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ROYAL COURT
(Samedi Division)

23 August 2021

Before: **Sir William Bailhache, Commissioner as Single Judge**

Between	**Marino Morelli**	**Plaintiffs/Respondents**
	Mario Morelli	
And	**Leonardo Morelli**	**Defendants/Applicants**
	Giannina Morelli Wagland	
	Lower Bridge Street Investments Limited	**Parties cited**
	Richmond Nominees Limited	
	Mayfair Nominees Limited	

JUDGMENT

Advocate J Sheedy for the Applicants
Mr Marino Morelli in person

Introduction

1. I sat as a single Judge on 17 May and 30 July 2021 to receive submissions as to whether the Court should proceed with an inquiry into damages pursuant to undertakings given by the Plaintiffs when obtaining interim injunctions *ex parte* as ordered by the then Deputy Bailiff, Mr T J Le Cocq on 22 June 2016. The application for the inquiry was made by the Defendants and resisted by the Plaintiffs.

The proceedings to date

2. No substantive claim was brought under the Order of Justice. The Plaintiffs, however, did seek free standing interim and permanent injunctions, drafted quite widely, which operated to restrain the Defendants from dealing in any way with inter alia the beneficial interests they held in Lower Bridge Street Investments Limited ("LBSI") and its subsidiaries. The underlying basis for the claim was that the shares in LBSI had belonged to the late Anita Morelli, mother of the Defendants and the Plaintiffs ("Mrs Morelli"), but the Plaintiffs asserted that these shares had been wrongly transferred to the Defendants in or about June 2015, thereby depriving the Plaintiffs of their forced heirship rights in the estate of Mrs Morelli who had died intestate on 16 March 2016. In the Order of Justice, it was said that the Plaintiffs intended to issue criminal and civil proceedings in Monaco, the latter for the purposes of reconstituting the global estate of Mrs Morelli in order that it could be properly liquidated in accordance with the laws of Monaco where she was domiciled at the date of her death. The Plaintiffs also obtained *ex parte* injunctions directly against the Parties Cited.

3. In order to obtain the injunctions in question, the Plaintiffs gave seven undertakings, the first two of which were in these terms:

> ***"(1) To comply with any Order that the Court may make as to damages, if the Court later finds that this Order has caused loss to the Defendants and decides that the Defendants should be compensated for that loss by the Plaintiffs;***
>
> ***(2) To pay the reasonable costs of the Parties Cited incurred as a result of this Order, including the costs of ascertaining whether the Parties Cited hold any of the Defendants' assets, and if the Court later finds that this Order has caused the Parties Cited loss, and decides that the Parties Cited should be compensated for that loss by the Plaintiffs, the Plaintiffs will comply with any Order this Court may make as to damages."***

4. On 24 August 2016, the Court sat to receive an application made by the Defendants to vary the terms of the injunctions to enable sums representing income or dividends deriving from a company called Sun Street Investments ("SSI"), a subsidiary of LBSI, to be paid to or as directed by the First Defendant; and also to enable the shares in SSI to be transferred to or as directed by the First Defendant. The Court granted the application to vary on 24 August 2016, with reasons reserved. Those reasons were subsequently delivered in a judgment (Morelli v Morelli [2016] JRC 172). As is clear from the postscript of the judgment, paragraphs 32 – 42 inclusive, the Court was asked by

the advocate for the Plaintiffs not to hand down the judgment, given that agreement between the parties had been reached in relation to the Jersey proceedings. Those submissions were unsuccessful and the judgment was handed down.

5. The agreement to which I have just referred is reflected in an Order of the then Deputy Bailiff, dated 21 September 2016, (the "Consent Order") made with consent of both the Plaintiffs and Defendants and the Parties Cited. The Consent Order was not drafted with the clarity which one might have wanted, but for the purpose of this judgment the essential terms were these:

   (i) The Defendants undertook:

      (a) to comply with the terms set out in the Order of Justice at paragraph 1, sub-paragraphs (1)(a)(i) to (vii) inclusive.
      (b) not to instruct, require or procure that LBSI did any of the acts as set out in stipulated paragraphs of the Order of Justice.

   (ii) The shares in SSI and the income deriving therefrom were entirely released from the injunctions without prejudice to the Plaintiffs' assertions that the beneficial interest in LBSI had been fraudulently transferred to the Defendants and that the shares in LBSI ought to form part of the global estate of Mrs Morelli. These assertions were maintained, as were the Defendants' denials of them.

   (iii) The Plaintiffs' undertakings in paragraphs 1 – 7 on pages 9 and 10 of the Order of Justice were continued with the following language:

   > ***"and upon the Plaintiffs' undertakings in paragraphs 1 – 7 on pages 9 and 10 of the Order of Justice being continued and applicable as regards the above undertakings by the Defendants."***

   (iv) All the undertakings were to remain until final resolution of the Monaco civil proceedings. There were mutual undertakings not to refer to the existence of these undertakings, or the injunctions ordered by the Deputy Bailiff on 22 June 2016, in the Monaco proceedings as a validation of their respective cases and also to agree arrangements for mediation. There was a proviso that if the Monaco civil proceedings were decided in favour of the Plaintiffs, namely the Monaco Court affirming the Plaintiffs' assertions as set out above, all monies paid to the Defendants under those arrangements would be returned to the global estate or taken from their respective shares of the global estate.

(v) On the basis of these undertakings and provisions, all the injunctions ordered by the Deputy Bailiff against the Defendants and Parties Cited on 22 June 2016 were discharged and the proceedings, including a pending application by the Defendants for the complete discharge of the injunctions, were stayed.

(vi) There was liberty to apply.

6. The criminal proceedings commenced against the Defendants in Monaco were dismissed on 3 July 2017. The civil proceedings continued until a judgment in September 2018 as referred to below.

7. Nothing then happened in relation to the proceedings in Jersey until June 2019, when the Court sat to receive an application by the Defendants to be released from the undertakings which they had given as set out in the Consent Order. That application was successful, the judgment being handed down on 17 September 2019, under reference Morelli v Morelli [2019] JRC 180. Noteworthy is paragraph 16 of that Judgment where there is an extract from the judgment of the Monaco Court of first instance in the civil proceedings from which it is clear that:

(i) A judge was appointed to oversee the work of the notary in completing the calculation, liquidation and apportionment of the succession of the late Mrs Morelli;

(ii) The claims of the Plaintiffs relating to concealment of an inheritance were dismissed;

(iii) The Defendants were charged to account between them for 100% of the shares of LBSI, SSI and a further company called Iduna Corporation SA together with the value of the mooring located in San Remo Harbour and various personal effects of the late Mrs Morelli.

(iv) Marino Morelli, the First Plaintiff, was noted as agreeing to return to the Estate the sum of £900,000, or the equivalent in Euros, received by him as an advance on his inheritance in October 2012.

8. I will return later in this judgment to the significance of the decision of the Court in Monaco. It is sufficient at this stage to note that the undertakings given by the Defendants and the Parties Cited were discharged both on the construction of the Consent Order and on the material change of circumstances which had been found to have occurred. The Plaintiffs' undertakings in the Order of Justice were considered, as a matter of construction, to remain in place, but there was liberty to the Plaintiffs to apply. No such application has been made.

The present application

9. It is with that background that the Defendants apply for an inquiry into damages in respect of the undertakings given by the Plaintiffs in the Order of Justice and/or the Consent Order. The Schedule of Loss claimed on this inquiry refers to the professional administration fees and disbursements paid in respect of LBSI from 30 June 2016 to 28 November 2019, in the total sum of £118,235.60, from which a number of deductions have been made, leaving the total sum claimed as £109,619.10 plus simple interest at the Court rate. The invoices supporting those fee notes for the most part give no significant detail as to the work involved, other than that the charges were made on a time basis. The basis of the claim is said to be that, absent the injunction imposed by the Court, which prevented a liquidation of LBSI, that company would in fact have been liquidated because the Defendants, as beneficial owners in unequal shares, did intend to follow that course.

10. The Defendants had fixed a date for proceeding with the inquiry into damages, but the preliminary hearing was to decide whether to proceed with that inquiry in the light of the objections which were put up by the Plaintiffs. In that connection Mr Marino Morelli made these points:

    (i) The Defendants could at any stage have written a letter seeking a variation of the undertakings but they did not do so;

    (ii) The Defendants could have paid £4.5 - £5.5m into Court in order to allow them to free LBSI from the injunctions/undertakings.

    (iii) He never said that the Defendants could not liquidate LBSI;

    (iv) The injunction was not wrongly granted in the first place. His notary had contacted the Defendants but had received no response. Accordingly, the Plaintiffs needed to protect their position.

    (v) The Plaintiffs still contended that the document by which the shares in LBSI were transferred was a forgery. Fraud might not have been proved yet, but the injunction was justified.

    (vi) The position in Monaco is that the claim has been stayed, and the case has not been decided against the Plaintiffs. He indeed has had a significant victory in Monaco. Assets wrongly transferred out of the estate of the late Mrs Morelli have been ordered to be reinstated, although it is said that in fact the Defendants have not complied with that Order.

    (vii) The injunction was sought to protect the estate of Mrs Morelli.

(viii) There has been excessive delay in bringing a claim for an inquiry into damages and on that ground alone, the Court ought to exercise its discretion to stop the proceedings at this stage.

The Law

11. As far as I am aware, this is the first occasion on which the Royal Court has been asked to order an inquiry into damages pursuant to the undertakings given by a plaintiff in obtaining injunctions *ex parte* in an Order of Justice. It is certainly the case that I have not been provided by either party with examples of cases in Jersey where this has happened before. There are also no rules of court which have been made to date in this respect. It is right, therefore, that I set out what I conceive to be the law and procedure which I should follow. In doing so, I have had close regard to a number of English cases, as will be apparent from the citations below. I am satisfied that this is the appropriate course: the practice directions which we have adopted in Jersey for obtaining *ex parte* injunctions have been taken from comparable practice directions and cases in England and Wales. I accept that the first step in the process is for the defendant in these circumstances to apply to the court to exercise its discretion to order an inquiry into damages and give such consequential directions as may be appropriate.

12. The starting point is to recognise that a plaintiff obtaining an injunction prior to judgment by which the assets in the hands of the defendant are restrained so as to provide comfort for the plaintiff that, if successful at trial, the judgment can be duly enforced, obtains relief against the defendant before the validity of the claim has been established. That being so, there will be cases where the plaintiff does not succeed at trial: and thus, with the benefit of hindsight, was clearly not entitled to the relief which he obtained. It is because obtaining that relief might cause the defendant loss that the plaintiff is required to give an undertaking in damages. It is to be noted that the undertaking is not given to the defendant. It is given to the court. It follows that there is no contract between the plaintiff and the defendant which the defendant might later claim has been breached by obtaining the orders in question. It is the court which is in the driving seat as to whether the undertaking given by the plaintiff should be enforced.

13. There is a helpful summary of the position in SCF Tankers Limited (formerly known as Fiona Trust and Holding Corporation) and Others v Yuri Privalov and Others [2017] EWCA Civ 1877 where, giving the leading judgment, Beatson LJ said this:

> ***"40. It is well established that the purpose of the cross-undertaking in damages and liability under it is to protect a party who is subjected to such an injunction preventing him from doing something but who subsequently prevails at the trial of the action from loss caused by the injunction; see Hoffman-La Roche and Co v Secretary of State for Trade and Industry [1975] 2 AC 295 at 361,***

per Lord Diplock. The court has discretion whether or not to enforce a cross undertaking in damages;

41. If the court decides to enforce a cross-undertaking, the decision of the High Court of Australia in Air Express Limited v Ansett Transport Industries (Operations) Proprietary Limited (1979) 146 CLR 249 has been influential in relation to the approach to causation and the burden of proof. Mason J, stated at 325 that it is for the parties seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction. Although Mason J dissented as to the result, on the burden of proof there was no division of view: see Gibbs and Steven JJ at 313 and 320. The approach in the Ansett case has been followed by a number of decisions in this jurisdiction. They include the decision of this court in Energy Venture Partners Limited v Malabu Oil and Gas Limited [2014] EWCA Civ 1295, [2015] 1WLR 2309, a case concerned with whether a cross undertaking as to damages should be fortified. Referring to the judgment of Gibbs J, in the Ansett case as to what was required to enforce the undertaking itself, Tomlinson LJ stated [at 54] that:

> *"[a]s to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered."*

42. The person who seeks to do must show that the loss would not have been suffered "but for" the order; that is on the facts of this case, that the freezing order and the security undertakings were an effective cause of the Standard Maritime parties' loss .....

43. The Ansett case had also been relied on 16 years earlier by Saville J in Financiera Avenida v Shiblaq Transcript 21 October 1988. The decision is unreported but extracts from Saville J's judgment are set out by Waller J in the Tharros Shipping case. After stating that it is for the party seeking to enforce the undertaking to show that the damage that he has sustained would not have been sustained but for the injunction, Saville J added:

> *"This approach does not mean that a party seeking to enforcement taking must deal with every conceivable or theoretical cause of the damage claimed, however, unlikely this may be. Once a party has established a prima facie case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that prima facie case, the court can, and generally would, draw the inference that the damage would not have been sustained but for the*

Order. In other words, the court seeks to approach and deal with this question of causation in a common-sense way"

In this court, Lloyd LJ with whom Stocker LJ and Sir George Waller agreed, stated that he saw no fault or flaw in Saville J's judge approach or in his conclusion on causation".

14. In adopting a common-sense approach, the court will have regard to the reality of the position which the enjoined party faces. Thus, McCombe LJ said this in Abbey Fording Limited (in liquidation) v Hone [2014] EWCA Civ 711, [2015] Ch 209 about the position of a person who is subject to a freezing order, where he said at paragraph 65:

"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 .... Applications for variation are not that simple. They take time to prepare and are not without cost ...... Approaches to claimants who agree variations, or even to provide suitable written indications to banks and other third parties that particular payment are not caught by the order, are often far from straight forward. 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."

15. In the Fiona case, Beatson LJ said of this passage at paragraph 57:

"That statement is primarily relevant to mitigation and to remoteness, but it also fits with Saville J's statement in Financiera Avenida v Shiblaq that questions of causation should be treated in a common sense way and that, once a party has established a prima facie case that the damage was caused by the order then in the absence of other material to displace that prima facie case the court can draw the inference that the damage would not have been sustained but for the order ......"

16. Although the claim brought on an undertaking in damages is not generally a contractual claim, it is well established that the measure of damages is assessed by having regard to the rule in Hadley v Baxendale [1854] 9 Ex 341where Alderson B said this:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either

arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

17. The second rule in Hadley v Baxendale enables the court to take into account any special circumstances known to both parties at the time the contract was made – by transposition to this type of claim, any special circumstances relating to the defendant which were known to the plaintiff at the time he gave his undertaking *ex parte* in order to obtain the injunction.

18. Assessing the measure of damages is precisely the objective of the inquiry into damages. The emphasis at the present stage of the procedure when the court is considering whether to order an inquiry is upon whether the injunction has been wrongly granted and if so whether the causative test in principle has been met. In considering the causation issue, the court should consider how the losses claimed fall within the rule in Hadley v Baxendale and indeed, in an appropriate case, the court is also entitled in its exercise of discretion to have regard to the likely measure of loss which it is said has been sustained.

19. I have also had regard to the following extracts from Gee on Commercial Injunctions, 7th Ed where the authors say this:

> ***"11-037 The undertaking in damages enables the court to decide subsequently who should bear the losses caused by an interim injunction, whether granted ex parte or inter partes, and grant appropriate compensation to be paid by the person providing the undertaking. A party covered by the undertaking will have the right, at the appropriate stage, to ask the court to enforce the undertaking against the claimant, and the court can do so, either assessing the damages summarily [see Econet v Vee Networks [2006] EWHC 1829; Columbia Picture Industries inc. v Robinson [1987] Ch 38] or more usually, by directing that the claimant pay the damages awarded on an inquiry as to damages.***
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> ***Thus the initial question is whether the injunction was "wrongly granted" (see Yukong Line Limited v Rendsburg Investments Corp [2001] to Lloyd's Rep 113 at [32]). If the claimant fails at trial then normally it would follow that the injunction was wrongly granted. But this is not always so .....***
>
> ***Whether or not the injunction has been wrongly granted is to be decided by the court and should be dealt with before any inquiry as to damages is directed. Such an inquiry should be concerned only with the quantum of damages to be awarded to the defendant pursuant to the jurisdiction conferred***

on the court by the undertaking. The inquiry should not be concerned with whether or not the injunction was justified. Nor in principle should it be concerned with whether the court, in the exercise of its discretion, should decline to award damages either wholly or in part. Thus, once an inquiry has been directed it should be concerned only with matters of causation and the quantification of damages.

....

11-039 Difficulties have often arisen as to whether an order directing an inquiry means that the undertaking is to be enforced by the court in the exercise of its discretion. If the judge making the order makes it clear that the discretion remains to be exercised in the future, then the order will not be treated as having determined it: Zygal Dynamics v McNaulty (above). So also if counsel for the claimant expressly reserves the point and the order is made on the footing of this reservation. If the judge orders an inquiry, having in principle decided that damages are to be paid, then if the claimant wishes to contend that the undertaking should not be enforced as a matter of discretion, this should be done by way of appeal against the order directing an inquiry: Cheltenham and Gloucester Building Society v Ricketts [1993] 1WLR 1545.

....

11-040 The ordinary practice on interlocutory injunctions is not to order an inquiry into damages on the cross undertaking unless and until the claimant has failed on the merits of the action: Ushers Brewery Limited v King (P.S.) & Co (Finance) Limited [1972] Ch 148. However, in a case involving a Mareva injunction, a defendant may obtain an inquiry into damages once it is apparent that the injunction was obtained wrongly or without jurisdiction...

11-041 Once it is clear in a Mareva case that there was not a sufficient risk of dissipation of assets, the court may enforce the undertaking and direct an inquiry even though the merits of the claim have not yet been decided ....

11-043 In F Hoffmann La Roche and Co AG v Secretary of State [1975] AC 295 at page 361 Lord Diplock said that: ....

> *"The court retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining*

or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so".

This places the burden of persuasion on the unsuccessful claimant, and recognises that once it is established, that the injunction was "wrongly granted", even though without fault on his part, the court will ordinarily order an inquiry as to damages. The word "inequitable" reflects that the procedure on the undertaking has come from the courts of chancery before the Judicature Acts, and that the question is one of discretion to be exercised taking into account all the circumstances of the case......

There is a discretion to refuse to enforce the undertaking and each case must be decided on its own facts. This will be done on the basis of all the material available to the court at the time of exercising the discretion, including matters post dating the granting of the order, and including in the case of a search order the results of the execution of the order...... if the defendant has provoked the bringing of the proceedings or brought them on himself, it may be "inequitable" to enforce the undertaking. The judge is entitled to take into account all the circumstances relevant to whether it is fair and just to refuse an inquiry:

Whether an injunction was "wrongly granted" does not depend on whether the judge made a mistake in granting it. It involves looking at all the facts at the time of the hearing seeking an inquiry with the benefit of knowledge of all those facts and applicable law, and hindsight (Smithkline Beecham PLC v Apotex Europe Limited [2005] EWHC 1655 [2006] 1WLR 872) .....

Unnecessary delay in making an application to the court to enforce the undertaking can result in the Court's declining to enforce it. This is irrespective of prejudice being caused: Barratt Manchester Limited v Bolton Metropolitan Borough Council [1998] 1WLR 1003. The court will take into account all the circumstances of the case, including the duration of the delay, any explanation for it, whether it has caused prejudice to the other party, whether any prejudice can adequately be dealt with by an award of costs, and whether the claim for loss is substantial and reasonably arguable. In Société General v Goldas Kuyunculuk Sanayi Ithalat Ihracat AS [2019] 1WLR 346 ...... the Court of Appeal stated that: "the presence of prejudice will be important but its absence is in no way decisive." The case had been "wharehoused" [sic] by the claimant for eight years after obtaining a freezing injunction and the judge struck out the case after the limitation period had expired, set aside the injunction and ordered an inquiry as to damages. The Court of Appeal reversed the judge on the inquiry for having

made "errors of principle. Delay in asking for an inquiry is a hugely important consideration ..." It was also "far from clear" that the claimant suffered no prejudice by the delay because if there had not been the delay in addressing the position, the claimant might not have had its claim barred by limitation. There were also questions as to the effects of delay on evidence which might be relevant for the inquiry.

If there is delay in prosecuting an inquiry, the court can decide to dismiss the inquiry .... It is for the court to decide in pursuance of its "broad equitable jurisdiction" whether to enforce the undertaking or to release it, and it can be released even after an inquiry has been ordered ....

11-044 ...If there has been a compromise agreement in respect of the continuance of the injunction, it is a matter of interpretation of that agreement whether the parties have agreed that no claim is to be made to enforce the cross undertaking. Where the agreement is silent on this it is a question of inferring whether the parties intended that the respondent abandoned the right to make such a claim ......"

Discussion

20. Subject to what is said at paragraphs 41 to 45 below, it is clear from the history of the Jersey proceedings that the first question which I have to consider – whether the injunctions were wrongly obtained by the Plaintiffs – must be answered in favour of the Defendants. The basis on which the injunctions were granted was considered by the court in 2016 and again in 2019 when the undertakings in the Consent Order were considered, and the judgments handed down make it tolerably plain that the Plaintiffs were not entitled to them. I will shortly turn to the remaining questions, namely causation/remoteness, the effect of the Consent Order and the exercise of discretion having regard to the overall issue of fairness. Before doing so, however, I note that a draft judgment in this case was distributed to the parties on the usual terms on 22nd July 2021 inviting comment as to factual and typographical errors in the usual way. Subject to that, arrangements were made for the draft judgment to be finalised and handed down on 30th July. Circulation of the draft judgment preserved the right of the Court to make any changes which it wished to make prior to the judgment being handed down. On 26th July Advocate Sheedy sent me a letter with which was enclosed some minor typographical comments on the draft; but in the letter there were much more substantive comments made about the analysis set out in the draft judgment. He contended that there had been a misunderstanding about the undertakings given to LBSI by the Plaintiffs (namely, that it was an undertaking limited to costs), which meant that the Court's analysis of the Consent Order and subsequent conclusions on that point were wrong. In the light of those written submissions, the parties were convened for 30th July to make submissions on three points:

(i) Whether paragraph 31 of the Court's judgment of 17 September 2019 ([2019] JRC 180) was binding on me in respect of the conclusions expressed therein on the statement in the Consent Order which read "all…undertakings to remain until final resolution of the Monaco civil proceedings or further order…";

(ii) What evidence there was before me as to the current state of the estate administration of Mrs Morelli and whether that was a matter the Court should take into account; and

(iii) Advocate Sheedy's letter of 26 July.

21. I will take the last of those points first. Advocate Sheedy had contended in his letter that I had overlooked the direct undertaking provided by the Plaintiffs to the Parties Cited, including LBSI, in the Order of Justice. That undertaking was the second of seven undertakings and is set out in paragraph 3 above and the Defendants had the benefit of that by virtue of an assignment to them by LBSI of its rights in this respect at the conclusion of the liquidation.

22. Although it might be said that this criticism went beyond what parties are asked to do in responding to the circulation of a draft judgment, I make absolutely no criticism of Advocate Sheedy for raising the point with me. Not to have raised it would probably have committed the parties to the time and emotional energy of an appeal which might, at least on this obvious ground, be avoided. My provisional reading of his letter was that I had indeed overlooked this undertaking and that as a consequence the analysis and discretion needed to be reviewed – hence I asked the Plaintiffs if they had any submissions to make on this narrow point, in particular whether they wished to support the reasoning which Advocate Sheedy had criticised. Mr Morelli did make submissions but in relation to this point he said in effect that he left it to my discretion. I accordingly have accepted those submissions which Advocate Sheedy made in relation to the draft judgment and I have removed the passages which depended upon my reading of the Consent Order in such a way as disregarded the second of the Plaintiffs' undertakings; and I have anxiously reviewed the exercise of discretion in the light of the changes made. In particular, I have been cognisant of the danger of unconsciously seeking to reach the same decision as before, as it were minimising the impact in the original decision of the analysis which, based as it was on a misreading of the undertaking, was faulty. I am satisfied that I have not fallen into that trap, albeit that there has been no change in the outcome.

The Consent Order

23. I will shortly consider the causation issue on the basis that such losses are in theory capable of being pursued under the undertaking in damages. In this context, it is to be noted that there are three potentially relevant time periods. The first is the period from the date of service of the Order of Justice, (currently unclear but sometime after 24 June 2016) and 21 September 2016, when the Order was made by the then Deputy Bailiff by consent, varying the original orders. The second

period is from that latter date until the conclusion of the Monaco civil proceedings; and the third is from that date until 17 September 2019, when the Court gave judgment that the undertakings given by the Defendants were discharged and whatever restrictions had previously bound them, if any, no longer did. As most of the losses claimed in the Schedule of Loss arose after September 2016, it is convenient to take the second and third periods first. That requires an analysis of the effect of the Consent Order.

24. It has to be said that this Consent Order is very unhappily drafted; but essentially the injunctions were replaced with undertakings. Those undertakings were not in precisely the same terms as the original injunctions because there were some carve outs enabling the shares in SSI and its income to be released and also enabling some payments from LBSI to the First Defendant to enable him to finance his defence of the Monaco proceedings. As mentioned above, having referred to those undertakings and exceptions from them, the Consent Order continues:

> ***"And upon the Plaintiffs' undertakings in paragraph 1 – 7 on pages 9 and 10 of the Order of Justice being continued and applicable as regard the above undertakings by the Defendants;"***

25. The question which this prompts is the extent to which the undertakings by the Plaintiffs can apply to the undertakings now given by the Defendants. This requires an analysis of the Plaintiffs' undertakings.

26. As is clear, there were 7 of them. Undertakings 4, 5 and 6 appear to be spent and it is hard to see how they could continue to be applicable in relation to the fresh undertakings given by the Defendants (see paragraph 5(i) above) and reflected in the Consent Order. The Plaintiffs' undertakings 1, 2, 3 and 7 could continue to apply.

27. The order for damages is if the Court later finds "this Order" has caused loss – but "this Order" has been discharged and no longer applies. All the Orders on 22 June 2016 were discharged on 21 September 2016 and it is not obvious, as a matter of grammar and language, that undertakings in relation to a discharged order could be applicable as regards undertakings subsequently given by the Defendants. It might also be said that there is an inherent contradiction in the Court deciding that it is appropriate to compensate the Defendants for losses which flow from their own agreement. On the face of it, the Defendants have agreed to give undertakings and it is hard to see as a matter of common sense how the restrictions which they agreed to have imposed upon them can be said to have been wrongly imposed.

28. It may be said that this inherent contradiction does not arise because there is no difference between injunctions and undertakings reflected in the Court Order. Breach of either incurs the possibility of a judicial sanction. Nonetheless, in my judgment there is a difference. Leaving aside

mandatory injunctions, the injunction is an order not to do something. The undertaking is a promise by a party not to do something, a promise which is usually given in return for some other concession – in this case, the saving provisions which are set out as exceptions to the terms of the Order of Justice. Indeed, the Consent Order came about because there was listed at that time an application by the Defendants to discharge the injunctions completely, an application which was to have been heard some two or three days after the date of the Consent Order. Thus the promises given by the Defendants to the Court were given in order to secure the release of SSI from the restrictions and to remove the risk of failure of the application to discharge the injunctions altogether, with whatever costs and other consequences might flow from that. The fact that the Defendants might contend they should not have been in the position of having to make that application in the first place is by the by: the fact is that they have agreed to give promises to the Court for the advantages which they perceived for themselves in doing so. It could be said that the Plaintiffs' undertaking in damages would not normally extend to such claims; and the question becomes whether it is necessary or appropriate to construe the Consent Order as having preserved them.

29. On the other hand, I accept that it was possible to construct some language which would leave in place the undertakings of the Plaintiffs to pay such losses as the Court thinks fit, notwithstanding these more general comments which I have made. Advocate Sheedy urged upon me that it would have made no sense for the Defendants to give up the benefit of the undertakings they had in the Order of Justice and yet still be bound by undertakings which were equivalent in effect to the injunctions. I note that the relevant provision which I am currently considering clearly does not apply to all 7 undertakings, notwithstanding the express terms of this paragraph in the Consent Order. It is clearly capable of continuing to apply to undertakings 1, 2, 3 and 7. I had originally been of the view that because it was unlikely to have had application to the undertaking given to the Parties Cited, there was no reason to apply the benefit of the Plaintiffs' undertakings to the Defendants – but having had the error of that analysis successfully urged upon me, I have on balance concluded that the better construction of the Consent Order, notwithstanding paragraphs 26-28 above, is that the undertakings in the Order of Justice do indeed apply to the Defendants' undertakings in the Consent Order, just as they did apply in order to receive the benefit of the injunctions, even though there is no express agreement between the parties that the potential for claims for compensation as a result of undertakings voluntarily given should be preserved. I have reached this conclusion largely because it seems unlikely that the Defendants would have willingly surrendered the benefit of the undertakings given to them by the Plaintiffs, having regard to the strength of their position on the discharge summons.

30. I turn next to the first additional point on which submissions were invited as described in paragraph 20 (i) above. At paragraph 31 of the Court's judgment of 17 September 2019, the Court said this:

"The Consent Order of 21st September 2016 contained a number of undertakings given by the Defendants, the Parties Cited and by the Plaintiffs. Although the order, as prepared by the parties and endorsed by the Deputy Bailiff, indicates that all the undertakings (including the Plaintiffs' undertakings contained in the Order of Justice) would remain in place until final resolution of the Monaco civil proceedings or further order of the Royal Court, we do not consider that the language of the Consent Order could possibly have been intended to remove the Plaintiffs' undertakings contained in the order of justice. We have not been addressed on that subject, and therefore those undertakings will remain in place with liberty to apply."

31. Advocate Sheedy submitted that that this was a conclusion of fact reached by me with the Jurats which bound me. The Plaintiffs had not argued in 2019 that the cross undertakings in damages should not continue to apply after the ending of the Monaco civil proceedings nor that they were ineffective. There was no basis on which the decision of the Court in that paragraph could be considered as given *per incuriam*, reliance being placed on the dicta in Morelle LDS v Wakeling and another [1955] 2 QB 379 at pp 406-407:

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: "Here was a manifest slip or error."

32. In my judgment, the question as to whether there has been a contract is largely one of fact, but the construction of the contract is ultimately a matter of law. Likewise, the construction of a consent order is a question of law. I therefore conclude that the fact that there were Jurats sitting with me on 17 September 2019 is of no consequence with respect to this point. The construction of the Consent Order, being a matter of law, is a matter on which I am free to express a contrary view in

the current proceedings to that expressed in 2019. Furthermore, although it is desirable that there should be consistency in the decisions of the Court on points of law, the doctrine of *stare decisis* is not one which has been adopted in the courts of this island. However, I consider such points to be merely theoretical in this case.

33. In fact, I do not think I am now expressing a contrary view to that expressed then. The issue of whether the Plaintiffs' undertakings survived at that point was not before the court and we had not been addressed on it. Nonetheless, all paragraph 31 of that judgment says is that the undertakings survived. It does not say that they continued to have effect beyond the date on which, by the Consent Order, they were expressed to finish, i.e. the end of the civil proceedings in Monaco. Thus, the undertakings continued in respect of the first and second periods, but they did not continue into the third period commencing on the conclusion of the Monaco proceedings. Advocate Sheedy says this would be most unfair. He points out that his clients sought the Plaintiffs' confirmation that the undertakings given by the Defendants were spent in 2018 when the Monaco court delivered judgment but the Plaintiffs not only refused to give that confirmation in correspondence but resisted the Defendants' application when that came before the Court in 2019.

34. I see the argument that it is unfair to say that the Plaintiffs' undertakings ceased when the Monaco judgment was delivered because that is capable of causing prejudice to the Defendants. However, in my judgment, that was the agreement that the Defendants concluded in September 2016 as described in the Consent Order. As the Court found in 2019, on a construction of the Consent Order, the Defendants were free of their undertakings from the moment the Monaco civil proceedings ended. They did not need either the consent of the Plaintiffs or a further order of the Court to confirm this. I do not see how the language "all...undertakings to remain until final resolution of the Monaco civil proceedings or further order..." can mean that the undertakings continued in respect of any losses sustained beyond the resolution of the Monaco civil proceedings. The fact that in 2019 the Court concluded that on a proper construction of the Consent Order the Defendants' undertakings ceased at that date necessarily involves the same conclusion in relation to the undertakings of the Plaintiffs. Those latter undertakings remain in place, however, in respect of any loss suffered before that date. In those circumstances, I do not consider that any claim for an assessment of loss after that date – i.e. the third period – can be sustained. It was not what was agreed, nor was it what the Court ordered and the fact that there may be adverse consequences for the Defendants in that result .cannot create a basis for a claim where none otherwise exists.

35. In principle, subject to the questions of causation and of the overall discretion, I find that the alleged losses sustained in the third period cannot be claimed under the undertakings, but those of the first and second periods can. In reaching that conclusion, I have not ignored the assertions of the Plaintiffs that delay is another ground upon which the Court ought not to exercise its discretion to order an inquiry into damages. The material timetable here is:

(i) Injunctions issued in June 2016.

(ii) Order for variation made in August 2016.

(iii) Consent Order staying the Jersey proceedings made in September 2016.

(iv) Completion of Monaco proceedings in July 2018.

(v) Judgment issued releasing defendants from undertakings September 2019.

36. LBSI was in fact placed in liquidation in January 2020, and a summons for an inquiry into damages issued on 7 February 2020. Given the nature of the Schedule of Losses claimed, it is understandable that the actual inquiry into damages could not be undertaken until the company was dissolved, which was on 15 April 2021. If delay were the only basis upon which it was asserted that there should be no inquiry into damages, I would have rejected that contention. I do not regard the Defendants as having been tardy in all the circumstances in bringing the application they have, even though I accept in principle that the application for an inquiry into damages could have been brought at any time after delivery of the Monaco Judgment in September 2018.

Causation and Discretion

37. I have found that the Consent Order entitles the Defendants to claim an inquiry in respect of the first and second periods, subject to the issues of causation and the general discretion to which I will shortly turn, and furthermore, these considerations do not prevent an inquiry into damages in relation to the first period, namely from 22 June 2016 to 21 September 2016.

38. According to the Schedule of Loss, the total involved for the first period would be less than £5,000, indeed possibly some two-thirds of that amount. Reminding myself that the loss claimed relates to the professional administration fees and disbursements paid in respect of LBSI, the question which arises is whether those expenses would have been incurred in any event during this first period. In my judgment the probability is that they would. The late Mrs Morelli died on 16 March 2016. On 30 June 2016, tax advice was received by the Defendants to the effect that having the underlying assets structured through three companies provided no purpose in terms of tax efficiency and there could be savings in terms of administration costs if the companies were put into liquidation. Accepting at face value for the purposes of this judgment only, that this was the established intention of the Defendants, it is highly unlikely that the liquidation would have been complete by September 2016. The claim for this period therefore fails the causation test. They were also costs which were being incurred at the time the injunctions were ordered in June 2016 and therefore did not flow directly from the imposition of the injunctions, which is a second reason why this part of the claim fails. I have also noted, without deciding it, that it seems unlikely that

such expenses would naturally fall within the second limb of Hadley v Baxendale either. In those circumstances that uncertainty, given the relatively small amount of loss at stake, is a substantial reason in my judgment as to why an inquiry into damages in respect of this period would be unlikely on a stand-alone basis.

39. The second period, from 21 September 2016 until the date of the termination of the Monaco proceedings, involves different sums. I have taken the date on which this period terminates to be 11 October 2018, which, according to Advocate Mullot, was the date on which notification of the judgment of the Court was handed down by the court bailiff to the Defendants. From the Schedule of Loss, the claim for this period would seem to amount to approximately £49,700, albeit more detail would be needed as to what the administration charges represented, were an inquiry to be ordered. On the face of it, any such inquiry would focus on that detail to be sure that the charges were properly allocated to the Plaintiffs. However, there is the broader causation issue to be considered at this stage.

40. In my view, the consent order was unhappily drafted but the drafting does not get one away from the conclusion that it was not the grant of the injunctions which caused the claimed losses because those expenses were being incurred at the time the injunctions were issued. It follows that the claim must succeed, if it is to succeed at all, on the second limb of Hadley v Baxendale. I think there is a very real doubt as to whether such a claim could be sustained and certainly on the evidence I have seen to date, there is nothing which would lead me to think that it was in the reasonable contemplation of both the Plaintiffs and the Defendants that such losses might arise. The Plaintiffs were not put on notice that a liquidation of LBSI was in contemplation. Of course, it is possible that, had this been raised, they would have disregarded it and not agreed. But I do not think I should assume that and there is no evidence that the possibility of LBSI being placed into liquidation was really in their contemplation when the Consent Order was made – even though there was an express prohibition against that in the injunctions originally obtained. That prohibition was in my view illustrative only of the great width of the injunctions obtained. I therefore consider that the claim in respect of the second period also fails the causation test.

41. In separately considering the exercise of my discretion in respect of both periods generally, I have had particular regard to the wider picture, as indeed I indicated at the end of the hearing in May was my intention. There has been an unhappy falling out within the family over the administration of the late Mrs Morelli's Estate. Contentions have been raised by different members of the family that Mrs Morelli made substantial gifts during her lifetime which ought to be taken into account in the administration of the estate. This contention under Monégasque Law would be, as I understand it, the equivalent of an action in Jersey for *rapport a la masse*. In other words the assets have to be brought back into the estate for the purposes of calculating a fair distribution of it. In the present case, it appears to be undisputed that the shares in LBSI, together with various other assets

originally covered by the injunctions are required to be brought back into the estate for the purposes of calculating a fair distribution of it.

42. There is no doubt that that has not happened so far but there is contention between the parties as to where responsibility for that lies and at the adjourned hearing I invited submissions as to the extent of the evidence on this point. I have now received copies of letters sent by Avocat Mullot dated 9 February 2021, 16 June 2021, 27 and 29 July 2021; and from Avocat Monasse dated 23 March 2021, and 11 and 22 June 2021. From these letters, it seems that the following points may be established:

    (i) The parties have submitted different valuations in respect of some of the property in, or the value of which should be accounted for in, the estate of Mrs Morelli;

    (ii) Neither party accepts the valuations of the other;

    (iii) Both parties accept that the Notary charged with the administration of the estate has been extremely slow in conducting her work;

    (iv) In effect there has been no obvious progress since the opening of the estate;

    (v) There has been correspondence with the judge supervising the administration of the estate (see paragraph 16 of the Royal Court's judgment [2019] JRC 180) who has been invited to ensure a statement of difficulty is drawn up, presumably as a first stage in identifying how the different points of difficulty can be resolved.

43. For the Defendants, Advocate Sheedy accepted that in the exercise of my discretion it was open to me to take into account the developments in the administration of the estate if these were established to be the fault of his clients. However, he asserted that to do so would require a fact finding hearing with Jurats and it would be wrong to refer such a matter to them. If the matter were inconclusive at present, there was no inequity which could be laid at the door of his clients and be taken into account. On the other hand, the prima facie loss of £100,000 or so in the administration of LBSI was identifiable. Thus, the uncertainties of establishing who was responsible for the delays in the administration of the estate should not be taken into account.

44. I do not have any doubt that the Plaintiffs are anxious to avoid delay. It is the Defendants, not they, who are in possession of the bulk of Mrs Morelli's estate and have the obligation to bring the value of what was once her property into account, and on the face of it, delay suits the Defendants much more than it does the Plaintiffs. It is the Plaintiffs who commenced proceedings both here and in Monaco. Such correspondence as I have seen – and I accept there much I have not seen – suggests it is the Plaintiffs who are pushing for the intervention of the judge in Monaco. Moreover, I do not accept the Defendants' contention that in the absence of proof of where responsibility lies,

the uncertainty on the point means that it can just be disregarded. The Defendants have the burden of satisfying me that it is appropriate to order an inquiry and at this stage they have not done so. Both parties agree that the value of LBSI must be accounted for in the administration of the estate. The Notary has clearly felt unable to proceed with establishing such a value, for whatever reason. Until there is sufficient evidence to the contrary, I proceed on the basis that the delay is attributable to the Defendants because they have the burden of proof that it is not something to be held against them.

45. It is perhaps unsurprising that the Plaintiffs were anxious to freeze the position so as to protect their rights to the estate. I have seen a copy of an early communication from the notary to the Defendants in 2016 seeking information, to which it has consistently been said that there was no substantive reply. This Court has found that the Plaintiffs were not entitled to take the action they did for all the reasons which are set out in the judgments given to date. Nonetheless, the arguments over freezing the assets might have carried much more credibility if the decision of the Monaco Court in September 2018 had been available at the relevant time. That is not to say that they would necessarily have succeeded. It is only a reflection that, in terms of overall fairness, an asset (LBSI) which is an important part of the overall value of the estate of the deceased might have been expected to have remained in existence whilst the various arguments over the estate took place. I have had regard to this as a significant factor in the exercise of my discretion.

46. Having considered this issue of fairness further, I am simply not comfortable ordering an inquiry into damages when the Defendants may not be cooperating in the administration of Mrs Morelli's estate.

47. In all the circumstances, both for the causation reasons set out and in the exercise of my discretion I decline to order an inquiry into damages at this stage in this case. The present application for an inquiry is therefore refused.