects of the order.
>
> [39] I conclude that it is in accordance with principle and the above authorities that general damages may be awarded where a search and seizure order has been wrongly obtained, and likewise with a freezing order. Such damages are to compensate the defendant for the consequences of the order which cannot be claimed as special damage. They are not, however, awarded for nothing. It may be obvious that the particular circumstances of the case justify an award, or it may well not be but rather the contrary. In most cases it will be necessary to have some evidence to support the award."

108. At paragraph 34, the judge had referred to this court's decision in a "stopped cheque" case, *Kpohraror v Woolwich BS* [1996] 4 All ER 119, in which Evans LJ said this,

> "[34]……It is abundantly clear, in my judgment, that history has changed the social factors which moulded the rule in the nineteenth century. It is not only a tradesman of whom it can be said that the refusal to meet his cheque is "so obviously injurious to [his] credit" that he should "recover, without allegation of special damage, reasonable compensation for the injury done to his credit" (see [*Wilson v United Counties Bank Ltd*] [1920] AC 102 at 112, [1918-19] All ER Rep 1035 at 1037 per Lord Birkenhead LC). The credit rating of individuals is as

> important for their personal transactions, including mortgages and hire-purchase as well as banking facilities, as it is for those who are engaged in trade, and it is notorious that central registers are not kept. I would have no hesitation in holding that what is in effect a presumption of some damage arises in every case, in so far as this is a presumption of fact."

109. In my judgment, it is obvious that a freezing order of the type imposed in this case constitutes a severe invasion upon the liberty of any person to deal with his or her assets as he or she sees fit. An intrusion upon that liberty is bound to have profound effect upon the day to day life of the person affected in a multitude of ways which do not require elucidation by evidence of special damage: see paragraph 39 in the *Al-Rewas* case (supra).

110. I would refer again to the words of Peter Gibson LJ in the *Cheltenham & Gloucester* case quoted above. As the learned Lord Justice said, this type of order is one of the law's "nuclear weapons". If they are wrongly deployed, just as with a nuclear weapon, damage is inevitable. It would be an affront to justice to hold that damages for the unjustified restrictions imposed, in addition to compensation for distress and anxiety, are irrecoverable under the cross-undertaking. It seems to me that injunctions of this type have the potential to be rather different in their impact from the early cases in which the contract analogy was developed. In the *Cheltenham & Gloucester* case, Peter Gibson LJ alluded to the particular risk of injustice that may arise from the grant of freezing orders,

> "frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets." (see above).

111. The judge proceeded to an admirably careful analysis of the evidence of the Appellants as to specific areas in which their well-being, and indeed their health, and that of family members, had been affected by the freezing order.

112. In his first judgment, the judge set out a passage from each of the Appellants' evidence touching upon this head of claim. It is worth repeating those passages. First, Mr Hone,

> "133…….[Mr Hone] … Again, I draw your attention to what happened in February 2009 and, again, when our lives were devastated and we are sitting here talking as if we are a corporate conglomerate with people working for us, everything, everything was swept away. Our ambition, our lives, everything was swept away. It took some many, many months for us to actually get back off of our knees and start thinking of ways to try and earn some money, when it was clear that the Liquidator was not going to do her job properly, approach is, realise things were wrong. She could have sold the air freight department in the sea freight department. She could have come at us and said, "Would you like to take these? Would you like to buy these as a going concern?" I have a degree in logistics. I could have done that, but she never.

> [Mr Nathan] Q. You never approached her and asked her?
>
> A. Never approached her?
>
> Q. To ask to buy it?
>
> A. I never asked her to buy the sea freight and the air freight division? The very first day that we walked in the door, Richard Mills, who is the operations director, the very first day said, "The phone is ringing. People are trying to book cargo. Tell them that they cannot, we are closed for business." There was nothing – she had already alienated and got rid of the business within two days. There was nothing to buy. If she had sat us down, as I think she should have and [sic]"Right, you are on gardening leave, but I want to talk to you. What can we do here? What do you think about what HMRC have said? What do you think about these assessments? Shall I appeal them?" If we had done that right at the beginning, we would not be here.
>
> Q. Okay. That was activity, these were all consequences of the appointment of the Liquidator. Yes?
>
> A. And the freezing orders that were put on us. I remember you said yesterday, "Why did you not buy a company off the shelf and start again?" How on earth could you go to a bank and say, "I have got freezing orders. We have got freezing orders on us"? It has been difficult enough, 18 months later, after we were found not guilty and the freezer was taken away, for the banks to talk to us now. It has been almost impossible, but we done it, but we could not have done anything then."

Secondly, Mr W Owen,

> "135….It became highly embarrassing for myself and my wife to do simple day to day tasks whilst the freezing order was imposed on us, such as going to the bank where the staff knew that we were subject to a freezing order. It was also very embarrassing for us to see people whom we have known for many years who would look at us as though we were criminals. This also caused damage to my reputation as a businessman and investor. My wife refused to go out and meet up with friends. She found it extremely difficult as did I…
>
> My youngest son was also affected by the freezing order as he was living at home studying for his GCSEs when the order was imposed. He missed the grades required to stay at the school he had studied at since the age of 11…"

Thirdly, Mr P Owen,

> "136…….It was unrealistic of the liquidator to assume that I would simply be able to secure alternative employment whilst subject to a freezing order…..
>
> It became highly embarrassing for myself and my wife to do simple day to day tasks whilst then [sic] freezing order was imposed on us, for example the bank would require us to answer numerous questions and present identification documents such as utility bills and passports on each visit. My wife still refuses to go into our local bank branch as a result of personal embarrassment caused to her in having our accounts frozen. Our credit cards were all terminated. It felt to us as though we were regarded as criminals within the local community which caused untold stress, embarrassment and indignity, not to mention damage to my reputation as a businessman and investor. The stress was unbearable and both my wife and I were forced to take sleeping tablets to help us rest."

113. The judge was obviously prepared to accept this evidence as factually accurate. As to Mr Hone's answer, the judge said,

> "134. I found Mr Hone's last answer to be an entirely cogent description of one effect of the wrongly granted Freezing Order on him and the other Defendants. I accept of course that there is an element of commonality between the effect of the Freezing Order and that of the liquidation of Abbey. However there is no doubt in my mind that in this section of his evidence Mr Hone accurately described the effect in practical terms of the Freezing Order on him as a self-employed businessman. It is an effect that I can legitimately take into account when assessing general damages as being a facet of the emotional distress indignity and loss of reputation that has been pleaded as the basis of the general damages claim."

114. It seems to me that the evidence was sufficient to ground a rather larger award of compensation overall than the narrowly calculated figures based upon paragraphs 15, 19 and 20 of the quantum judgment.

115. At the hearing to assess quantum, the judge carefully investigated individual aspects of the claim to general damages in respect of each Appellant. He rejected some of these as not material. For example, he rejected the idea that he should take into account Mr Hone's observations as to the effect of his straitened circumstances on his mother and on his son's university ambitions. He also rejected a claim base on loss of reputation. He further rejected, as an aspect of the claim, the inability to obtain or retain banking facilities because of an absence of specific instances in the evidence.

116. The judge rejected, as part of Mr W Owen's general damages claim, the effect on his son's studies. However, the judge did accept in this context the effect on Mr W Owen personally of the distress caused to his wife. In paragraph 19 of this judgment, the judge concluded,

> "I consider the effect described by Mr Owen in the social life of himself and his wife as another material, and perhaps highly material factor. At the end of his evidence I asked Mr Owen to describe the effect on him of the freezing order. He replied…that it was completely and utterly stressful, that his wife was ill, his kids suffered and it was, as he put it, "just awful". I accept this as an honest summary by someone who does not easily describe emotional effects and stress effects of the sort that I am now considering."

117. With regard to Mr P. Owen the judge repeated his findings from paragraph 136 of his first judgment (quoted above) and said,

> "I accept the level of embarrassment described. I accept the effect on Mr Owen's wife as observed by Mr Owen as relevant to an assessment of his damages claim because I infer that distress was caused to him by the effect on his wife of the making and maintenance of the freezing order."

118. The judge turned to aggravating features of the damages claim. He noted that, out of five factors originally pleaded in this respect in paragraph 13 of the Points of Claim, only one was in the end relied upon, that was the one identified in sub-paragraph (e). This factor was the manner in which the Liquidator dealt with requests for payment out of funds caught by the freezing order. The judge said that he regarded such a feature as capable of supporting a claim for compensation under this head. He said that it could elevate the level of damages awarded, but did not think that this required the matter to be looked at as an award of aggravated damages. With all that, I respectfully agree.

119. The judge turned to the claim for "aggravated damages" and referred back to points arising in the correspondence written by the Liquidator's solicitors which he considered "to have been aggressively or over aggressively expressed, or which were simply wrong and should not have been expressed at all". As already indicated, I agree with the judge on all this too.

120. The judge's conclusion on this point was, however, this:

> "26. The point, however, that stands out from the witness statements of all of the Defendants is this: nowhere at any stage do any of the Defendants suggest that any of the correspondence that I am now referring to was responsible for causing them any personal distress, anxiety, loss of dignity or otherwise. This is not entirely surprising on the facts of this case. The Defendants were represented throughout by competent and experienced solicitors. Whilst a demand that no sums were to be expended on legal expenses without prior approval was wrong in principle and could have been a source of great anxiety and distress, and whilst threats unilaterally to reduce the sums that could be expended on living expenses in breach of the terms of the orders of the Court were capable of causing great anxiety, that potential effect is likely to have been

> reduced significantly and perhaps eliminated by appropriate legal advice from experienced legal advisors. At no stage did the Defendants' solicitors assert in the correspondence that what was being said was causing distress and no such allegation was made, as I have said, in any of the witness statements of the Defendants. All this leads me to conclude that the matters relied on as justifying an increase in the damages otherwise recoverable for loss of dignity and/or distress cannot be relied on because there is no evidence to support an assertion that any distress was caused by the conduct complained of and in my judgment it is not open to the Defendants to avoid this effect by claiming aggravated damages. They will have been awarded damages for distress to the extent that that claim has been proved. In this regard, no submissions in answer are advanced to the points made by Mr Nathan in paragraphs 86 to 87 of his written submission."

121. With this conclusion, however, I respectfully disagree, although I do not think that the compensation in this area needs to be classified as "aggravated damages". I disagree with the inference that the judge drew from the absence from the correspondence and witness statements of specific assertions of distress caused to the Appellants from the manner in which the order was being policed. The whole thrust of the complaint in this case before the judge was that the Liquidator was using the order in unreasonable ways. CHH complained about that fact regularly. In my judgment, the correct inference to have been drawn was that the nature of the Liquidator's reaction to the various points arising under the administration of the order must have been communicated on a regular basis by CHH to their clients, the Appellants. That reaction must inevitably have caused added discomfort to the Appellants, over and above the restrictions imposed by the existence of the order itself, in a manner which hardly had to be spelled out in witness statements. The fact that CHH remained stoical and moderate in their responses, in my judgment, is nothing to the point, even if the Appellants were being advised that the Liquidator's attitude was unjustified. The judge inferred that the potential effect of what was being said on behalf of the Liquidator was likely to have been reduced or eliminated by appropriate advice. To be told that the opposite party is making unjustified assertions, necessitating further correspondence and further expense could hardly have been without effect. This aspect of the matter, as seems clear to me, must have enhanced the general sense of inhibition imposed already on the Appellants by the mere imposition of the order itself. An unjustified freezing order is one thing; an unjustified freezing order, unreasonably policed is another.

122. As indicated above, Mr Coppel for the Appellants submits that, over and above any damages of the type so far considered the judge ought to have awarded damages "for the general opportunity loss for the inability to use their assets over the course of 20 months" (skeleton argument, paragraph 139). He argues that it is clear from the Appellants "track record" over a number of years that, absent the freezing order, they had all been capable of turning their resources financial and otherwise to profitable use and that, even if the specific heads of claim had been rejected, some general award should have been made for this loss.

123. The judge's final approach to general damages was this,

> "28. Mr Coppel suggests that damages should be awarded at a rate of £1,500 a month per Defendant for a period of 20 months, being the period that the freezing order remained in force and effect. In my judgment that approach is inappropriate for the reasons that I have given. I accept, however, as I have already said, that the length of time that the order remained in place is bound to be a factor in assessing damages in a case of this sort. Thus, whilst I accept that Mr Nathan's submission that the sums that will be awarded will be modest, the sum awarded must take account of the effects on each claiming party over the relevant period."

124. In my judgment, I would not adopt an approach of awarding either "modest" damages on the one hand or "generous" damages on the other. I think that the correct approach should be award *realistic* compensation for what has occurred.

125. I follow the point made by HMRC (re-emphasised in the latest submissions) that the Appellants did not clearly plead business losses over and above the specific heads of loss alleged. However, I do take the view that the judge was over-restrictive in his approach to compensation under this head, even on the pleadings and evidence before him, having regard to the clear indications in his judgment that he accepted that the Appellants had been subjected unjustifiably for 20 months to restrictions on their way of life and the use of their assets, coupled with unjustifiably restrictive policing of them. They had also been subject to the obvious reflection on their credit caused by the very existence of the freezing order. Like Evans LJ in *Kpohraror*, I would have no hesitation in holding that some damage arises in every such case, justifying more than a nominal award. I note that in that case, this court upheld an award of £5,550 damages for wrongful failure to pay a single cheque for £4,550.

126. The judge here awarded the equivalent of some £92.30 per week to each of the Appellants. In my view, the wrongful restrictions on their way of life and the reflection on their credit should of itself have attracted compensation, before any regard to the emotional effect on the Appellants. In addition, it was necessary to reflect the specific elements of distress which the judge found established. There was also the aggravating feature of the needlessly aggressive approach of the Liquidator's solicitors to the administration of the order.

127. In the course of preparation of our judgments, we invited further submissions from the parties on this aspect of the case. We included in that invitation a request for submissions as to whether damages might be awarded under this head for a violation of the Appellants' right to respect for their private lives under Article 8 of the European Convention on Human Rights. HMRC again objected that no such claim had ever been made by the Appellants and that it was too late to raise it now.

128. In the circumstances, for my part, I do not think I need to approach the present point down the avenue of Article 8. It seems to me that the court's power to make an award of damages is adequately grounded in domestic law.

129. The sum to be awarded can be no more exact in measurement than the sum awarded by the judge. However, I see no reason why a sum of £750 per month would be excessive. I would, therefore, allow the appeal under this head and award a sum of £15,000 in total to each Appellant in place of the £8,000 awarded to each under paragraph 3 of the judge's order.

130. In their supplementary written submissions, counsel for the Appellants argued that sums of £9,000 per month of the injunction should be awarded to each of the Appellants (i.e. £180,000 each). Having failed to establish specific lost business opportunity before the judge, it seems to me that such a claim must be regarded as entirely fanciful. I reject it. However, for the reasons given, I think the judge's award needs an upward adjustment of the amount indicated.

131. I would add that, since preparing this judgment in draft, I have seen a draft of the judgment of Vos LJ in which he adds observations of his own on this aspect of the case. With those observations, I agree.

(G) Costs

132. In respect of costs, the judge ordered the Appellants to pay Abbey's costs of the Inquiry up to 21 August 2012, to be assessed (if not agreed) on the standard basis, less £10,000 in respect of the costs of that part of the claim that had succeeded. He further ordered the Appellants to pay the costs of Abbey and of HMRC after 22 August 2012 to be assessed (if not agreed) on the indemnity basis. In making the indemnity costs award, the judge correctly directed himself by reference to the question identified by Waller LJ in *Excelsior Commercial & Industrial Holdings Ltd. v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, at paragraph 39 as follows:

> "Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in the way which justifies an order for indemnity costs?"

133. The factual basis upon which these orders were based was this. In June 2012, the Appellants made an offer under CPR Part 36 to settle the claims made for £1.9 million. This was not accepted. On 10 August 2012 Abbey made an offer under Part 36 to settle the claims for sums totalling £50,000 broken down into a number of specific elements. A final offer was made by HMRC on 12 October 2012, outside the rules but without prejudice save as to costs, to settle all claims, including costs, for a total of £90,000. In the alternative, Abbey's Part 36 offer was repeated. These offers were not accepted by the Appellants.

134. I think that it is fair to say that, all things being equal, the normal order in the light of the Appellants failure to beat the Part 36 offer would be that they would have their costs up to the expiry of the time for accepting the Part 36 offer (1 September 2012) but they would have to pay HMRC's costs from that date (plus interest on those costs), all such costs being assessed (if not agreed) on the standard basis.

135. The judge took a different view for the reasons stated in paragraphs 12 and 13 of his costs judgment in these terms,

> "12. In my judgment, it is manifestly inappropriate to approach this case on the basis that the defendants should recover their costs down to the date when Abbey's Part 36 offer expired. To adopt that approach would be to entirely ignore the following points:
>
> i) all the pecuniary claims failed bar two;
>
> ii) of the pecuniary claims that succeeded, one did so on a basis that at least arguably had not been advanced until the hearing and the other was conceded prior to the start of the hearing;
>
> iii) the claim for exemplary damages was struck out as unarguable in law; and
>
> iv) the claim for aggravated damages failed.
>
> 13. The argument that the costs should be paid in the way advocated by Mr. Coppel depends, amongst other things, on an analysis that there was a single cause of action and that their recovery of the small sum in fact recovered represented a success. I repeat in this regard what I said in the judgment on the liability issues at paragraph 21, that is to say, that the cross-undertaking is given to the court not to the respondent against whom the injunction was granted and in consequence does not create a cause of action but rather entitles the respondent to apply for compensation. In fact, as I outlined in paragraph 19 of my judgment, the claim for pecuniary compensation proceeded by reference to a series of discrete allegations and was coupled with a claim for general, aggravated, and exemplary damages."

136. The judge's view on indemnity costs from 21 August 2012 was based essentially on what he said in paragraphs 21 and 22 of his judgment. He acknowledged HMRC's submission that indemnity costs should be ordered because the claims made were exaggerated and continued,

> "21. In my judgment, whilst exaggeration can be a basis for ordering indemnity costs, it does not follow that there will be such an order in every such case. In my judgment, what takes this case out of the norm is the defendants' persistence with the claim structured in the way I have described, following not merely the service of the Part 36 offer by the First Claimant but after service of the Second Claimant's offer.
>
> 22. At some stage, the claim could and should have been reviewed critically by reference to the relevant authorities and by reference to the primary evidence available in relation to it as well as the expert evidence then being relied upon. In my judgment, Mr Nathan was correct to submit that effects justifying indemnity costs tend to be cumulative but more that that conduct that might not be described as outside the norm at

> the outset can become so if persisted in over time. To persist in claims that are exaggerated, cannot be proved even on the evidence of the claiming party and which are simply bad in law, and to do so long after the time when those factors ought to have been ascertained is conduct, in my judgment, that goes outside the norm to be expected in relation to the conduct of litigation of this sort."

137. Mr Coppel submits that the costs award was harsh and punitive and wrong in principle. He invites the court to allow his appeal on that basis.

138. In my judgment, the judge's costs orders were indeed wrong in principle. His order was based upon one side of the criticism that could be levelled against the parties in the manner in which this inquiry was conducted. There were two sides to the coin. Neither HMRC nor Abbey had made any attempt whatsoever to settle the Appellants' claims until August 2012. Neither offered anything: some general compensation should clearly have been offered as "a given" without more ado as soon as the order of Lewison J became final. On the other hand, the Appellants had made approaches to initiate a settlement or mediation process as early as July 2011; these approaches were not taken up by Abbey (which at that stage was in the "driving seat" of the defence of the Appellants' claim)[7]. As mentioned above, HMRC were only joined to the proceedings on 2 October 2012, some 6 weeks before the main hearing, and (as we are now informed) when the new Liquidator of Abbey refused to defend the Appellants claims.[8]

139. It is correct that all the specific claims failed bar two. However, there was a bona fide dispute as to applicable principles of law and the Appellants had been undoubtedly hampered unreasonably, in their attempts to find alternative avenues in which to earn money by the attitude of the Liquidator and of her solicitors. The judge found that attitude to be an aggravating feature in the computation of the general damages award, even though in the end he declined to award "aggravated damages" and awarded only a "modest" sum of money to each of the Appellants for general damages. Compensation was awarded after Abbey and HMRC had made no attempts whatsoever to recognise the consequences of their ill-judged litigation until 2 years after Lewison J's judgment.

140. The conduct of all the parties before and during the proceedings was relevant under CPR Part 44, rule 44(5). I said at the beginning of this judgment that the attitude of Abbey/HMRC to the conduct of the assessment appeals was of residual significance. In my judgment, it would be simply unjust not to bear in mind that history again in assessing the relative reasonableness of the parties in this case. I consider that the judge was wrong in principle to concentrate on the criticisms that might be levelled against the Appellants, without apparent regard to criticisms that might equally have been levelled against HMRC/Abbey.

141. On the judge's conclusions as to the substantive compensation to be awarded, I consider that justice would have been amply served if, in the light of his findings on

[7] See the witness statement of Mr. N. Kelly of the Appellants' solicitors of 12 February 2013: Appeal Bundle D/14/1228-9, paragraphs 11 and 12.
[8] See HMRC's submissions of 12 May 2014, page 4, footnote 13.

the substantive claim, he had adhered to the starting point of giving the Appellants their costs down to 31 August 2012 and HMRC their costs thereafter, to be assessed in each case (if not agreed) on the standard basis. Instead, the judge adopted a punitive course which was not justified, having regard to the history of this litigation overall.

142. Therefore, if I had not considered that the appeal on the substantive matters should be allowed to the extent indicated, I would have allowed the costs appeal and would have substituted an order along the lines indicated in the immediately preceding paragraph.

(H) The Appellants' application to adduce "fresh" evidence

143. I have mentioned above the Appellants' application to adduce fresh evidence on the Appeal. As indicated in the skeleton argument in support of the application the purpose of it was, first, to deal with "disparaging remarks" made about the Appellants in HMRC's skeleton argument on the main appeal, and secondly, to bring the court up to date with the Appellants' business activities.

144. As indicated, during the course of the hearing, we informed the parties that we refused the application. The simple reason for this refusal was, for my part, that I did not find in the proposed new evidence anything of relevance to the issues which we had to decide. In my judgment, we need say no more about the matter.

(I) Proposed result

145. For the reasons given above, I would allow the Appellants appeal to the extent of awarding further compensation to them in the sum of £9,300 in respect of the "marble" claim. I would order payment of a sum of £15,000 each to the Appellants for general damages, in substitution for the sums of £8,000 awarded below. The sum to be awarded to Mr P Owen under paragraph 2(b) of the judge's order should stand. I propose that the calculation of the appropriate final figure for the damages to be awarded be the subject of the written submissions of the parties.

146. In the circumstances, there will no doubt need to be further argument required as to the costs here and in the High Court.

Lord Justice Vos:

147. I agree with McCombe LJ and add a very few words of my own, only because we are disagreeing with the judge on the appropriate level of damages that should have been awarded to the Appellants.

148. First, it is important to be clear about what the damages are being awarded for. As the judge said, and McCombe LJ records at paragraph 104, the damages are being awarded on the basis that Abbey acted in breach of a notional contract with the Appellants whereby Abbey had agreed, in essence, that they would not prevent the Appellants disposing of or dealing with their assets up to a value of nearly £6 million. Every action taken by the liquidator in imposing and policing the injunction must be regarded as a breach of this notional contract attracting a potential award of damages.

149. Secondly, one must be clear as to what elements can and what elements cannot form the subject of an award of damages where a freezing order has been unjustifiably

obtained. The judge confined his attention to general compensatory damages for upset and stress and the effect on the Appellants reputation. He rejected the claims for general business opportunity losses, and for the effect that that liquidator's conduct had on the appellants. But he did not suggest that such heads of damage were unavailable, only that that they had not been proved on the evidence in this case. He did not consider whether damages could or should be awarded for the general business and other disruption caused by the inappropriate use of one of the law's two nuclear weapons (to use the terminology adopted by Peter Gibson LJ in *Cheltenham & Gloucester BS v. Ricketts* [1993] 4 All ER 276 at pages 284-5).

150. In my judgement, general damages can in an appropriate case be awarded on a cross-undertaking in respect of an inappropriately obtained freezing order for any or all of these elements: 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. Whilst I agree with the judge that damages for upset, stress and loss of reputation are generally modest in this and other fields, I concur with McCombe LJ in thinking that realistic compensation should otherwise be awarded for what has occurred that was in breach of the notional contract I have described.

151. McCombe LJ has not sought to break down his suggested general damages award of £15,000 for each appellant (or £750 per month) into its constituent parts. I think it would be difficult to do so. It should be clear, however, that his suggested award (with which I agree) is in respect of the upset and stress found by the judge, and the general business and other disruption caused to the appellants by Abbey's breaches of its notional contract. This latter element includes in this case compensation for the adverse effects of the inappropriate policing of the injunction.

152. I would wish also to make clear that I regard this as a bad case. The liquidator's conduct was, at times, inexcusable, and the adverse effects of the injunction were far-reaching and life-changing for each of the Appellants. These were the consequences of Abbey's conduct in repeatedly breaking its notional contract by which it had undertaken that it would not prevent the Appellants disposing of or dealing with their assets up to a value of nearly £6 million. Those who inappropriately seek, obtain and enforce freezing orders should be aware of the kinds of damage they may cause, and of the fact that the courts will be astute to hold them to account by making such awards for their breaches of their notional contracts.

Lady Justice Arden:

153. I am grateful to McCombe LJ for his compelling and comprehensive judgment. I agree with his judgment and the order he proposes, subject to clarifying below my reasoning on general damages and costs.

154. On general damages, the thrust of McCombe LJ's reasoning is that the judge was wrong to reject the appellants' argument that they suffered distress as a result of the operation of the freezing order because the correspondence was handled by their solicitors and there was no direct evidence of any distress. He considers that this approach made the amount awarded for general damages unrealistic. Vos LJ agrees.

155. I do not consider that it is necessary to decide that the judge drew the wrong inference about the effect of the liquidator's attitude in correspondence on the appellants. They may have taken little interest in that correspondence consistent with their general view that it was impossible for them anyway to raise finance for business transactions even if permitted to undertake them. The fact is that they were undoubtedly restricted in what business they could do by the mere existence of the wrongfully obtained freezing injunction. It was not simply that the injunction was emotionally distressing as the judge thought: it also put their business careers on hold and prevented them making any business plans for the future. This was likely to be a further cause of distress, the pleaded case for general damages. The fact that Abbey had entered provisional liquidation or begun misfeasance proceedings against them did not prevent them from starting up a new business as, on the evidence of the appellants, the freezing injunction did.

156. I agree with Vos LJ that a further allowance should be made for that additional element of distress: to do so has the great merit that it is consistent with common sense and ordinary experience, and therefore, as my Lords describe it, realistic. The judge did not include it in his award. Furthermore, the court is not prevented from reaching this conclusion by the absence of authority. The Strasbourg case law awarding just satisfaction to companies for non-pecuniary loss where the state had wrongly searched their premises and stopped them carrying on business (see *Société Colas Est v France* App no 37971/97, 16 July 2002) provides support: the Strasbourg court cited *Comingersoll v Portugal* (App 35382/970, 6 April 2000), where the non-pecuniary loss included damage to reputation and uncertainty in decision-planning. There cannot be any logical difference here between a person who trades in his own name and a person who trades through a company.

157. HMRC rightly submits that the appellants did not rely on Article 8 of the Convention, even though the freezing injunction could without doubt engage their Article 8 rights. However, contrary to Mr Nathan's submission, the court is entitled to take the Strasbourg case law into account in this case just as it can take any other comparative law into account where it provides inspiration for a point on which there is no direct authority in our own law. As one comparative lawyer put it, "no-one would bother to fetch a thing from afar when he has good or better at home, but only a fool would refuse quinine because it didn't grow in his own garden." (Rudolf von Jhering, cited in Zweigert & Kotz, *Introduction to Comparative Law* (Clarendon, 3rd ed, 1998, p 17)).

158. Moreover the figure which my Lords propose in their judgments is consistent in amount with the judge's award for distress.

159. In these circumstances, we do not have to determine the issue as to the judge's costs order since our larger award of general damages means that the judge's order must be set aside. However, in my judgment, he was entitled to award the costs down to the last date for acceptance of the Part 36 offer against the appellants on the basis that the respondents were far and away the winners at trial. It would be a surprising if a Part 36 somehow created a presumption that the party who wrongly rejected a Part 36 offer was prima facie entitled to his costs down to his wrongful rejection of the Part 36 offer. It would also be surprising if the ultimate winner lost any argument on costs up to the date of his offer simply because he did not make the offer earlier. I would

therefore have concluded that the judge had acted within his margin of discretion in making his costs order.

160. In any event, however, there will have to be written submissions on the correct order to be made in respect of costs below in the light of the additional element of general damages which we award.