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RECENT DEVELOPMENTS IN THE PRIVY COUNCIL: CASES, TIPS AND TACTICS

BREACH OF CONSTITUTIONAL RIGHTS, THE EMERGENCE OF THE PROPORTIONALITY PRINCIPLE AND FREEZING ORDERS

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Introduction

1. I shall cover two topics in this webinar:
   (1) breach of constitutional rights and the emergence of the proportionality principle;
   (2) some interesting cases concerning freezing injunctions where the Court awarded damages to the Defendant in respect of the Plaintiff's undertaking in damages when obtaining an interim injunction.

Proportionality

General principles

2. In the important decision in *Suraj v AG of Trinidad* the Privy Council considered regulations made during the Coronavirus pandemic that severely limited gatherings and imposed criminal sanctions for non-compliance.[1] The Appellants argued that these restrictions breached their constitutional rights to freedom of association and assembly[2] and in a second appeal, freedom of religious belief and observance.[3]

3. The Privy Council held that, since ordinary legislative activity would, by its nature, invariably interfere with constitutional rights, the need to allow effective government in the general public interest required that those rights were not absolute but were balanced against the public interest, and against each other, by means of the conventional proportionality qualification which allowed a law to interfere with fundamental rights if it had a legitimate aim and there was a reasonable relationship of proportionality between the means employed.

4. *Suraj* decisively concluded the deep controversy in Trinidad as to whether the Government could interfere with qualified constitutional rights by demonstrating that the interferences were proportionate.[4] However, *Suraj* has a much wider significance because the proportionality principle will now become a key issue in appeals before the Privy Council alleging breaches of qualified rights.

5. The idea of proportionality developed in Germany in the nineteenth century and very seldom explicitly features in international rights conventions, written constitutions or human rights legislation.

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[1] [2023] A.C. 337
[2] Under s 4(j) of the Trinidad Constitution
[3] Under s 4(h) of the Constitution
[4] See the views of Lady Hale for the majority in *Suratt v A-G of Trinidad* 2008] AC 655, [58] and the 5 judge Court of Appeal decision in *Francis v State of Trinidad* (2014) 86 WIR 418, both of which supported the proportionality principle.

6. Nevertheless, proportionality is central in cases before the European Court of Human Rights,[5] the European Union,[6] under the UK Human Rights Act (which makes rights in the European Convention on Human Rights enforceable in UK law),[7] the Caribbean Court of Justice[8] and the Inter-American Court of Human Rights.[9]

7. In *Suraj* Lord Sales and Hamblen held:

> *51. The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in* de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing *[1999] 1 AC 69 . That case concerned the constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the case law since then: see T Robinson, A Bulkan and A Saunders,* ***Fundamentals of Caribbean Constitutional Law*** *, 2nd ed (2021), pp 473–475. It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure* ***(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community:*** *see Huang v Secretary of State for the Home*

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[5] The ECtHR has consistently affirmed that in determining whether an interference is "necessary in a democratic society", it will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued: see eg *Z v. Finland* (1998) 25 E.H.R.R. 371§ 94

[6] Where the UK Supreme Court in *R(Lumsdon) v Legal Services Board* [2016] A.C. 697 held that proportionality required a public body to demonstrate that its objective could not be attained by means of a less restrictive scheme,

[7] See *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] A.C. 700 where Lord Sumption held:

> *20 …. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in de Freitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69 , 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case law, notably R(Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (in particular the speech of Lord Steyn), R v Shayler [2003] 1 AC 247 , paras 57–59 (Lord Hope), Huang v Secretary of State for the Home Department [2007] 2 AC 167 , para 19 (Lord Bingham) and R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 AC 621 , para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.*

[8] See eg *Air Services Ltd v AG of Guyana* [2021] CCJ 3 (AJ) GY Barrow JCCJ [20] "*human rights are not absolute. This engages the principles of proportionality, and reasonableness*".

[9] In *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (2007) the Court interpreted the qualified privacy right under Article 11.2 and held:

> *93 …. it is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system is a legitimate purpose; ii) that the measures adopted are appropriate to achieve the purpose sought; iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional, and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.*

Department [2007] 2 AC 167, para 19 (Lord Bingham) and Bank Mellat v HM Treasury (No 2) [2014] AC 700 , paras 20 (Lord Sumption JSC) and 73–74 (Lord Reed JSC).

The application of the proportionality principle

8. The impact of the proportionality principle has been underlined in two recent appeals.

9. In *AG of Trinidad v Charles (No 2)* the Privy Council upheld a decision of the Court of Appeal that s 5(1) of the Bail Act 1994, which provided that bail could not be granted to any person charged with murder, was unconstitutional.[10] The Privy Council concluded that the statutory prohibition on bail was not proportionate by reference to the last two elements of the test*:*

> ***(iii) Whether a less intrusive measure could have been used***
> *63. It is the Attorney General's own case that in Trinidad and Tobago "it had never been the practice to grant bail in cases of murder whether before or after committal". Given that practice it is difficult to see why there was a need to remove any discretion to grant bail and to impose a legal prohibition. In relation to cases of murder, the legislative objectives were already being met by the practice of the courts.*
> *64. Since it was (wrongly) assumed that the law already prohibited bail in cases of murder, there was no consideration of whether it was necessary or appropriate to introduce such a prohibition. No concern was expressed about the courts' existing approach to the grant of bail in murder cases.*
> *65. Even if there had been such a concern, this could have been addressed* ***by imposing conditions on the exercise of the court's discretion rather than by removing it altogether****. This was the general approach adopted in the Bail Act in section 6. Even where it was considered that a stricter approach was required, as in the case of those with three relevant prior convictions,* ***there remained a discretion in the court to grant bail where "sufficient cause" could be shown*** *(section 5(2)).*
> *66. The Board therefore concludes that* ***less intrusive measures could have been used****.*
> ***(iv) Whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community***
> *67. Under this heading it is relevant to consider the extent of the inconsistency with sections 4 and 5. A blanket prohibition of bail infringes a number of the rights and freedoms recognised in sections 4 and 5.*
> *68. The Attorney General accepts that it infringes the right not to be deprived of liberty except by due process of law (section 4(a)); the right not to be deprived of reasonable bail without just cause (section 5(2)(f)(iii)), and the right not to be deprived of procedural protections necessary for giving effect and protection to section 5 rights and freedoms (section 5(2)(h)).*
> *69. The Board considers, for reasons addressed below, that it also infringes the right not to be subject to arbitrary detention (section 5(2)(a)).*
> *70. Other rights which the respondent contends are infringed include the right to the protection of the law (section 4(b)); the right to be presumed innocent (section 5(2)(f)(i)), and the right to a fair and public hearing (section 5(2)(f)(ii)). It is not necessary to determine whether these rights are also infringed. On any view, the rights and freedoms infringed are significant both in number and in substance.*
> *71. It is also relevant to have regard to the nature and significance of the infringement of these rights.*

[10] [2022] UKPC 31

*72. **A fundamental objection to a blanket prohibition of bail is that it treats all persons charged with murder indiscriminately and denies the possibility of bail whatever the circumstances and however compelling the case for bail may be. As such it operates in an arbitrary and potentially unfair and unjust way.***

73. It is obvious that the circumstances in which a murder charge may be made are many and various. As recently stated by the Board in Boodram v Attorney General of Trinidad and Tobago [2022] UKPC 20 at para 30 :

> *"The crime of murder is, of course, always very serious; but some murders are even more serious than others. The circumstances of murder cases vary across a wide range, from the terrorist who aims to overthrow a state by killing as many of its citizens as possible to the devoted partner who commits a 'mercy killing' in order to end the unbearable pain suffered by a loved one who is terminally ill…"*

*74. **The variety of circumstances in which a murder charge can arise means that there may well be cases where none of the objectives of a prohibition of bail will be served**. There is no risk of absconding; there is no risk of further offending; there is no risk of interfering with witnesses or of obstructing the course of justice. In such cases there is likely to be a very compelling case for bail, but the blanket prohibition means that bail will not be possible. Preventing differential treatment in cases with different circumstances involves what has been described as a "standardless sweep". As pointed out by the Court of Appeal of Trinidad and Tobago in Attorney General v St Omer Civil Appeal No. P351 of 2016 at para 62, a*

> *"standardless sweep" has the potential to produce unfairness and arbitrariness and is contrary to principles of fundamental justice.*

*75. Under the Bail provision the prohibition of bail occurs as a result of being charged and applies pre-committal, as in this case. It may well therefore **include people in respect of whom there is insubstantial evidence of guilt. That is vividly illustrated by the facts of the present case in which it was ultimately found that the respondent had no case to answer - in the meanwhile he had spent nearly 8 ½ years in custody.** A person who is eventually acquitted or discharged at a preliminary enquiry may therefore have been deprived of liberty for a substantial period of time, causing serious harm to their life chances, without there ever having been a consideration by a judicial officer whether the denial of bail is suitable in the particular circumstances of their case.*

76. The Board was told that there were other examples of much longer pre-trial custody periods than that endured by the respondent and that lengthy pre-trial detention is common. This exacerbates the potential unfairness of a blanket prohibition.

*77. As further pointed out at para 62 of the **St Omer case**, in pre-committal cases such **unfairness is compounded by the fact that bail would be denied solely on the "say so" of the police or prosecutor.** The police or prosecutor is given the power to determine that a person will be deprived of his or her liberty for a potentially prolonged period of time by the choice of offence with which to charge a suspect and by his or her determination that there is sufficient evidence to justify the charge.*

78. The consequences of a prohibition on the grant of bail were considered by the Board in State of Mauritius v Khoyratty [2006] UKPC 13; [2007]1 AC 80 . In that case it was held that such a prohibition infringed the separation of powers contained in section 1 of the Constitution of Mauritius. In his judgment Lord Mance explained that it would also contradict the principle of the rule of law, stating as follows at para 36:

> *"…To remove the court's role - and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed …offence …would be to introduce an entirely different scheme. …[which] would contradict the basic democratic principles of the rule of law and the*

separation of judicial and executive powers which serve as a primary protection of individual liberty".

79. The importance of the right to liberty was vividly explained by Bereaux JA in his judgment in Francis v State of Trinidad and Tobago (2014) 86 WIR 418 at para 276 (with which the Chief Justice and three other Justices of Appeal agreed):

> *"…The liberty of the subject is one of the fundamental rights which is very jealously guarded in most democracies. It is especially precious to us as a society with a colonial past and a history of slavery and indentureship, in which liberty had to be fought for or bought and for which so many of our ancestors paid with their lives. As our national anthem puts it we, as a nation are 'forged from the love of liberty'. As judges sworn to uphold the Constitution, we will guard it with every breath of our constitutional power."*

*80. Moreover, in **cases such as the present the infringement of the right to liberty** undermines a right specifically recognised in section 5 of the Constitution, namely the right not to be denied bail without "just cause". As explained in relation to the equivalent provision in the Canadian Constitution in R v Pearson [1992] 3 RCS 665 at p689:*
'Just cause' refers to the right to obtain bail. Thus bail must not be denied unless there is 'just cause' to do so. The 'just cause' aspect … imposes constitutional standards on the grounds under which bail is granted or denied."

*81. The prohibition operates by reference to a single circumstance – the offence of which a person stands accused. **That is assumed to be sufficient in itself to constitute "just cause" regardless of other circumstances and regardless of how unjust they may show the deprivation of liberty to be**.*

82. The fundamental importance of the protection by law of the right of liberty was emphasised in the Board's recent decision in Duncan and Jokhan v Attorney General of Trinidad and Tobago [2021] UKPC 17 at para 23 :

> *"The protection of liberty and the security of the person by law is, by long tradition, recognised as a fundamental value in the common law and this is reflected in the Constitution. It is also recognised as a fundamental value in international human rights instruments including the European Convention on Human Rights and the International Covenant on Civil and Political Rights ('the ICCPR') with which Chapter 1 of the Constitution has a close affinity: Minister of Home Affairs v Fisher [1980] AC 319, 328-330 . Lord Bingham summarised the position in A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68 (the so-called Belmarsh case) at para 36:*
>
> > *'In urging the fundamental importance of the right to personal freedom … the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day…'*

83. For all these reasons the Board accepts that very severe consequences flow from the infringement of the fundamental rights and freedoms by the Bail provision, including the undermining of the rule of law.

10. In *AG v Jamaican Bar Association*[11] the Privy Council held that the Jamaican statutory regime for combatting money laundering, which placed certain obligations on attorneys, did not breach the attorneys' (or their clients') constitutional rights to liberty, privacy and protection from search of

[11] [2023] UKPC 6

property.[12] The Privy Council described the proper approach to assessing proportionality when assessing legislative choices in these terms:

> *78. In considering whether "a less intrusive measure could have been used" the need to allow the legislature a **margin of appreciation** is of **particular importance**. As Lord Reed explained in Bank Mellat v HM Treasury (No2) [2013] UKSC 39, [2014] AC 700 at para 75 :*
>
> > *"In relation to the third of these criteria, Dickson CJ made clear in R v Edwards Books and Art Ltd [1986] 2 SCR 713 , 781-782 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose", and that the courts were "**not called upon to substitute judicial opinions for legislative ones** as to the place at which to draw a precise line'. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173 , 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a 'least restrictive means' test would allow only one legislative response to an objective that involved limiting a protected right."*

11. The Privy Council accepted that the statutory restrictions to regulate combat money laundering was an important legitimate aim and that it was rationally connected to the objective of combatting money laundering.

12. The Bar Association strongly argued that there was no good reason why the objectives of the statutory regime could not equally be met by having a disciplinary regulatory regime rather than one involving the criminal law. However, the Privy Council ruled that "*is no doubt something that the Jamaican legislature would have considered but whether to take the further step, in the interest of effective detection, prevention and enforcements, of making the regime part of the criminal law is very much within the legislature's margin of appreciation*".[13]

13. It addressed the fair balance issue as follows:

> *93. If, as the Court of Appeal found, the Regime infringed* Legal Professional Privilege *LPP then one could well understand the conclusion that aspects of the Regime are not proportionate given the importance and (almost) absolute nature of LPP. However, the Board has found **that LPP is protected and the infringement is of attorney-client confidentiality rather than LPP. That is a much less serious matter**. Confidentiality is, for example, routinely invaded in civil litigation through the obligation to give inspection of relevant documents. This is justified by the need to get at the truth. The justification in the present context is as important, if not more so. Moreover, in civil litigation disclosure may well lead to the material being in the public domain, whereas disclosure under the Regime is controlled and in many cases will not extend beyond the GLC.*
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> *94. It is also **of relevance that a number of protections have been built into the Regime**. These include entrusting responsibility for monitoring compliance to the GLC rather than the FID and requiring there to be a nominated officer to receive internal reports and to make the decision about whether a STR should be made.*

[12] See s 12(3)(a)(j)(i)(ii) of the Jamaican Constitution

[13] Above [92]

95. The Regime has serious implications for the practice of attorneys and imposes obligations previously unknown to the legal profession. That said, lawyers are just one of the DNFBPs to which the Regime is applied and in all cases it is limited to the six activities, as recommended by FATF.

*96. Having regard to all the considerations urged upon us by the parties, the Board's conclusion, **bearing in mind in particular the very great importance of the objectives of the Regime for Jamaican society and the Jamaican economy**, is that **a fair balance has been struck** and that the Regime is a proportionate measure, as the Full Court held.*

97. The Board therefore holds that the Regime's infringement of rights of privacy has been demonstrably justified.

Damages for enforcing undertakings when granting a freezing injunction

14. When granting an injunction, it is standard for the applicant to give an undertaking as to damages which can be enforced if the injunction is dissolved.[14]

15. In *Ennismore Fund Management v Fenris Consulting* the Privy Council confirmed the principles to be applied when awarding damages where the Defendant sought to enforce an undertaking after a freezing order had been granted.[15] The Privy Council dismissed the appeal, holding:

> *54. The approach to the assessment of damages where an undertaking is enforced is **analogous to that taken where there has been a breach of contract**. This is so notwithstanding that there is no contract between the parties and the undertaking is given not to the injuncted party but to the court. The principal authority on the point is Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 , p 361E-F (see the speech of Lord Diplock):*
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> > *"… if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed … 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 LJ at 427."*

16. *Sagicor Bank Jamaica Ltd v Seaton* also concerned a Defendant enforcing an undertaking given by the Bank when obtaining a freezing order.[16] The Court found that the Bank had not been entitled to freeze a Jamaican businessman's foreign currency accounts and to debit JM$9.2 m from them. The issue to be determined involved identifying the remedy to which the Defendant was entitled- to

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[14] But see BACONGO v Department of the Environment of Belize [2003] 1 W.L.R. 2839 where Lord Walker said:

> *39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result). In the context Mr Clayton referred to the well-known decision of the Court of Appeal in Allen v Jambo Holdings Ltd [1980] 1 WLR 1252, which has had the result that in England a very large class of litigants (that is, legally assisted persons) are as a matter of course excepted from the need to give a cross-undertaking in damages. However their Lordships (without casting any doubt on the practice initiated by that case) do not think that it can be taken too far. The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice. In Allen v Jambo Holdings Ltd Lord Denning MR said, at p 1257: "I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it." On the facts of that case, that was an appropriate comment. But there may be cases where the risk of serious and uncompensated detriment to the defendant cannot be ignored. The rich plaintiff may find, if ultimately unsuccessful, that he has to pay out a very large sum as the price of having obtained an injunction which (with hindsight) ought not to have been granted to him. Counsel were right to agree (in line with all the authorities referred to above) that the court has a wide discretion.*

[15] [2022] UKPC 27

[16] [2023] 2 All E.R. 81

restore him to the position he would have been in if the Bank had not breached its contracts with him by freezing and debiting the bank accounts. Lord Hodge held that the appropriate remedy was to reconstitute the accounts in US dollars in an accounting. Interest, including compound interest, could be awarded as damages for breach of contract. However, the party seeking interest had to plead and prove their loss, which the businessman had not done.

17. The Privy Council's ruling reflected that in the early 1990s and for several years afterwards Jamaica had very high rates of inflation and that its currency significantly depreciated in value in relation to foreign currencies.

18. Lord Hodge stressed that is trite law that the fundamental principle underlying the award of damages for breach of contract, which is a substitute for performance, is that the Plaintiff or Claimant is to be placed in the same position it would have been in, so far as can be achieved by a money award, as if the contract had been performed.[17] (i) the money which the Bank wrongfully withdrew from the accounts, (ii) compound interest at the contractual rates on the withdrawn money from 16 October 1992 until the date when the Bank repaid the money in 2019, (iii) a claim for the loss of use of the withdrawn funds, and (iv) a claim for the loss of use of the money in the foreign currency accounts in the period in which they were wrongfully frozen.[18]

19. Lord Hodge held that the Privy Council could give effect to the claim for repayment of the sums due on the Defendant's accounts as a claim in debt (i) by requiring the reconstitution of the foreign currency bank accounts as if the money had not been withdrawn from them, (ii) by adding interest to the principal sums which were or should have been in the bank accounts at the contractual rates which were applicable over the relevant period, and (iii) by applying the accrued interest on a monthly basis to the bank accounts as provided for in the contracts between Mr Seaton and the Bank. In Odgers, ***Paget's Law of Banking*** , 15th ed (2018), the editors (para 22.79) explain that the date from which the period of limitation of a customer's claim for repayment of a wrongful debit begins to run is the date of his or her demand for repayment because "the claim is in reality for repayment of a debt said to be owed in full (ie the amount standing to the customer's credit, without deduction of the disputed debit) as opposed to a claim that the wrongful debit is a breach of contract giving rise to a right in damages.[19] Similarly, Lord Hodge ruled that where interest is due on an account from which there has been a wrongful withdrawal, the Plaintiff is entitled to have the bank account reconstituted so as to give him or her the relevant contractual entitlement to interest.[20]

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[17] Above [16]

[18] Above [11]

[19] Above, [19] relying on the judgment of Staughton J *in Limpgrange Ltd v Bank of Credit and Commerce International SA* [1986] FLR 36 , 47 in which he explained the principle:

> *It was pleaded in the points of claim that, in breach of contract and their duty of care, BCCI had wrongly debited the company's accounts with the amounts of the disputed transfers, and that the company had thereby suffered loss and damage. Strictly speaking it seems to me that those are unnecessary averments. If debits were made without authority they should be disregarded, and the company can claim as money owed to it by BCCI the credit balance remaining when those debits are left out of account. Or, if there would still be an overdraft, the company would be liable to BCCI only for such amount as the account was overdrawn after deletion of the disputed debits.*

[20] Above [20] relying on *National Bank of Commerce v National Westminster Bank plc* [1990] 2 Lloyd's Rep 514 , which concerned a claim against a bank for reimbursement of unauthorised debits and a defence of limitation by the bank, Webster J analysed the claim as a claim in contract for repayment which required a demand for repayment by the customer as a precondition of the liability of the bank to repay. He followed (at p 517) Staughton J's approach in *Limpgrange Ltd* in holding that unauthorised debits were ineffective and should be disregarded, allowing the customer to claim them as money owed to it, in other words as a claim in debt, the balance remaining when the debits were left out of account.

20. Consequently, the Privy Council held that the Defendant's first two claims would be satisfied that by reconstituting the foreign currency bank accounts by adding back as at the date or dates of the withdrawal the sums which the Bank withdrew without authority and by calculating the interest which would have been due on the accounts in accordance with the contracts between the Bank and the Defendant if the sums withdrawn by the Bank had remained in those accounts until they were withdrawn by or paid to the Defendant.[21]

21. The Defendant's third and fourth claims for damages for breach of contract (ie a claim for the loss of use of the withdrawn funds and a claim for the loss of use of the money in the foreign currency accounts in the period in which they were wrongfully frozen) was more problematic. The Defendant had relied on the House of Lords' decision *Sempra Metals Ltd v Inland Revenue Commissioners*.[22] However,

22. However, the Privy Council held:

> *31. It is clear from the judgments of the House of Lords in Sempra Metals that to claim compound interest as damages for a breach of contract which has deprived the plaintiff of money it is necessary to **plead and prove** that the plaintiff has suffered the relevant loss. For example, the plaintiff may plead and prove that it has had to borrow money on which it has incurred interest charges as a borrower or that it has lost the opportunity to invest the promised money or that, in the absence of the money of which it has been wrongfully deprived, the plaintiff has had to use funds that otherwise would have earned such interest: Lord Hope at paras 16 and 17, Lord Nicholls at para 95, Lord Scott at para 132, and Lord Mance at para 216. If these strictures in Sempra Metals are good authority, Mr Seaton's third and fourth claims must fail.*

25 May 2023

[21] Above [21]

[22] [2008] 1 AC 561