

Neutral Citation Number: [2026] EWCA Civ 1476

Case No: CA-2026-000793

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE HON. MR JUSTICE GRIFFITHS
KB-2023-004010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2026

Before:

THE LADY CARR OF WALTON-ON-THE-HILL,
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE ZACAROLI
and
LORD JUSTICE BUTCHER

- -

Between:

MEX GROUP WORLDWIDE LIMITED	**Appellant**
- and -	
(1) STEWART OWEN FORD	**Respondents**
(2) BRIAN ROBERT CORMACK	
(3) REGAL CONSULTANCY INTERNATIONAL LIMITED	

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Thomas Grant KC and Caley Wright (instructed by **Stephenson Harwood LLP**) for the **Appellant**
Saaman Pourghadiri (instructed by **Cooke, Young and Keidan LLP**) for the **Respondents**

Hearing date: 21 October 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Lady Carr of Walton-on-the-Hill, CJ (delivering the judgment of the court):

Introduction

1. This appeal requires the court to determine the scope of recoverable loss on a damages inquiry under a cross-undertaking as to damages in a freezing order. The Appellant, Mex Group Worldwide Limited ("MGWL"), contends that recovery is limited to damages caused by the restraining (or in an appropriate case mandatory) effect of the freezing order; losses suffered more widely as a result of the imposition of a freezing order are not recoverable.

2. The issue raised is one of general importance, not least since the wording of the cross-undertaking in question used the standard wording adopted in freezing orders, and matches the formula in the current model freezing order, the use of which has been mandatory since 6 April 2025.

3. Permission to appeal (and a stay of the inquiry as to damages pending the appeal) was granted, by Popplewell LJ, on the basis that there was a compelling reason for an appeal because the relevant law is in need of clarification. This is the first time that the present issues as to the scope of recoverability under a cross-undertaking for damages in a freezing order have come before the Court of Appeal for decision.

The Freezing Order and the Cross-Undertaking

4. The question arises in the following basic context. In October 2023 Lavender J granted a worldwide freezing order in favour of MGWL against various defendants, including the three Respondents and others (including CSM Securities SARL ("CSM")) ("the Freezing Order"). The Respondents' position is that the First Respondent ("Mr Ford") originated and introduced bonds, and the Second Respondent ("Mr Cormack") is the owner and controller of the Third Respondent ("Regal"), an English company engaged in the business of introducing financial products to professional investors.

5. Each of the Respondents has a connection with CSM. The precise nature of those relationships is disputed. The Respondents allege that Regal's role was to market, promote and sell bonds issued by CSM and that Mr Ford and Regal both had contractual arrangements with CSM whereby they would receive fees or payments relating to bonds issued by CSM.

6. The Freezing Order was obtained without notice and in support of proceedings initiated by MGWL against the Respondents (and others including CSM) in Scotland alleging an unlawful means conspiracy directed at harming MGWL's interests ("the Scottish proceedings"). The claim was valued at Euro 85million.

7. The Freezing Order restrained the Respondents from removing from the jurisdiction, disposing or dealing with or diminishing the value of any of their assets up to the value of Euro 85million, or dealing with any legal or beneficial interests. There were exceptions to this order, including for ordinary living expenses and the costs of legal advice. Further, there was no prohibition on dealing with or disposing of assets "in the ordinary and proper course of business" (known as the "Angel Bell" proviso).

8. As a condition of obtaining the Freezing Order, and as is standard, MGWL had to give a cross-undertaking in damages. Schedule B to the Freezing Order included the following cross-undertaking to the court:

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

Relevant events following the Freezing Order

9. In March 2025 MGWL abandoned the Scottish proceedings in circumstances set out by Lord Sandison in an opinion reported at *Mex Group Worldwide Ltd v Ford and others* [2025] CSOH 39 ("the *Sandison* judgment"). This meant that the Freezing Order fell away. Lord Sandison commented (at [78]) that there was "no demonstrably satisfactory reason" for the abandonment. The Freezing Order was discharged by consent in September 2025.

10. The Freezing Order had in fact already been discharged as against other defendants on the basis of a (deliberate) failure to make full and frank disclosure and lack of jurisdiction. These defects went to the heart of the Freezing Order as a whole, and affected the position of all defendants, including the Respondents. The discharge was upheld by the Court of Appeal on 8 August 2024 (see [2024] EWCA Civ 959).

11. MGWL, having received a draft of the Court of Appeal's judgment under embargo, reacted by, through its solicitors, notifying the Freezing Order, for the first time on 7 August 2024, to international stock exchanges, to the custodians of CSM's bonds and to the listing agents for CSM ("the Disclosure"). Lord Sandison described this as an act of "weaponis[ation]" of the existence of the Freezing Order (see [76] and [77] of the *Sandison* judgment).

The Application and Direction for an Inquiry

12. In November 2025 the Respondents applied for an inquiry as to damages under the Cross-Undertaking. They claim to have suffered significant losses as a result of the Disclosure. The Disclosure is said to have caused the de-listing of or refusal to list bonds issued by CSM, the unavailability of new bond issuances for CSM, and the resignation of CSM's listing agents. As a result, the Respondents claim to have lost significant commissions and other sums that they would have earned on CSM's bonds. Mr Cormack also claims damages for reputational damage, claiming a loss of income from directorships which he says were not offered to him as a result of the stigma of the Freezing Order. The losses claimed collectively by the Respondents stand at over £100million.

13. It is common ground that the losses claimed by the Respondents do not arise by reason of the restraints in the Freezing Order.

14. Griffiths J granted the Respondents' application for an inquiry in March 2026 (see [2026] EWHC 629 (KB)). On the question of recoverability of loss, he said this:

> "49. If loss has been caused to the Applicants by the worldwide freezing order, I am not attracted by an argument, on the facts of this case, that only damage attributable to the restraining effects of the orders, as opposed to all the effects of the order, including the effect of what has fairly been described…as its weaponisation, should be recovered. In principle, and as a matter of equity and justice, I think that it should all be recoverable in this case, if proved as a matter of fact on the evidence in due course."

15. Addressing Mr Cormack's claim for loss as a result of the damage to his professional relationships and ability to obtain non-executive directorships, Griffiths J concluded that the inquiry as to damages would ascertain, first, what, if any, loss of this nature had been established, and would then be in a position to determine whether compensation for it should be awarded. His judgment at that stage was that, if established, such loss should in principle be recoverable (at [51] to [53]).

16. MGWL's contention is that Griffiths J was wrong, and failed to apply the correct principles as to what losses are recoverable under a cross-undertaking which, so it is said, are established by authority binding on Griffiths J, and on this court. MGWL submits that those principles establish that recoverable losses are to be assessed on the basis of a hypothetical contract by which the applicant for the injunction is taken to have agreed not to prevent the respondent from taking the action restrained by the injunction (here the restrictions on the Respondents from removing from the jurisdiction, disposing or dealing with or diminishing the value of any of their assets or dealing with any legal or beneficial interests), but has breached that agreement. Losses attributable to the grant of the Freezing Order but not caused by the "breach" of that notional contract are not recoverable. The limitation contended for by MGWL may be described, for brevity, as "the restraint limitation".

17. The Respondents contend that the restraint limitation is not justified by the terms of the Cross-Undertaking, nor by principle or policy, and nor is it established by authority. The Respondents argue that, if it is established that the grant of the Freezing Order has occasioned loss to any of the Respondents then, subject to rules of causation and remoteness analogous to those which would apply in contract, those Respondents can recover such loss under the Cross-Undertaking.

Discussion and analysis

History of the cross-undertaking in damages

18. Although its inauguration has been ascribed to Knight-Bruce LJ while he was Vice-Chancellor, it appears that the practice of requiring an undertaking in damages, or making express provision in the order for a defendant to be protected from loss caused by the grant of an interlocutory injunction subsequently found to be unjustified, pre-dates 1841. From about 1859 it became the usual practice of the Court of Chancery to require such an undertaking. This facilitated the achievement of two objectives: first, the court could abstain from expressing premature views on the merits; and, second, the court could grant an injunction knowing that, if the defendant prevailed, he would

usually obtain some compensation for having been subjected to the order (see Gee on Commercial Injunctions (7th ed., 2022) at [11-002]).

19. With the advent of the *Mareva* injunction, as freezing orders were initially known, the giving of a cross-undertaking became a matter of particular importance. In *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 ("*C&G*"), the operation and significance of the cross-undertaking in a case involving a freezing order were considered by the Court of Appeal.

20. Neill LJ gave a summary of the guidance found in the authorities as to the enforcement of a cross-undertaking in damages. It is helpful to refer to the first four of the features which he identified (at 1551):

> "(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined party but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so…"

21. Peter Gibson LJ said (at 1554):

> "The practice of requiring an undertaking in damages from the applicant for [an interlocutory] 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 not 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 L.J. in *Bank Mellat v Nikpour* [1985] F.S.R. 87, 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."

22. Since *C&G* the courts have recognised, on a number of occasions, the severity of the consequences for a defendant which can result from the grant of freezing orders. In *FSA v Varrick* (Unreported, 24 July 2001) at [9], Laddie J noted that because freezing orders "are so powerful and their adverse effect on defendants can be so terminal, the court must always be astute to ensure that it is not unfairly prejudicing a defendant who may have a defence to the claims made against him." In *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB) ("*Al-Rawas*") at [35], Jack J referred to a freezing order as "go[ing] to the heart of the party's ability to use the banking system", and said that "[t]o be on the wrong end of a freezing order is undoubtedly a stigma - … it suggests that the defendant has failed to pay its debt and has been found likely to try to dissipate its assets." In *Abbey Forwarding Ltd v Hone (No. 3)* [2014] EWCA Civ 1711, [2015] Ch 309 ("*Abbey Forwarding*"), McCombe LJ referred, at [110] to Peter Gibson LJ's remarks in *C&G*, quoted above, and to the metaphor of nuclear weapons, and said that if freezing orders "are wrongly deployed, just as with a nuclear weapon, damage is inevitable".

The test on an inquiry

23. If it is determined that a freezing order ought not to have been granted, the defendant can seek the enforcement of the cross-undertaking. There is no dispute about the two-stage test usually adopted on such an application to enforce: the first question is whether the undertaking ought to be enforced at all, essentially a question of discretion; if yes, the question is whether the defendant has suffered any damage by reason of the injunction.

24. In relation to the first question, the starting point was said by Cotton LJ in *Griffith v Blake* (1884) 27 Ch D 474 at 477 to be as follows:

> "… the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary."

25. In *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430 at [42]-[43], Neuberger LJ said:

> "As a matter of principle, and, indeed, of general practice, I would certainly accept that, where a claimant has obtained an interlocutory injunction restraining the defendant from doing something until trial, and the court decides at trial that a permanent injunction should not be granted, the defendant can normally expect, virtually as of right, to have an inquiry as to the damages to which he is entitled pursuant to the cross-undertaking which the claimant will have been required to give as a condition of obtaining the interlocutory injunction. However, there plainly are exceptions to this general rule. In

> *Hoffmann-Laroche v Secretary of State* [1975] AC 295 at 361D, Lord Diplock said that the court 'retains a discretion not to enforce the undertaking if … it is inequitable to do so.'
>
> It is clear, however, that 'special circumstances' are required before an inquiry can properly be refused."

Though Neuberger LJ was there addressing a case in which a permanent injunction had been refused at trial, what he said is also applicable in most cases in which an interlocutory injunction is discharged prior to trial because it should not have been obtained, or cannot be maintained.

26. One circumstance in which the court will not order an inquiry as to damages is where the court is satisfied that it would be pointless to do so because the intended claim for damage is plainly unsustainable (see *Yukong Line Ltd v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113 at [33] and [35]).

27. In the present case, MGWL contends that the intended claim for damage is plainly unsustainable, because the damage contended for did not flow from the restraining effects of the Freezing Order. The question for us is whether a claim for losses said to have been caused by the fact of the grant of the Freezing Order and the Disclosure but which do not flow from the restraining effects of the Freezing Order is plainly unsustainable.

Scope of recoverability under the Cross-Undertaking

The words of the undertaking

28. The wording of the Cross-Undertaking is a useful, indeed essential, starting point. We have already set out the terms of the Cross-Undertaking. As indicated above, it follows the wording of the current model freezing order, the use of which has been mandatory since 6 April 2025 (see CPR 25.14(1)). (The wording can be modified as appropriate, but any departure from the standard wording must be drawn to the attention of the judge hearing the application (see CPR 25.14(2))).

29. This wording is not confined to providing for payment of loss caused by the restraining effects of the injunction, but instead applies to loss caused by "this order". There is nothing in the wording to suggest anything other than a broad-based approach which requires fair compensation. It is not surprising that broad language is used. At the point that an injunction is granted, it may be difficult for anyone to say, and still more difficult for the court to know, what losses will be occasioned to the defendant by the order. The breadth of the wording facilitates the grant of an injunction notwithstanding that uncertainty (although the court is likely to seek to form some idea of probable losses when considering whether the cross-undertaking should be fortified and, if so, in what amount).

The origins of the remedy

30. A remedy under a cross-undertaking in damages is equitable in origin and nature. This point was made by Aickin J in the Australian case of *Air Express Ltd* v *Ansett Transport Industries (Operations) Pty Ltd* [1979-1981] 146 CLR 249 ("*Air Express*") at 261. His

statement was said to be correct as a matter of the law of England and Wales by McCombe LJ in *Abbey Forwarding*, at [47]. In the same paragraph McCombe LJ said that Aickin J may have had the "touchstone" of the matter when he had said (at 266-267 of *Air Express*):

> "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."

The significance of Aickin J's reference to damages flowing "from the injunction" will appear from what we say below. What is important at this point is Aickin J's reference to the need to prefer a view which is just and equitable, or fair and reasonable, rather than to adopt a rigid approach.

Policy considerations

31. Policy considerations also militate against imposing the restraint limitation. If loss is caused by a court order which should not have been made, "justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so", as it was put by James LJ in *Graham v Campbell* (1878) 7 Ch D 490 ("*Graham v Campbell*") at 494. Moreover, freezing orders are typically granted without notice, and almost invariably at a stage when the court cannot properly evaluate the case put forward by the applicant. Yet they are orders which, as is well known and as has been recognised in the authorities, can have profound effects on a defendant. A broader approach whereby any losses suffered as a result of the grant of the order, provided that they are not too remote may be recoverable, acts as a deterrent to the making of unmeritorious applications for freezing orders, including applications where the essential aim of the order is to place financial pressure on a defendant, rather than actually to prevent the dissipation of assets.

Is the restraint limitation prescribed by authority?

32. In circumstances where the restraint limitation is not supported by the wording of the Cross-Undertaking, the origin or nature of the remedy, or considerations of policy, the argument that there is such a restriction has to be, and has been, one based on authority. MGWL's case is founded on what it contends is an established, and specific, contractual analogy. MGWL relies on what was said by Lord Diplock in *Hoffmann-La Roche & Co. A.G. v Secretary of State for Trade and Industry* [1975] AC 295 ("*Hoffmann-La Roche*"), at 361, in a passage which all agree was *obiter*, 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 would 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*."

(We have italicised the passage upon which MGWL places particular reliance.) MGWL argues that what Lord Diplock there said is not only highly persuasive authority in itself, but reflects earlier Court of Appeal authority and has been applied regularly.

33. Lord Diplock's reference to what Brett LJ said in *Smith v Day* is to the following passage (at 427-428):

> "Again, I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with. 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 contract with **or duty to the opposite party**. The rules as to damages are shewn in *Hadley v. Baxendale*. 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 contract which would be affected by the breach." (emphasis added)

34. As is apparent, an analogy with contract was relied on by Brett LJ because the undertaking is given to the court, not to the other side. Two other features of what Brett LJ said should be observed. First, the analogy was not merely with contract but also

(undefined) "duty" to the opposite party. This of itself indicates that an analogy with contract should not be applied rigidly in all cases. Second, Brett LJ did not say what contractual term should be treated as having been breached. He did not specify whether it should be a term that the counterparty would not restrain the relevant action, or a term that they would not obtain an injunction, or a term formulated in some other way. The precise nature of the contractual term that was to be relied on by analogy was not in issue in that case, and indeed there does not appear to have been any argument in relation to it.

35. Thus, in Lord Diplock's obiter dicta in *Hoffmann-La Roche* (where the terms of the cross-undertaking were to abide by any order the court might make as to damages sustained "by reason of this order"), although he was purporting to paraphrase what Brett LJ said in *Smith v Day*, he went a step further, in referring to the relevant notional contract as one under which the plaintiff had promised not to prevent the defendant from doing that which he was restrained from doing.

36. Other statements in authorities decided prior to *Hoffmann-La Roche* do not support the limitation suggested by Lord Diplock. In the early case of *Novello v James* (1854) 5 De GM & G 876, Knight Bruce LJ referred to the undertaking as one to pay damages "consequent upon the order and the order continuing such injunction". In *Graham v Campbell* James LJ referred (at 494) to the defendant being "entitled to have all damage sustained by him by reason of the injunction." In *Smith v Day* itself, Jessel MR considered that a defendant builder subjected to an injunction which did not restrain him from going on with the building altogether, but only from building so as to produce a certain result, would be entitled to damages on the cross-undertaking if he reasonably ceased building altogether and sustained loss by so doing (at 425). In *Schlesinger v Bedford* (1893) 9 TLR 370 at 371 Lindley LJ considered that the touchstone to recoverability under the cross-undertaking was whether damages flowed naturally "from the injunction".

37. In each of *Graham v Campbell*, *Smith v Day* and *Schlesinger v Bedford*, the court stressed that any damages, to be recoverable, should be caused by the injunction and not be too remote or collateral, but was not seeking to draw a distinction between the effects of the grant of the injunction and of the restraining provisions within it. It is perhaps not surprising that this distinction did not feature in these cases as one of importance because all of the authorities prior to the advent of the *Mareva* injunction in 1975 were concerned with what may be called "simple" injunctions, i.e. those that restrained conduct that was arguably a breach of the claimant's rights. In such cases, the grant of the injunction is premised on there being a good arguable case in respect of the underlying cause of action and damages being an inadequate remedy, and the terms of the injunction are directed specifically to restraining the allegedly unlawful behaviour. It is unlikely (or at least less likely) that in such cases there would be a material difference between damages flowing from the restraint and damages flowing from the order.

38. A freezing injunction, on the other hand, restrains dealing with all assets (subject to any limitations in the order), and is premised on a conclusion (in addition to good arguable case) that there is a risk that the defendant will dissipate their assets. As we have said, there is a stigma attached which goes beyond that attached to a simple injunction. It is an obviously foreseeable and non-remote consequence that the fact of the order being

made may itself cause damage of a different nature from the damage caused by the restraint contained in it.

39. Court of Appeal cases subsequent to the advent of the *Mareva* injunction have been decided on a basis consistent with the non-restrictive approach, and have upheld awards of damages flowing from the existence of the injunction and not specifically from the restraints imposed. In *Financiera Avenida SA v Shiblaq* (Court of Appeal (Civil Division) (7 November 1990)) ("*Shiblaq*") the defendant had been compelled to resign from his job by reason of the fact that a *Mareva* injunction was granted against him. That injunction had been wrongly obtained. At first instance, Saville J had awarded damages under the cross-undertaking, having found that the defendant's resignation from his job had been by reason of the injunction, rather than the existence of the underlying litigation, and that loss of that type was a foreseeable consequence of the obtaining of a *Mareva* injunction. An appeal in relation to those aspects of Saville J's decision was dismissed. Although Lord Diplock's dictum in *Hoffmann-La Roche* was referred to, no argument was advanced that the damages were irrecoverable because they were not caused by the restraints imposed by the order. Instead, Lloyd LJ formulated the question which had needed to be addressed as "whether the defendant has suffered any damage by reason of the granting of the injunction", and he (and Stocker LJ and Sir George Waller) upheld Saville J's decision that the defendant had suffered such damage. It is true that the restriction for which MGWL now contends, was not argued, but it is nevertheless significant that the Court of Appeal decided in the way it did. It indicates, at least, that the court saw nothing obviously inconsistent between the terms of the cross-undertaking and the damages awarded.

40. Much the same can be said in relation to the decision in *Keller v Cowen* [2001] EWCA Civ 1704 ("*Keller*"), in which the Court of Appeal (Lord Woolf LCJ, Simon Brown LJ and Buxton LJ) dismissed an appeal, and rejected permission to appeal on some grounds, against a judgment awarding damages under a cross-undertaking in respect of losses caused to a company by the withdrawal of that company's overdraft facilities consequent upon the continuation of a freezing order. The freezing order had caused the loss of the company's "lifeline funding" (see [26]). Again, the restraint limitation now urged by MGWL does not appear to have been argued, but the court clearly saw nothing anomalous in the award of the damages claimed under a cross-undertaking in conventional terms (see [7]).

41. In *Al-Rawas*, Jack J made reference to Lord Diplock's speech in *Hoffmann-La Roche* (at [15]). He also, as we have said, recognised that the obtaining of a freezing order goes to the heart of a party's ability to use the banking system, "which is at the heart of trade", and that to be on "the wrong end" of a freezing order is "a stigma" (at [35]). Jack J held that general damages may be awarded where a freezing order has been wrongly obtained, to compensate the defendant for the consequences of the order which cannot be claimed as special damages (at [39]). He contemplated that damages for emotional distress, though not ordinarily recoverable under a cross-undertaking, might be awarded in exceptional circumstances (at [40]). He made an award of general damages in the case of one defendant (at [48]), which was justified by evidence that that defendant had suffered damage to his professional and business reputation (see the evidence summarised at [16]). The approach adopted by Jack J is not consistent with the restraint limitation.

42. MGWL relied on the decision of Mr Michael Briggs QC (as he then was), sitting as a Deputy Judge of the High Court, in *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch) ("*Harley Street*"). In relevant part, that was a decision on whether to order fortification of a cross-undertaking. The defendants contended that the freezing order had damaged the share price of a defendant by lending credence to the serious allegations made in the proceedings. The judge was not persuaded that further fortification was required, for a number of reasons, principally that he was not persuaded that any loss had been sustained after the grant of the freezing order. But he also said (at [33]) that he was "disinclined to treat a misconceived notion by investors that the grant of a freezing order lent the court's credence to [the] allegations [made in the action] as part of a chain of causation between the freezing order and any loss in share value". He continued that this would be: "a factor wholly unrelated to any restraint placed by the freezing order", and thus lying "outside the quasi contractual analysis of causation, set out originally by Brett LJ in *Smith v Day*…". He added (at [34]) that neither he nor counsel were aware of any case in which the purely reputational consequences of a freezing order have formed part of an award of damages under the cross-undertaking, wholly divorced from the consequences of the restraints imposed.

43. This decision is entirely explicable on the basis that the judge was not persuaded that there had been shown to be any loss caused (or likely to be caused) by the freezing order. Insofar as the judge referred to any losses having to be the effect of the "restraints" as opposed to the grant of the order, the point does not appear to have been the subject of argument. The judge considered that the "quasi contractual analysis" which he was applying was that originally set out by Brett LJ in *Smith v Day*, but, as we have said above, Brett LJ's analysis did not indicate that loss should be recoverable only if caused by the restraints in the order. Moreover, the cases of *Shiblaq* and *Keller* do not appear to have been cited, and the judge's comment at [34] strongly suggests that he might have expressed himself differently if they had been.

44. Important consideration of the principles on which compensation is given by the court under a cross-undertaking in a freezing order, albeit not expressly on the point with which we are concerned, was given by this court in *Abbey Forwarding*. The principal argument considered by the Court of Appeal was to the effect that compensation under a cross-undertaking should not be subject to a remoteness limitation. This was rejected, and it was held that such a limitation was mandated by authority, at least in the majority of cases. In the course of his discussion of this point, McCombe LJ (with whom Arden and Vos LJJ agreed) referred to what Lord Diplock had said in *Hoffmann-La Roche*. At [44]-[46] he said:

> "[44] Therefore, even though Lord Diplock's dictum in the *Hoffmann-La Roche* case … was not part of the ratio decidendi of that case, it is firmly based on authority at least as far as this court, which (as I see it) is binding on 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] [Counsel for the respondent] … in urging on 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. …
>
> [46] I consider that [counsel's] reservation in this respect was correctly made. The cases speak of analogy and analogies are necessarily imprecise comparators."

45. At [63]-[64] McCombe LJ summarised his reasoning on the principal point on that appeal, as follows:

> "[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 the *Hoffmann-La Roche* case, 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 will 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."

46. What is clear from these passages is: (i) that Lord Diplock's dictum in *Hoffmann-La Roche* was being considered in relation to the issue of whether there is a requirement of remoteness, and not as to whether losses must flow from the order or the restraints in it; (ii) the analogy with contract is just that, and must be applied with appropriate flexibility; and (iii) the principles pursuant to which compensation is awarded under a cross-undertaking should accord with justice, including that a wrongly-injuncted defendant should be compensated for losses that they should not have suffered.

47. On the issue with which we are concerned in the present case, *Abbey Forwarding* sheds further light, strongly suggesting that there is no restraint limitation. Two aspects of the decision are important. The first is the treatment of the claim made in respect of the so-called "marble transactions". This claim was in respect of transactions which were not performed because of the freezing order which had been granted in that case, and more specifically because of the refusal of the claimant's liquidator (who had obtained the injunction) to agree to the performance of those transactions. Given that the freezing order contained, as is standard, an Angel Bell proviso (see [80]), loss caused by the fact that the marble transactions had not gone ahead cannot be said to have been

caused by the restraints imposed by the order. They were instead caused by the fact of the order, and the way in which it was being "policed" or administered by the liquidator. Yet the Court of Appeal dismissed the application for permission to appeal in relation to the one marble transaction in respect of which the first instance judge had awarded compensation (at [92]), and allowed the claim in respect of the other marble transactions in relation to which the judge had refused compensation (at [95]-[101]).

48. The second is the court's treatment of the claim for general damages under the cross-undertaking. The first instance judge had awarded a sum of £8000 each to three of the defendants by way of general damages. He had reasoned that the correct approach was to apply the analogy that there had been a contract that the claimant would not prevent the defendant from doing what he was restrained from doing, but that this could be regarded as a contract of a *Watts v Morrow* type (i.e. as one the very object of which is to provide pleasure, relaxation, peace of mind or freedom from molestation) (see [114]-[115] of HHJ Pelling QC's judgment, quoted at [104]). At [106] McCombe LJ said that HHJ Pelling QC's approach had accorded with principle. It is important, however, to appreciate that the approach which McCombe LJ was approving was that which he spelled out in the next two sentences of his judgment, as follows:

> "[HHJ Pelling QC] 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, para. 129. I agree."

We draw attention to the fact that McCombe LJ stated that the damages should compensate for "the consequences of the order".

49. In considering whether the amount awarded as general damages by HHJ Pelling QC had been correct, McCombe LJ found that the judge had been wrong to reject the case made that distress had been caused by the way in which the injunction was "policed" by the liquidator. He said, at [121]:

> "[121] … The whole thrust of the complaint in this case before the judge was that the liquidator was using the order in unreasonable ways…. 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."

50. At [125] McCombe LJ concluded:

> "[125] … I do take the view that the judge was over-restrictive in his approach to compensation under this head … 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 v Woolwich Building Society* [1996] 4 All ER 119, I would have no hesitation in holding that some damage arises in every such case, justifying more than a nominal award."

51. It is apparent from this that McCombe LJ was allowing for the award of compensation which was not referable to the effect of the restraints imposed by the order, but were rather referrable to the effect either of the very existence of the order, or the way in which it was "policed", which involved making it, in practice, more restrictive than its terms dictated.

52. In *Abbey Forwarding*, Vos LJ agreed with McCombe LJ but added some comments because the Court of Appeal was disagreeing with the judge as to the appropriate level of damages that should have been awarded to the appellants (see [147]). At [148] he referred to the appropriate basis on which damages should be awarded as being that the claimant had acted in breach of a notional contract with the appellants whereby it had agreed "in essence, that they would not prevent the appellants disposing of or dealing with their assets", up to a certain value; and that "[e]very action taken by the liquidator in imposing and policing the injunction must be regarded as a breach of this notional contract". At [150] he then said:

> "[150] In my judgment, 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."

53. Vos LJ also added, at [152]:

> "… 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."

54. Thus Vos LJ agreed with McCombe LJ that the contractual analogy should not be applied rigidly. In addition, and though it was not a matter which fell for decision, Vos LJ also considered that any notional contract was not simply one not to restrain the defendant in the way specified in the order, but "in essence" one not to prevent the defendant disposing of or dealing with its assets, which could be breached by the seeking and obtaining of an order and the way in which it is policed or enforced. Vos LJ made clear that general damages could be recovered for upset and loss of reputation.

Upset and loss of reputation are unlikely to be attributable just to the restraining provisions of the order, and in acknowledging their recoverability, he was accordingly adopting a more expansive approach to recovery under cross-undertakings than is inherent in MGWL's case. Finally, Vos LJ recognised the importance of it being known to applicants for freezing orders that they can be made liable for the variety of types of damage which such orders may cause. This, in our view, reflects Vos LJ's concern both that court orders improperly obtained should not impose uncompensated loss on defendants, and that applicants and potential applicants for freezing orders should be deterred from seeking unwarranted orders and from seeking to enforce orders obtained in an inappropriate fashion.

55. A number of decisions postdating *Abbey Forwarding* were cited to us. We need to refer to five. In *Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) v Bosworth* [2021] EWHC 1126 (Comm), [2021] 4 WLR 72 ("*Alta*"), Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge, considered an application for fortification of a cross-undertaking. He found that the applicant had made out a good arguable case that damage would be caused "as a result of the grant of the interim freezing order" (at [43]). In coming to that conclusion, the judge recognised that it was "readily understandable how financial institutions and counterparties might be concerned with the impact of a freezing injunction on the business to be done with the respondent", and that "the injunction gives credence to the fraud allegations in the proceedings" (at [44]-[47]). The judge did not apply the restraint limitation on potentially relevant loss and damage.

56. In *PJSC National Bank Trust v Mints* [2021] EWHC 1089 (Comm) ("*Mints*"), Calver J also decided an application for fortification of a cross-undertaking. He undertook a review of the relevant principles as to when compensation can be awarded under a cross-undertaking and as to fortification of cross-undertakings, at [23]-[33]. Much of what he said is uncontentious. He did, however, identify and purport to apply the principle that any damages recoverable under a cross-undertaking must flow from the restraint: see [27ii(c), and (f)], [47] (second sentence), [82], [93]. His decision also relied, and is explicable, on the basis that the suggested losses were too remote: see [46]-[47] (first sentence). The reliance on the restraint limitation is, essentially, for the purpose of emphasising that the grant of the order must be an effective cause of the putative loss.

57. Calver J's summary of relevant principles in *Mints*, and the restraint limitation, were adopted by Jacobs J in *Omni Bridgeway (Fund 5) Cayman Invt Ltd v Bugsby Property LLC* [2023] EWHC 2755 (Comm), at [5]-[6]. There was, however, no issue as to these matters: see [7]. Jacobs J's decision rested on the fact that the claimed loss was speculative, and there had not been shown to be a good arguable case that it would be "suffered in consequence of the injunctions sought" (see [20]).

58. A part of Calver J's summary in *Mints* was also cited by this Court in *Yodel Delivery Network Ltd v Jacob Corlett* [2025] EWCA Civ 1108. That was not a case relating to a freezing order, and nothing turned on the restraint limitation.

59. Finally, we should refer to the decision of the Privy Council in *Ennismore Fund Management Ltd v Fenris Consulting Ltd* [2022] UKPC 27. Reference was made to Lord Diplock's dictum in *Hoffmann-La Roche* (at [54]). That, however, was a case in which, again, nothing turned on the restraint limitation: the damages were alleged to have flowed from the restraints: see [16]. It is nevertheless notable that Saville J's

decision at first instance in *Financiera Avenida SA v Shiblaq* was cited without disapproval (see [65]-[66]).

60. Drawing the threads together in relation to the authorities which have been cited to us:

(1) Decisions prior to *Hoffmann-La Roche* established that damages under a cross-undertaking should be awarded on an analogy with the damages which might be awarded for breach of contract or duty. They had not established the restraint limitation.

(2) What was said by Lord Diplock in *Hoffmann-La Roche* on the ambit of damages under a cross-undertaking was *obiter*. Insofar as it enunciated the restraint limitation, it went further than its supposed source in what Brett LJ had said in *Smith v Day*.

(3) Since the inauguration of the *Mareva* injunction, and prior to *Abbey Forwarding*, there were two decisions of the Court of Appeal (*Shiblaq* and *Keller*), in which the results would have been different if the restraint limitation was a rigid and invariable rule.

(4) *Abbey Forwarding* is authority binding on this court to the effect that the contractual analogy should be applied with a degree of flexibility, and with the aim of providing just compensation. The existence of the restraint limitation was not directly in issue, but the existence of the limitation contended for by MGWL here is not consistent with the result and parts of the reasoning in *Abbey Forwarding*.

(5) No other decision binding on us establishes the existence of the restraint limitation. Some first instance decisions contain reasoning inconsistent with it, in particular *Alta*. A first instance decision handed down after the hearing before us explicitly rejects it (see *Alta Trading UK Limited v Bosworth* [2026] EWHC 2767 (Comm) at [527] to [539]). Others enunciate and purport to apply the restraint limitation (in particular *Harley Street* and *Mints*). Those cases are equally explicable on the basis that any damage alleged was not caused by the injunction or was too remote a consequence thereof, rather than because of the existence of the restraint limitation. They are not, in any event, binding on us.

Conclusion

61. The compensation payable under a cross-undertaking in conventional terms included in a freezing order can extend to any loss caused by the order (including by the obtaining, maintaining, policing and use of the order by the claimant) which it is just that the claimant should pay. It will ordinarily be just only that the claimant should pay for such losses as are caused by the order and which are not too remote. In judging causation and remoteness, contractual principles will apply by analogy, unless there is a good reason why that should not be so. The analogy with contract must, however, be applied with logical and sensible adjustments where appropriate.

62. The key determinant of the extent of damages payable under a cross-undertaking is and should be the extent of the impact of the order, and what is fair and reasonable in the circumstances. It should not be governed by a rigid formula such as the restraint

limitation contended for by MGWL. As we have explained above, the approach which we have outlined is consistent with the terms of the Cross-Undertaking and with considerations of justice and policy, and there is no authority which precludes it.

63. On this analysis, there are no grounds for interference with the decision of Griffiths J to order an inquiry as to damages. The claim for losses said to have been caused by the fact of the grant of the Freezing Order and the Disclosure is not plainly unsustainable.

64. For these reasons, the appeal is dismissed.