Sylvain Michael Bogensberger v Advocate Philip Cowan Sinel

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	11 December 2018
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Text

[2018] JRC 228

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between:
Sylvain Michael Bogensberger
Representor
and
Advocate Philip Cowan Sinel
Respondent
and

Between:
Advocate Philip Cowan Sinel
Plaintiff
and
(1) Moira Hennessy
Defendants
(2) Advocate Damian James
(3) Advocate Adam Clarke
(4) Luc Jan Edouard Argand
(5) Marie Emmanuele Michelle Argand (as executor of the estate of the late Killian Hennessy)
(6) Sylvain Michael Bogensberger
(7) Amaury d'Everlange
(8) The Law Society of Jersey

Advocate M. L. Palmer **for the Representor**.

Advocate J. S. Dickinson **for Advocate Sinel**.

Advocate M. L. Preston **for the First Defendant**.

Advocate N. S. H. Benest **for the Fourth, Fifth and Sixth Defendants**.

Authorities

Sinel v Hennessy [2018] JCA 095.

Sinel v Hennessy [2018] JRC 007.

Royal Court Rules 6/11

JT v JCRA [2017] (1) JLR 213.

Chanel Ltd v Woolworth & Co Ltd [1981] 1 WLR 485.

Re Kingsley Healthcare Limited [2001] WL 1040201.

Angel Group Ltd v Davey [2018] WL 01040329.

James v Law Society of Jersey and Others [2017] JRC 047B.

Marett v Marett [2008] JLR 384.

Café de Lecq v Rossborough [2012] JRC 154.

Des Pallieres v RBC Trustees (CI) Limited [2018] JRC 172.

Estate —directions hearing in relation to two proceedings concerning disclosure of

documents and serving order of justice out of the jurisdiction.

CONTENTS

THE MASTER:

Introduction

1 This judgment relates to a single directions hearing in respect of two sets of proceedings fixed at my request. The first action (Court file 2016/141) are proceedings brought by Sylviain Michael Bogensberger ("Mr Bogensberger"). Mr Bogensberger is a Swiss lawyer who obtained a grant of probate in Jersey on behalf of Marie Emmanuele Michelle Argand and Luc Jean Edouard Argand ("the Executors"). The Executors are the executors of the estate of Killian Bertrand Marie Jacques Hennessy (Mr Killian Hennessy). Mr Killian Hennessy died in Switzerland on 1 st October, 2010. As Mr Killian Hennessy was deemed to have died domiciled in Switzerland, administration of the estate of Mr Killian Hennessy is being dealt with by the Justice de Paix of the district of Lausanne in the Canton de Vaud. The Court in Lausanne appears to have confirmed the appointment of the Executors. The Executors are Swiss advocates, as is Mr Bogensberger.

2 The proceedings brought by Mr Bogensberger by representation were commenced on 26 th May, 2016. In these proceedings, Mr Bogensberger seeks disclosure on behalf of the Executors of all documents relating to any advice given by Advocate Sinel to Mr Killian Hennessy or any documents in the possession of Advocate Sinel concerning any trusts established by Mr Killian Hennessy or which received funds from him. Mr Bogensberger contends that the Executors are entitled to this information because as executors they step into the shoes of Mr Killian Hennessy.

3 Advocate Sinel disputes that the Executors are entitled to any information and in summary contends that any advice he may have given to Mr Killian Hennessy was confidential to Mr

Killian Hennessy alone and the Executors are not entitled to any documents Advocate Sinel may hold.

4 The second action brought by Advocate Sinel was commenced by way of order of justice on 1 st March, 2017. The proceedings were summarised at paragraph 4 of the Court of Appeal's judgment *Sinel v Hennessy* [2018] JCA 095 dealing with the question of whether or not Advocate Sinel should be allowed to serve the order of justice out of the jurisdiction. Paragraph 4 and 5 of the Court of Appeal judgment state as follows.

> ***"4. The Order of Justice sets out claims made by the Plaintiff in respect of certain materials. One of the Plaintiff's clients, according to the Order of Justice, was and is a Mr Gilles Hennessy. The materials in question comprise the contents of a package sent in May 2015 to the First Defendant by an anonymous person under cover of a Jersey postcard with, written on it, the text "Again, I think you deserve the truth". The Order of Justice states that these materials included documents (which we call "the Documents") which on their face plainly attracted legal professional privilege by virtue of the lawyer/client relationship between the Plaintiff and his client. The Order of Justice contains averments to the effect that the Documents must have been stolen or otherwise improperly obtained from the Plaintiff or his client, that they could not have been intended for anyone to see other than the Plaintiff, staff of his firm or his client, and that that must have been obvious to any of the Defendants into whose hands the Documents came.***
>
> ***5. The relief claimed in the Order of Justice is injunctive only, to preserve confidentiality. The Order of Justice seeks to restrain, in summary, the giving of publicity to the Documents and their contents (that is, the information set out in the Documents), the delivery up or destruction of the Documents and of any copies and the giving of assistance to the Plaintiff to enable him to see that confidentiality continues to be maintained."***

Mr Gilles Hennessy is the son of Mr Killian Hennessy.

5 In this judgment I refer to the proceedings commenced by the order of justice as the injunctive proceedings and I will refer to the proceedings brought by Mr Bogensberger as the representation proceedings. I also adopt the Court of Appeal's definition of Documents referred to in the extract above for the purposes of this judgment.

6 This judgment therefore contains my reasons for issuing certain directions in respect of the injunctive proceedings and for issuing certain directions in the representation proceedings. It also contains my decision on the issue of when any trial of the representation proceedings should take place and whether it should take place after determination of the injunctive proceedings.

Relevant background and procedural history

7 7. What was at the heart of the issue of when the trial of the representation proceedings should take place was a consent order dated 15 th March, 2017, ('the consent order') which states as follows:-

> *"1. the trial dates for these Substantive Proceedings (scheduled to commence on the 10th April, 2017) be vacated; and*
>
> *2. the parties shall attend upon the Bailiff's Judicial Secretary to re-fix trial dates for the said Substantive Proceedings to be heard post determination of the Injunctive Proceedings (2017/072)."*

8 What led to the act of court of 15 th March, was a letter from Le Gallais & Luce signed by Advocate Clarke for Mr Bogensberger and Advocate Chiddicks for Advocate Sinel. The third and fourth paragraphs of that letter stated as follows:-

> *"On the 1 st March 2017, the Injunctive Proceedings were issued seeking injunctive relief in regard to the prevention of the distribution and/or utilisation of certain documents pertinent to the Substantive Proceedings.* An application to have the Injunctive Proceedings treated as a cause de breveté will be filed shortly.
>
> *Under the circumstances, the parties seek an Order that trial dates for the Substantive Proceedings be vacated and the parties be ordered to attend before the Bailiff's Judicial Secretary to re-fix appropriate trial dates post the determination of the Injunctive Proceedings."*

9 The representation proceedings were commenced on 26 th May, 2016. An answer was filed on 22 nd July, 2016, and a reply was filed on 12 th September, 2016.

10 Initially Moira Hennessy was a party to the representation proceedings but was released by act of court dated 3 rd October, 2016.

11 By the same order directions were made for a trial lasting two days which was set to commence 10 th April, 2017. However, on 1 st March, 2017, the order of justice in the injunctive proceedings was served. The events that led to those proceedings are summarised in the Court of Appeal judgment which I have made reference to. It is not necessary for the purposes of this judgment to set out those detailed events.

12 12. The Court of Appeal allowed Advocate Sinel's appeal against the decision of the Royal Court dated 12 th January, 2018, (*Sinel-v-Hennessy* [2018] JRC 007), (setting side the order for service out that I had issued) and confirmed the order for service out of the

proceedings on Moira Hennessy. The Executors filed an answer on 21 st April, 2017, and an amended answer on 19 th December, 2017; the order of justice was amended on 7 th December, 2017. The plaintiff filed a reply to the Executor's amended answer on 4 th January, 2018.

13 Moira Hennessy filed her answer to the order of justice on 21 st September, 2018, and a reply to Moira Hennessy's answer was filed by Advocate Sinel on 29 th October, 2018. The reason for the delay in Moira Hennessy filing an answer was firstly because the hearing before the Court of Appeal only took place in May 2018, and secondly Moira Hennessy only indicated that she would not oppose the order of justice being amended on 21 st August, 2018, which led to my order of 22 nd August, 2018, allowing the majority of the amendments.

14 At the same time as issuing this order I raised the question of whether the representation proceedings and the injunctive proceedings should be consolidated or heard at the same time which has led to the present application.

15 As a result of the various submissions made to me, the following issues emerged for consideration:-

(i) Should there be consolidation? I record at this stage that all parties were not in favour of consolidation for reasons I address later.

(ii) Should there be a stay of either the representation or the injunctive proceedings?

(iii) What was the effect of the consent order dated 15 th March, 2017?

(iv) What is the Court's jurisdiction to review a consent order?

(v) Should the consent order be reviewed in the present case?

(vi) Should evidence on foreign law be permitted in the representation proceedings?

(vii) Should evidence on foreign law be permitted in the injunctive proceedings?

(viii) What other directions are required?

16 In respect of these issues I set out below the submissions of the parties. I wish to record however, that it was not helpful for the executors to have one Jersey advocate for the representation proceedings (Advocate Palmer) and another Jersey advocate for the injunctive proceedings (Advocate Benest). At present I do not understand the reason for the Executors having separate representation in the two proceedings. It certainly led to

practical difficulties during the course of oral argument because Advocate Benest had to provide answers to questions put to Advocate Palmer because they were matters outside Advocate Palmer's knowledge. It also appears to me to be an unnecessary expense and adds to costs both for the Executors but also for Advocate Sinel.

Advocate Sinel's Contentions

17 Advocate Dickinson firstly contended in respect of any possible stay of the injunctive proceedings, that there was no application for such a stay, no evidence to justify any stay and no skeleton. Any suggestion of a stay should therefore be refused. To the extent that Advocate Preston suggested that the Court should consider a stay, this was indicative of the procedural game playing of Moira Hennessy. Her approach was clear from the history of the injunctive proceedings and also that the Documents were filed with the Swiss court shortly before commencement of the injunctive proceedings in order to frustrate the injunctive proceedings because the Documents were not going to be used by Jersey lawyers in any proceedings in Jersey.

18 What was required was a ruling in the injunctive proceedings about whether or not the Documents could be used. This was because although the Documents had been admitted into the proceedings in Switzerland in relation to the administration of the estate of Mr Killian Hennessy, based on Swiss law advice given to Advocate Sinel by Advocate Jacquemoud, the admission of the Documents was only an evidential decision. Accordingly the Swiss Court, when making its final decision could take into account any decision of the Royal Court, when the Swiss Court was considering whether the Documents should remain confidential or whether public interest in the administration of the estate overrode any confidentiality.

19 Advocate Dickinson next contented there was no jurisdiction to vary an agreed consent order which was a contract between the parties. An express provision on the face of the consent order was required to vary the same. There was no liberty to apply provision in the consent order and so the Royal Court had no power to vary it.

20 20. If the Royal Court did have a power to vary the consent order, contrary to Advocate Sinel's primary position, there were no changes of circumstance which justified a variation. In particular the undertaking now offered that the documents would not be used in the representation proceedings was tactical and could have been offered at the time the consent order was entered into.

21 Delay was not a basis to interfere with a consent order.

22 The fact that the injunctive proceedings had taken longer was not therefore a change of circumstance to justify varying the consent order.

23 The overriding objective did not allow the Royal Court jurisdiction to interfere with the consent order.

24 In relation to consolidation, none of the grounds contained in Rule 6/11 of the *Royal Court Rules* were made out. If there was an overlap on questions of Swiss law and the entitlement of the estate to information, whether from Advocate Sinel or Mr Gilles Hennessy, this was confusing entitlement to a judgment in Jersey in the injunctive proceedings with the ability to enforce that judgement. The fact that possible challenges to enforcement may arise was not a basis to consolidate two different Jersey proceedings dealing with different issues.

25 If the injunctive proceedings were not determined before any trial of the representation proceedings, this would contaminate the representation proceedings.

26 Advocate Dickinson also challenged the observation of Commissioner Birt in *JT v JCRA* [2017] (1) JLR 213 at paragraph 29 as follows:-

> ***"The court is concerned in this case with an interlocutory order which in effect grants a stay pending appeal.*** In my judgment it is clear that the court always retains an inherent jurisdiction to revoke or vary interlocutory orders in the light of changing circumstances"

27 It was contended that this observation was too broad and went beyond the approach taken in England in the cases of *Chanel Ltd v Woolworth & Co Ltd* [1981] 1 WLR 485, *Re Kingsley Healthcare Limited* [2001] WL 1040201 and *Angel Group Ltd v Davey* [2018] WL 01040329

Contentions of Moira Hennessy and the Executors.

28 Advocate Preston for Moira Hennessy contended that there was no interest in using the Documents in the representation proceedings and so the representation proceedings could proceed.

29 There was no need for any consolidation. He agreed that the representation proceedings concerned the entitlement of the Executors to documents held by Advocate Sinel in respect of Mr Killian Hennessy whereas the injunctive proceedings related to a claim by Advocate Sinel to keep confidential documents relating to advice given by him to Mr Gilles Hennessy.

30 The Executors had a duty to administer the estate of Mr Killian Hennessy. It was therefore important that the representation proceedings progressed. Until they were progressed the administration of the estate was stymied.

31 The timing of the undertaking being offered in May of this year was coincidence. This argument arose because the decision of the Swiss court to admit the documents was dated 22 nd May, the undertaking was offered on 22 nd May. 22 nd May was also the first day of Advocate Sinel's appeal, leading to the Court of Appeal's judgment of 24 th May.

32 The test for lifting a stay was ultimately based on whether it was in the interests of justice that the stay continued or was discharged. The fact that there was a relationship between Advocate Sinel and Mr Gilles Hennessy was now clear both from the proceedings and the Royal Court and the Court of Appeal judgments dealing with service out of the jurisdiction.

33 The overriding objective cannot be ignored. Its purpose was to prevent misuse of court proceedings. In this case an end in sight was needed to both sets of proceedings.

34 In relation to the timing of the undertaking and whether it could have been given at the time of the consent order, the Executors had not retained Jersey legal advisors when they saw the Documents and could not do so before the question of whether or not a Jersey lawyer was entitled to have regard to the Documents had been resolved. This was in issue in 2016 and early 2017 leading to the Royal Court's judgment in *James v Law Society of Jersey and Others* [2017] JRC 047B.

35 35. Advocate Benest for the Executors in the injunctive proceedings, while confirming she was not waiving privilege in any respect, made the following observations.

36 The undertaking from the Executors was offered in response to a suggestion of the Royal Court at paragraph 48 of the Royal Court's judgment in *James*. These proceedings concerned the extent of the professional obligations upon the two advocates who had received the Documents. In particular Advocate James who had acted for Moira Hennessy was instructed to send the documents to Advocate Clarke then acting for the Executors and whether he was permitted to do so. This led the Royal Court to state as follows:-

> ***"45. Because the present Code does not in terms inhibit Advocate James from sending the documents to Advocate Clarke as he has been instructed, it is arguable that there is no reason why he should not do so. A good test of that question might be what the obligation is on the part of Advocate Clarke were he to receive them. Of course he could have received them directly from Advocate James' client Miss B or indeed from the executors. Until there is an order of this Court to the contrary, there is nothing preventing her or the executors from so forwarding the documents. It would not be a disciplinary offence for Advocate Clarke to receive them because he might need to advise his client upon them.***
>
> ***46. What next then? We take first the position of Miss B. She is not party to this application, which concerns professional standards, and***

we make no orders today in respect of her. She is a defendant to the proceedings which Advocate Sinel has started and is entitled to take advice in relation thereto. In that respect she apparently has the Anonymous Package in her possession and can show it to her lawyer to obtain such advice. Until further order of a competent court, that remains the position for her. We note that, in considering the professional obligations of Advocate James, we should not overlook that if called to give evidence in the executors' proceedings, Miss B could give evidence as to the contents of the Anonymous Package unless restrained.

47. The executors appear to us to be in the same position. Albeit they are party to this application, they are not Jersey lawyers. They are defendants to Advocate Sinel's Order of Justice and are entitled to take advice in relation thereto. They can show the Anonymous Package to their lawyer for the purposes of taking such advice. They and Advocate Clarke will wish to consider, for the purposes of ensuring that Advocate Clarke is not professionally embarrassed in the executors' representation whether they should take advice from someone other than him, although that is not to say such professional embarrassment would necessarily arise if they do not. It is a matter at this stage for them and Advocate Clarke. In the light of the comments which follow, they may wish to consider providing an appropriate undertaking to Advocate Sinel which would avoid the necessity of interlocutory applications in respect of his Order of Justice before the hearing of the executors' representation in April, and indeed might bring a close to those proceedings altogether.(Emphasis added.)

48. That is not to say that the Anonymous Package should necessarily be admitted in the executors' proceedings. Advocate Sinel has quite understandably taken out an Order of Justice seeking to restrain the use of the Anonymous Package even if the ambit of the definitions in that Order of Justice might need to be revisited. Advocate Sinel will no doubt wish to consider whether he should not issue a summons for an immediate injunction restraining the use of the documents. The parties to his Order of Justice are not the same as the parties in the executors' proceedings, and it would seem therefore that such a summons would be outwith the scope of the executors' proceedings, but as the defendants include the executors and Advocate Clarke, on the face of it, the effect of obtaining an order, if it is obtained, would be similar to obtaining an order on inadmissibility within the scope of those executors' proceedings. At all events that is a matter for Advocate Sinel. The furthest we feel we should go in the present proceedings is to indicate that it is on the face of it difficult to identify a valid reason why Miss B should have been sent documents which do not belong to her; on the face of it

they must have been obtained improperly, and it would be unsurprising if a court were to determine that in those circumstances they ought not to be used. Of course the same outcome could be achieved by agreeing appropriate undertakings, and if those were agreed between the parties to the executors' proceedings, and their lawyers, it might be that a formal application in relation to the Order of Justice no longer proved to be necessary. At all events, that is a matter for the relevant parties to consider and we take it no further in this judgment which is limited to the Code of Conduct and the guidance. (Emphasis added.)"

The undertakings now offered by the Executors were said by Advocate Benest to be offered in response to the suggestion at paragraph 48 of the Royal Court's judgment in *James*.

37 Advocate Benest also agreed with Advocate Preston that progress of the administration of the estate was now held up and the injunctive proceedings needed to be determined in order for the Swiss court to progress the administration of the estate of Mr Killian Hennessy.

38 38. The importance of a resolution of the injunctive proceedings was asserted, notwithstanding Advocate Benest's submission that there was still an argument on Swiss law to be determined by the Royal Court to the effect that Swiss law obliged Mr Gilles Hennessy to provide information about Mr Killian Hennessy's estate which included any information provided to Mr Gilles Hennessy by Advocate Sinel so that no injunctive relief should be granted. In the same vein, Advocate Benest also contended that the Swiss judgment issued on 2 nd May 2017 allowing the Documents to be admitted to the Swiss administration proceedings had not been appealed and therefore the Documents were before the Swiss court.

39 In respect of the effect of the consent order, there was a distinction between a consent order that went to the finality of any relief granted, whether in respect of an issue that could proceed to a trial or an interlocutory application from a consent order agreeing a stay. The Royal Court always had power to rule that a stay should not continue notwithstanding a consent order. In the present case the differences between the two proceedings meant it was it strange to allow the stay of the representation proceedings to continue.

40 Advocate Palmer for the Executors (including the representor) in the representation proceedings made the following contentions.

41 Firstly, she confirmed the undertaking offered not to use the Documents in the representation proceedings.

42 Secondly, if any judgment was granted in Advocate Sinel's favour in the injunctive proceedings there was no admission that any such judgment was enforceable in

Switzerland against her clients.

43 Ultimately, the dispute was about Mr Killian Hennessy and Mr Gilles Hennessy avoiding the effect of Swiss inheritance laws.

44 The difference in view in relation to the effect of the Swiss decision admitting the Documents was about whether the decision to admit the Documents could be challenged at a final hearing in Switzerland.

45 There was clearly a pleaded case that Mr Gilles Hennessy as a matter of Swiss law was obliged to provide information to the Executors about the estate which was relevant to any relief that might be granted in the injunctive proceedings.

46 46. In 2017 the Documents were seen as relevant by both parties to the injunctive proceedings. That was no longer the position which was why the undertakings were now offered by the Executors.

Advocate Dickinson's Reply

47 In reply Advocate Dickinson submitted as follows:-

(i) There was no evidence from any of the other parties on the need for a decision in the representation proceedings to assist the Swiss court in its administration of the estate of Mr Killian Hennessy.

(ii) There was no suggestion in any of the English decisions that the overriding objective gave the High Court a power to interfere with an agreed consent order.

(iii) In effect the Executors had simply changed their minds; there was no evidence as to why.

(iv) The agreement to stay the representation proceedings until determination of the injunctive proceedings was relevant to the relief to be granted in the injunctive proceedings.

(v) An injunction in the injunctive proceedings would prevent use of the documents in the representation proceedings and in Switzerland.

(vi) There was no general undertaking not to use documents anywhere.

(vii) Advice could have been obtained from Jersey lawyers in 2017 to offer an undertaking.

Decision

***Consolidation*.**

48 I start by reference to whether or not the proceedings should be consolidated. The power to consolidate is found in Rule 6/11 of the *Royal Court Rules* which provides as follows:-

> ***"6/11 Consolidation of causes or matters***
>
> ***(1) If, when 2 or more actions are pending, it appears to the Court that –***
>
> ***(a) some common question of law or fact arises in both or all of them;***
>
> ***(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or***
>
> ***(c) for some other reason it is desirable to make an order under this Rule,***
>
> ***the Court may order that those actions be consolidated on such terms as it thinks just or may order that they be tried at the same time or one immediately after another or may order that any of them be stayed until the determination of any of them.***
>
> ***(2) Actions that have been consolidated may be de-consolidated at any stage of the proceedings."***

49 While I raised the issue of consolidation, having heard from the parties I agree with them that generally there is no overlap. The representation proceedings in summary concern whether or not the Executors are entitled to see documents relating to any advice given by Advocate Sinel to Mr Killian Hennessy. The injunctive proceedings relate to whether or not Advocate Sinel is entitled to injunctive relief to keep confidential advice given to Mr Gilles Hennessy.

50 The one qualification to the above concerns a potential overlap between Swiss law issues. The Swiss law issue that appears to arise in the representation proceedings (subject to certain directions provided below) relates to the duty of a lawyer to hand over information to executors of a deceased person. Mr Kilian Hennessey is said to have been deemed domiciled in Switzerland at the date of his death. In the injunctive proceedings, the issue pleaded relates to the duty of an heir (in this case Mr Gilles Hennessy) under Swiss Law to hand over information about the estate of Mr Killian Hennessy to Swiss executors.

51 This potential overlap is not enough to consolidate the hearings as a matter of discretion. However, it was relevant to directions I issued in relation to the admissibility of Swiss law expert evidence in the representation proceedings and the injunctive proceedings. In

particular to the extent that Swiss law evidence may be admitted in the future in the representation proceedings, Advocate Sinel and the Executors must each retain the same expert they retain to give evidence on the Swiss law issue raised in the injunctive proceedings. This possible overlap is also relevant to the issue of when the two sets of proceedings should be determined and in which order if there is power to vary the stay agreed by consent to which I now turn.

Whether the Court has jurisdiction to vary a consent order.

52 The starting point for varying a consent order is *Marett v Marett* [2008] JLR 384. The headnote summarises the position as follows:-

> ***A consent order could be varied or set aside only in exceptional cases in which (a) the order was based on an error of fact (e.g. misrepresentation or misunderstanding as to the position or in relation to the assets); or (b) a supervening event undermined or invalidated the basis of the order.*** A consent order was interpreted as if it were a contract (although its legal effect was derived from the court order and did not depend on the parties' agreement). It could, therefore, be set aside if there were grounds that invalidated the underlying contract."

In the present case there was no question of any error arising. The question is rather whether the undertaking or the subsequent delay that has emerged and the position of the parties in that there is now overlap between the two proceedings means that the Royal Court may vary the stay previously agreed by consent.

53 In *JT v JCRA* referred to above, Sir Michael Birt recognised that the court always retained an inherent jurisdiction to revoke or vary interlocutory orders in the light of changing circumstances although on the facts he refused to exercise his discretion to do so. This led him to state at paragraph 30(i)-(iv) as follows:-

> ***"30 It is therefore a matter of discretion as to whether in all the circumstances the court considers it just and appropriate to revoke or vary the interim order given the withdrawal of the appeal by JT.*** I have carefully considered the points made on behalf of the JCRA but I have come to the conclusion that it would not be just and appropriate to do so and I would summarize my reasons as follows:
>
> ***(i) The starting point is that the parties agreed to delay the commencement date of the decision until seven days after the appeal was determined.*** The appeal was determined on February 17th and accordingly the effect of the interim order on the facts is that the commencement date is February 24th.
>
> ***(ii) I appreciate that the JCRA did not interpret the interim order in this manner but a mistake as to the meaning of an agreement by one of***

the parties is not a reason for setting it aside—see (*the observation of the Court of Appeal in Home Farm Devs.* Ltd. v. Le Sueur (2) [2015]JCA242, ***at paras. 46–47); see also the observation in Marett (3)*** (2008 JLR 384, ***at para. 64) that a misunderstanding as to the consequences or ramifications of an agreement is not a defect of consent.***

(iii) Where parties have agreed that a decision under appeal will (if the appeal is dismissed) only commence from seven days after determination of the appeal, I consider that there is a heavy burden on a respondent to persuade the court that, despite such agreement and the resulting consent order, the court should nevertheless subsequently ignore that agreement and order that the decision take effect at some date prior to the determination of the appeal, i.e. retrospectively. Having agreed the position, and the court having endorsed that agreement, parties are entitled to plan accordingly in the expectation that, in the event the appeal is dismissed, the position will be as stated in the consent order.

(iv) The JCRA has not persuaded me that it be right to take the unusual course of varying or revoking the interim order in this case so as to order that the decision should come into effect at a date earlier than that provided for in the interim order. I appreciate the points concerning the public interest and the extra 55 days of higher charges and the fact that following determination of the appeal much of 2017 still remained in which the price reductions could be effected but those are matters which the JCRA could have had regard to when deciding whether to agree to the interim order. It would not be right for the court to rely on those matters so as now to change retrospectively what had been agreed between the parties and endorsed by the court. …

54 In respect of the English cases to which Advocate Dickinson referred me of *Chanel*, *Kingsley* and *Angel Group*, all of these cases related to undertakings offered in lieu of injunctions. This led to His Honour Judge Hodge QC in the *Angel Group* case to state at paragraph 27 as follows:-

"27 Happily, there is no real issue between the parties as to the applicable legal principles, although there are inevitably differences of emphasis by counsel. Since the freezing injunctions made by Mann J, and continued by Mr Hochhauser QC, had been made by consent on the part of the defendant, who now seeks to vary them, it is necessary to consider the proper approach on an application to vary a consent order, as set out by *the Court of Appeal in the leading case of Chanel Ltd. v FW Woolworth & Co. Ltd* [1981] 1 WLR 485 ***at p.492H-493A.*** It is well-established that it is an abuse of process to later attempt to set aside or vary an interim order on a point that was reasonably available to the defendant at the original hearing. There must have been a significant change of circumstance which was not reasonably foreseeable for the court to

entertain such an application"

The point he made at paragraph 29 is also significant and one I agree with. At paragraph 29 Judge Hodge QC stated:-

> ***"29 There is also authority for the propositions that the justification for that principle is that to allow litigants to take points serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."***

55 However, in my judgment there is a distinction between a consent order that goes to the merits of proceedings (as in *Marett*) or a consent order that resolves an interlocutory dispute such as the granting of injunctive relief including by giving undertakings or indeed an agreement to resolve any other procedural applications such as a strike out application, or a summary judgment application, for example and a stay. Clearly parties can only reopen agreements reached by consent to resolve the merits of a claim or a contested interlocutory dispute on the basis of *erreur* or a supervening event that undermines or invalidates an order. I am bound by *Marett* to hold this is the case; to hold otherwise would also lead to litigants to taking points serially in subsequent applications which would lead to rehearings of the same arguments or multiple procedural applications on essentially the same issue. There is a public interest in ensuring that the parties stick to the agreements they have reached to resolve interlocutory disputes as much as final disputes.

56 However, in respect of a stay I consider the position is different. In *JT v JCRA*, the parties had agreed a stay of the decision issued by the JCRA pending an appeal to the Royal Court against that decision until the seven days after the appeal was determined. The appeal was then abandoned. The Royal Court considered it possessed the power to revisit a stay granted where there were changing circumstances and distinguished the power to vary a stay from an order resolving the merits of a dispute (see paragraph 29 of *JT v JCRA*).

57 The *JCRA* decision is not inconsistent with the English authorities to which I was referred. The English cases all concerned attempts to vary undertakings offered by consent in lieu of injunctions and do not consider whether a simple stay agreed by consent can be varied and in what circumstances. I add for the sake of completeness that if there is liberty to apply in an agreed consent order or as part of an undertaking then an application to vary the order can be made but a change of circumstances is still required

58 Both in the *JCRA* decision and in the English cases, matters that a party could have had regard to or steps that a party could have taken when the original order was agreed cannot be used to demonstrate a change in circumstances. This is clear for example from paragraph 30(iv) of the *JT v JCRA* decision itself cited above. The Royal Court expressly noted that the matters relied upon in seeking to vary the interim orders were matters that the JCRA could have had regard to when deciding whether or not to agree the interim order. In The *Angel Group* decision, the change in circumstances had to be ' ***unforeseeable'***

(paragraph 27).

59 In reviewing how far the Court has power to vary a stay agreed by consent, I consider I am entitled to take into account the overriding objective. As is well known, the overriding objective requires the court to deal with cases justly and at proportionate cost and includes an express duty on the court to actively manage cases. In my judgment this duty also means that the court can revisit a consent order to stay matters approved by the court in the light of changing circumstances. In the recent case of *Des Pallieres v RBC Trustees (CI) Limited* [2018] JRC 172, I ruled that I possessed an inherent jurisdiction to the extent necessary to give effect to the Royal Court Rules (paragraph 28).

60 The difficult question in relation to the overriding objective and continuation of a stay is how far there is a distinction between delay in relation to how long an action is going to take to progress to trial where undertakings have been offered to compromise injunctive relief and delay in relation to an agreed stay. It is clear in relation to a compromise of an interlocutory decision and the offering of undertakings, that a case taking longer than expected is not a basis of itself to vary any undertakings. This appears to be because the risk of a case taking longer is foreseeable even if precisely how long is not. In my view, because of the overriding objective, delay in the sense of a case taking significantly longer than anticipated at the time the stay was entered into is relevant to whether a stay should continue in force and might be a changing circumstance in itself to allow the court to vary or lift a stay to progress an action to a conclusion. Whether the delay is in fact a basis to vary an agreed stay will depend on the facts of each case.

***Should the consent order be varied*?**

61 Having ruled that I have power to vary the consent order, the question arises as to whether it should be varied? In posing this question, I record that the stay was for a trial only of the representation proceedings until determination of the injunctive proceedings. The agreed stay was not a stay of the representation proceedings as a whole. This means there is no stay to prevent me ordering the parties to take all necessary preparatory steps for a trial of the representation proceedings to take place. This includes requiring any amendments to pleadings, any relevant expert evidence, filing skeleton arguments and agreeing trial bundles. The consent order only stays when the trial is to take place. The question is whether this stay should remain.

62 In relation to this question, I am of the view that the undertaking offered in May 2018, could have been offered earlier. Whilst I do not consider that any inference can be drawn as to the timing of the undertaking being offered compared to the decision of the Swiss court on 22 nd May, 2018, and the commencement of the appeal hearing before the Court of Appeal, the undertaking could have been offered long before May 2018. It was referred to in the decision of *James v Law Society of Jersey* at paragraph 48 which was issued on 22 nd March, 2017.

63 Furthermore, the representor and the Executors are experienced lawyers, albeit in other jurisdictions. In my judgment, given that they chose to make the use of the Documents in Switzerland, they would have understood the ability to give assurances to the Court in Jersey not to use the Documents pending a dispute. I also consider that the Executors could have obtained at least “in principle” advice on the ability to give such undertakings as a matter of Jersey law and their effect without having to disclose documents to any Jersey lawyer retained to give in principle advice.

64 However, the fact that the undertakings could have been offered earlier is not conclusive in favour of Advocate Sinel. This is because the basis of the agreement reached between Advocate Sinel and the Executors underpinning the consent order was to prevent “the distribution or utilisation of certain documents pertinent to the substantive proceedings”. In other words, when the consent order was entered into, there was a concern that the Documents would be used in the representation proceedings. As matters now stand, both Advocate Sinel and the Executors are in agreement that, subject to the one point of Swiss law referred to above, there is otherwise no overlap between the injunctive proceedings and the representation proceedings. Why should the stay remain when there is no overlap? I do not therefore follow why determination of the injunctive proceedings is required before a trial of the representation proceedings can take place.

65 65. In addition, the undertakings now offered mean that there is no risk of an overlap arising. The fact that the undertakings could have been offered earlier does not prevent me having regard to the undertaking to consider whether the risk the consent order was said to address still applies i.e. the distribution or utilisation of certain documents pertinent to the representation proceedings.

66 In addition, if the stay remains in place, this means that the issue of whether the Executors are entitled to the documents of Advocate Sinel cannot progress. While no evidence was filed before me as to the effect of this on the proceedings before the Swiss court, I do not consider that I need such evidence to conclude that information alleged to be held by Advocate Sinel about Mr Killian Hennessy's estate and advice given to him is significant in relation to what assets should form part of the estate of Mr Killian Hennessy if the allegations in the representation are true. The information which interests the Executors appears to relate to assets of very significant value, if the Executors’ concerns are correct. Now that the basis of the stay no longer applies because there is no overlap and because the Documents are not going to be used in the representation proceedings, I consider that the consent order should be varied so that the trial does not await determination of the injunctive proceedings. There is no need for determination of the representation proceedings to await determination of the injunctive proceedings.

67 While delays have occurred in this case, I am varying the order because the basis of the order no longer applies and not because of the delay in progressing the injunctive proceedings. I have not therefore made any findings as to why delay has occurred, whether it arises out of any tactical game playing or whether delay was foreseeable when the

consent order was agreed.

68 I am also not persuaded that the representation proceedings need to be delayed until determination of the injunctive proceedings so that any judgment favourable to Advocate Sinel may be used in any proceedings in Switzerland. The question of use of any judgment in the injunctive proceedings in favour of Advocate Sinel in Switzerland is a separate issue and, as Advocate Dickinson himself suggested, is a matter of enforcement. The desire on the part of Advocate Sinel to enforce in Switzerland any Jersey judgment in his favour in the injunctive proceedings is not a matter that is relevant to determination of the representation proceedings.

69 The injunctive proceedings and the representation proceedings, as the parties agree, are separate proceedings. Normally therefore they should be heard separately. However, there is a possibility of overlapping Swiss law evidence. I have already addressed this in part by ruling that Advocate Sinel may only adduce evidence from the same Swiss law expert in the injunctive proceedings and the representation proceedings; this ruling also applies to the executors. This order was to address the risk of overlapping Swiss law questions and therefore the possible risk of inconsistent findings arising in the representation proceedings and the injunctive proceedings.

70 70. In addition to the orders made limiting expert evidence, I have also concluded that the trial of the representation proceedings should immediately follow on from the trial of the injunctive proceedings before the same Judge and Jurats rather than await its determination i.e. judgment. The consent order will therefore be varied to a limited extent to allow consecutive trials before the same court. Directions will also be given in both actions for the filing of separate skeleton arguments and separate bundles so that separate but consecutive trials take place.

71 The consent order is varied so that the injunctive proceedings and the representation proceedings will be heard one immediately after the other with determination being made by the same Royal Court. This allows the representation proceedings to proceed more quickly than is the position envisaged by the consent order while addressing the limited risk of an issue of Swiss law emerging in the injunctive proceedings which might overlap with any permitted Swiss law issue in the representation proceedings. If I am wrong on there being an overlap, any issue arising in the injunctive proceedings about use of the Documents in the representation proceedings will not be dealt with by different courts.

Other directions

72 In the injunctive proceedings, I gave directions for Swiss law evidence to be admitted because the effect of the Swiss court judgment in 2018 was clearly an issue on the pleadings and impacted on what relief the Royal Court might grant should it otherwise find in favour of Advocate Sinel. I also gave other directions but these do not require any

reasons as they were based on drafts supplied in advance by the parties with some modifications as to timing suggested by me and accepted by the parties at the hearing.

73 In relation to the representation proceedings, at present no foreign law issue is presently pleaded. Yet in advance of the present hearing Advocate Dickinson indicated he wished to adduce evidence of Swiss law at trial (as well as expert evidence on Norman customary law and French law). The question of adducing expert evidence on Swiss law had previously been raised at an earlier directions hearing in 2016 where I had refused to permit Swiss law evidence without Swiss law evidence being pleaded. Advocate Dickinson was not retained in 2016 and so was not aware of my earlier indication. In light of the Swiss law opinion now put forward on behalf of Advocate Sinel from Advocate Maurer, raising the issue that, as a matter of Swiss law a lawyer was not obliged to hand over privileged information to executors of a deceased client, as long as this assertion is pleaded, in principle I would then allow Swiss law evidence on this issue to be put before the Royal Court. The parties were given until the end of January to produce amended pleadings in the representation proceedings in light of this indication.

74 74. In relation to the request to adduce evidence on Norman customary law, I ruled that any Norman customary law authorities relevant to the issue of whether or not an executor was entitled to privileged information given to a deceased client, should simply be cited to the Royal Court. In addition the opinion produced at present did not address the key question in issue but for the most part was a general treatise on Norman customary law which it was not necessary to produce to the Royal Court in the form of expert evidence. There was some discussion in the opinion on the scope of an Advocate's oath but any customary law authorities relied upon on concerning that question can also be cited without the need for expert evidence.

75 In respect of a draft opinion on French law, for any evidence of French law to be adduced, the relevant principle has to be pleaded including explaining why regard should be had to French law. At present this has not been explained. French law also did not appear to be relevant because in relation to questions of privilege, as noted in *Café de Lecq v Rossborough* [2012] JRC 154, Jersey law looks to English law. Any comparative exercise therefore should take place either by quoting English or other common law authorities.