IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NUMBER: FSD 0105 of 2014 (ASCJ)

BETWEEN: **1. ARNAGE HOLDINGS LTD.**
2. BROOKLANDS HOLDINGS LTD.
3. EAST FARTHING HOLDINGS LIMITED
4. MS. KATIA RABELLO
5. MR. FERNANDO TOLEDO

PLAINTIFFS

WALKERS (A FIRM)

DEFENDANT

IN CHAMBERS
THE 22-24 May and 5 – 20 December 2018. Judgment delivered 16 May 2019
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE.

APPEARANCES: **Anneliese Day QC and Anthony Akiwumi Attorney-at-Law of Etienne Blake, instructed by Richard Annette of Stuarts, for the Plaintiffs.**

Mark Simpson QC instructed by Sebastian Said and Anna Snead, Attorneys-at-Law of Appleby, for the Defendant.

Headnote

Action against attorneys for breaches of duties of confidence, trust and loyalty – application for summary judgment on basis that there is no arguable defence – existence of the lawyer-client relationships- the Trillium Indicia for the identification of the relationships- acceptance of conflicting retainer – disclosure of confidential information to party hostile to clients – whether to be excused because any other reasonably competent attorney would have obtained disclosure in light of clients' obligation to disclose – distinction between fiduciary and contractual duties- continuing nature of the duty of confidence beyond termination of retainer.

Causation of loss – actionable breaches of fiduciary duties of trust and confidence – whether causation of loss must be proven – liability in equity – equitable compensation – whether common law principles of causation and foreseeability applicable – equitable remedy of account for profits – election between an account and equitable compensation – liability for loss resulting from breach of professional code of conduct – whether also in public interest to enforce – Myers v Elman wasted costs jurisdiction – whether appropriate to invoke in circumstances of case.

Jurisdiction to grant summary judgment on liability with loss or damages to be assessed – applicable principles – whether <u>some</u> loss to be proven at summary judgment stage.

Foreign proceedings – Defendant's cross – application to strike out Plaintiffs' claims on grounds of abuse of process – whether abuse of process of Cayman Court to seek to recover losses resulting from Brazilian bankruptcy and regulatory proceedings – defence of illegality – whether a defence to claims for losses arising from alleged but unproven dishonest conduct and where no pleaded reliance on that conduct.

Res judicata in the wider sense – Henderson principle – whether plea in bar can be based on preclusive effect of foreign proceedings – application of doctrines of privity of parties and mutuality of estoppel.

JUDGMENT

1. The Plaintiffs are companies and individuals who represent the interests of the Rabellos, a prominent Brazilian family.

2. The first and second Plaintiffs are Cayman Islands companies which are owned and controlled by the fourth Plaintiff, Katia Rabello. She represents her family's interests, as well as her own, in this action. The third Plaintiff is another Cayman Islands company of which the registered shareholder is the Fifth Plaintiff, Fernando Toledo. Fernando Toledo is a close and trusted friend and business associate of the Rabellos, regarded by them as a "*de facto*" member of the family. He has personal claims and supports the claims of the Rabellos in this action.

3. Lying at the heart of the dispute before the Court is the Plaintiffs' – and through them the Rabellos' – claim to a longstanding lawyer-client relationship with the Defendant. It is a relationship which the Plaintiffs claim existed for many years and which the Defendant betrayed. This alleged betrayal is pleaded to have resulted in massive losses which the Plaintiffs seek to recover in this action.

4. The Defendant is a major Cayman Islands law firm which provides legal services in the Cayman Islands and in other jurisdictions. It largely denies the existence of the lawyer-client relationship with the Plaintiffs and denies entirely, any liability for the alleged losses.

5. Before the court for resolution now are two cross-applications. The first is that of the Plaintiffs for summary judgment on liability, on the basis that the Defendant has no arguable defence to their claims. The second, that of the Defendant for striking out of the Plaintiffs' claims, is presented on the basis that the claims have no prospect of success and are an abuse of the process of the court.

6. These antithetical and opposing applications are emblematic of this hostile litigation which has been marred throughout, by allegations and counter-allegations of abuse[1].

7. Despite that history, the arguments in support of the claims and those for the defence must now be addressed on these cross-applications.

8. The Plaintiffs sue, more particularly, for breach of contractual and fiduciary duties of confidence, trust and loyalty and tortious duties of care[2]; claims which are said to have arisen from the Defendant's betrayal of their lawyer-client relationship.

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[1] Including two earlier contested hearings before this Court, one by the Plaintiffs successfully challenging orders for disclosure (about which more below) and the other, a strike out application brought by the Defendant against the Plaintiffs, alleging that the Plaintiffs had abused the process of this Court by failing to disclose and deliberately suppressing highly relevant evidential material about proceedings in Brazil. That acrimonious application consumed 14 days of Court time in April- May 2016 and confrontational cross-examination of witnesses. It was eventually rejected for reasons given in a ***Judgment delivered on 10 August 2016***.

[2] Although no claims in tort for breaches are particularized, claims for contractual and fiduciary breaches of duty are (at pp52-54). In the Statement of Claim in the Prayers at pages 68-69, there are however, what appear to be claims in tort for "aggravated and exemplary damages" and "damages for breach of duty of care". Core Bundle Vol 1 Tab 11, page 68. In so far as these may depend upon the Defendant's breaches of the duty of confidence, the English Court of Appeal have said that an action for breach of confidence did not fall to be considered as a "tort" for the purposes of English law: see ***Douglas v Hello! Ltd*** (No. 3) [2005] EWCA Civ 595. Note however, as the authors of ***Jackson & Powell on Professional Liability 7 ed***, ***Sweet and Maxwell***, comment (at page 101) that Lord Nichols in ***Campbell v MGN Ltd*** [2004] UKHL 22; [2004] 2 A.C. 547 (at inter alia [14]), referred to the cause of action for breach of confidence as a tort, at least in the context of a claim which concerned the misuse of private information. In the context of this case, it will be necessary for the Plaintiffs to prove their losses under any one of the proven heads of liability. There are also pleaded claims for damage to the reputation of Katia Rabello said to have arisen from the publication of the Cayman Disclosure in Brazil (paras 194- 196 of the Statement of Claim) about which I expressed strong doubts

9. The focus of the Plaintiffs' grievances, is the conduct of the Defendant in acting for a third party, a Dr. Afonso Braga, a Brazilian court-appointed trustee in bankruptcy. Dr. Braga is regarded by the Plaintiffs as their arch nemesis, he having pursued and rendered the Rabello family interests, including Katia Rabello herself and her interests, bankrupt in Brazil.

10. It is uncontroverted that in aid of Dr. Braga's campaign against the Plaintiffs, the Defendant obtained the disclosure of the Plaintiffs' confidential information in this jurisdiction by way of *ex parte* (without notice) applications to this Court and provided that information to be deployed by Dr. Braga against them in Brazil.

11. This conduct of the Defendant is the basis upon which the Plaintiffs seek summary judgment on liability, asserting, as already mentioned, that the Defendant has no arguable defence[3] to their claims.

12. Upon being granted summary judgment on liability, the Plaintiffs would next move for the trial and assessment of the quantum of the consequential losses.

13. The Defendant for its part either denies the existence of the lawyer-client relationship or where, in the case of any of the Plaintiffs it is either admitted or is to be found to have existed, denies any breach of duty and pleads that the Plaintiffs, by their own unlawful conduct in Brazil, are the authors of their own misfortune.

14. This the Defendant pleads, is largely the result of Katia Rabello having been found by the Brazilian courts to be complicit in fraudulent misconduct, including having been found to have deceived the Brazilian courts. This is misconduct which the Defendant also pleads,

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during exchanges with counsel at the hearing as these appear to be tantamount to claims in defamation and to which the usual defences would apply.

[3] Citing Grand Court Rules, Order 14 r. 1.

was the justification for Dr. Braga's campaign in bankruptcy against the Rabello interests.

15. On that basis says the Defendant, the Plaintiffs' claims against it are for losses which are the consequences of fraudulent conduct and cannot be maintained without either raising an impermissible collateral attack upon judgments of the Brazilian courts or without reliance upon their own, and in particular Katia Rabello's, illegal conduct. That for those reasons also, the Defendant is entitled to the striking out of the Plaintiffs' claims now[4].

16. Framed in those conflicting terms, it was immediately apparent that the Plaintiffs' application for summary judgment and the Defendant's cross-strikeout application, were not readily given to resolution on the summary basis upon which such applications are typically to be heard and decided. For even while important matters of fact were incontrovertible (and so not requiring of trial to proof)[5], some factual issues were complicated. Complex issues of law also arose for determination but none which could not also be determined without the need for a full trial and as contemplated by the rules where the determination of points of law could result in the disposal of the entire case or of an important aspect of the case[6].

[4] Citing Grand Court Rules, Order 18, rule 19(1) which states, as relied upon by the Defendant here: "The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
(a) It discloses no reasonable cause of action or defence, as the case may be; or
(b) ..
(c) ..
(d) It is otherwise an abuse of the process of the court"

[5] Very importantly in this regard for the purposes of establishing liability on the summary basis, is the fact that there was a very limited number of documents to be examined, comprised in less than 100 pages and compiled at my request by the Plaintiffs' attorneys and presented in a single bundle entitled "***Plaintiffs' Selection of Documents relating to various retainers"*** The contents of these documents very much speak for themselves.

[6] See Grand Court Rules Order14A r.1.

17. Accepting that allowing the entire dispute to go instead to a full trial on all the issues would certainly have involved a more costly and acrimonious exercise, I acceded to the taking of the cross-application at this stage.

18. I was satisfied, on the basis of the settled principles for the taking of such applications, and as a matter of better case management, that the issues of liability (on the Plaintiffs' case) and the strike out arguments (on the Defendant's case) were sufficiently amenable to resolution on the incontrovertible facts, to allow for their summary determination at this stage.

19. I was also satisfied that proper case management in the case called for a split trial of liability and quantification of loss, the latter being likely to itself involve a substantial hearing once liability was established.

20. The Plaintiffs' application for summary judgment on liability, is predicated upon the absence of a reasonable defence[7]. This is the test to be applied to the assessment of the pleadings and the evidence as to liability, without the need for a trial of facts which may properly be disputed[8]. The policy of Order 14 is to prevent delay in cases where there is no real defence. See ***European Asian Bank AG v Punjab and Sind Bank (No.2)***[9], per Lord Justice Goff (as he then was). And where, in an action for unliquidated damages such as the present, the liability of the defendant can be clearly and readily established, the case law is also clear that the court should give judgment for the plaintiff with costs

[7] See Grand Court Rules Order 14 r. 1(1) which states: "*Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the Defendant.*"

[8] See variously, ***Roberts v Plant*** [1895] 1 Q.B. 597 CA***; Robinson & Co v Lynes*** [1894] 2 QB 577; ***Dane v Mortgage Ins Corp*** [1894] 1 QB 54 CA; ***Nassau Steam Press v Tyler*** (1894) 70 L.T. 376; ***Edwards v Davis*** (1888) 4 T.L.R. 385, CA., all as cited at Notes to RSC 14/4/2 1999 Ed. P 171

[9] [1983] 1 W.L.R. 642 at 654. See also as an example of the application of the principles in the local case law: ***In the Matter of Omni Securities Limited (No. 3)*** 1998 CILR 275 and ***Rankin v Scott, Martin and Ebanks*** 2008 CILR Note 9, citing ***Swain v Hillman*** [2001] 1 All E. R. 91.

for damages and interest thereon to be assessed. In those circumstances, the statutory interest[10] on the damages awarded will run, not from the date of judgment on liability, but from the date of the judgment which assessed or recorded the damages payable to the plaintiff, see: ***Thomas v Bunn***[11].

21. In the case of the Defendant's strike-out cross-application on grounds of abuse of process, proper case management also called for its resolution now. A primary consideration here was that the issues would be largely subsumed within those to be heard on the Plaintiffs' case for summary judgment.

22. The hearings on the cross-applications commenced on 22-24 May 2018 when they were adjourned part-heard to 5 December 2018[12]. They eventually concluded on 20 December 2018, after a total of 14 days of arguments (involving also the cross-examination of one important witness, Mr. Robert Macaulay, about whom more below). These circumstances developed because, in order to ascertain whether the Defendant had an arguable or reasonable defence to the claims on liability, and without usurping the functions of a trial judge, it was necessary to make some assessment of the evidence supporting the Plaintiff's claims in this regard. Indeed, as it was also necessary to determine the Defendant's strike out application based as it was on the proposition of the Plaintiffs' having no prospect of success and their case being an abuse of the process[13].

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[10] To be awarded in this jurisdiction pursuant to section 34 of the Judicature Law (2017 Revision).

[11] [1991] 1. A.C. 262, discussed in Notes to RSC O.14/4/2., at p172 1999 Ed. The Notes go on to explain that, in relation to costs, such interest will run from the date of the judgment or order for costs, even though this is before the costs have been taxed (***Hunt v R.M. Douglas (Roofing) Ltd*** [1990] A.C. 398. And, where unliquidated damages are claimed but there is a triable issue as to the quantum of damages, the Court has no power to give judgment for part of the damages or to give conditional leave to defend in respect of part of the damages, unless the Court is satisfied that such part of the damages can be clearly identified and quantified and that such ascertained part of the damages is undisputedly due (***Associated Bulk Carriers Ltd v Koch Shipping Inc.*** [1978] 2 All E.R.. 254, CA). On the other hand in such a case, the Court has power to make an order for an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which the plaintiff is likely to recover.

[12] Due primarily to my unavailability taking another complex trial.

[13] See for this approach in principle, as discussed in ***Re Omni*** (above) at pp 279 – 280, and 291.

23. Having acquired a sufficient understanding of the facts and law to be able to arrive at a determination of both applications on the summary basis, this is the judgment on both, with reasons for my conclusions.

The Plaintiffs' burden

24. As discussed above, and as will be more fully explained below in the factual context, the Plaintiffs, without the Court having to be called upon to try disputed issues of fact, each needed to establish that the Defendant has no arguable or reasonable defence to the essential elements of their respective claims on liability for the breaches of duty claimed.

25. These elements, to be fully examined below, are: (i) the existence of the lawyer-client relationship and the concomitant duties of confidence, loyalty and care, (ii) breaches of those duties, (iii) the causation of loss arising from the breaches and (iv) as further regards causation at this stage, proof that some identifiable loss was caused for which the respective Plaintiff would be entitled to compensation.

26. In respect of each Plaintiff, I am satisfied that these elements of claim have been proven, such that each Plaintiff is entitled to the pronouncement of summary judgment on liability against the Defendant, with the assessment of quantum of loss to be set for trial.

27. It follows that the Defendant failed in its strike-out cross-application which required establishing that the Plaintiffs' claims disclosed no reasonable cause of action and were an abuse of the process of the Court[14].

28. However, for reasons which will also be explained, the Defendant will remain entitled, at the trial of quantum, to challenge the Plaintiffs' claims as they allege any particular causative link between the conduct of the Defendant and any particular head of loss. This,

[14] See GCR Order 18 rule 19, to be discussed below.

as the Plaintiffs accept, will all be subject to the principles of the case law on equitable compensation or damages, on the basis that the duties proven to have been breached by the Defendant were fiduciary or contractual in nature.

29. While at this summary judgment stage the Plaintiffs were able, as required, to establish that some significant losses were sustained as the result of the Defendant's breaches of duty; in respect of the largest heads of claim for loss, the causative links between the Defendant's breaches and those losses remain to be established to the civil standard of proof. Those remain as a primary subject of the trial to come on quantum, as will also be further explained below.

The factual background to the Plaintiffs' claim to the lawyer-client relationship.

30. While all the Plaintiffs, including the incorporated entities, are linked to the Rabello family, the nature and extent of the relationship between the Defendant and the Rabellos themselves, is of central importance to the dispute.

31. The Rabellos held extensive business interests in Brazil and elsewhere, in banking (Banco Rural), land holding, finance, hospitality, and other areas of industry, in the form of a conglomerate named the Rural Group[15].

32. Banco Rural was the flagship of the Group. It operated more than 100 branches throughout Brazil and had a number of subsidiaries abroad, such as Banco Rural Europa S.A (Portugal); Rural International Bank ("RIB") in Nassau, Bahamas and IFE Banco Rural, in Uruguay.

[15]Apart from Banco Rural, other notable Rural entities include Rural Leasing S.A. Arrendamento Mercantil ("Rural Leasing"), Rural International Inc, a Florida corporation ("Rural International"), Rural Securities Inc, another Florida corporation ("Rural Securities") and Investcred Companhia Securitizadora de Creditos Financeiros ('Investcred") which was renamed in May 2003 as Securinvest Holdings S.A. ("Securinvest"). Securinvest figured prominently in events in Brazil.

33. The majority shareholder in Banco Rural was Trapezio S.A., a Brazilian company which was itself majority owned and controlled by the Rabello family.

34. The family also owned Trade Link Bank ("TLB"), a licensed Category B Bank in this jurisdiction. While neither a subsidiary nor a legal affiliate of Banco Rural (which, as a Brazilian entity was separately regulated in Brazil), the family's interests in TLB carried significant repercussions in Brazil and these must also be examined.

35. As Mr. Toledo avers in his first affidavit[16] – following almost three years of materially adverse regulatory, financial and reputational consequences, Banco Rural was placed into compulsory liquidation by the Brazilian Central Bank (the "BCB"), in August 2013.

36. Banco Rural's demise is sought to be attributed by the Plaintiffs, at least in significant part, to the Defendant's breaches of duty. However, the Plaintiffs' losses in this regard, as in regard to other heads of losses, are not yet fully particularized. The Plaintiffs, through Mr. Akiwumi, acknowledged during the hearing, that full particulars will have to be pleaded once the case is set for trial on quantum[17].

37. It was nonetheless accepted by Mr. Akiwumi, that it was essential at this stage for the grant of summary judgment on liability, that – given the size of the claim – some significant loss must be proven. This was, therefore, the basis upon which this summary judgment application was taken.

[16] Court Bundle B Tab 20.

[17] It is also appropriate to note here that upon the assessment of quantum of losses, the Court will be called upon to address the question of what is the proper basis. Will it be equitable compensation for breach of the fiduciary duties of confidence and loyalty (as the Plaintiffs claim) or will it be the common law "but for" test which will require the respective Plaintiff to establish the causative link between the breaches of duty and any particular head of loss (as the Defendant asserts)? This too will be discussed below.

The Defendant's admissions

38. While the Defendant makes no admission as to breach of duty or any consequential loss, it makes limited admissions as to the existence of the lawyer-client relationship. It admits that such a relationship existed in relation to the First, Second and Third Plaintiffs but denies its existence in relation to the Fourth and Fifth Plaintiffs – Katia Rabello and Fernando Toledo.

39. The undisputed evidence reveals, however, that there was, indeed, a long-standing relationship between the Defendant and the Rabellos, including Katia Rabello and through Fernando Toledo's dealings with the Defendant on his own behalf and on behalf of the Rabellos, with him as well.

40. This conclusion emerges from an examination of many retainers and engagements undertaken by the Defendant over the course of a quarter of a century.

The TLB Retainer in 1984

41. The relationship began in late 1984 when the Defendant was engaged by Sabino Rabello (Katia Rabello's father and the patriarch of the family), to establish TLB in this jurisdiction.

42. TLB was incorporated by the Defendant on 2 January 1985. It was established to operate as an offshore investment bank at first headquartered in Miami[18] where it conducted investments on behalf of the Rabello family and a book of other clients largely based in Brazil.

43. Mr. Toledo began working for the Rural Group in Miami in 1991. Beginning in 1996, the majority of Mr. Toledo's work was related to TLB, which established its headquarters

[18] As explained by Mr. Fernando Toledo in his first affidavit at Vol B Tab 7.

office in Grand Cayman in 1993. As Mr. Toledo took on increasing responsibility within the Rural Group, he traveled frequently to the Cayman Islands. In particular, he managed the Rabello family's offshore investments (and those of other clients) through TLB. In May 2003, Mr. Toledo became a director of TLB. In January 2005, upon the death of Sabino Rabello, Mr. Toledo became President and Managing Director of TLB.

44. In 1998 East Farthing Limited, (the third Plaintiff, "EFHL") was incorporated in this jurisdiction by the Defendant on the instructions of Sabino Rabello, to hold the family's majority shares in TLB.

45. The shareholding in EFHL itself (issued as a single share) was first held by a partner of the Defendant as nominee[19] but was later transferred to Sabino Rabello. Upon his passing in 2005, the share in EFHL was transferred by the Defendant to Mr. Toledo acting on the instructions of Sabino's widow, Mrs. Jandyra Rabello; herself acting as Personal Representative of the estate of Sabino Rabello.

46. By resolution of its board at a meeting convened by the Defendant, Mr. Toledo was also appointed sole director of EFHL on 4 May 2005[20]. As can be seen from the Register of Directors and Officers of EFHL, its initial directors were Sabino Rabello, Junia Rabello, Jandyra Rabello, Nora Rabello and Katia Rabello. Walkers SPV, an affiliate of the Defendant, provided registered offices services and acted as corporate secretary.

47. The Defendant also acted for the Rabello family for the transmission of Sabino Rabello's estate in this jurisdiction[21], in particular in respect of the devolution of the share in EFHL (as mentioned above) and thus in respect of the devolution of TLB itself.

[19] Acting by David Whittome, a partner of the Defendant – see Register of Members kept by the Defendant- Vol. B Tab 20 page 272

[20] Register of Directors kept by the Defendant, ibid, page 272.

[21] As is asserted by Katia Rabello and admitted by Mr. Diarmad Murray, a partner of the Defendant, in his letter of 22 September 2011, at Vol B Tab 7 Exhibits "FT 7" to Mr. Toledo's affidavit, page 17 (internal page 1117). In that letter there appears the

48. Despite this background (and more to be examined below in respect of TLB, EFHL, and the other two incorporated Plaintiffs, Arnage Holdings Ltd and Brooklands Holdings Ltd. "Arnage" and "Brooklands"); the Defendant, as already mentioned, does not admit that either Katia Rabello or Fernando Toledo was a client.

49. As regards Katia Rabello, this is also despite it being no longer disputed that the Defendant acted on behalf of Arnage and Brooklands, of which she was at all material times, the 50% beneficial owner (until her father's death in January 2005) or 100% beneficial owner (after her father's death). This action by the Defendant was in respect of a significant Note Purchase Transaction in which context to be explained below, it could not have been overlooked or misunderstood that she was the 50% beneficial owner.

Incorporation of Arnage and Brooklands and Securinvest.

50. In May 2000, Arnage and Brooklands were incorporated in this jurisdiction and together became the registered shareholders of a Brazilian company named Investcred[22], which was soon afterwards incorporated in Brazil on 17 May 2000 (later renamed Securinvest Holdings S.A ("Securinvest")). The Canadian Imperial Bank of Commerce (Cayman Islands) ("CIBC") served as corporate administrator for Arnage and Brooklands until this role was later transferred, on the instructions of Katia Rabello, to Equity Trust (Cayman) Ltd. ("Equity Trust").

51. This change of administrator would prove to be a crucial change of circumstances in relation to Dr. Braga's campaign against the family in Brazil because Katia Rabello,

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following general admission of the lawyer-client relationship at least in respect of TLB: "**Walkers acted as Cayman counsel for Trade Link Bank ("TLB") from its incorporation until its liquidation. The firm received instructions to assist in setting up of TLB from Sabino Rabello and had an ongoing relationship with Mr. Rabello and TLB as a result**… **The last matter this firm dealt with on behalf of the Rabello Family was the estate of Sabino Rabello, in respect of which Walkers obtained a grant of probate**"

[22] Full name: Investcred Companhia Securtizadora de Creditos Financeiros.

through her ownership of Arnage and Brooklands, had become the ultimate beneficial owner of Securinvest ("UBO"). These very consequential circumstances are also to be more fully examined below.

Arnage and Brooklands – the June 2000 Retainer – the Note Purchase Transaction and its connection to Banco Rural and the Rural Group

52. In June 2000, the Defendant acted for each and all of Arnage, Brooklands and TLB in connection with a Note Facility (the "Note Purchase Transaction") by way of a letter agreement dated 27 June 2000. By this arrangement, Securinvest provided a $40 million Note to Arnage and Brooklands for onward sale to TLB, in return for financing from TLB for the carrying out of Securinvest's business in Brazil.

53. That business included the acquisition of bad loans and other non-performing assets from Banco Rural and the realization of those assets on behalf of Banco Rural and the wider Rural Group.

54. In agreeing to act for all the Cayman corporate parties to the Note Purchase Transaction[23], the Defendant would have had to satisfy itself that in doing so it would act under no conflict of interest. This meant that the Defendant must have been satisfied, as indeed was the case, that the common interest purpose and beneficial ownership of all parties for whom it acted, were held in common within the Rabello family (including Katia Rabello as 50% beneficial owner of Arnage and Brooklands and as 50% UBO of Securinvest).

[23] It is admitted by the Defendant at paragraph 3 of the Defence that it acted on behalf each and all of Arnage, Brooklands and TLB in this transaction.

55. Following its review of the transactional documentation, the Defendant issued its opinion to CIBC and Canadian Imperial Bank of Commerce, Toronto Office, dated 27 June 2000, approving of the transaction on behalf of Arnage and Brooklands.

56. Thus, it is apparent that as Mr. Toledo asserts in his first affidavit[24]:

> *"The Note Purchase Transaction was essentially an inter-group transaction whereby TLB loaned funds to Securinvest to purchase distressed assets from the Rural Group.*
>
> *My understanding is that the above-mentioned corporate structure of incorporating a Brazilian company (Securinvest) owned by two Cayman Islands companies (Arnage and Brooklands) was proposed by Banco Rural executives working with the Brazilian representatives of CIBC, which provided nominee directors, shareholders and a registered office of Arnage and Brooklands. I instructed the TLB General Manager (Ricardo Bermudez) to obtain advice from the Defendant as to whether the proposed structure was advisable under Cayman Islands law and whether it would fit with the overall offshore structure that the Defendant had already established in the form of TLB. At all times, the Defendant was fully aware of the reasons why Arnage and Brooklands were incorporated and accordingly, their ultimate beneficial ownership by the Rabello family.…*
>
> *All of the Plaintiffs are inter-related as was their relationship with the Defendant: Arnage and Brooklands were incorporated to act as shareholders in Securinvest and for the purpose of the inter-group Note Purchase Transaction entered into with TLB; EFHL held Sabino Rabello and my shares in TLB. I was ultimately the Managing Director of TLB and I am now the sole director of Arnage, Brooklands and EFHL. Katia Rabello is the ultimate beneficial owner of Securinvest, through Arnage and Brooklands. I and the Rabello family, at all material times, owned and/or controlled TLB. The Defendant was fully aware of all of these inter-relationships, having acted on behalf of all of the Plaintiffs as well as the Rabello family generally*".

57. The breaches of duty claimed by the Plaintiffs relate in important part, to the obtaining by the Defendant on behalf of Dr. Braga, of the disclosure of confidential information relating to Arnage and Brooklands and to the very same Note Purchase Transaction involving TLB and Securinvest (including the Defendant's legal opinion itself); along

[24] At paras 62, 63 and 90, Vol B Tab 20.

with information revealing Katia Rabello's status as UBO of Securinvest through Arnage and Brooklands. This, along with other confidential information, came to be disclosed to Dr. Braga pursuant to orders obtained by the Defendant from this Court in May and July 2010. The disclosed information was quickly deployed by Dr. Braga against Katia Rabello, Securinvest and other Rural Group entities in Brazilian bankruptcy proceedings. These proceedings will be considered in some detail below.

Other relevant events in Brazil

58. Against the foregoing background of the lawyer-client relationships and before turning to look in more detail at the Brazilian bankruptcy proceedings and the related court proceedings in this jurisdiction, it is necessary at this stage to look at an earlier concatenation of events in Brazil, as they came to involve the Rabello family.

59. Katia Rabello is a ballerina. Her primary calling was as patron of a ballet school in her home city of Belo Horizonte, in the State of Minas Gerais. This was her occupation until 1999 when she became a director of Banco Rural upon the tragic death of her elder sister Junia (who had been groomed by their father Sabino to succeed him at the helm of the Rural Group).

60. Later, in October 2001, Katia became President of Banco Rural and still later, upon the passing of her father in January 2005, she became President of Banco Rural's Administrative Council.

61. By then there had been underway in Brazil, a Joint Parliamentary Commission of Enquiry into the infamous "Mensalao Affair". This enquiry revealed payments for vote-buying in Brazil's Congress, in return for the corrupt promotion and passage of preferential

legislation. The scandal raised wide-spread allegations of corruption against the Government of Luiz Inacio Lula da Silva.

62. It came to light that certain of the Mensalao payments had been made or arranged through Banco Rural. As a result, Katia Rabello, as its novice President, found herself summoned before the Joint Parliamentary Commission in September 2005.

63. Unsurprisingly, there was intense publicity about Mensalao in Brazil and overseas, including adverse publicity relating to Banco Rural and Katia Rabello as its President.

64. As a result, states Mr. Toledo[25], the legal and political environment within which the Rabellos, Banco Rural and the Rural Group were operating, became very hostile.

65. Despite her protestations of personal innocence while admitting to knowledge that her Bank had been involved in the passing of certain payments[26], Katia Rabello was indicted, along with some 40 others implicated, on 30 March 2006 by the Supreme Federal Prosecution Office. She was much later convicted in September 2013 for offences of conspiracy, mismanagement of a financial institution, money laundering and fraudulent transmission of moneys abroad. Eventually, after final appeal to the Supreme Federal Tribunal[27], she was sentenced in November 2013 in relation to the Mensalao Affair. She was imprisoned from November 2013 to December 2016[28].

66. It is of some significance now however, that she asserts[29] that the charges in relation to the Mensalao Affair had no connection to the allegations which were later promoted by Dr. Braga to engulf the Rabellos and their interests in the bankruptcy proceedings of a different Group of Companies, the Petroforte Group. In this regard, Dr. Braga came to

[25] In his Affidavit (above) at paras 104-110
[26] Vol C1/24/705 – page 552 of the Parliamentary Report
[27] About which more below.
[28] See her 4th Witness Statement in these proceedings in the December 2018 Hearing Bundle, Tab 19
[29] At para 6 op cit.

allege collusion between her father and Mr. Ari Natalino, the then principal of the Petroforte Group. Dr. Braga alleged that Sabino Rabello used Securinvest and another Rural entity, Rural Leasing, in collusion with Ari Natalino, – using his Petroforte Group (which was later placed into bankruptcy) – to defraud the creditors of Petroforte. This allegation, when accepted by the Brazilian courts as will be seen below, later became the basis upon which Dr. Braga was able to extend the Petroforte bankruptcy over the Rabello interests and which later became the basis for his allegations of collusion against Katia Rabello herself.

The Cayman connection to events in Brazil and the
Defendant's further involvement: The May 2006 Retainer

67. The Mensalao Affair itself had revealed no immediate connection to the Rabello family's affairs in the Cayman Islands but other related events did.

68. In its capacity as regulator of Banco Rural and other Brazilian banks implicated, the BCB had commenced its own investigation into the Mensalao Affair.

69. In August 2005, the use of a TLB account by a well-known publicist of the Workers' Party (the party of President Lula da Silva) was disclosed by a leading Brazilian newspaper and this linked TLB to Mensalao, attracting the attention of the BCB.

70. While TLB was an entirely unrelated Cayman entity having no legal relationship with Banco Rural, this revelation resulted, as Mr. Toledo explains, in heightened press and regulatory scrutiny of Banco Rural's overseas holdings and affiliates. The BCB then commenced an investigation into TLB itself.

71. On 2 May 2006, Mr. Robert Macaulay, acting on behalf of the Rabellos as their Miami based overseas counsel, emailed Mr. Mark Lewis, a partner of the Defendant, requesting

a call to discuss corporate and banking issues relating to EFHL (and by obvious implication TLB).

72. On 15 May 2006, following a teleconference with the Defendant (described by Mr. Macaulay as having taken place in response to his email and which the Defendant neither denies nor admits), another email was sent by Mr. Macaulay to another associate attorney of the Defendant's, Mr. Winston Conolly. This email requested that *"we urgently need from Walkers (Secretaries) Limited certificates substantially in the forms attached confirming that none of Mr. Rabello's heirs is or has been a member/shareholder of the Company [EFHL] or TLB"*.

73. The Plaintiffs assert through Mr. Macaulay, that a meeting in May 2006 (also neither admitted nor denied by the Defendant) was held in Grand Cayman between Mr. Macaulay and Mr. Toledo on behalf of the Rabello family and Mark Lewis and Winston Connolly of the Defendant. Mr. Toledo avers[30], that at that meeting both himself and Mr. Macaulay explained the implications for TLB and the Rabellos of the Mensalao Affair, in light then of the BCB's involvement as regulator of Banco Rural.

74. According to Mr. Toledo, discussions were focused on *"developing a strategy with the Defendant to protect the Rabello family and TLB given the problems that were developing; the Rabello family's objective being to try to ensure that its links to TLB were kept confidential given the political climate in Brazil."*

75. Instructions were given to the Defendant to take steps to transfer the shareholding in EFHL to Mr. Toledo and discussions were had around the ultimate closure of TLB, the essential objective being to *"distance the Rabello family from TLB (especially given the Mensalao investigations)."*

[30] Paras 115-121 of his First Affidavit

76. Confirmatory of these discussions and instructions, it appears that the Defendant (per Mark Lewis) then issued Notarial Certificates dated 31 May 2006[31] to certify that certain named members of the Rabello family (excluding Sabino Rabello who was by then deceased but including Katia Rabello) *"do not and have not appeared on the Register of Members of the Company [respectively EFHL and TLB]] as members of the Company at any time since incorporation of the Company."*

77. This was of course, a technically correct certification as it did not speak to ultimate beneficial ownership of either EFHL or TLB.

78. Mr. Toledo avers that the Defendant was specifically informed that these Notarial Certificates were intended to be presented to the Brazilian authorities, an averment which again, the Defendant neither admits nor denies.

79. In the event, the Notarial Certificates provided by the Defendant were presented to the BCB and their purpose would have been clearly understood by the Defendant.

The Defendant acted in other contexts relating to Sabino Rabello's estate

80. It is also uncontroverted that the Defendant acted in other contexts on behalf of one or other of the Plaintiffs or on behalf of the Rabello family as a whole.

81. As already mentioned, the Defendant advised the Family and Mrs. Jandyra Rabello as personal representative of Sabino Rabello's intestate estate in particular, in the context of Administration Proceedings in this jurisdiction. This was against the background according to Mr. Toledo[32], of advice from the Defendant that in order to transfer the share in EFHL to him, it was first necessary to apply to this Court for a grant permitting Mrs. Jandyra Rabello to deal with the estate in this jurisdiction.

[31] Copies are seen at Vol B/20 .2/289 and 290
[32] Paras 124-128 of his First Affidavit

82. The Defendant therefore acted for the family in applying to this Court for resealing of the Brazilian Letters of Administration, to permit Mrs. Rabello to act on behalf of her husband's estate in this jurisdiction.

83. This then involved the heirs (including Katia Rabello) entering into a Deed of Variation to vary the normal entitlements upon intestacy and so to relinquish any claims they might have had to an interest in EFHL. A copy of the Deed of Variation which was drafted by the Defendant is propounded in evidence[33], as entered into by each of the relevant family members, including Katia Rabello. Further written consents from each of the relevant family members (again including Katia Rabello) to the transfer of the share in EFHL were provided and copies are also propounded in evidence[34]. The transfer was approved by the EFHL board and executed by Mrs. Jandyra Rabello, effectively transferring Sabino Rabello's interest in EFHL and so in TLB, to Mr. Toledo[35]; all on the advice of the Defendant.

The BCB investigation in Brazil and the May 2007 Retainer

84. Apprehensions expressed by Mr. Toledo and Mr. Macaulay on behalf of the family to the Defendant at the May 2006 meeting, turned out to be all too well founded. In February 2006 (and unknown at the time to the Rabellos)[36], the BCB had contacted the Cayman Islands Monetary Authority ("CIMA") – its Cayman Islands counter-part – in respect of its investigation into links between the Rabello family, Banco Rural and TLB. The BCB requested from CIMA any information relating to the shareholding in TLB.

[33] Exhibit FT2 to Mr. Toledo's First Affidavit, Volume B Tab 20. 2, page 275.
[34] Exhibit FT2 pp33-37.
[35] See Exhibit FT2, page 52.
[36] According to Mr. Toledo at paragraph 129 of his First Affidavit.

85. Having extracted undertakings from the BCB by way of letter dated 28 June 2006 that any information provided would be used only for regulatory purposes; CIMA provided to the BCB information from its own records which showed the shareholdings in TLB from its date of incorporation and specifying that the majority shareholder was Sabino Rabello up to November 1998 and thereafter, that the shareholder was EFHL "*represented by Sabino Rabello*".

86. But even that revealing disclosure proved inadequate for the BCB's purposes and so, on 30 November 2006, the BCB requested further information from CIMA relating to TLB[37], expressly including any documents showing "*current outstanding operations between TLB and any company of the Rural Conglomerate*" which was defined as including Banco Rural. The BCB informed CIMA that the purpose of the investigation was "*to identify common ownership between Banco Rural and TLB*". This was implicitly, it must have been understood, to further establish an ownership link between the Rabello family and TLB.

87. The letter dated 30 November 2006 again confirmed that the information was sought only for the BCB's regulatory purposes, including civil and administrative (i.e: not criminal) proceedings.

88. In response, CIMA informed the BCB[38] that not all the information sought was in their possession and accordingly that CIMA would have to issue a "Direction" under section 34 (9) of the Monetary Authority Law (MAL). However, that before so doing (in addition to the assurances earlier given) CIMA required from the BCB:

[37] Exhibit FT1 Vol B Tab 20.1 pp 11-12.
[38] By letter dated 16 January 2006 (but meant as January 2007) – Exhibit FT1above, page 13.

"*an undertaking that the information provided will not be used in criminal proceedings against any person(s) providing the information, other than proceedings for an offence under section 34 (17) of the (MAL) or an offence of perjury*".

89. By way of letter dated 23 February 2007[39], the BCB gave that undertaking.

90. Accordingly, on 30 April 2007, CIMA, on behalf of the BCB, issued a formal Direction to TLB to provide documents pursuant to section 34 (9) of the MAL[40], including a copy of the Register of Officers and Directors of TLB.

The May 2007 Retainer

91. Immediately, in response to CIMA's 30th April Direction, in early May 2007 the Defendant was engaged by Mr. Macaulay on behalf of TLB (and therefore as Mr. Toledo avers, on behalf also of TLB's directors, officers and shareholders) to provide legal advice on resisting the CIMA 30 April Direction. This was stated expressly as in order to maintain the confidentiality of any further connections between TLB and the Rabello family.

92. The Defendant's Engagement Letter[41] contains an expressed obligation on its part to "*take such steps as we in good faith think fit to preserve confidential information from misuse both during and after termination of the Engagement.*"

93. This is acknowledged by the Defendant as having given rise to an ongoing duty of confidentiality beyond the termination of the May 2007 Retainer itself. Nonetheless, it is

[39] Exhibit FT1 (above) p 14
[40] Exhibit FT1 above, pp 15- 16
[41] Exhibit FTI above, pp 17-27

a duty which, as I understand its case, the Defendant insists it did not breach in later acting for Dr. Braga.

94. But more to the point here of what the Defendant must have understood and appreciated about the predicament in which the Rabellos found themselves in the context of events unfolding in Brazil, including the BCB inquiry; the following appears in the letter written by the Defendant on 3 May 2007 to CIMA, on behalf of those whom it considered to be its clients. This was in response to CIMA's 30 April Direction and confirmatory of the wide ambit of the May 2007 Retainer as Mr. Toledo avers (NB: the interchangeable use of the plural and singular "clients" and "client"):

> "*Our clients are aware that other of their documents provided by foreign government sources to the Brazilian authorities under conditions of confidentiality have, within a short period of time, appeared in the Brazilian press as a result of what appear to have been deliberate leaks. We would therefore, be grateful if you would please confirm that to the best of your knowledge the request is not in respect of criminal proceedings contemplated being brought against TLB or any of its current or former directors, officers or agents and that the request is not being made for the benefit of another branch of the Brazilian government. In light of the above please also confirm the measures that CIMA has taken to satisfy itself that the information enclosed herewith will be kept confidential and not further disseminated by the BCB to anyone outside of that institution, whether in the press, another branch of the Brazilian government or otherwise.*
>
> *We have enclosed on behalf of our clients the information requested- "The Register of Officers and Directors for Trade Link Bank"- in a complete and redacted version. The redacted version simply sets forth the current officers and directors – Messrs. Toledo and Jacobson, citizens of the USA and UK respectively, neither of whom resides in Brazil – and confirms that they have been the sole officers and directors of TLB since inception in 2005. The complete version reflects all officers and directors of TLB since inception in 1985. The additional information contained in the complete version cannot in our client's view be relevant to any legitimate regulatory enquiry. The only possible use for that information, in our*

> *client's view, would be non-regulatory legal and other actions to be taken against individual Brazilian residents who are former TLB officers and directors. In our client's view no such legitimate claims arise.*
>
> *Based on the foregoing, we respectively request that you produce to BCB only the redacted register of TLB officers and directors. We would be pleased to meet with you at your earliest convenience to discuss this matter further if you think it appropriate…."*

95. As it happened, CIMA did not accede to that request to disclose only the redacted register of TLB to the BCB but instead, presented the BCB with the full unredacted version.

96. Worst fears were realized when the BCB, in breach of its undertaking to CIMA, publicly disclosed the information provided which linked the Rabello Family to TLB and gave it over for deployment to the detriment of Katia Rabello and other Family members, for use in criminal proceedings against them. These were proceedings in which Mr. Toledo was also named although not indicted. More about these criminal proceedings will be examined below in the context of a further retainer of the Defendant in August 2009.

97. At this juncture, it is important to note that while no complaint has been raised against the Defendant in relation to their conduct of this, the May 2007 TLB/CIMA retainer, the Plaintiffs assert that the Defendant could not – when later approached by Dr. Braga in April 2010 to act for him – have been in any doubt about the nature of the predicament facing the Family in Brazil in relation both to the Mensalao Affair and then contemporaneously, the BCB enquiry. The Defendant could therefore have been in no doubt, say the Plaintiffs, about its obligation to maintain and protect their confidentiality when Dr. Braga came along.

98. This is an unanswered averment and one which I regard as unanswerable.

The August 2007 Retainer: dissolution of TLB

99. The Plaintiffs' grievance is further contextualized by other retainers by which the Defendant had acted for one or other of the Plaintiffs before Dr. Braga came along. Next there was the August 2007 Retainer for the dissolution of TLB, which had stopped trading although it was then still a solvent entity. The following uncontroverted account of this retainer comes from Mr. Toledo[42]:

> *"Between August 2007 and November 2007, there were a number of further discussions between Mr. Macaulay, myself and both Mark Lewis and/or Nick Rogers (another Partner) of the Defendant. By this stage TLB had effectively ceased trading and, given both the BCB investigation into links between the Rabello family and TLB and increased regulatory scrutiny due to the Mensalao Affair, in which the indictment of Katia Rabello had been accepted by the STF [Supreme Federal Tribunal[43]] in August 2007, the Defendant was instructed to advise upon dissolving TLB….*
>
> *...in its capacity as general Cayman Islands legal counsel to TLB and also pursuant to the May 2007 Retainer and the August 2007 Retainer, I believe that the Defendant was fully aware that any links between the Rabello family (and/or Banco Rural) and TLB were strictly confidential, subject to regulatory investigation by the BCB and that the Defendant should take all reasonable steps to prevent disclosure of such material.*
>
> *TLB was dissolved on 17 September 2009."*

100. This was the culmination, as regards TLB, of the concerns raised at the May 2006 meeting and which led to the subsequent retainers of the Defendant in relation to the BCB.

[42] First Affidavit, above, at para 152
[43] Brazil's highest court for the determination of constitutional and criminal cases.

The August 2009 Retainer

101. Next followed the August 2009 Retainer. As mentioned above, this arose when, as anticipated and feared by the Rabellos and Mr. Toledo, the information relating to TLB's officers and directors which had been provided to the BCB by CIMA, was disclosed by the BCB and used by the Brazilian authorities as the basis for criminal proceedings (despite the undertakings given to CIMA by the BCB).

102. In that regard, on 15 December 2008, a criminal complaint[44] was issued by the office of Federal Public Prosecutions in the State of Minas Gerais against Katia Rabello and seven other defendants (including three other members of the Rabello family). This complaint alleged the making of false representations to the BCB and expressly relied upon the information provided by CIMA to the BCB[45].

103. The persons indicted included controlling shareholders in Banco Rural and its senior management. Among the "FACTS" particularized in the complaint, at item 1 reads as follows (translated):

> "*The accused offered falsified information to the Central Bank of Brazil when denying the existence of stockholding (either direct or indirect) and/or joint management in Banco Rural S.A. and the Trade Link Bank (TLB) financial institution, headquartered in the Cayman Islands, incurring in the crime of false representation reported by private document 9 articles 299 and 298 of the Penal Code…*

104. And at item 5:

> "*By conclusively proving the shareholding by the Directors of Banco Rural S.A in Trade Link Bank, the Cayman Islands (CIMA) Monetary Authority, meeting the request made by the Central Bank, sent a graph showing the evolution of the TLB shareholders on the period from 08.31.1984 (the TLB incorporation) to 02.09.2004 (pages 318/323). From*

[44] Referred to herein interchangeably as "complaint" or "indictment".
[45] A copy of this complaint is included at Exhibit FT1 (above) at pp 73- 92

that list it is found that Banco Rural's controllers, administrators and former administrators are or were TLB shareholders, including periods with joint shareholding in both…"

105. On 5 August 2009, Mr. Macaulay (according to Mr. Toledo, at his request) sent an email[46] to partner Mark Lewis of the Defendant setting out the background relating to this Criminal Complaint stating:

> *"… new criminal proceedings have been opened in Brazil utilizing confidential documents relating to TLB provided by CIMA to the Brazilian Central Bank (BCB) purportedly for the purpose of civil regulatory functions. This use of the confidential information for criminal proceedings is in violation of the applicable provisions of the Cayman Monetary Authority Law[47], the MOU between Brazil and Cayman[48] and the correspondence between the BCB and CIMA. We need assistance from you and/or the appropriate persons at your firm to immediately address this issue and limit the harm to the Brazilian defendants who have been prejudiced by the unlawful disclosure*." [Emphasis added.]

106. On the same day, Mr. Macaulay received separate emails from partner Mark Lewis and associate James Austin-Smith of the Defendant. They confirmed that the retainer had been accepted and that the Firm (including the Partner Mr. Diarmad Murray who was then Managing Partner) had the necessary experience and competence to deal with the matter.

107. By way of letter of the next day (6 August 2009), Mr. Macaulay provided the Defendant with correspondence between CIMA and the BCB which had been disclosed in the context of the on-going proceedings in Brazil.[49] This included the correspondence between CIMA and the BCB exchanged in 2006 in relation to the disclosure of the legal and beneficial ownership of TLB discussed above and which was relied upon to advance

[46] Exhibited at FT1 (above) page 40.
[47] Section 50 of the Monetary Authority Law (2004 Revision) is cited in Mr. Toledo's Affidavit at para 165 in support.
[48] The MOU section 8.1 is also cited as containing provisions restricting the use of disclosure provided by CIMA to the BCB to the exercise of BCB's "regulatory functions" and section5.4 as restricting that use to the specific defined purposes disclosed to CIMA when requesting the information.
[49] Exhibited at FT1 (above) pp43-92.

the BCB's objective of establishing any affiliation, business operations or connections between TLB and Banco Rural.

108. Mr. Macaulay's letter of 6 August 2009 also included a copy of the criminal complaint which named the "Brazilian defendants", including Katia Rabello.

109. The objective of Mr. Macaulay's letter gleaned from its terms, was, in effect, to seek the Defendant's advice on obtaining the possible intervention of the Cayman Attorney General and/or CIMA, with the BCB or the Brazilian Courts, to prevent the CIMA disclosure from being further "abused" in the criminal proceedings, to the detriment of the Brazilian defendants.

110. On 7 August there followed an email from Mr. Austin-Smith to Mr. Macaulay in these terms:

> "*I am putting together an engagement letter now. Is the* ***ultimate client*** *TLB or the various individuals facing prosecution? If the latter can you indicate which.*"[Emphasis added.]

111. In response, Mr. Macaulay sent an email later that day to the Defendant in these terms:

> "*Your* ***ultimate clients*** *for purposes of this matter should be* ***East Farthing Holdings Ltd,*** *a Cayman corporation which was the sole shareholder of TLB upon liquidation,* ***and Fernando Toledo****, the sole shareholder of East Farthing*". [Emphases added.]

112. Then followed the August 2009 Retainer Letter itself which begins in these terms:

> "*You have asked us to assist East Farthing Holdings Ltd in preventing the use of material provided by the Cayman Islands Monetary Authority to Banco Central Do Brasil in a criminal prosecution in Brazil (the "Engagement*").

113. This Engagement Letter goes on at paragraphs 35 and 36 to confirm that the Defendant would vouchsafe the confidentiality of the "*clients'"* information, in terms identical to those in the May 2007 Retainer set out above at paragraph 92.

114. It is the Defendant's position that notwithstanding the context and background of the criminal proceedings in Brazil, the only client for which it was by this August 2009 Retainer engaged, was EFHL. The Defendant thus invites the narrowest construction of the phrase "*ultimate client*", from Mr. Macaulay's email of 7 August (above).

115. Unsurprisingly, the Plaintiffs do not accept this.

116. For one matter, while the Engagement Letter in terms refers only to EFHL, Mr. Toledo was its sole shareholder. And while Mr. Toledo was not indicted, he was named in the Brazilian indictment.

117. Moreover, say the Plaintiffs, it was obvious from Mr. Macaulay's letter of 6 August 2009 that the purpose of this retainer was to "*protect the Brazilian defendants*" – the natural persons who were the subject of the indictment and which made no mention of EFHL. The obvious concern was to ameliorate the impact of the CIMA disclosure (which revealed the connection between the Rabello family, Banco Rural and TLB) upon those persons identified as subjects of the indictment.

118. The Defendant, say the Plaintiffs, could therefore have been under no misunderstanding that its true clients in this context were those, especially Katia Rabello, facing possible conviction in Brazil, as the result of the abuse of the CIMA disclosure by the BCB.

119. It is also to be noted that Mr. Toledo became listed by the Defendant as a client[50], in its internal records relating to the August 2009 Retainer. This is a fact which the Defendant

[50] See Reply 10.1 to the Reply to the Request for Further and Better Particulars of the Amended Defence dated 5 December 2014 (page 22). See also, 2nd affidavit of Ms. Feena Christian (nee Cray) which suggests that the listing of Mr. Toledo as a client could not have been by "mistake", as the Defendant sought to aver. Also, in the affidavit of Antonia Hardy filed on behalf of the Defendant, she attests that no conflict check was ever carried out, by the Defendant in its clients' database, against the names of Katia Rabello or Fernando Toledo.

at first sought, it seems mistakenly, to deny by averring in its Defence[51], that EFHL was named as the sole client in its marketing and billing database.

120. Still further, it does appear from the letter written by the Defendant (per Mr. Austin Smith) to CIMA on 9 September 2009, that the Defendant regarded itself as acting on behalf of those persons in jeopardy in Brazil.

121. At paragraph 5 this letter states:

> "*We have subsequently been informed that criminal proceedings have been brought by the Federal Public Prosecutors office in Brazil based on the information provided by CIMA. We attach (in original and English translation) a document prepared in those court proceedings by the Federal Public Prosecutors office in Minas Gerais. In particular we would draw your attention to the comments made at paragraphs 5 and 6, in which the document makes it quite clear that material provided by CIMA is not only to be used as evidence in these criminal proceedings but, in fact, forms the backbone of the case against the Defendants*."

122. Thus, this letter clearly raises the concern, that documentation provided by CIMA to the BCB for regulatory purposes was being used in the Brazilian criminal proceedings and, as it goes on to conclude, that the manner in which information had been obtained by the BCB had

> *"…deprived those now facing serious criminal charges of the protections imposed by the Cayman Islands legislature through the Monetary Authority Law (and other statutes).*
>
> *In the circumstances we would appreciate if you could confirm that our understanding of the position is accurate so that this breach of the law and the MOU can be brought to the attention of both the trial court and the authorities in Brazil."*

123. As a further sign of the ongoing lawyer/client relationship, throughout this period in late 2009 and subsequently, as Mr. Toledo avers[52], the Defendant regularly sent fee invoices

[51] Paragraph 47.4 of the Amended Defence (now withdrawn by the Defendant).

to Mr. Macaulay to be settled on behalf of its clients[53]. Those invoices were settled, save for the final one dated 7 June 2011 which was, quite remarkably, issued more than a year after the Defendant had accepted Dr. Braga's retainer and started acting for him in April 2010[54].

124. The full factual context to the August 2009 Retainer, including the historical significance of earlier retainers, must be analyzed for the application of the common law criteria for the identification of the lawyer-client relationship and its duties and obligations, including the ongoing duty of confidence which it engendered. This analysis will be undertaken below.

125. The narrative on the August 2009 Retainer can be concluded here by noting that despite CIMA's attempts at intervention, the BCB denied having acted contrary to its undertakings and the indictment was nonetheless prosecuted against the Brazilian Defendants, including Katia Rabello, to their conviction.

126. Katia Rabello was however, later acquitted on her appeal in relation to this indictment, the Brazilian appellate courts having found that the allegation of "misrepresentation on documents" as raised by the BCB, was unjustified[55].

Katia Rabello as client

127. As regards her status as client, Katia Rabello avers in her witness statement[56] that while she never dealt personally with the Defendant, given the Defendant's longstanding

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[52] First Affidavit (above) at para 201.

[53] Albeit that these invoices state the matter as "Trade Link Bank – CIMA Request". The fees were incurred by and/or on behalf of Mr. Macaulay's client (the Defendant's past submissions that Carlton Fields (Mr. Macaulay's firm) were the clients, was abandoned).

[54] Fee Invoice dated 7 June 2011, exhibit FT1 to first affidavit of Fernando Toledo Court Bundles Vol B Tab 20.1, at page 123.

[55] See Appellate Decision, Exhibit FT 10 to third affidavit of Fernando Toledo, Core Bundle Tab 30 pp129-132

[56] Dated 22 January 2015, at para 10. Vol B Tab 19.

relationship with her family, the Rural Group and TLB, she relied on the Defendant to act on her behalf regarding all Cayman Islands legal matters that affected her and understood that they would act to protect her interests in this regard.

128. This relationship began where she was concerned, in 1998. This was when her father set up EFHL as the holding company for his interests in TLB. The Defendant handled the legal work, including naming herself, her sisters Junia and Nora and their mother Jandyra, as directors of EFHL. She also avers to her belief that the Defendant must have regarded her as a client when it acted on her behalf as a beneficial owner of Arnage and Brooklands and as a UBO of Securinvest, (as it indisputably did at least on behalf of the Cayman incorporated parties) in relation to the Note Purchase Transaction.

Winding up of EFHL – Retainer in February 2010

129. As a further post-script and for completeness – in addition to acting for EFHL in connection with the August 2009 Retainer, in early 2010 the Defendant began advising on the potential dissolution of EFHL.

130. This is apparent from a chain of emails between Mr. Macaulay and attorney Charles Kirkconnell of the Defendant beginning on 1 February 2010, in which Mr. Macaulay stated that "*the client has decided to dissolve the company as it is no longer needed due to the completion of the liquidation of Trade Link Bank*".

131. Mr. Macaulay asserts and to my mind it is plain, that that reference to "the client" must have been understood to be a reference at least to Mr. Toledo, but also as well to the Rabellos, as the persons implicated with TLB in the BCB inquiry and the resultant criminal proceedings in Brazil.

132. There then followed a number of email exchanges between the Defendant and its associate Walkers Corporate Services Limited on the one hand and Mr. Macaulay on behalf of "the client" on the other, in relation to the dissolution of EFHL[57].

133. Having read them, it is safe to say that nothing in those email exchanges suggests a contrary understanding on the part of the Defendant.

The significance of historical retainers

134. The May 2006 Retainer, the May 2007 Retainer, the August 2007 Retainer, the August 2009 Retainer and the February 2010 EFHL Retainer, like those before them relating to the setting up of TLB and EFHL and advice to Arnage and Brooklands (in relation to the Note Purchase Transaction), are of significance now for specific purposes.

135. First, they provide the factual background for the legal examination of the existence of the lawyer-client relationship between the Defendant and the Plaintiffs which the Plaintiffs claim. The Retainers also reveal, as the Plaintiffs complain, that the Defendant must have been aware of the vulnerable position of the Rabello interests in Brazil – vulnerability both in the public and regulatory arenas – which was widely known. It follows that the Defendant must therefore have been aware of the dire implications for the Rabello interests when the Defendant decided to act for Dr. Braga against them. Thus, the Retainers set the context for the finding of the lawyer/client relationship, as well as for the examination of the allegations of breaches of duty arising from the relationship.

[57] See FT2 (above) pp118-131

Summary of evidence showing the lawyer/client relationship – Katia Rabello and Fernando Toledo.

136. The Defendant, through Mr. Simpson, has admitted the existence of the relationship with the first three Plaintiffs – Arnage, Brooklands and EFHL.

137. The evidence in support was undeniable in any event, as discussed above.

138. I think I need therefore summarize here, only the evidence which in my view, shows the relationships with Katia Rabello and Fernando Toledo.

139. As regards Katia Rabello, the only conclusion to be reached from the events discussed above is that Katia Rabello was a client of the Defendant as at the date when the Defendant agreed to act for Dr. Braga ("the Braga Retainer"). This is undeniable given not only the many years of the Defendant having acted as the Cayman attorneys for the Rabello family, including Katia Rabello, but also more particularly on account of the following:

(a) The explicit instruction given on 5 August 2009 by Mr. Macaulay[58] for the Defendant to act so as to limit the harm to the Brazilian Defendants in the Brazilian criminal proceedings which, to the Defendants knowledge, included Katia Rabello;

(b) The fact that a clear purpose of the August 2009 Retainer was to assist Katia Rabello in her defence to the Brazilian criminal proceedings.

(c) The August 2009 Retainer (entered into only some 8 months before the Braga Retainer) was on-going at the time of the acceptance of the Braga Retainer. As set out at paragraphs 77 and 78 of the Statement of Claim and paragraphs 193 to 201

[58] Exhibit FT 1 to Toledo first affidavit, Vol B.20.1 page 40

of Mr. Toledo's First Affidavit, whilst the Braga Retainer was being pursued by the Defendant, the Defendant was simultaneously:

(i) Advising Katia Rabello's US Attorneys on her behalf as to the progress being made under the August 2009 Retainer;

(ii) Taking further instructions in relation thereto;

(iii) Liaising with CIMA in furtherance of Katia Rabello's interests in this regard; and

(iv) Providing further advice for her benefit as to Cayman Islands law as regards the CIMA disclosure to the BCB.[59]

(d) The Defendant's own work-product and correspondence with CIMA, clearly demonstrates its own understanding that it was acting on behalf of the defendants in the Brazilian criminal proceedings. See for example, the Defendant's letter to CIMA of 9 September 2009, discussed in detail above.

(e) Finally, the two references and connections[60] to Katia Rabello in the Defendant's own client database as explained by Feena Christian in her second affidavit[61] and in respect of which she acknowledged, very belatedly on behalf of the Defendant, that upon the acceptance of the Braga Retainer, a conflicts check had not been conducted in relation to Ms. Rabello. This is an oversight which occurred although Katia Rabello was expressly named as a respondent to the second application brought on behalf of Dr. Braga and for which the Defendant has also belatedly, apologized.[62]

[59] See Exhibit FTI to Mr. Toledo's first Affidavit Vol B tab 20.1 pages 112 to 124
[60] There were a number of connections in the Defendant's client database to the Rural Group and TLB which were majority owned by the Rabello family.
[61] See Core Bundle Vol 2 Tab 21 paragraphs 28-33.
[62] First Affidavit of Antonia Hardy, 27 July 2017, paragraph 10.2, Core Bundle Vol 2 Tab 20.

140. As regards Fernando Toledo:

(a) the Defendant's own records indicate that he was a client in respect of the August 2009 Retainer. A simple search of the Defendant's systems would again have revealed multiple references to him, including the express reference to him as "client"[63].

(b) Mr. Macaulay's email of 7 August 2009 to the Defendant expressly named Mr. Toledo as a client.[64]

(c) Mr. Toledo's known position as managing director of TLB;

(d) Mr. Toledo's position as sole shareholder of TLB through EFHL, making him to the Defendant's knowledge, the beneficial owner of both TLB and EFHL;

(e) His undisputed evidence that he met with the Defendant on several occasions and regularly communicated with the Defendant for many years in the context of TLB and Rabello family business, including both (i) the voluntary dissolution of TLB and (ii) the probate process whereby he inherited the TLB shares through the transfer of EFHL shares previously owned by Sabino Rabello;

(f) The Defendant's belated admission and apology for not having carried out a conflicts search regarding Mr. Toledo, despite the fact that he was expressly named by the Defendant as a subject of the applications made by it on behalf of Dr. Braga. By this belated admission, the Defendant has confirmed that a conflicts search would have disclosed him as a client under the August 2009 Retainer and would have shown his connections with TLB, the Rabello family

[63] Second Affidavit of Feena Christian (nee Cray) paragraphs 34 -45, Core Bundle Vol 2, F2/31/Pages 87 to 182, at page 108: Reply 10.1 of the Reply to the Plaintiffs' Request for Further and Better Particulars of the Amended Defence (dated 5 December 2014) and Feena Cray's First Affidavit of 27 February 2015, paragraph 7; Core Bundle Vol 1 Tab C1/26.
[64] Vol B/20 –Exhibit FT1 page 195 to Mr. Toledo's First Affidavit.

and the Rural Group (Banco Rural and Rural Leasing both being named specifically as related entities in the applications brought on behalf of Dr. Braga). Mr. Toledo was also recorded in the Defendant's systems as a director of Rural International Inc, equally with his connections to TLB and EFHL.[65]

(g) The earlier suggestion by the Defendant that Carlton Fields (Mr. Macaulay's firm) was the client is no longer being asserted. Contrary to that earlier position advanced in court, it is now admitted that Carlton Fields "*…has never been recorded as a client in Walkers' systems*".[66]

(h) As in the case of the other Plaintiffs, many confidential documents relating to Mr. Toledo[67] were obtained by the Defendant and disclosed to Dr. Braga.

The Braga Retainer and the Brazilian Bankruptcy Proceedings.

141. Even before their difficulties with the BCB began in about 2006, problems for the Rabellos had arisen from the allegedly dishonest involvement of Sabino Rabello with Ari Natalino of the Petroforte Group, in what became known as the Sobar S.A. Álcool e Derivados ("Sobar") Sale/Leaseback transaction ("the Sobar transaction").

142. The Sobar transaction was entered into in 2000 at a time when Petroforte[68] the parent of Sobar, is alleged to have become bankrupt. It gave rise to allegations that between them, Sabino Rabello and Ari Natalino had colluded to strip away Sobar assets from the Petroforte Group, putting them out of reach of its creditors, through the use of the Rural Group entity, Rural Leasing and later, by using Securinvest.

[65] Core Bundle Vol 2 Tab 21 Tab C4/27M, paragraph 43 of Feena Cray's Second Affidavit.
[66] Second Affidavit of Feena Christian (nee Fray) paragraph 51 – Core Bundle Vol 2 Tab 21 (C4/27M).
[67] See Schedules A and B of the Reply to the Defence.
[68] Petroforte Brasileiro De Petroleo Ltda, once one of the largest distributors of petroleum and ethanol products in Brazil.

143. The Defendant came to be retained by Dr. Braga in April 2010[69], in the context of a long running battle between Dr. Braga, as trustee–in-bankruptcy of the Petroforte Estate on one side, and the Rabello family and their Rural Group on the other. This battle had been engaged in the Brazilian Courts over the alleged stripping away of the Sobar assets (a sugar plantation and ethanol plant valued at some USD100 million).

144. In proceedings filed by him before the Brazilian Courts to revoke the Sobar transaction (the "*Revocation Action*"), Dr. Braga averred that the Sobar transaction was a sham, and that its effect which was to fraudulently deprive the Petroforte Estate of the Sobar assets.

145. In 2000, prior to Petroforte having been placed into bankruptcy, Rural Leasing and Sobar had, in fact, entered into a contract for the sale/leaseback[70] of the Sobar assets. Pursuant to the terms of the contract, Sobar transferred to Rural Leasing the Sobar assets which were subsequently leased back to Sobar by Rural Leasing, for a contracted price to be paid by instalments.

146. Due, at least ostensibly, to the non-payment of instalments under the contract, Rural Leasing commenced litigation against Sobar and those proceedings were settled.

147. In 2003, Rural Leasing commenced a further action to repossess the Sobar assets given that again at least ostensibly, Sobar had not made any further payments.

148. This repossession of the assets by Rural Leasing was eventually, and the Plaintiffs say finally, – and the Revocation Action notwithstanding – approved by the Brazilian Courts.

[69] The Defendant has confirmed that it was first contacted, in respect of acting for Dr. Braga, by email from the BVI law firm Martin Kenney & Co, on 28 April 2010 to Diarmad Murray who was then Managing Partner of the Defendant and the same Mr. Murray who is shown to have been referenced in correspondence with Mr. Macaulay on behalf of the Plaintiffs.
[70] As explained by Mr. Toledo at paras 206- 213 of his First Affidavit (above).

149. Subsequent to the Brazilian Courts' approval, the Sobar assets were sold to Securinvest and then by Securinvest to a Brazilian company named Turvo Participacoes Ltda. ("Turvo").

150. Notwithstanding Rural Groups' protestations that the Sobar transaction was not a sham and had in fact been approved by the Brazilian Courts, Dr. Braga, having become appointed as Trustee over the Petroforte Group, commenced the Revocation Action in 2006 and immediately obtained from the Court, a secured lien over the Sobar assets. This lien was described by him to the Brazilian Court as needed to prevent risk of the dissipation of those assets.

151. For reasons which still remain unexplained in these proceedings, despite having commenced the Revocation Action, Dr. Braga commenced a new action by way of bankruptcy proceedings against Securinvest itself. By this action he has sought to bring all Securinvest assets (not only those which were Sobar related), into the Petroforte bankruptcy. For these purposes, as I understand it, Dr. Braga relied (and continues in the course of ongoing appeals in Brazil to rely) upon the Brazilian legal theory of the "*common economic group*". This is that such a common group came into existence to comprise Securinvest and Petroforte, because of the alleged collusion between Sabino Rabello and Ari Natalino for the stripping away of the Sobar assets from the Petroforte Group to the Rural Group using Rural Leasing, Securinvest and Turvo.

152. A pivotal point for the extension of the Petroforte Bankruptcy to the Rural Group ultimately through Securinvest, was the fact that Sabino Rabello and Ari Natalino were

both found to be the shareholders in Turvo[71]. This was said to be the pivotal connection for the application of the legal theory of "common economic group", as I understand it.

153. The legal theory would thus be established unless it could be shown that Securinvest (as the destination of the Sobar assets), was itself owned by third parties having no connection to either of the Rural or Petroforte Groups.

154. On the basis of his petition against Securinvest (supported by his alleged but then as yet unproven connection between Securinvest and Petroforte) Dr. Braga persuaded Judge Beethoven of the Sao Paulo Bankruptcy Court to make an order *ex parte* (i.e.: without notice) in August 2007, extending the Petroforte Bankruptcy over Securinvest ("the August 2007 Bankruptcy Order"[72]). This Order, even while the Revocation Action remained unresolved, then allowed Dr. Braga (through a court-appointed receiver) to take control of all of Securinvest's assets going well beyond Sobar. These assets include the Hotel Nacional in Brasilia; a BR$100,000,000 note payable to Securinvest from a television network (Rede TV)[73], along with various other land holdings and a private plane.

155. These non-Sobar Securinvest assets[74] are alleged by the Plaintiffs to be worth in the order of USD300 million and as will be further explained, form the core of the losses sought to be recovered from the Defendant. And when including the claim relating to the loss of Banco Rural (also to be further explained below), the claim rises to over USD400 million.

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[71] As discussed in the earlier judgment of this Court of 20 May 2011 in which the Cayman Disclosure orders were reviewed: Core Bundle Vol. 1 Tab 17 (rep. at *2011 (1) CILR 402* ("the May 2011 Judgment").

[72] A translated copy of the Judgment is exhibited at Core Bundle Vol 2 Tab 1A.

[73] Pleaded as a Note for R100,000 at paragraph 202 of the Statement of Claim and Summary of Losses but this is explained by the Plaintiffs' attorney Mr. Annette as being a typographical error.

[74] The Plaintiffs' claim for USD100 million in respect of loss of the Sobar assets was abandoned during the arguments having regard to the disputed entitlement to them which is the subject of the Revocation Proceedings. See Transcript March 2016, Day 5 793:22 and December 2018 Day 5:122 ff [J2/83-5].

156. The Defendant's liability is claimed to have arisen from subsequent events in this jurisdiction after it started acting under the Braga Retainer. These are events to which I now turn.

Chronology leading to the disclosure of the Plaintiffs' confidential information to Dr. Braga in the Cayman Islands ("the Cayman Disclosure")

157. While the August 2007 Bankruptcy Order against Securinvest was obtained from Judge Beethoven prior to the Braga Retainer (which arose later in April 2010), the Cayman Disclosure and the claim against the Defendant relating to it, relates to the ultimate rejection of Securinvest's appeal in August 2011.[75] The rejection of Securinvest's appeal is averred by the Plaintiffs' to have been directly influenced by the Cayman Disclosure – the disclosure of confidential information obtained by Dr. Braga in this jurisdiction, acting through the Defendant.

158. The procedural chronology, in brief, was as follows.

159. Securinvest had appealed against Judge Beethoven's August 2007 Bankruptcy Order to the Tribunal de Justicia de Sao Paulo ("the TJSP") but on 30 September 2008, the TJSP affirmed the Judge's Order[76]. In his judgment on behalf of the TJSP it was Judge Akel who, for the first time, made reference to a common economic group having come to comprise Petroforte and the Rural Group.

160. In his earlier judgment issued on 24 August 2007, Judge Beethoven had however, made very damning conclusions against Securinvest and the wider Rural Group. It is important for present purposes to record aspects of this Judgment here because an important element of the Defendant's causation defence, is that the crucial conclusions reached by

[75] By the Superior Tribunal de Justicia (the "STJ"), the highest appellate court for non-constitutional questions of federal law and about which more below.
[76] The TJSP's Order per Judge Elliot Akel, being filed on the 16 October 2008: see Exhibit FT3 (op cit) Vol B Tab 3.2.

the Brazilian courts adverse to the Plaintiffs, had been reached prior to the Braga Retainer and the Defendant's actions taken on behalf of Dr. Braga. Accordingly, that there was therefore no causal link between the Defendant's actions and the Plaintiffs' loss, at any rate in relation to Securinvest.

161. Having noted in his Judgment that Dr. Braga had applied for the extension of the effects of the Petroforte Bankruptcy over Securinvest and had requested that the BCB be notified (because the Sobar transaction was also seen as linked to Banco Rural), Judge Beethoven continued:

> *"In reality, based on the petition...there is serious evidence that the very leaseback operation, as alleged, was a flagrant sham involving Rural Leasing... and the company Sobar (once the debt had been passed on to Securinvest, Banco Rural obtained title to the factory for a small amount representing a fraction of its true worth.… These leaseback operations were highly prejudicial to Petroforte's creditors….*
>
> *Thus the intention to defraud Petroforte's creditors is proven…. All that has exposed (the fraudulent) practices here has been the effort of the brilliant administrator in bankruptcy supported by the good work of the Public Prosecutor's Office of Sao Paulo. They took note of the operation thus involving Sobar. The commercial leaseback agreement was concluded for sky high values. Hence Sobar ended up owing Rural Leasing more than BRL 20 million…. It followed the covert sale to Securinvest, in which the spurious link between Petroforte Group and Rural Group is obvious. Finally, it lends credence to the further operations effected and legal actions brought, listed by the Administrator at [illegible] 6 et seq of these case papers. All this was designed to frustrate the rights of the creditors in addition to the agreements between the companies, and in addition to the offshore companies belonging to Banco Rural. There is no doubt of the suspect behavior involved in the transactions with Petroforte Group… Clearly the Rural Group is liable given the well-known bankrupt status of Petroforte Group…*
>
> *In view of the foregoing, I hereby determine that a copy of this order and of the Administrator's statements shall be served on the Central Bank, and also on the Public Prosecutor's office, so that each may take measures within its competence against Rural Group, in view of what is found*

herein, and that all useful documents be placed at the disposal of the Central Bank at its simple request.

Based on these facts, as a guarantee to the estate's creditors, I ORDER SEIZURE of all assets listed on pages 22 and 23 of these case papers [Sobar as well as the other Securinvest assets mentioned above] in view of the mixing of the relations and assets now inferred. The case papers demonstrate the fraud, the perversion of the corporate object and the bad faith of those involved. Hence it is appropriate, as a preliminary, to disregard the legal personality of all these associated companies, and to extend to them the bankruptcy of the Petroforte Group, in view of the embezzlement of assets and the erosion of capital which the financial group promoted, in collusion with Mr. ARI NATALINO. The management of Rural Group were included in this aspect. In light of the Consumer Defence and Civil Codes, the personal assets of the defrauders are liable for the company's debts, given the willful misconduct identified above.
I therefore rule that the effects of the bankruptcy shall be extended to all the companies listed on page 02, and that the usual procedure shall be followed.

I order that an on-line stop be placed on all accounts of the companies and persons involved, the amount of which shall be as stated on page 40.
I order the appointment of Mr. ALEXANDRE CURY DE REZENDE, a person trusted by this court, as MANAGER of the company SOBAR S.A.…The commission requested shall be issued for that purposes. The Military Police shall take action for the requested purposes. The brief shall be carried out by the Administrator in Bankruptcy, and the manager shall lend support and write a report of the proceedings and of the measures taken... ANAC[77] is to take action to ground the aircraft".

162. A number of arguments were raised on behalf of the Plaintiffs in relation to this Judgment of Judge Beethoven. First, it is said that its real rationale was the finding that the Sobar Transaction was a "*flagrant sham*" and that it was on that basis the Judge decided to "*disregard the legal personality of these associated companies and extend to them the bankruptcy of the Petroforte Group*". Further, that nowhere did the Judge

[77] The National Civil Aviation Agency of Brazil

purport to rely upon the common economic group theory. Rather, as mentioned above, it was Judge Akel of the TJSP who first invoked the theory in relation to Securinvest and Petroforte.

163. It was therefore also contended in argument and by Mr. Macaulay in his evidence on behalf of the Plaintiffs, that Judge Beethoven got the facts and the law wrong when he made this judgment. As to the law, based on Brazilian legal advice, Mr. Macaulay contends that under Brazilian law, a third party (in this instance the Rural Group, including Securinvest) and its assets may be brought into another company's bankruptcy proceedings *only* if :-

(i) The bankrupt entity and the third party acted with an intent to defraud creditors; and

(ii) The two companies were part of a "common economic group", i.e: acting under common ownership and control.

164. While insisting that the Sobar Transaction is not a sham (which he emphasized is the very issue joined before another Brazilian court in the Revocation Action yet to be determined), Mr. Macaulay contends that the evidence, including the Cayman Disclosure which was obtained by Dr. Braga in this jurisdiction with the aid of the Defendant, confirmed that there was in reality no factual basis for a finding of "*common economic grou*p" as between Securinvest and Petroforte and/or between Banco Rural and Petroforte, as that concept is to be understood at Brazilian law. As Mr. Macaulay contends, the concept requires there to be common ownership between Securinvest and Petroforte, a state of affairs that never, in fact, existed as the Cayman Disclosure merely

proved that Katia Rabello is (and always has been, with her father or individually) the UBO of Securinvest.

165. This is a criticism which was maintained in the Plaintiffs' pleadings in respect of the Brazilian judgments, including the TJSP's Judgment of 30 September 2008, all the way up to the final decision of the STJ in August 2011. The Plaintiffs also emphasizes that the final STJ decision (to be considered below), itself followed after Dr. Braga's obtaining of the Cayman Disclosure and so must have been influenced by it.

166. The Plaintiffs aver that in this way, the Cayman Disclosure was pivotal in the erroneous finding of common economic group being ultimately upheld. They say that although Judge Beethoven had already made his Judgment before the Cayman Disclosure was obtained, the ultimate outcome before the STJ was undoubtedly influenced by the Cayman Disclosure.

167. There is no dispute that the STJ certainly had access to the Cayman Disclosure.

168. This criticism that the common economic group theory was misapplied by the Brazilian courts is strongly rejected by the Defendant through Mr. Simpson. He characterizes it as an impermissible collateral attack upon the judgments of the Brazilian courts, judgments to which he argued, this Court is, by principles of comity, obliged to defer and respect.

169. An important consideration of this duty of comity insists Mr. Simpson, is the fact that the STJ, as the final appellate Court, was bound by the findings of fact by the Courts below and that both Judge Beethoven and the TJSP had concluded that the factual basis for the extension of the Petroforte Bankruptcy over Securinvest was proven.

170. Faced with these arguments and when pressed by this Court during the latter days of the hearing, Mr. Akiwumi sought to explain that no criticism of the Brazilian judgments

themselves is intended by the Plaintiffs. Rather, that what the Plaintiffs contend is that the obtaining *ex parte* of the Cayman Disclosure by the Defendant and the unilateral and unwarranted[78] deployment of it by Dr. Braga before the Brazilian Courts, as well as its release to the BCB and ultimately to the media, deprived the Plaintiffs of the opportunity to contain its harmful impact and the ultimate prejudice which it caused to them, in the different arenas in Brazil.

171. The Plaintiffs claim that had they been allowed notice of the Defendant's applications to this Court on behalf of Dr. Braga (instead of being denied notice due to the gagging orders obtained by the Defendant)[79], the Plaintiffs could and would have applied to this Court for, at least, protective measures to contain the unwarranted misuse of the information in Brazil. Had they had this opportunity, that at the very least, they would have limited the consequences of the Defendant's actions in acting for Dr. Braga, in breach of its duties to them[80].

172. They might well, say the Plaintiffs, even have managed to persuade this Court to refuse or revoke entirely the orders for disclosure, had they had the opportunity to explain that the Revocation Action instituted by Dr. Braga himself was still pending and therefore that the allegations of fraud raised against them and relied upon by Dr. Braga in his applications to this Court, were yet to be determined by the Brazilian courts. In this

[78] In the sense of not being authorized by this court.
[79] Which prevented Equity Trust and CIBC as the respective respondents to the Norwich Pharmacal applications from notifying the Plaintiffs, their clients.
[80] See Statement of Claim paras 85(xi), para 94 (ix) and (x); (in relation to the absence of urgency which negated the need for ex parte applications which excluded the Plaintiffs); para 110 (citing the consequence of the ex parte action taken by the Defendant which was that the Plaintiffs were unaware of the defendant's actions until November 2010 after the Cayman Disclosure had been deployed against them in the proceedings in Brazil, the United States, Belize and the British Virgin Islands ("BVI"), paras 117, 125 and 127(iii),133 and 135 (alleging again, the failure to notify the Plaintiffs). Finally, and most expressly on this point para 136 pleads that *"By reason of the Defendant's wrongful conduct in failing to inform the Plaintiffs of the (Norwich Pharmacal applications and orders) [the Plaintiffs] had no knowledge of the First Norwich Pharmacal Order when it was made. In those circumstances and by reason of the Defendant's wrongful and unlawful conduct, the Plaintiffs were unable to apply to Court to seek relief prior to either (i) the Defendant's egregious breaches of contract, fiduciary duty and/or its duty of care; or (ii) prior to the wrongful consequential disclosure of confidential documents being made to the Defendant on behalf of Dr. Braga"*.

regard therefore, this Court might have thought it proper to require Dr. Braga to first obtain the adjudication of the Revocation Action before entertaining his applications. The most telling factor against the Plaintiffs in Dr. Braga's applications to this Court, were the allegations of fraud upon the Petroforte creditors. Yet, neither Dr. Braga nor the Defendant disclosed when seeking the Norwich Pharmacal Orders, that these were as yet merely unproven allegations.

173. I am persuaded that these arguments and pleadings are well grounded in probability. In its May 2011 Judgment, this Court, when reviewing the Orders for disclosure and disapproving of most (even while approving of some) of the Cayman Disclosure:

(i) expressly referenced the fact that the allegations of fraud against the Grupo Rural interests remained unproven, and,

(ii) moreover, found that there had been no risk of dissipation of assets belonging to the Petroforte Estate such as could justify the wider disclosure that had been obtained,

(iii) and held that in any event, the urgency contended for by Dr. Braga in getting the disclosure and gagging orders[81] was unfounded in light of Judge Beethoven's injunctive order and appointment of a manager/receiver over all Securinvest assets, including over Sobar, the only alleged Petroforte asset identified; and

(iv) was concerned that Dr. Braga could be regarded as operating under a conflict of interest in light of the incentivized scheme for his (and his court-appointed

[81] As set out in his First Affidavit at [14]-[15]: "*This application is urgent. The reasons for the urgency are that the Brazilian Superior Court has given me a limited time in which to provide it with evidence as to the true beneficial owners of Securinvest. It has imposed a limited time window for that evidence to be provided, which is due to expire on Tuesday, 6 July 2010.... In addition…. If those who are improperly seeking to avoid the turnover of a potential US$500 million of value to the Petroforte Estate are aware of my enquiries in Costa Rica, I suspect they are likely to take steps to frustrate my enquiries elsewhere, including in the Cayman Islands…."* And further at [43] "As I have explained above, one of the reasons this Application is so urgent is because of the value of the assets vested in Securinvest...." Court Bundle Vol B May 2018 Hearing Tab 4.2.

investigator OAR's)[82] remuneration - remuneration which was based upon the amount of the recoveries achieved on behalf of the Petroforte Estate. This especially was a very sensitive fact says the Plaintiffs, which this Court was entitled to be informed about from the outset, when assessing Dr. Braga's credibility as the sole witness who gave evidence in support of his application for the far-reaching disclosure orders which were obtained, important aspects of which were later, upon review, reversed by this Court for being "*premature, unjustified and impermissibly wide*[83]". It is also remarkable that this Court also then made an order for the retrieval of most of the Cayman Disclosure.

174. Thus, in essence, the claim of the Plaintiffs is for loss of opportunity to seek remedial relief as a result of the Defendant's actions in obtaining the *ex parte* orders on behalf of Dr. Braga. I will return to consider the claims as framed in these terms, when dealing with the pleadings on breach and causation and the law relating to them.

175. An important marker to lay down here, is that this aspect of the claim does not involve this Court having to consider any alleged "collateral attack" upon the judgments of the Brazilian courts. It is trite and I accept, that any remedial relief in respect of its own Orders would have been a matter for this Court to grant either to preempt the use of the Cayman Disclosure in Brazil (and in Florida, USA; the BVI and Belize where it was also used to the detriment of the Plaintiffs) or to delimit its use in those jurisdictions. It is to be noted in this context as to the probable outcomes, that when this Court made its

[82] OAR Consultantes Consultoria Ltda, the private investigatory firm engaged by Dr. Braga to assist in his investigation in Brazil and overseas with the aim of finding and "*repatriating*" to the Petroforte Estate, any assets belonging to any of a long list of Rural Group and Petroforte companies. OAR, by clause 5 of its agreement with Dr. Braga, was expressly to be remunerated only on the contingency of recoveries, at 20% of value and at 30% of value, depending on whether it simply produces evidence which enabled the confiscation of known assets or whether it actually discovered and assisted in the recovery of unknown assets. See December Hearing Bundle Tab 3.1, exhibited to Mr. Macaulay's ninth affidavit.

[83] See the May 2011 Judgment (above), in which this court also held that in light of the Revocation Action already instituted and the appointment of a receiver by Judge Beethoven over all Securinvest assets, there was no risk of dissipation and no urgency to justify Dr. Braga's seeking the breath of disclosure that he obtained.

retrieval order on 25 July 2011 in respect of most of the Cayman Disclosure, the Brazilian Courts did, at least, purport to comply[84].

176. I return here to the chronology of events in Brazil.

177. Having failed in its appeal to the TJSP, Securinvest appealed finally against Judge Beethoven's August 2007 Judgment to the STJ where it did indeed contend, among other things, that Judge Akel's finding of "*common economic group*" was wrong.

178. Evidence was presented to the STJ on behalf of Securinvest which sought to show that far from there being any Rabello, Rural Group (or for that matter Natalino) interest in Securinvest, that company, while owned by Arnage and Brooklands, was ultimately owned by Costa Rican individuals through Costa Rican companies, as the registered owners of Arnage and Brooklands.

179. This was a state of affairs which had come, at that time, to be reflected on the share registers of Arnage and Brooklands maintained in this jurisdiction (the "Costa Rican structure").

180. But the Costa Rican structure was in reality, an artifice put in place before, on the instructions of Katia Rabello.[85] By those means, the Costa Rican individuals came to hold the shares in Arnage and Brooklands merely as her nominees but the Costa Rican structure was presented to the STJ as the real beneficial ownership of Securinvest.

181. Informed by OAR from their investigation in Costa Rica that the Costa Rican individuals were "*people of straw*", Dr. Braga persuaded the STJ (in circumstances to be more

[84] See Certificate to the Grand Court, sent by the Brazilian Court, certifying that the retrieval order had been implemented: Vol. M Tab 90. "Purport to comply", because the BCB was nonetheless allowed to use the Cayman Disclosure to the detriment of the Plaintiffs.

[85] According to paragraph 11 of the Amended Defence, the false information about the beneficial ownership of Securinvest through Arnage and Brooklands was submitted to the STJ on 15 October 2009 and re-submitted on 5 November 2009, the only change being that the names of the Costa Rican holding companies were switched from Arnage to Brooklands and vice versa.

closely examined below) that he should be allowed to come to the Cayman Islands to investigate further into the UBO of Securinvest, through Arnage and Brooklands.

182. The STJ gave directions to allow him to do so and this was how he came to engage the Defendant to act for him in this jurisdiction.

Katia Rabello's reasons for lying to the STJ.

183. This Court insisted upon an explanation from Katia Rabello of her reasons for devising the Costa Rica Structure. In response, she filed her third witness statement in these proceedings[86]. The creation of the Costa Rican structure to obscure her status as the owner of Arnage and Brooklands and so, as the UBO of Securinvest as well, she contends before this Court, was not intended to defraud Petroforte's creditors by misleading the STJ over the existence of the "common economic group" issue. Instead, she contends that it was meant only to prevent the wholesale confiscation of all Securinvest assets (wider than just Sobar) and even greater harm to the Rabellos' interests - harm which she correctly anticipated would result from the public disclosure of her status as UBO of Securinvest in Brazil.

184. This is a contention which is sought to be explained on the basis also of her Brazilian legal advice, which is that her status as UBO of Securinvest, far from showing any commonality of ownership between the two Groups – Rural and Petroforte – rather proved instead that there was no such commonality of ownership as it confirms that only she, a Rabello and no Petroforte interest, owns Securinvest.

185. If the Securinvest issue was the only concern, there would therefore have been she asserts, no need to obscure her status as its UBO in the context of the STJ appeal. Her

[86] December Hearing Bundle. Tab 1 (Red)

status as UBO should have resulted in Securinvest being released from the Petroforte bankruptcy. This, she argues, should therefore be taken by this Court as confirming that her real objective was not to mislead the STJ or defraud Petroforte creditors but to prevent the even more harmful consequences of the disclosure of her status as UBO of Securinvest to the BCB and in the public domain in Brazil.

186. Especially in this regard, she invites this Court to consider that by the time of the STJ hearing, the BCB had also embarked upon its own investigation into Banco Rural's involvement in the allegedly fraudulent Sobar transaction, as prompted by Judge Beethoven's Judgment of 24 August 2007.

187. And so, not only was her family and herself at risk of losing Securinvest's Sobar assets, they were (and remain) also at risk of losing all of Securinvest's other assets as well. Further, that they have in fact lost Banco Rural itself which has been compulsorily liquidated by the BCB following a run on the bank caused by the BCB's investigation having become public knowledge. All these events she avers, were triggered or exacerbated by the Cayman Disclosure being deployed or publicized against her family in Brazil.

188. The Costa Rican structure is therefore ultimately sought by her to be explained as intended not to deceive the STJ in its determination of Securinvest's appeal but to protect Securinvest from the "confiscation" of its other and more valuable non-Sobar assets, by Dr. Braga.

189. Her family she asserts, was willing to have the question of the Sobar Transaction resolved in the Revocation Action and this was what would have happened had Securinvest succeeded in its appeal to the STJ. Thus there was no intention to defraud the

Petroforte Estate of Sobar assets. It is the extension of the Petroforte bankruptcy to all of Securinvest's assets which the Plaintiffs regard as confiscatory and which she sought to avoid. And further, for reasons also articulated by Mr. Macaulay in his evidence, the campaign against Securinvest was all part of the incentivized scheme by which Dr. Braga and his advisers OAR[87] seek unjustly to enrich themselves at the expense of the Rural Group and the Rabello family.

190. These are concerns and explanations upon which Katia Rabello elaborates in her third witness statement[88] and for which she gets supports from Mr. Toledo and Mr. Macaulay in their evidence.

191. For reasons which I trust will become apparent from my discussion of the legal principles on liability below, I did not need to reach a conclusion now on the veracity or correctness of these concerns and explanations.

192. Whether or not Katia Rabello's concerns and intentions were as she explains, will be of relevance to the *ex turpi causa* defence raised by the Defendant and will be examined further in that context below.

Conclusions on the Plaintiffs' loss of opportunity to contest the Norwich Pharmacal applications

193. What I was required to conclude upon and which I regard as established for the purposes of summary judgment on liability, is that, at minimum, there was indeed as pleaded[89] a loss of the earliest opportunity for the Plaintiffs to defend themselves in the context of the

[87] As mentioned above, it is now acknowledged that Dr. Braga is assisted and advised by OAR (which was appointed by Judge Beethoven to assist in his inquiries). Mr. Macaulay's unchallenged evidence is that both are remunerated by way of commission as a percentage of recoveries made on behalf of the Petroforte Estate.
[88] See immediately below.
[89] See again references to the Pleadings above.

proceedings before this Court. Further, that this loss of opportunity arose from the Defendant's actions on behalf of Dr. Braga.

194. The Defendant relies upon the fact that this Court after an *inter partes* hearing, approved those parts of the disclosure which revealed the evidence of Katia Rabello's status as UBO of Securinvest.[90] But that cannot in my view, be relied upon by the Defendant as an answer to liability for the loss of opportunity for the Plaintiffs to have challenged the applications for disclosure.

195. I explain my reasons for this conclusion at this juncture, as follows.

196. First, it is notable, as discussed above, that other important aspects of the Cayman disclosure were found by this Court to have been unjustified and went well beyond disclosure of the UBO of Securinvest. Given all the other arguments that the Plaintiffs would likely have been able to put before this Court, they may well therefore have succeeded, either in preventing Dr. Braga's deployment of their confidential information in Brazil altogether or at least, in confining the use of it to the singular issue of the identity of UBO, which was pivotal to Securinvest's appeal then before the STJ.

197. The former of those two propositions now finds support in the likelihood that Dr. Braga would have been compelled to explain to this Court why, in the absence of risk of dissipation of Sobar assets, he should not first have been required to prove his allegations of fraud in the Revocation Action and in so doing, also compelled to answer to the concerns over his and/or his advisors, apparent conflicts of interest. These were concerns which could have led this Court at first instance, had they been revealed, to question the *bona fides* of his applications especially for the ***Bankers Trust*** disclosure.

[90] Judgment delivered on 10 June 2011, formal Order 20 May 2011.

198. The latter proposition now also finds support in the fact that this Court would have been inclined, as indeed it showed it was[91], to impose restrictions to confine the use of the Cayman Disclosure to only so much of it as was necessary for answering the specific question raised by the STJ (the subject of its mandate to Dr. Braga for coming to the Cayman Islands); viz: the identity of the UBO of Securinvest.

199. It is the denial of the opportunity to establish either of those two propositions that I regard as buttressing the Plaintiffs' claims for breach of duty and consequential damages.

200. Ultimately however, the Plaintiffs (Katia Rabello in particular) will also need to establish to the necessary civil standard of proof, the various alleged losses as the result of this averred loss of opportunity. This issue of causation will also necessarily be examined in some detail below for the purposes of summary judgment on liability. The issue arises whether the Plaintiffs are entitled to claim equitable compensation for breach of fiduciary duty (as they claim primarily) without proof of causation or must satisfy the "but for" causation test, in seeking to recover damages for breaches of the equitable as well as contractual duties.

Katia Rabello's Bankruptcy

201. A very obvious consequence of the use of the Cayman Disclosure was the reliance on it by Dr. Braga, for petitioning *ex parte* to put Katia Rabello herself into the Petroforte bankruptcy and for persuading Judge Beethoven to hand the Cayman Disclosure over to the BCB[92].

202. It is an irresistible conclusion that these consequences would likely have been avoided had she had the opportunity to oppose the granting of the Cayman Disclosure.

[91] See orders made upon the CR(P)L application, at Court Bundle B May 2018 Hearing, Tab 4.5, [4].
[92] This petition to Judge Beethoven's Court will be examined below.

203. My reasons specifically for this conclusion will become clearer below after an examination of the Cayman Norwich Pharmacal Proceedings, including the *inter partes* proceedings in which the Plaintiffs were belatedly able to participate before this Court, as well as the events which followed in Brazil.

204. I return now to the chronology of events leading to Dr. Braga's applications to this Court.

The STJ Directions and the Norwich Pharmacal Applications to this Court leading to the Cayman Disclosure and Katia Rabello's bankruptcy

205. As mentioned above, Dr. Braga acting through OAR, had made his inquiries in Costa Rica. He concluded that the individuals behind the Costa Rican structure were "*straw men for unknown third parties"* [93] a situation which was not consistent with their purported beneficial ownership of a company as valuable as Securinvest. One of them had, moreover, denied having any interest in or knowledge of Arnage and Brooklands[94].

206. Dr. Braga was therefore able to persuade the STJ that he should be allowed to make further enquiries in the Cayman Islands into the ultimate beneficial (not merely legal) ownership of Securinvest.

207. The STJ, per Justice Nancy Andrighi, agreed that he should further his investigation but as a precautionary measure to avoid undue prejudice to Securinvest, she ordered the temporary suspension of the extension of the Petroforte bankruptcy over Securinvest.

208. As expressed by Justice Andrighi in her order of 22 September 2009 (translated)[95]:

> *"Doubt as to the economic group to which SECURINVEST belongs initially suggests that its rights should be protected. Until it is possible to determine which economic group SECURINVEST belongs to, I consider it*

[93] Dr. Braga's First Affidavit dated 26 May 2010 filed in support of the Norwich Pharmacal applications, at [12].
[94] Op cit, ibid.
[95] From pages 4-5 of the translation at Core Bundle Vol 2 Tab 1A.2

appropriate to suspend, for the time being, the winding up order before the harm caused to its business becomes irreversible.
However, this measure cannot continue indefinitely. The uncertainty that hangs over this subject must be cleared up.

According to the information contained in this injunction application, SECURINVEST is a company made up of two shareholders: ARNAGE HOLDINGS LTD and BROOKLANDS HOLDINGS LTD. (both of which are legal entities based in a foreign country). Documents have been submitted within the proceedings which recount that neither of the two foreign companies have among their shareholders any of the businesses or individuals involved in Grupo Rural or Grupo Petroforte, according to the information checked by the Sao Paulo Public Prosecution Service.

That information however, is not enough to clear up the doubts which these proceedings throw up. SECURINVEST must not just limit itself to saying who does not have a share in its capital. It is possible, for example, that the businesses ARNAGE and BROOKLANDS have among their shareholders other legal entities, and so indirectly it might be possible to identify the two economic groups. Therefore, instead of saying who its shareholders are not, SECURINVEST must indicate who actually has a shareholding in its capital in order to eliminate the impasse over this issue.

For these reasons, I hereby grant this interim injunction and suspend the winding up order against SECURINVEST for a period of 15 (fifteen) days. Within that time limit, the applicant must submit to the High Court of Justice documents which specifically demonstrate who its shareholders are, who the shareholders of the shareholders are, and so on. This must be done in such a way that the corporate chain is unraveled and all the individuals with a direct or indirect share in the company's capital are revealed.

After that information has been submitted, the matter must return for a decision on whether to confirm or revoke the interim injunction hereby granted.
Let the respondent be served so that it may submit a response within the legal time limit."

209. From the foregoing it is clear that the issue before the STJ was two-fold: (i) the identity of the UBO of Securinvest and (ii) whether Securinvest should remain within the Petroforte Bankruptcy by operation of the legal theory of common economic group.

210. There was at that time, no question of Katia Rabello herself or her assets being placed into the Petroforte Bankruptcy and there is nothing to suggest that the STJ had such a possible outcome in mind.

211. But as was to be soon apparent, Dr. Braga had a different agenda which was not disclosed to this Court.

212. Having come to Cayman, Dr. Braga retained the Defendant.

213. The first application made by the Defendant on his behalf by reliance on the ***Norwich Pharmacal*** principle [96], sought orders addressed to Equity Trust for disclosure of information held on behalf of Arnage and Brooklands (as the registered owners of Securinvest).

214. This was on the basis that Equity Trust, in terms of the ***Norwich Pharmacal*** principle, had become "*innocently mixed up*" in the fraudulent wrongdoing of Securinvest (and by association Arnage and Brooklands) in its attempts to defraud Petroforte of its assets.

215. This application, made *ex parte* and so without notice to the Plaintiffs, resulted in orders made on 27 May 2010 for the disclosure to Dr. Braga of confidential information which showed not only that Katia Rabello was the UBO of Securinvest through Arnage and Brooklands, but also that on her instructions, the registered offices had been changed from CIBC to Equity Trust. It also showed, ultimately to her greatest embarrassment, that also on her instructions to Equity Trust given only some days after Justice Andrighi's Order, the Costa Rican structure had been put in place.

216. Recognizing that Equity Trust would have had a fiduciary obligation to inform its clients of the 27 May 2010 Orders ("the Equity Trust Orders") and was obliged to bring an

[96] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133.
His affidavit also cited the Bankers Trust principle: *Bankers Trust v Shapiro*, (below)

application to this Court before it could divulge its client's confidential information[97], the Defendant on Dr. Braga's behalf also sought and obtained a "gagging" order, preventing Equity Trust from notifying the Plaintiffs of the existence of the proceedings and of the Equity Trust Orders.

217. The justification for such orders was said by Dr. Braga to have been to prevent the respondents (first Equity Trust and later CIBC) from "*tipping off*" their clients "*which would likely frustrate and prejudice my investigation. I also seek an injunction which would have the effect of keeping my investigation confidential in Cayman with respect to Brooklands and Arnage*."

218. Dr. Braga having thus obtained information from Equity Trust which also showed the earlier involvement of CIBC as service provider to Arnage and Brooklands (and so indirectly to Katia Rabello); a second application[98] was made on his behalf by the Defendant resulting in an order of 1 July 2010 directed to CIBC for disclosure (the "CIBC Orders"). Gagging orders were again obtained to prevent CIBC from notifying its former clients.

219. Together, the Equity Trust Orders and the CIBC Orders are hereinafter referred to as "the Norwich Pharmacal Orders".

220. As already mentioned, the information sought and ordered to be disclosed extended far beyond that which showed the UBO of Securinvest and included other information held by the respondents about the financial affairs of the Plaintiffs.

221. Of its own motion, this Court had however, required of Dr. Braga certain undertakings to limit the use and disclosure in Brazil and elsewhere of the confidential information

[97] Under the law as it then stood, pursuant to The Confidential Relationships (Preservation) Law, (CR(P)L) , section 4.
[98] Again relying on the Norwich Pharmacal and Bankers Trust v Shapiro principles.

obtained by way of the Norwich Pharmacal Orders. Essentially, the undertakings were that the information not be used or disclosed by him outside of the Petroforte bankruptcy proceedings.

222. Unfortunately, and perhaps inevitably given the entirely *ex parte* nature of the proceedings, those undertakings proved not to have been sufficiently worded to have prevented Dr. Braga from initiating or prompting the dissemination of the Cayman Disclosure beyond the STJ, in Brazil.

The *inter partes* review by this Court leading to the May 2011 Judgment

223. The insufficiency of the undertakings became a subject of concern for the Plaintiffs when, on the *inter partes* basis long after Dr. Braga's deployment of the Cayman Disclosure in Brazil[99], they sought a review of the Norwich Pharmacal Orders and the Cayman Disclosure by this Court.

224. The unduly extensive nature of the Cayman Disclosure and its onward dissemination to the BCB or acquiescence in it by Dr. Braga, were the subjects of deserved criticism by the Plaintiffs and this Court in its May 2011 Judgment.

225. However, no finding of a contemptuous breach of his undertakings was made against Dr. Braga, given the lack of clarity and specificity of the wording. The Court expressed its concerns all the same, that the spirit of the undertaking had been violated by him.[100]

Katia Rabello's bankruptcy

226. Dr. Braga's first port of call after obtaining the Cayman Disclosure was not the STJ but Judge Beethoven's First Instance Bankruptcy Court.

[99] When for the first time, the Plaintiffs became aware of the Norwich Pharmacal Orders and Cayman Disclosure having been obtained.
[100] See Judgment of 20 May 2011 (extracted below) at para 265.

227. There, he deployed the Cayman Disclosure in support of a new (and again) *ex parte* petition for the extension of the Petroforte Bankruptcy to Katia Rabello personally, to her lawyer and close associate Flavio Barbosa Do Amaral Jr and to all other identifiable entities of the Rural Group. This petition appears to have relied upon a different legal theory or premise, viz: the "disregarding of legal personality" although apparently to some as had been invoked by Judge Beethoven himself against Securinvest at first instance.[101]

228. Judge Beethoven readily granted the petition, as appears from the strident language of his Judgment of 28 October 2010. It is clear that his Judgment was heavily influenced by the Cayman Disclosure as it revealed Katia Rabello's lie to the STJ. Relevant passages are excerpted as follows[102]:

> "*This matter concerns seeking CIVIL LIABILITY AND THE DISREGARDING OF LEGAL PERSONALITY, along with an application for a freezing order submitted by the LIQUIDATED ESTATE OF PETROFORTE BRASILEIRO DE PETROLEO, and which cites the banker KATIA RABELLO and the lawyer FLAVIO BARBOSA DO AMARAL JUNIOR. The Trustee [illegible] a huge amount of documents. These documents for the most part were obtained abroad by the Trustee who applied in camera from the courts of those countries at hearings held in camera. This was all done with the authorization of this court and the Office of Counsel for the State consented to this step being taken, as appears in the secret action taken before this court.*
>
> ..
>
> *Through this brief report I DECIDE AS FOLLOWS.*
>
> *INITIAL DECLARATION*
>
> *Even after 32 years of service to the Judiciary of Sao Paulo, this lowly judge is suddenly faced with a truly shocking situation.…The respondent relied upon LIES and FRAUDULENTLY AVOIDING the Honourable SUPERIOR COURT OF JUSTICE, as represented by the brilliant and*

[101] See pp 42-44 above.
[102] From the translation at Core Bundle Vol 2 Tab1A.5

esteemed JUSTICE NANCY ANDRIGHI, the greatest judge the JUDICIARY of this country can boast of; it disrespected the moral grandeur of Justice Andrighi, who granted the PETROFORTE (sic) GROUP an interlocutory injunction suspending the extension of the effects of the Winding Up Order by way of an interim measure issued by that Honourable Court- as is evidenced by the documents attached to the application by the diligent Receiver, ALVES BRAGA
UBI GENTIUM SUMUS? As Cicero would say.

The key issue relating to the interlocutory order granted by the aforementioned esteemed Justice lay in unraveling the link which the shareholders in SECURINVEST had with the PETROFORTE ECONOMIC INTEREST GROUP. To put another way, it is alleged that the Court acted erroneously because, allegedly, no one from SECURINVEST had any relationship with any company in the LIQUIDATED GROUP[103]

Thus, despite that initial astonishment, the documents attached, and obtained from abroad by the Trustee, demonstrate that the order of the brilliant Justice NANCY ANDRIGHI, Interlocutory Order [which require SECURINVEST] to reveal

> *"…exactly who the shareholders are, who the shareholders of the shareholders of the shareholders are and so forth…"*

was responded to by SECURINVEST [by] FALSEHOOD- because, according to documents from the [illegible] country [presumably Cayman Islands], COSTA RICA, the shareholders in SECURINVEST are ARNAGE HOLDINGS in the Cayman Islands – which has one shareholder, DESAROLLO DE PROYECTOS S.A., with only one shareholder, by the name of Jose Ignacio Jenkins Moreno – and Brooklands HOLDINGS, also from the Cayman Islands – which has its shareholder the individual Adriana Cordero Ehreberg.

It should be noted that the very clear order of the esteemed Justice revealed that the information provided by SECURINVEST was to the effect that, from among their shareholders, whether individuals or companies, neither ARNAGE HOLDINGS nor BROOKLAND HOLDINGS had shareholdings in Rural Group

[103] It must be noted here that with the Brazilian legal theory framed in those terms, the Cayman Disclosure, in revealing the link between Securinvest and Rural Group (through Katia Rabello), did not reveal that anyone from SECURINVEST had any relationship with any company in the "LIQUIDATED GROUP" (ie: Petroforte). This, Katia Rabello argues, was the mistaken "common economic group" basis for the extension of the Petroforte bankruptcy to Securinvest. A different basis was however apparently adopted here against Katia Rabello herself on Dr. Braga's petition by reliance on Art 50 of the Brazilian Civil Code, and so by disregarding her separate legal identity (and that of the other subjects) to treat them as liable for the debts of Petroforte. This emerges more clearly from later passages in Judge Beethoven's Judgment below. Despite this change of tact by Dr. Braga deployed ex parte against her, Katia' Rabello's appeal to the TJSP was refused. She appealed further to the STJ where her appeal is yet to be concluded.

or the PETROFORTE GROUP… and therein lies the core falsehood used to deceive…

The attitude of SECURINVEST is incredible – a thousand times incredible. It is a product and demonstration of the prurient times in which we live that the Superior Court and the meticulous Judge Rapparteur could be FRAUDULENTLY DECEIVED. The rectitude and probity of the Reputable Order were defiled by the action of SECURINVEST which touches on LITIGATION IN BAD FAITH…in that way SECURINVEST gambled its defence against an incontrovertible fact, distorting the documented truth after the Court Order was made by creating [illegible] SHAREHOLDER COMPOSITION in order to make believe that there was no connection between RURAL GROUP and the PETROFORTE GROUP, something which was manifestly unfounded, invented and deceitful and which showed disrespect for the Courts and the esteemed Judge Rapporteur. SECURINVEST was oblivious of the fact that these claims did not –nor could they – produce any returns from lies…

Even more incredible is the disrespect which SECURINVEST showed to the Courts when it fraudulently altered the shareholder composition of the companies located in tax havens because the documents which the Trustee obtained in Costa Rica, the Cayman Islands and the British Virgin Islands reveal without shadow of doubt that the abovementioned shareholder composition was created after the date when the brilliant Judge Rapporteur made the order requiring clarification as to [ultimate beneficial ownership].

.. Thus it has been fully established that the ultimate beneficiary of SECURINVEST always was and continues to be KATIA RABELLO…

To put it another way; at the time of this Court's decision making SECURINVEST liable for the debts of PETROFORTE in light of clear connections which it has with the liquidated company, Katia was the SECURINVEST shareholder – and FALSE INFORMATION has been supplied to the SUPERIOR COURT OF JUSTICE, because as at 05.11.2009 an email was sent (see page 155) stating that ARNAGE and BROOKLANDS had been incorporated in 2000- it also stated that these companies form part of the structure set up in order to enable Banco Rural to show a better financial balance – so SECURINVEST was set up to in order "to clean up Banco Rural's balance sheet"[104]…

Similarly, it is not possible to say that the owners of SECURINVEST had no relationship with the liquidated company. The dismissal of the director in the Cayman Islands by Katia Rabello and his replacement by the Equity Trust [illegible] intention of misleading JUSTICE NANCY ANDRIGHI. This was

[104] It is unclear why, in light of this earlier admission by email on 05.11.2009, it was nonetheless alleged by Dr. Braga (and accepted by Judge Beethoven) that the connection between SECURINVEST and Rural Group (through Katia Rabello) was sought to be hidden from the Brazilian Courts.

untruthful, it created a new circumstance that would frustrate the true situation with regard to the control of SECURINVEST, and it was a manifestly malicious act.

Note must also be taken of the letter from FLAVIO BARBOSSA AMARAL giving an account of the creation of Arnage and Brooklands so as to "enable Banco Rural to produce better financial statements" and "to clean up the balance [sheet].[105]*"…*

Similarly, the documents reveal [illegible] that the deceased bankrupt ARI NATALINO was involved with KATIA RABELLO, with River South as intermediary for him and SECURINVEST for her- which by the way was admitted by ARI when he was heard in court. Thus by linking the word of ARI to what FLAVIO AMARAL stated in the letter revealed above, [it can be seen] that SECURINVEST was created to obtain these loans…

CONCLUSION

There can be no doubt that hundreds of documents have been omitted, relating to the promiscuity between the companies in the BANCO RURAL [GROUP] and the PETROFORTE GROUP- all in the [illegible] of decisions predating this Judgment and since confirmed by the Court of Justice of SAO PAULO[106]*. The true malicious litigation perpetrated, albeit unsuccessfully, by PETROFORTE was revealed, and note should be taken of the judgments of the honourable LABOUR COURT and the Report from the BANCO CENTRAL (CENTRAL BANK OF BRAZIL), all of which have been appended by the Trustee. For that reason, imposition of personal liability on the parties cited in this action must be rigorously enforced, in view of Art 50 of the Civil Code* [107]

OPERATIVE PART

In light of the foregoing, I ALLOW IN FULL the application made by the Trustee. I order that the legal personality of all the companies identified on page 102 be disregarded due to the clearly established link with the PETROFORTE GROUP, despite the fact that it has been noted that a number of directors, controllers and managers are declared to be liable for the irregularities found. I impose a freezing order to be placed on the assets of KATIA RABELLO and of FLAVIO BABOSA DO AMARIL JUNIOR pursuant to Art. 40 Decree Law n0.

[105] It is worth noting that while this aspect of the evidence as revealed by the Cayman Disclosure (as many other aspects) appeared to put the subjects of the petition in a negative light without having given them an opportunity to explain, the obvious explanation was that the use of Securinvest in this way was not in and of itself unlawful but an advisable strategy on which the Defendant itself advised, for the recovery of Banco Rural's bad debts and as illustrated by the Note Purchase Transaction.

[106] This is a reference to SECURINVEST'S appeal to the TJSP from Judge Beethoven's earlier judgment having been refused- the further appeal then taken to the STJ.

[107] Article 50, that which was relied upon here for " *the disregarding of legal personality*" provides: "*If legal personality is abused, through perversion of purpose or by the intermingling of assets, the courts may decide, on application by the party concerned or by the public prosecution service if it joins the proceedings, that the effects of certain given binding relationships extend to the personal assets of directors or members of legal persons*" – as taken from the translation of Dr. Braga's petition, of 20 June 2007, Core Bundle Vol 2 tab 1 page 791 of the bundle.

7.661/45 and an extension of the effects of the Winding up Proceedings to both so that their assets shall be liable to meet the debts of the Liquidated Estate, in light of their attitude to the matters under review. I therefore make the following orders:

1) *I order that the bank account of both be blocked and seized ELECTRONICALLY*
2) *The application from these individuals for DISMISSAL be dismissed in order to implement this action…*
7) *The BANCO CENTRAL shall be served with a copy of this decision, for the purposes set out in page 104 [of the petition]*
8) *A copy of this decision shall be sent by official letter to the Honourable JUSTICE NANCY ANDRIGHI, with a direction that the Trustee deliver the appropriate documents.*

The Registry Office shall be notified that, due to the fact that the proceedings have been ordered to be heard IN CAMERA in the Cayman Islands, only interested parties shall have sight of and free access to the court papers, along with their legal representatives…"

Relevance of Judge Beethoven's Judgment of August 2010 to the Plaintiffs' case

229. I must make a number of relevant findings and observations here about this Judgment by way of expansion on conclusions already recorded above.

230. First, (and without intending any criticism of the Judgment) its obvious far-reaching effects against Katia Rabello, going far beyond anything that this Court could have contemplated when granting the Norwich Pharmacal orders on the *ex parte* basis on which it did.

231. While Katia Rabello was named as a subject of the second Norwich Pharmacal application, no indication was given to this Court of Dr. Braga's intention to press, beyond the remit given him by the STJ in respect of Securinvest, for the extension of the Petroforte bankruptcy to her personally, by reliance upon the Cayman Disclosure.

232. Had that intention been disclosed to this Court, a different view may well have been taken of the making of the gagging orders which were sought and granted and which

resulted in the Cayman Disclosure being released from this jurisdiction to Brazil entirely without notice to her (or to any other Plaintiff).

233. Indeed, the specific basis upon which Dr. Braga was granted Norwich Pharmacal relief was emphasized by this Court in the May 2011 Judgment[108] where at [100] –[101] is noted the following:

> *"In response to those criticisms [as to his lack of standing to bring the Applications], Dr. Braga also presented an alternative argument- developed in his third and fourth affidavits – to the effect that he would, in any event, have been entitled as officeholder over the Petroforte Bankruptcy, to investigate the alleged 'economic group" connection with Securinvest and so entitled to Norwich Pharmacal relief in any event in that capacity, whether or not he remained as Administrator over Securinvest.*
>
> *I am obliged to explain that that is not a premise that I would have accepted given the clearly different basis on which he obtained the Norwich Pharmacal relief in his capacity as office holder over Securinvest."*

234. Thus, it was clearly not within the contemplation of this Court that Dr. Braga would have been deploying the information against Katia Rabello personally, or against her other interests within the Rural Group apart from against Securinvest itself.

235. Indeed, had such an intention been understood, a different view may well have been taken of the Norwich Pharmacal applications being allowed to proceed *ex parte*, in the first instance.

236. The very need for the gagging orders themselves would have been seen in a different light, orders which, in any event, could hardly have been necessary to ensure the compliance of CIBC and Equity Trust. Yet, it ought to have been apparent to the Defendant that Katia Rabello was at risk of the actions to be taken in Brazil by Dr. Braga, once armed with the Cayman Disclosure. She was in fact specifically named as a subject of the second Norwich Pharmacal application addressed to CIBC and which sought the

[108] Above.

wider disclosure about her financial affairs (including the Note Transaction involving Arnage and Brooklands on which the Defendant itself had advised). This wider disclosure – described by this Court as being of the unwarranted Bankers Trust type[109], had not been authorized by the STJ and was found by this Court[110], upon the eventual review of the Norwich Pharmacal Orders, to have been improperly obtained.

237. What the Defendant ought to have realized then may now be but a secondary consideration – foreseeability not being a requirement for liability for breach of fiduciary duty[111]. Its understanding then of the situation is, however, now relevant (assuming as I have found[112], that Katia Rabello was a client), to the issue of its actual breach of duty, in acting as it did against her and her interests on behalf of Dr. Braga.

The Plaintiffs' loss of opportunity to respond to the Norwich Pharmacal applications and the May 2011 Judgment

238. The Defendant's actions also go to Katia Rabello's loss of opportunity to respond to the Norwich Pharmacal and CR(P)L applications, and to do so before the Cayman Disclosure was allowed to leave this jurisdiction.

239. Anticipating an adverse conclusion on this aspect of the case - in particular as to the alleged breaches of duty owed to Katia Rabello - the Defendant's response, per Mr. Simpson, is essentially that there is in any event, no proven causation of loss because

[109] Citing *Bankers Trust v Shapira* [1980] 3 All E.R. 353, the leading case on the principles governing ex parte disclosure of financial information which may lead to the location or preservation of assets or where there is a risk of dissipation of assets. The principles are discussed at [142]-[162] of the May 2011 Judgment.
[110] In its May 2011 Judgment (on which in this context, see further below).
[111] As will be discussed further below.
[112] And as will be more fully explained below.

Katia Rabello would have been (and might yet be) [113], released from the Petroforte bankruptcy if Securinvest itself had been (or is ultimately) released.

240. In other words, that no loss was caused which would not have been caused once her status as UBO became known to the Brazilian courts.

241. But this is hardly an effective response, given that, even if the Defendant is correct in this supposition, the fiscal harm which will have been caused in the meantime to her interests will be undeniably significant. This fiscal harm would have occurred over many years of litigation, arising from legal costs, as well as the restraint and alienation of her assets. Regard must also be paid to the adverse intervention by the BCB upon Banco Rural, alleged by Katia Rabello to have been also caused by the Cayman Disclosure.

242. Regrettably, also now to be factored in, and as is also now apparent from hindsight, Dr. Braga's representations to this Court that there was a risk of dissipation of assets as a basis also for the gagging orders and rapid *ex parte* disclosure, were not true.

243. This is confirmed, as shown above from Judge Beethoven's Judgment of 28 October 2010, by the earlier appointment of the manager/receiver over all Securinvest assets.

244. And so, by hindsight, it is also now apparent that Dr. Braga's real season for wanting to shut the Plaintiffs out of the Cayman Proceedings, was to steal a march on those, beyond Securinvest itself, against whom he intended to extend the Petroforte bankruptcy and in so doing, seize their assets.

245. Had this Court not been misled in relation to the need for secrecy and urgency, again it is highly probable that it would not have proceeded on the entirely *ex parte* basis, nor granted the *Norwich Pharmacal* Orders in the terms that it did.

[113] Referring her to Katia Rabello's appeal which is still to be finally resolved by the STJ.

246. Katia Rabello (and where applicable other Plaintiffs) seek, and are in my view entitled, to rely on this high probability now to ground their claims for breaches of duty and consequential loss.

247. These conclusions, while far-reaching as regards the breach of duties and so potentially detrimental to the Defendant's Defence on causation, I am satisfied can safely be reached now despite the fact that this Court, upon its review of the Norwich Pharmacal Orders, decided that some of the Cayman Disclosure had been properly granted, even while deciding that much of it had not.

248. As explained in the May 2011 Judgment, this Court was then hearing the matter on the basis of specific criticisms then raised by the Plaintiffs in respect of Dr. Braga's conduct in the Cayman proceedings. It then did not have the benefit of hindsight it now has in relation to important aspects of the Plaintiffs' case. In summary the concerns which were then addressed were as follows:

1. The first and pivotal question (already touched upon in passing above) was whether Dr. Braga had proper standing for making his applications to this Court for any of the Cayman Disclosure. As explained at para 42 (i) of the May 2011 Judgment*:*

> *"Dr. Braga's alleged misrepresentation to this Court as to the nature, meaning and effect of the Suspension – that is the Stay Order of the 22 September 2009 of the STJ, as ratified and confirmed by the STJ on 7 May 2010.*
>
> *As a corollary to this, the alleged misrepresentation by Dr. Braga as to his status as officeholder over Securinvest in light of the suspensive meaning and effect of the Suspension.*
>
> *And, as a further corollary, Dr. Braga's alleged misrepresentation to this Court as to his authority to act in the Cayman Islands as the*

equivalent of trustee in bankruptcy of Securinvest – the basis upon which he obtained the Norwich Pharmacal Orders."

249. On this issue, this Court found, in summary, that Dr. Braga did not misrepresent to the Court his status as Judicial Administrator over Securinvest at the time of his applications for Norwich Pharmacal relief. It was accepted that he was authorized by the STJ and so had standing to bring the applications.

250. The second issue*: "Dr. Braga's alleged non-disclosure of the Revocation Suit which he had instituted in respect of the SOBAR transaction and which he had failed to pursue; instead seeking to extend the Petroforte Bankruptcy to Securinvest and other Rural Group entities.*

Brazilian law. As a further corollary, the alleged failure of Dr. Braga to disclose to this Court, Securinvest's defence to the SOBAR fraud allegations."

251. In essence, Dr. Braga's response to these criticisms, was that he was under no obligation to disclose the Revocation Action and discuss its implications with this Court because that was all irrelevant to Securinvest's appeal which was then before the STJ and which was the basis upon which he had been directed to investigate the UBO of Securinvest in this jurisdiction [114]. Further, that Securinvest had been placed into the Petroforte Bankruptcy, not on any basis of judicial finding of fraud (the subject-matter of dispute enjoined in the Revocation Action) but on the basis of findings of fact by the lower courts of a common economic group between Securinvest and Petroforte. And moreover, that these were findings of fact which were not to be reversed on appeal to the STJ, which was concerned only with the legal basis for the extension of the bankruptcy.

[114] It must be noted that when it suited him, Dr. Braga argued differently to the effect that he was entitled to use the Cayman Disclosure to advance the Revocation Action and for the recovery of assets generally. See [151] of the May 2011 Judgment.

252. This meant therefore, that the factual conclusions reached by Judge Beethoven at first instance and affirmed by the TJSP, were unassailable. And this was though the implication was that the underlying factual allegations of fraudulent collusion between Sabino Rabello and Ari Natalino, must have been accepted and acted upon by those Courts, without either the Rabello interests or the Natalino interests having had the opportunity to respond to those allegations.

253. That having been the basis upon which the issue of the Revocation Action was addressed by Dr. Braga upon the review by this Court at [106] – [110] of the May 2011 Judgment, the following conclusions were reached:

> *"If this [the narrow legal basis for appeal to the STJ] is correctly taken as precluding Securinvest's assertion before the STJ that it has a factual defence to the allegations of fraud upon which the extension of bankruptcy has been made to it, then Dr. Braga could have had no obligation to bring such a factual defence to the attention of this Court when making the Norwich Pharmacal application…*
>
> *I do not consider that Dr. Braga had a duty to disclose any more than the fact of the existence of the Suspension and the appeal before the STJ…*
>
> *Whether, as a matter of Brazilian law and procedure, it was permissible and fair for Dr. Braga to have instituted the Revocation Suit in respect of the SOBAR transaction, then elected not to pursue those proceedings, opting instead by ex parte proceedings before the same Court to seek and obtain the extension of the Petroforte Bankruptcy to Securinvest; is not a matter upon which this Court can properly seek to pass judgment. That issue is for the Brazilian Courts to determine. It would therefore have been irrelevant to the question whether the Norwich Pharmacal relief in aid of the Bankruptcy proceedings should have been given by this Court."*

254. Those conclusions were reached specifically and only in the context of this Court's review of the Cayman Disclosure in response to the STJ's mandate to Dr. Braga in relation to Securinvest. Those conclusions in no way anticipated or condoned the use of

the Cayman Disclosure against Katia Rabello herself or against any other Rabello interest. That was not the subject which was before this Court for review.

255. All I think I need repeat for emphasis now with the benefit of hindsight – not only from the point of view of the extension of the Petroforte Bankruptcy to Securinvest as considered in the May 2011 Judgment but also especially and differently, as regards its extension to Katia Rabello and her interests – is that it is highly probable that her concerns that the allegations of fraud should first have been resolved in the context of the Revocation Action before the Cayman Disclosure was released for deployment against her in Brazil, would have been regarded by this Court as relevant and persuasive. Had she been afforded the opportunity to make that case, it is also highly probable that Dr. Braga would not have been able to force her into the Petroforte bankruptcy without having first resolved the Revocation Action (which remains unresolved).

256. As already mentioned, this is an important aspect of the loss of opportunity of which she (and by association the other Plaintiffs) now complain.

257. In the absence of written reasons from this Court for the grant, *ex parte,* of the Norwich Pharmacal Orders, it must be assumed that the allegations of fraud, albeit then as yet unproven, would have been of central importance to the deliberations of this Court when granting those Orders.

258. Indeed, at [120] of the May 2011 Judgment, following the *inter partes* review, the following finding – reflective of the basis for the exercise of the Norwich Pharmacal jurisdiction itself – appears:

> "*In light of what has been brought to the attention of this Court about the allegations of wrong-doing in Brazil by the use of Securinvest for the fraudulent stripping away of Petroforte Bankruptcy assets, the Defendants [ie: Equity Trust and CIBC] may be regarded as having become*

innocently "mixed-up" in those allegations by their arrangements with the Applicants which enabled the impugned transactions to remain concealed."[115]

259. Katia Rabello's inability, for want of notice, to have addressed this issue of fraud in the first instance before this Court (and consequently it seems, to address it proactively as it remained to be resolved in the Revocation Action or in any other forum) in her own defence, is another important aspect of the loss of opportunity of which Katia Rabello now complains and which goes properly in my judgment, to the issue both of the Defendant's breaches of duty as well as to their consequences. These are issues to be more closely examined below.

260. Here I can conclude that had Katia Rabello been given the opportunity to address this Court on these matters, it is highly probable that, at the very least, clear and strict orders would have been made to preclude Dr. Braga's deployment of the Cayman Disclosure against her personally in the Petroforte Bankruptcy, or its disclosure to the BCB to be deployed against Banco Rural – matters which went well beyond the mandate given to Dr. Braga by the STJ.

261. It is safe to arrive at that conclusion now precisely because neither of those uses of the Cayman Disclosure was either contemplated or expressly allowed by the Norwich Pharmacal Orders.

262. For completeness, I will also examine the third, fourth and fifth aspects of the Plaintiffs' complaints to this Court at the time of the *inter partes* review:

2. *Dr. Braga's alleged breach of the express undertakings given to this Court upon the grant of the CR(P)L orders for disclosure of the confidential information belonging to Arnage and Brooklands and so relating to or*

[115] See also [131] where the analysis proceeded expressly on the basis that the allegations of fraud were as yet unproven but nonetheless sufficed for the grant of Norwich Pharmacal relief.

> *belonging to their ultimate legal and/or beneficial owners. Related to this, Dr. Braga's alleged breaches of the implied undertakings given to this Court upon seeking and obtaining the Norwich Pharmacal Orders.*

263. In this regard Dr. Braga had indeed given undertakings (both expressed and implied) not to use and file copies of any of the Cayman Disclosure for any purpose other than (i) for complying with the order of the STJ, (ii) for the institution and prosecution of any proceedings relating to the Petroforte Estate either in Brazil or overseas or (iii) his investigation regarding the UBO of Securinvest.

264. The evidence reveals that while Dr. Braga did not himself disclose the Cayman Disclosure to the BCB, he did persuade Judge Beethoven to direct that that be done for the purpose of expanding the reach of the Petroforte Bankruptcy over Banco Rural.[116]

265. It was found by this Court from the evidence then available, that his breaches of the undertakings did not rise to the level of proof required for a finding of contempt[117]. However, this Court remarked upon his failure to honour the *spirit* of the undertaking in these terms:

> "*While the Court must express its disappointment at Dr. Braga's failure to honour the spirit of the Undertakings by taking reasonable measures available to him to protect the confidential information, I am obliged to conclude that he is not shown to have breached the terms – expressed or implied – of the Undertakings.*
>
> In *reality, the circumstances of this case emphasize the need for great circumspection (already recognized in the Codelco case (above)[118], in the granting, on the ex parte basis, of discovery orders in aid of foreign*

[116] Core Bundle Vol 2 Tab 13, Dr. Braga's petition to the Bankruptcy Court dated 25 October 2010 where at page 103 he submitted: "*Petition official letters be addressed to the Central Bank of Brazil for the purposes of acknowledging the transactions of Securinvest Holdings along with the Rural/Petroforte Group, as well as knowing that its actual owner is Katia Rabello. Also, that its shares from Banco Rural and other companies shall be attached and collected by the bankrupt estate. (Law 6.024, on 03/13/74). In the same way, it needs to acknowledge that it is the Rural Group, and personally Ms. Katia Rabello that are behind the companies listed in that evidence*".

[117] As discussed at [174]-[214] of the May 2011 Judgment.

[118] Reported as Deutsch-Sudamerikanische Bank A.G. v Codelco 996 CILR 1.

proceedings; in particular where discovery is to be the consequence of Norwich Pharmacal type applications in aid of foreign proceedings."

266. All the more reason, say the Plaintiffs, why it was wrong in all the circumstances then prevailing, for the Defendant to have acted against them on behalf of Dr. Braga and to have obtained the gagging orders preventing them from making a timely and effective response to his applications.

267. The Plaintiffs case in this regard, is firmly grounded in high judicial authority. In ***National Commercial Bank Jamaica v Olint***[119] Lord Hoffman said on behalf of the Privy Council:

> *"[A] judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act"*[120]

268. His Lordship went on to say (ibid):

> "*Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."*

These standards of care were disregarded by the Defendant when it acted for Dr. Braga by proceeding on the *ex parte* basis on which it did, its failings exacerbated in the circumstances then prevailing, by the absence of urgency or any risk of destruction of evidence or dissipation of assets.

3. *The question whether or not Dr. Braga was obliged to seek recognition and authorization to act in the Cayman Islands pursuant to Part XVII of the Companies Law, (assuming he was properly to be regarded as a*

[119] [2009] 1 WLR 1405
[120] At para 13

foreign representative of a bankrupt estate) instead of bringing an application for Norwich Pharmacal relief as he did.

269. Here the argument[121] was that Dr. Braga, acting as a foreign court-appointed trustee as he claimed to be, was obliged to seek recognition and authorization to act in the Cayman Islands pursuant to Part XVII of the Companies Law, instead of bringing an application for Norwich Pharmacal relief as he had done.

270. Given the specific and limited mandate of the directions issued to him by the STJ to investigate the UBO of Securinvest, this argument was not accepted by this Court in the May 2011 Judgment. Rather, it was held that there was no requirement to obtain recognition and enforcement of his appointment generally within the jurisdiction as he was not, for example, required to search for and recover assets[122]. This was notwithstanding that the Defendant sought and obtained on his behalf, the wider disclosure which could only have been justified, on the ***Bankers Trust*** principles (below),by a mandate of that kind as discussed next below.

5. Other issues of principle relating to the seeking and obtaining of Norwich Pharmacal relief or related Bankers Trust relief[123] – which [(further relief by way of disclosure)] was also given as part of the Norwich Pharmacal Orders."

271. It was here that this Court most directly criticized the application for the wider disclosure which had been made by the Defendant on behalf of Dr. Braga and which went far beyond the disclosure of Katia Rabello's status as UBO of Securinvest. At [156] – [158] of the May 2011 Judgment, the following conclusions were expressed in this regards:

"*In my view, there simply was no basis for thinking that the information sought by those means (paragraphs 7(d), (ii), (f), (g) and (h) of the Norwich Pharmacal*

[121] As set out at [42.(iv)] of the May 2011 Judgment
[122] See [172]-[173] of the May 2011 Judgment
[123] Bankers Trust v Shapiro [1980] 3 ALL. E.R. 353.

Orders) could assist with locating and preserving assets which had been fraudulently diverted away from the Petroforte Estate.

Any such allegation up to the time of the applications before this Court (27 May 2010 and 2nd July 2010) centered around the SOBAR transaction. Yet the assets involved – the ethanol plant and sugar plantations – had long since been under the control of Dr. Braga through the extension of the Bankruptcy to Securinvest, Turvo, Agroindustrial and Kiaparack in August 2007 (see the 1st Affidavit of Dr. Vasconcellos, para 77 (iv)). No other "assets" to which a risk of dissipation attends, have been identified.

The substantive disputes between the parties have been ongoing in Open Court in Brazil for several years. Accordingly, it cannot properly be maintained that there was any urgent need for the Bankers Trust type relief here to prevent the dissipation of assets. The fact that there has been no subsequent need for Mareva injunctive orders (to freeze assets identified) and no allegedly hidden assets disclosed, is strongly indicative of the fact that the Bankers Trust relief was never likely to have achieved its permissible objectives."

272. As already mentioned, the Plaintiffs (Katia Rabello in particular), became aware of the Cayman Disclosure having been obtained only after it was deployed in Judge Beethoven's Court in Brazil against them. This was also after the orders were made placing Katia Rabello's assets into the Petroforte Bankruptcy and referring the matter to the BCB for investigation[124].

273. The Cayman Disclosure was also later placed before the STJ by Dr. Braga (he was directed to do so by Judge Beethoven)[125] and the STJ itself – even while making no express reference to the Cayman Disclosure but having adjourned for the specific purpose of obtaining it – must have relied upon it to lift the stay ("suspension") of the operation of the Petroforte Bankruptcy over Securinvest and to dismiss Securinvest's appeal.

274. This reliance by the STJ will go ultimately to the question of causation of loss and is clear enough from the following analysis.

[124] See para 171(vi) of the Statement of Claim, op. cit, pp58 - 59
[125] See "OPERATIVE PART", ITEM 8 at page 11 of his Judgment of 28 October 2010 as extracted above and in.: Core Bundle Vol 2 Tab 1A.5.

275. While alluding to and noting the significance of the Cayman Disclosure[126], Justice Andrighi (in her Judgment on behalf of the STJ) emphasized that matters of fact were for the Courts below, thus:

> "*The characterization of a union of companies, in turn, is more than anything else, a factual matter. For that reason, whatever the [Lower] Court decided in that respect cannot be revised in this office [court] by virtue of the obstacle of the Abridgement of Law 7/ Court of Appeals*"[127]

276. This, as Mr. Simpson correctly in my view, emphasized on behalf of the Defendant, meant that the STJ did not retry the factual issue whether or not there was in existence a common economic group. Instead the STJ deferred to the findings of the lower courts in that regard.

277. But it is clear that it was only after seeing the Cayman Disclosure, that the STJ was content to defer to the findings of the lower Courts (originally by Judge Beethoven but expanded upon by the TJSP by its invocation of the common economic group legal theory).

278. This meant (as Mr. Simpson emphasized throughout the hearing) that the extension of the Petroforte Bankruptcy which had been ordered before the Cayman Disclosure was obtained, was therefore not a result of the Cayman Disclosure obtained by the Defendant on behalf of Dr. Braga.

279. If this is correct, then the Defendant's actions could not have caused the Plaintiffs' losses.

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[126] Stating at different points for instance that at page 9 of 20: It is also asserted [by Dr. Braga] in short, that SECURINVEST itself, whose members/partners/stockholders… are two companies with headquarters in a tax haven, would immediately be a member of the Rural Group. It is through that perspective that this appeal shall be judged" and at page 14 of 20 that "... the corporate chain described in this process, is not only with regard to the agro-industrial complex SOBAR, but in relation to diverse other assets, shows the existence of a modus operandi which offers evidence of one group of companies (GRUPO SECURINVEST, whether or not it is a member of the more extensive GRUPO RURAL), on the other (PETROFORTE)." Core Bundle Vol 2, Tab 9.

[127] At page 13 of 20 op cit, ibid.

280. A different conclusion is reached however, on the more likely analysis that the STJ would have released Securinvest from the Petroforte Bankruptcy but for the Cayman Disclosure, especially the disclosure of Katia Rabello's status as UBO.

281. It is therefore important that I here lay down yet another marker.

282. It is that the question whether the STJ relied upon the Cayman Disclosure, and if so to what extent, for the dismissal of Securinvest's appeal; remains a disputed question of fact which was not given to determination by me on the basis of this application for summary judgment on liability.

283. Rather, it is a factual dispute which in my view did not have to be resolved now in order to establish liability for breach of duty. However, it still properly remains to be examined and resolved as a question of causation of loss at the next stage.

284. It is a question which will need to be answered in that context but only if Katia Rabello can show that Securinvest would have been released from the Petroforte Bankruptcy had it not been for the Cayman Disclosure.

285. This will be a difficult hurdle for her to overcome when it is recognized that she was herself under a legal (one might even say moral) obligation to disclose the truth about her status as UBO to the STJ and that status was (on correct *prima facie* analysis in my view), the ultimate reason for the STJ's refusal of Securinvest's appeal.

286. As already mentioned above, it is also in this respect that Mr. Simpson invokes the *ex turpi causa* defence. It goes to the effect that Katia Rabello's case depends upon her having been entitled to mislead the STJ by her lie.

287. Otherwise, she would be required to accept that the extension of the Petroforte Bankruptcy to Securinvest (and he also contends ultimately to herself) was the result of

her status as UBO being revealed to the Brazilian courts. This he submits she was obliged to disclose and so may not claim for damages from the Defendant because it brought about the disclosure. Any other competent attorney would have been obliged to take the same actions, said Mr. Simpson. Thus, the same outcome was inevitable.

288. And moreover, the argument goes, Katia Rabello cannot claim to have suffered any loss as the result of the Cayman Disclosure, even if it was relied upon by the STJ for dismissing Securinvest's appeal- the loss was the result of her own misconduct in trying to obfuscate the "fraudulent' relationship between Securinvest and Petroforte.

289. While I have rejected the *ex turpi causa* defence as a basis for striking the Plaintiffs' claims, (especially those of Katia Rabello), I must note that in any event, it could not serve as a defence to <u>all</u> of the Plaintiffs' claims, some of which – such as the claims for loss of opportunity discussed above – in no sense depend upon Katia Rabello's lie to the STJ or upon any other form of illegality.

290. Given the various and complex bases upon which liability for loss is claimed by the Plaintiffs, it sufficed, in my view, for the grant of summary judgment that liability for loss was established in at least some areas[128]. These include, as I will come to discuss further below, the placing of Katia Rabello herself into the Petroforte Bankruptcy. I will also consider the provision of the Cayman Disclosure to the BCB which is pleaded as resulting in regulatory action against Banco Rural (of which Katia Rabello was a major shareholder) and ultimately its demise.[129]

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[128] *Lunnum v Singh and Others* TLR 1999, the Times 19 July 1999, CA (to be further discussed below)

[129] See the Statement of Claim, para 15.Core Bundle Vol 1 Red Tab A.11, PAGE 8. And, for instance as regards action taken against Banco Rural despite the recall by this Court of the Cayman Disclosure from the BCB: Court Vol C1 Tab 23.24, pp709-713, an English translation of an Attorney General's Ruling of March 2012, on the use of the Cayman Disclosure by the BCB, (submitted with the second affidavit of Nicholas Dunne on behalf of the Defendant, pp709-713) and which confirms that the Cayman Disclosure was used as *"reputable evidence to support an administrative proceeding for punitive damages against Banco Rural and Ms. Katia Rabello due to violation of the provisions set forth in Article 34, V of Law No. 4595 of 1964"*.

291. In this regard, the record shows for instance[130] that Katia Rabello was herself the subject of administrative proceedings by subpoena taken by the BCB in relation to Banco Rural's provision of funding to Securinvest. If not exactly the same as by way of the Note Purchase Transaction, these provisions were certainly of that kind. In those proceedings, the BCB sought orders for the recovery of "*punitive damages*" against Banco Rural and against Katia Rabello, personally.

292. This BCB subpoena went on at length to cite and quote from Judge Beethoven's decision of 29 October 2010 against Katia Rabello, making it plain that the BCB was relying not only upon his findings but also upon the Cayman Disclosure referenced by the Judge and sent by him to the BCB at Dr. Braga's behest (and contrary to the spirit of Dr. Braga's undertakings given to this Court, as discussed above).

293. It has not yet been established before me what fiscal penalties were imposed upon Katia Rabello arising from this subpoena (or from any other measure taken against her by the BCB) but it is *prima facie* clear that a link between the Defendant's breach and the BCB's actions is established and that some loss was caused.

294. This finding too will suffice for summary judgment on liability, as will become clearer from the discussion of the case law below.

295. But I emphasize here again, that the full extent of any loss must be a matter for assessment at the trial of quantum.

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[130] Court Vol C1 Tab 23.24, pp715-719, which shows that by reliance on the Cayman Disclosure, Katia Rabello was subpoenaed, in prosecution of the Administrative Proceedings for punitive damages by the BCB in respect of "IRREGULARITIES" committed by her as President of Banco Rural namely, "*Granting prohibited loans to corporations banned from operating with the institution, since the respective corporate control belongs to companies established in tax havens, and of which you are the owner and ultimate beneficiary, while acting as the Director and Board Member of the said financial institution" the subpoena continued under "DESCRIPTION OF EVENTS: "Banco rural S.A granted credit operations to Securinvest Holdings s.a., a company registered with the Brazilian Registry of Legal Entities – a company controlled by two companies incorporated and organized under the laws of the Cayman islands: Arnage Holdings and Brooklands Holdings...."*

Sanction of Settlement Proposal granted by Judge Beethoven but resisted by Dr. Braga

296. The evidence also reveals that after the case was referred back to Judge Beethoven's Court by the STJ [131], a settlement proposal in relation to Katia Rabello's and Securinvest's bankruptcy (as part of the Petroforte bankruptcy) was propounded before the Judge. The Judge (after what seems to be characteristic peroration) approved of the proposal which would have resulted in the release of the non-Sobar assets, referring to the wider effects of the bankruptcy as "*offensive*" to his Court, and as "*unjust enrichment*" for the Petroforte Estate.[132]

297. This Judgment of Judge Beethoven's was however, appealed against by Dr. Braga to the TSPJ and was overturned. Katia Rabello and the other Rural Group interests have appealed further to the STJ, where a final judgment on the settlement proposal is awaited.

Summary of claim

298. In summary, the Plaintiffs' claims are as follows[133]:

> *8. Despite the quarter of a century relationship of trust and confidence between the Defendant and the Rabello family summarised above (including the specific instruction of the Defendant in relation to confidential information relating to Cayman Islands companies being sought by authorities in Brazil); ,from about May 2010 the Defendant betrayed that trust by disloyally acting on behalf of Dr. Braga ... as*

[131] After the rejection of Securinvest's appeal: Core Bundle Vol 2- CB2/7/676.

[132] Core Bundle Vol 2 Tab 7, ruling on 23/10/11 (at page 5 of the translation) that "…*what is certain is that the plea is ready to be accepted. It is offensive to this court that the Bankrupt parties be requested one penny more than what is correctly owed. Continuing in the unlimited accountability of the bankrupt parties, since the main object of the babbling (sic) is already in the possession of the Court, is a thesis that does not sail in calm seas. There is a principle that should apply to all human relations: the prohibition of unjust enrichment … based on these principles, there is no doubt in the decision for the acceptance of the request … the humble magistrate does not have reasons to continue ad infinitum with the persecution of the assets of the bankrupt parties when there is already the main company which was the object of the initiatives from the Public Audit Office…"* [i.e: Sobar].

[133] As taken from paragraphs 8 to 17 of the Statement of Claim,

Judicial Administrator over the Bankruptcy Estate of Petroforte …in obtaining extensive disclosure of confidential information relating to the Plaintiffs through the Ex-Parte Norwich Pharmacal Proceedings.

9. *The Norwich Pharmacal Proceedings expressly sought very broad disclosure of documents. At all material times, the Defendant knew that Banco Rural and Rural Leasing were directly and/or indirectly owned and controlled by the Rabello family (including Ms. Katia Rabello) and that the material sought was both confidential and sensitive and that the Rabello family would not want such information to be disclosed to the Brazilian authorities which could cause great damage to the Plaintiffs.*

10. *The disclosure obtained by the Defendant on behalf of Dr. Braga included numerous confidential documents relating to the Defendant's former clients, Arnage, Brooklands and Mr. Sabino Rabello, including both confidential documents created by the Defendant and work product produced by the Defendant on behalf of those clients.*

11. *The disclosure also contained numerous confidential documents relating to the Defendant's then existing clients, Ms. Katia Rabello and Mr. Fernando Toledo.*

12. *Furthermore, the disclosure contained numerous confidential documents relating to the ownership and commercial operations of TLB and demonstrating commercial connections between TLB and the Rabello family in circumstances where the Defendant was, at the same time, expressly engaged by, inter alia, Ms. Katia Rabello in connection with*

Brazilian criminal proceedings concerning the alleged joint ownership of TLB and Banco Rural by the Rabello family.

13. *In summary, the Defendant not only acted against its own former and existing clients' interests, it also acted against its existing clients' interests in circumstances where it was simultaneously expressly engaged to seek to protect such confidential information from disclosure to the Brazilian authorities by reason of the great damage which could be caused to the Plaintiffs and the Rabello family by ... such disclosure.*

14. *Such actions were in serious and flagrant breach of the Defendant's fiduciary, contractual and tortious duties to the Plaintiffs and were also a gross breach of confidence.*

15. *The consequences of the Defendant's breaches have been catastrophic for the Plaintiffs. The disclosure of confidential documents relating to the Plaintiffs has in turn led to multiple legal proceedings in various countries, a BCB investigation and extremely harmful publicity in Brazil. In turn, this has:-*

    (i) severely impaired confidence in the value of Banco Rural, having a devastating impact upon its operations, and has ultimately led to Banco Rural being taken over by the BCB and being placed into compulsory liquidation; and

    (ii) resulted in Ms. Katia Rabello's assets being frozen in the Petroforte bankruptcy in Brazil.

16. Further, following the disclosure of the confidential information and documents, the Defendant continued to aid and abet Dr. Braga in his improper efforts to pursue alleged offshore assets held by the Rabello family and related entities as well as Brazilian assets which were never part of the Petroforte Estate but which are in jeopardy as a result of the Defendant's breaches.

17. The Defendant's breaches are likely to result in losses of over US$500,000,000 being sustained by the Plaintiffs."

Discussion on the four elements
to be established for grant of summary judgment.

299. Against the background of the foregoing factual explanation of the Plaintiffs' case, I will now consider in turn, each of the four elements they must establish, and the applicable legal principles, for the grant of summary judgment.

The existence of the lawyer-client relationship

300. The first of course, is the existence of the lawyer-client relationship in respect of each plaintiff and the concomitant duties which arose.

301. Both sides agree that the identification of the lawyer-client relationship is an exercise to be undertaken by an examination of all the circumstances of the case.

302. As was stated persuasively by the Ontario Superior Court of Justice in the recent ***Trillium*** case:[134]

[134] ***Trillium Motor World Ltd v General Motors of Canada Limited*** 2015 ONSC 3824, Judgment delivered July 8, 2015, per T. McEwen J., at [417]. In the case, the question was whether the well-known Canadian law firm of Cassels Brock & Blackwell LLP had been retained by the Trillium parties (a group of General Motors car dealerships) and had acted in breach of its fiduciary and contractual duties owed to them by, at the same time, having acted for a Canadian Government entity who regulated the relationship between Trilium and the then distressed General Motors and whose interests were adverse to those of the Trillium parties. The lawyer-client relationship was found to have existed and that Cassells had acted in breach of its duties without

> "*The existence of a solicitor-client relationship is a fact-driven and multifaceted analysis. Sometimes, it will be readily apparent that a retainer exists. Other times, a careful examination of the facts must be undertaken. The court must take a holistic approach to the question at hand, considering the evidence in its totality"….*

303. Earlier in the judgment[135], the following very helpful dicta appear in relation more specifically, to the analysis of the issue "*Was there a retainer*?" This dicta was cited and accepted by both sides in the arguments before me as appropriate for adoption and application here. I agree and so set it out fully, as it deserves:

> *"[411] The solicitor-client relationship is based on general concepts of contract and the specific contract of a retainer:* ***Filipovic v Upshall*** *(2000), 133 O.A.C 151 at para. 5 (C.A.). Whether a solicitor-client relationship exists is a question of fact. There is no need for a person to formally retain a lawyer by way of letter or other document. Nor is it necessary that an account be rendered or a bill paid. Rather, a court must look to a number of factors to ascertain whether such a relationship exists.*
>
> *[412] Justice Hawco helpfully identified twelve relevant indicia in* ***Jeffers v Calico Compressions Systems****, 2002 ABQB 72, 314 A.R. 294 [(hereinafter "the Trillium Indicia)"]... They are as follows:*
>
> *(i) a contract or retainer;*
>
> *(ii) a file opened by the lawyer;*
>
> *(iii) meetings between the lawyer and the party;*
>
> *(iv) correspondence between the lawyer and the party;*
>
> *(v) a bill rendered by the lawyer to the party;*
>
> *(vi) a bill paid by the party;*
>
> *(vii) instructions given by the party [(and here I would add "or on behalf of the party ")] to the lawyer;*

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having first notified the Trilium parties of its conflict of interests and obtained their consent to act for the Canadian Government (which consent would not have been given). Compensation for the breach of duties in the amount of CAD45 million, was awarded to the Trillium parties.

[135] At [411]- [413]

(viii) the lawyer acting on the instructions given;

(ix) statements made by the lawyer that the lawyer is acting for the party;

(x) a reasonable expectation by the party about the lawyer's role;

(xi) legal advice given; and

(xii) any legal documents created for the party.

[413] Not all indicia need to be present. Rather, as Hawco J. explains at para 8,

> *"…the question appears to be whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party."*
>
> *Further, the twelve indicia are not exhaustive. Depending on the facts of the case, other indicia may be relevant*".

304. I think I need only state here what must be obvious from all the circumstances of this case. This is that, when applied to the facts of this case, the Trillium Indicia serve to identify each of the Plaintiffs, including Katia Rabello and Fernando Toledo, as clients of the Defendant. I simply make reference here again by way of illustration, to the discussion of the circumstances pointing to the lawyer-client relationship undertaken above, especially at paragraphs 134-140.

305. And specifically in relation to "o*ther indicia*" – these could include, as the case law reveals, a situation where a lawyer acts for a company knowing that its interests are identical to or closely aligned with the interests of its beneficial owners who themselves come to depend upon the lawyer-client relationship. This is, as explained above, the nature of the relationship contended for by the Plaintiffs here.

306. This principle is illustrated by the conclusion reached by the Court of Appeal for England and Wales in ***Johnson v Gore Wood.***[136] There the issue was whether it was an abuse of process to claim that solicitors engaged by a company and who were alleged to have breached their duty of care by giving negligent advice to the company, also had breached a similar duty of care owed to its controlling shareholders (the Plaintiffs). Ward LJ, giving the judgment of the Court, approved the reasoning of Staughton J (as he then was), where he had decided on a similar issue in favour of the client and against the solicitors in ***R P Howard Ltd v Woodman Matthews &Co (a firm)***:[137]

> *"…arguments of a very similar nature prevailed in the judgment of Staughton J in … Howard Matthews … where the solicitor knew that the company was a family company effectively run by Mr. Witchell from whom they received instructions. He held at p 121A: "In my judgment in the circumstances of this case, Mr. Witchell as well as the company was the client of Mr. Mason. That seems to me to reflect the reality of the situation. Mr. Mason knew that Mr. Witchell …was the company. He probably knew that Mr. Witchell derived his livelihood and some profit from the company, and was vitally concerned in its well-being. Mr. Witchell had first been his personal friend, and had come to him in connection with other matters for legal advice, both as the representative of the company and in a personal capacity. When Mr. Witchell sought his advice on ... [a matter concerning the company] Mr. Mason owed a contractual duty of care both to the company and Mr. Witchell."*
>
> *Nor, in my view, should it matter in principle, where a fiduciary duty is engendered by a contractual relationship, whether the client has entered into a direct contractual relationship with the fiduciary or through an agent or, in the case of a corporate client, through the use of a nominee company,.."*

307. Another fundamental issue in **Johnson v Gore Wood** was whether Mr. Johnson should have been allowed to bring claims for losses in his personal capacity as shareholder which were not merely reflective of the losses claimed by his company (which latter

[136] [1999] BCC 474, at 485.... The case went further on appeal to the House of Lords where the arguments proceeded on the assumption that the duty of care(found by the Court of Appeal on the strike out application to have been arguable), could be established: [2002] 2 A.C. 1 at p32 C-G (per Lord Bingham) and at p41 E-G (per Lord Goff).
[137] [1983] QB 117

claims had been the subject of an earlier settlement between the company and the solicitors).

308. In holding that certain of his claims were not merely reflective of the company's losses and so not prone to being struck out on that basis for being an abuse of process, the Court of Appeal also acknowledged that a separate lawyer-client relationship had developed as between Mr. Johnson and the solicitors[138]. It followed, that subject to Mr. Johnson showing that the damage complained of was caused by the solicitors' breach of duty and was not too remote, he was entitled in principle to recover any damage which he had himself suffered as a personal loss separate and distinct from any loss suffered by the company[139]. Like in this case, the proof of his personal loss depended on the facts to be established at trial and could not have been determined simply on the pleadings.

309. **Johnson v Gore Wood** was later reaffirmed and applied by the English Court of Appeal in **Raitu v Conway**[140]**.** In **Raitu v Conway,** the Court was called upon to decide whether a contractual retainer, engaged between a company and its solicitors, could give rise also to fiduciary obligations of confidence and loyalty owed to the owners of the company who, despite not being privy to the contractual retainer, had nonetheless also reposed trust and confidence in the solicitors not to act in detriment of their interests.

310. In arriving at their affirmative decision, their Lordships necessarily also had to consider whether the separation of legal identity, as between the company and its owners, precluded the extension of the lawyer-client relationship and its attendant fiduciary

[138] At p 35 C, Lord Bingham records that it was accepted for the purposes of the application to strike out the damages claim that the solicitors Gore Wood &Co, owed a duty to Mr. Johnson personally and was in breach of that duty.

[139] The case is, a leading authority on the subject of reflective loss. After a compendious review of the earlier case law, Lord Bingham summarized the principle as it applies to circumstances like those claimed in the case by Mr. Johnson and here, by Katia Rabello and Fernando Toledo in respect of Arnage, Brooklands and EFHL- at p 35 H – 36 A: "*Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to the other*."

[140] [2005] EWCA Civ 1302

obligations. In concluding that the relationship could be extended and affirming the approach taken in **Johnson v Gore Wood**, Auld LJ on behalf of the Court, expressed the reasoning in the following terms[141]:

> "*There is, it seems to me, a powerful argument of principle, in this intensely personal context of considerations of trust, confidence and loyalty, for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded*."

311. The solicitors in **Raitu v Conway** were thus found to be liable, not only to the company for breach of the contractual obligations arising from the retainer, but also to the owners of the company (another company and its individual shareholders) for breach of the implicit fiduciary obligation of loyalty arising from the trust and confidence that they themselves had reposed in the solicitors, not to act against their interests in order to advance their own.[142]

312. These conclusions of principle are very relevant and applicable to the present case where the Defendant seeks to rely upon the separation of legal identities as between the incorporated Plaintiffs (Arnage, Brooklands and EFHL) and the individual Plaintiffs who are their legal and beneficial owners, as a basis for denying the existence of the lawyer-client relationships with the latter and so, the fiduciary obligations as well. Like in **Raitu v Conway,** the circumstances of this case require the lifting of the corporate veil to prevent the Defendant from denying the existence of the relationship of trust and confidence which had clearly developed, not merely between the incorporated Plaintiffs and the Defendant but also between the individual Plaintiffs (Katia Rabello and Fernando Toledo) and the Defendant as well.

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[141] Op cit, [78]

[142] This they had done by bidding for a valuable property in St Johns Wood, London, in competition with those persons who were found to be their clients.

313. There is further dicta from ***Raitu v Conway*** which is of instructive application to the present case in this regard.

314. At paragraph 57, reflecting on the fiduciary nature of the lawyer-client relationship, Auld LJ stated as follows:

> ""*As to fiduciary obligation, where better to start than the following treatment by Millett LJ (as he then was) in* ***Bristol &West v Mothew*** *[1998] Ch 1 at 18A-C:*
>
> > *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent[143] of his principal. This is not intended to be an exhaustive list but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".*
>
> *In short, as he was later to put it in* ***Bolkiah v KPMG*** *[1999] 2 A.C 222 at pp 234H- 235A, a fiduciary must not put himself in a position of actual or potential conflict with his client without the latter's fully informed consent.*""

315. The foregoing principles have all come to be enshrined in the Code of Conduct for Cayman Islands Attorneys-at-law:[144]

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[143] Defined in **Clarke Boyce v Mouat** [1994] 1 AC 428 as "*consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interest of the other*".

[144] These Rules were adopted after the Defendant's acceptance of the Braga Retainer but the Defendant was nonetheless obliged, at the times relevant to the Plaintiffs' claims, to comply with the equivalent duties as set out in the English Rules and recognized at common law in place at the time. The English Rules have been deemed by implication to apply in the absence of local rules:

"a. *The relationship between the practitioner and the client is one of* ***confidence and*** *trust which must never be abused (Rule 1.02).*

b. *An attorney's primary duty is to his client, to whom he* ***must act in good faith****. He must at all times and by proper and lawful means advance and* ***protect*** *his client's best interests without fear or regard for self-interest (Rule 1.04)*

As the commentary states: "The professional judgment of an attorney should at all times be exercised within the bounds of the law ***solely for the benefit of the client and free from compromising influences and loyalties"***

c. *An attorney has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and may not divulge such information except in certain specified and closely circumscribed circumstances (see Rule 1.06)*

As the commentary records: "***Confidentiality and privilege of client information are among the prime principles of professional practice. Such information belongs to the client and not to the attorney. Generally any request by a third party for client information held by an attorney should be referred to the client or refused…an attorney's duty continues even after the client has ceased to be the attorney's client…"***

d. *An attorney must not without the informed consent of such person act or continue* ***to act for*** *any* ***person where there is a conflict of interest between the attorney on the one hand and an existing or prospective client on the other hand; nor similarly may the attorney agree to act for such person when, at the time he takes instructions, it is reasonably foreseeable that such conflict may arise during the course of his doing so.*** (Rule 1.11)

As the commentary states: "***This rule is based on the principle that a person who occupies a position of trust must not permit his personal interests to conflict with the interests of those whom it is that person's duty to protect****… a potential conflict of interest is a situation which, without care, could well lead an attorney into a breach of fiduciary duty."*

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see ***In Re an Attorney-at-Law*** 1988-89 CILR Note 1, written judgment of this Court delivered on 22 July 1988, per Collett CJ, where disciplinary sanction was imposed on the basis of conduct measured against the long-standing English principle of "*conduct unbecoming*" an attorney.

316. In summary, it is clear from all the foregoing that, as was neatly stated by Justice Ground of the Ontario Court in ***Drabinsky v KPMG***:[145]

> *"I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information.* ***It includes a duty of loyalty and good faith not to act against the interests of the client.*****" [Emphasis added.]**

Actionable breaches of duty

317. The foregoing analysis and findings on the existence of the lawyer-client relationship (and its attendant duties), lead to the second and third elements of the Plaintiffs' case – the existence of the duties in this case and the actionable breaches of those duties. These must now also be established beyond reasonable argument, for the grant of summary judgment on liability. They may also be conveniently examined together.

318. Subject to the of lawyer-client relationships being established, it is not surprising that the Defendant itself would admit to the existence of the duties. At paragraphs 32 and 34 of the Amended Defence, the Defendant admits to:

- *"Owing a fiduciary duty to existing clients not to prefer the Defendant's own interests over those of existing clients;*
- *Owing a fiduciary duty to existing clients not to prefer the interests of one client over another;*
- *Owing a fiduciary duty to existing clients not to put itself in a position where its duty to one client might conflict with its duties to another; and*
- *That an attorney should not act if it is in possession of "… information that might be relevant to a new Client."*

[145] (1998) 41 OR (3D) 565, Ground J. at p 2.

319. Notwithstanding the obvious ways in which the foregoing admissions would also describe the breaches committed by the Defendant in this case, it seeks to avoid that conclusion in relation to Katia Rabello and Fernando Toledo by asserting that they were never its clients.

320. As I have found that assertion to be wrong then the Defence has no prospect of success as against Katia Rabello's and Fernando Toledo's claims for breaches of duty.

321. This conclusion is unavoidable in light of the continuing nature of the duty of confidence, when the facts of this case are considered in light of the case law.

322. The reason is neatly expressed in the following statement of principle by the Ontario Court of Appeal:[146]

> "*…that brings me to what appears to be the rationale for the disqualification of a solicitor who owes conflicting duty to two different clients. The most obvious justification for removal of a solicitor is to uphold the public's confidence in the proper administration of justice. A solicitor cannot properly serve clients opposed in interest, and once having chosen to serve a particular client, will not be allowed to advance the cause of that client in a particular matter at the expense of what he has learned in confidence from the other client interested in the same cause…. Two other justifications are also given. First, the other client feels aggrieved when his or her former solicitor appears for a party opposed to his or her interest. That client feels a sense of exploitation at having confidentiality communicated to that solicitor or his associate certain confidences and later having to answer ... in cross-examination in the same or related matter. Of course, this situation also diminishes the general public's confidence in the legal profession…*"

323. That very practical explanation of the importance of the duty of confidence owed by a lawyer to his client underscores the grievances of the Plaintiffs in this case. They rightly

[146] From ***Regina v Speid***, 1983 Carswell Ont 1333, [1983] O.J. No. 2441, at [18]-[19]. The case law is replete with similar denunciations of lawyers acting in conflict of interests for different clients. See for instance, ***Al Sabah*** (above) where this Court injuncted a firm from accepting a brief which would have required it to act against a former client despite the firm's proposal to erect "Chinese walls" to ensure that information belonging to the former client did not inform those acting for the proposed client; and ***Bolkiah v KPMG*** (above) where Lord Millett explained (at 234) that "*..a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position… his disqualification has nothing to do with the confidentiality of the client information. It is based on that inescapable conflict of interest which is inherent in the situation.*"

say that a duty of confidence had arisen when they imparted their confidential information to the Defendant such that the Defendant was precluded from acting for Dr. Braga against them and from taking steps to disclose their information to him. The obligation to keep matters confidential is one of the defining features of a lawyer-client relationship.

324. That a duty of confidence had arisen as owed by the Defendant to the Plaintiffs when their confidential information was imparted to the Defendant is indisputable. A duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others: see ***A-G v Guardian Newspaper***.[147]

325. Reflecting further on the nature of the fiduciary duties and obligations of a lawyer, their Lordships in ***Raitu v Conway,*** also emphasized the fact that they will often survive the expiry of the contractual retainer by which they were engendered (at [60]):

> *"As to a solicitor's duty of confidentiality, it can come into its own as a separate obligation from that of a fiduciary when the fiduciary relationship has come to an end with the end of the solicitor/client relationship. Lord Millett, in* ***Bolkiah v KPMG****, which was a breach of confidence, not a breach of fiduciary duty, case, sought to emphasize this distinction at 235C:*
>
> > *"Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of the former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the*

[147] [1990] 1 AC 109 at 281b, per Lord Goff.

confidentiality of information imparted during its subsistence."'

326. In the case at bar, the Plaintiffs contend for the survival of the ongoing duties of trust and confidence owed to them as arising from each and every one of the distinct retainers discussed above. These surviving duties were, as set out above, belatedly acknowledged by the Defendant[148] but it contends, without explanation (at least at this stage), that the duties were never breached. This is contended notwithstanding the Defendant's actions on behalf of Dr. Braga, including, as a stark example, the compulsion of disclosure from Equity Trust and CIBC of the records of the Note Purchase Transaction. This was a transaction in respect of which the Defendant advised Arnage and Brooklands (and implicitly Katia Rabello on behalf of her own and her family's interests as beneficial owners). Given the Defendant's implicit knowledge that the beneficial interests in Arnage, Brooklands, TLB, Securinvest and Banco Rural (the direct or indirect counter-parties to the Note Purchase Transaction) all belonged to the Rabellos, it followed that the Defendant owed each of those entities and their beneficial owners, the continuing duty of confidence[149] and obligations of trust and loyalty such that the Defendant was precluded from acting for Dr. Braga.

327. In light of the existence of the lawyer-client relationship with Arnage and Brooklands (and in my view by extension with the Rabellos) and its patent conflict of interest in

[148] This is although at the earlier stages until this hearing began, the Defendant had relied upon the defence of "No confidence in iniquity", averring at [27] of its Amended Defence by reliance on the dictum of Vice-Chancellor Wood from ***Gartside v Outram*** (1857) 26 LJCh (NS) 113 that "*You cannot make me the confidant of a crime or a fraud and be entitled to close up my lips upon nay secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist*" This was explained by the Defendant at [28] in these terms: "*The documents disclosed by CIBC and Equity Trust in the Cayman Islands (the disclosure of which, on the Plaintiffs' case led to other proceedings in the BVI, Belize and Florida) showed that Katia Rabello had sought to deceive the STJ as to the beneficial ownership of Securinvest in order to cover up a fraud on the creditors of the Petroforte Estate. They were therefore not confidential". Core Bundle Vol 1 Red Tab A.14 pp13-14.* The Defendant's belated concession in this regard merely reflects the inevitable outcome, as will be more fully explained when dealing with the *ex turpi causa* defence, below.

[149] Here there is no dispute that the continuing duty of confidence was owed at the time of the Braga Retainer, to those Plaintiffs who were admitted to have been or are found by the Court to have been clients. The local case law clearly recognizes the continuing nature of this duty of confidence: ***Al-Sabah v Maples and Calder and six others*** 1994-1995 CILR 471.

acting for Dr. Braga, the Defendant's denial of the breach of duty is completely untenable.

328. The Plaintiffs also contend that at the time the Defendant accepted the Braga Retainer, the Defendant was still under the contractual (and attendant fiduciary) obligations of trust confidence and loyalty first engendered by the general retainer which began in 1985 and which continued to subsist on behalf of the Rabello family. Its latest iteration was the August 2009 Retainer to protect the "Brazilian Defendants" and in respect of which, as we have seen, the Defendant continued to advise and rendered bills to Mr. Macaulay[150], even after the acceptance of the Braga Retainer.

329. In this regard, further principles from ***Raitu v Conway*** are relied upon by the Plaintiffs, (per Auld LJ at [71] – [75]):

> *"...it is important to keep in mind that the reason for a solicitor's fiduciary duty to his client, though engendered by the retainer, is distinct from the contractual obligations arising under it. It arises from the relationship of trust and confidence that is an important consequence and feature of the retainer….*
>
> *Where there is a contractual retainer and where it provides expressly or by implication obligations of a fiduciary nature, such obligations must clearly prevail, or "mould" or "inform" the fiduciary nature of the contractual relationship. But where there is a relationship involving say, a transaction or transactions between a solicitor and a person who, having regard to that relationship and the solicitor's profession, reposes trust and confidence in him, a fiduciary duty may arise without a retainer. So much seems to be clear from the historic development and continued separate existence of the notion of a fiduciary relationship and one created by contract. It is clearly acknowledged in the following passage from the judgment of Mason J in* ***Hospital Products Ltd v United States Surgical Corpn*** *(1984) 156 CLR 41, at 97, cited with approval by Lord Browne-Wilkinson, giving the judgment of the Privy Council in* ***Kelly v Cooper*** *[1993] AC 205, at 215:*

[150] These bills were issued, as we have seen, in the name of EFHL but only as a matter of convenience as Mr. Macaulay explained.

> *"That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its construction."*

330. There then followed some further very pertinent comments from Auld LJ:

> *"Mason J's approach is instructive in that, whilst it subordinates the effect of a fiduciary relationship to the terms of any concurrent contract, it also acknowledges – depending upon the circumstances – the potential coming into being and continuation of a fiduciary obligation without or regardless of any contract.*
>
> *Illustrative of such an approach is* ***Longstaff v Birtles*** *[2002] 1 WLR 470, in which this Court held on the facts, that the defendant's solicitors' fiduciary duty extended beyond the termination of the retainer. In that case solicitors who had acted for a couple in an abortive negotiation to purchase a public house and whose retainer had been terminated, persuaded the couple to join with them, without advising them to seek independent legal advice, in what turned out to be a disastrous commercial venture. In allowing the couple's appeal against the first instance judge's dismissal because the solicitors' retainer had been terminated before the matters of which the couple complained, Mummery LJ, with whom Laws LJ and Sir Anthony Evans agreed, said at paragraphs 1 and 35 of his judgment:*
>
> > "1. *The source of the [fiduciary] duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency. As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest may conflict…*

> *35. This case can, and in my judgment, should be decided on the simple ground that there was a relationship of trust and confidence between the Longstaffs and the solicitors; that the relationship did not cease on the termination of the retainer in respect of the intended purchase…that in the context of the relationship the proposal [made by the solicitors to the Longstaffs] gave rise to a situation in which the duty of the solicitors might conflict with their interests; and that they acted in breach of fiduciary duty in continuing to deal with (the) Longstaffs, in a situation of a conflict of duty and interest, without insisting they obtain independent advice*."

331. The importance of the foregoing dicta for present purposes is its premise that, irrespective of the existence of a formal or express contractual retainer, a lawyer will owe and continue to owe the fiduciary duties and obligations of trust, confidence and loyalty, if the circumstances of his relationship with his client gave rise to those duties.

332. In this case the evidence has disclosed two express contractual retainers – the May 2007 Retainer (to contain the impact of the CIMA disclosure to the BCB) and the August 2009 Retainer to protect the Brazilian Defendants (in the form of the letter sent by Walkers, per Mr. Austin-Smith, to Mr. Macaulay on the 7 August 2009).

333. Nonetheless, the other retainers incontrovertibly existed, as evidenced by their circumstances, including correspondence as between the Defendant and Mr. Toledo or Mr. Macaulay.

334. Each retainer gave rise to the lawyer-client relationship and to the attendant duties and obligations of trust, confidence and loyalty. On the basis of the case law discussed above (and indeed the local Code of Conduct itself)[151], these duties survived the expiry of any retainer which had in fact expired.

[151] See the Commentary to Rule 1.06 (above)

335. As I understand his case, the Defendant argues for the expiry of all but one of the many retainers, viz: the 2000 Note Purchase Retainer. And so, in relation to the TLB Retainer in late 1984 (by which TLB was established in 1985), the Arnage and Brooklands Retainer (other than for the Note Purchase Transaction in 2000), the May 2006 Retainer (re the shareholder certification in respect of EFHL and TLB to the BCB), the May 2007 Retainer (re the further BCB investigation aided by CIMA) – that, if they existed, that they had all expired and that the Defendant owed no ongoing duties or obligations in relation to them.

336. Moreover, the Defendant also denies that there was a "*general retainer*" on the ongoing basis, to act for the Rabello family.

337. However, as regards the one exception – the August 2009 Retainer – the arguments centered around not strictly its expiry but whether it covered only EFHL and/or Mr. Toledo, rather than more widely, the "Brazilian Defendants".

338. In light of my conclusions above that the August 2009 Retainer obviously covered all those persons known to the Defendant to have been in jeopardy in Brazil, especially Katia Rabello and Fernando Toledo (who was also named), and that it continued until well after the Braga Retainer; it must also be concluded that the Defendant placed itself into an irreconcilable conflict of duty and interest when it accepted the Braga Retainer. In so doing, as the case law explains, the Defendant acted in breach of its duties owed to Katia Rabello and Fernando Toledo.

339. In light of the case law, it is also clear that the Defendant remained throughout under a continuing duty of trust and confidence (in respect of all retainers) not to disclose - nor take steps contrary to its client's interests to disclose – their confidential information.

This was a duty owed not only to Arnage and Brooklands in respect of the Note Purchase Transaction in 2000 as the Defendant contends, but to all the Plaintiffs in respect of all their affairs.

340. It follows that the Defendant should not have accepted the Braga Retainer, as the Defendant has itself come belatedly to acknowledge[152]. In acting for Dr. Braga against the Plaintiffs and their interests, the Defendant breached its duties and obligations of trust, confidence and loyalty which it owed to the Plaintiffs.

341. While I do not need to find and do not find that the Defendant acted knowingly and deliberately in breach, the breaches are nonetheless serious and clear. No explanation has been offered by the Defendant. There was, for instance, no explanation whatsoever why Mr. Murray (the managing partner who had direct responsibility for the then still ongoing August 2009 Retainer), decided that the Defendant could act for Dr. Braga when he was approached by Martin Kenney &Co to do so on the 28 April 2010. Nor was it explained how it came about, that the Defendant proceeded to act, both for the Plaintiffs on the August 2009 Retainer and for Dr. Braga, simultaneously acting through the same litigation department which, at that time, comprised a relatively compact team of approximately only ten persons.[153]

The hypothetical "reasonably competent" attorney

342. Given that it is the conduct of the Defendant in acting for Dr. Braga that is the subject of the Plaintiffs' claim, I do not accept, as the Defendant pleaded and argued, that the position of a hypothetical "reasonably competent" attorney is relevant to the outcome.

[152] Per Antonia Hardy, from her affidavits, as explained above.

[153] While Antonia Hardy in her First Affidavit [Core Bundle 2 Tab 20 and C4/272] explains the nature of the conflict searches which were undertaken and their results, she offers no explanation and likely could herself offer no explanation) as to the matters identified by the Court in this paragraph.

The Defendant's proposition – that it must be excused from liability for its own breaches of duty because some other attorney not owing those duties would have achieved the same results for Dr. Braga – is in my view, untenable.

343. Nonetheless, I consider that I should record the reasons for my conclusions on this issue, as well.

344. First, the Defendant in running this argument also proposes that the effects of the Cayman Disclosure should be considered under two separate heads: the Norwich Pharmacal Disclosure and the Bankers Trust Disclosure. Thus, as the Norwich Pharmacal Order – to the extent it allowed the disclosure of Katia Rabello's status as UBO of Securinvest, was upheld by this Court – the actions of the Defendant could be separated from its actions in obtaining the unwarranted Bankers Trust disclosure, for the purposes of assessing what a "reasonably competent hypothetical attorney' would have done. And, that as it was arguably the disclosure of the UBO status that resulted in the losses complained of by Katia Rabello, the Defendant should be excused because any other competent attorney would have inevitably obtained that disclosure.

345. The difficulty for the Defendant in running this argument is that the Plaintiffs are not suing any other attorneys. They sue the Defendant, the firm that had the conflict of interest and which should never have acted against the Plaintiffs, its existing and former clients, in the circumstances which it did. The basis of the claim is the breach by the Defendant of the duties which it, not some other hypothetical set of attorneys, owed.

346. The strictness with which breaches of fiduciary duty by attorneys acting in conflict of interest is regarded by the courts, is illustrated by the House of Lords decision in **Hilton v Barker Booth & Eastwood**[154]

347. In that case, the solicitors had acted for two clients in a commercial transaction in a situation of conflict. They had failed to reveal to client A the fact, of which they were aware because they had acted for him, that Client B had convictions for dishonesty, was an undischarged bankrupt and so was unlikely to fulfill his end of the commercial transaction; as he in fact failed to do. His failure resulted in significant financial harm to client A, who sued the solicitors for breach of duty. The trial judge found for the claimant client A but awarded only nominal damages on the basis of what another (hypothetical) solicitor would have done, concluding that if other reasonably competent solicitors had acted the claimant would not have been told about client B's criminal convictions and dubious past (and hence would have proceeded with the transaction in any event).

348. However, the House of Lords looked at what the defendant solicitors should have done (ie: not act in the position of conflict of interest) and found that once they proceeded, they should have disclosed client B's convictions and dubious history (even if that meant they would have been liable to suit by him) and declared that substantial damages for client A should be assessed on that basis.

349. Secondly, the Defendant's proposition is unsupported when one considers how a reasonably competent attorney would have been required to meet his or her obligations to the Court and to those persons (the Plaintiffs) who were properly entitled to notice of the applications for disclosure of their confidential information. The test to be applied being

[154] [2005] 1 W.L.R. 567.

"*what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession*[155]".

350. I have already considered this issue above in the context of examining the Plaintiffs' loss of opportunity. Here, I think it will suffice therefore, if I simply set out what I consider to be the factors, correctly identified by Counsel for the Plaintiffs, which might well have led to a different outcome had another "reasonably competent" attorney been engaged by Dr. Braga to act against the interests of the Plaintiffs.

351. Having regard to the nature of the duties of full and frank disclosure when making an *ex parte* application of the Norwich Pharmacal kind, (to be measured also against the duty to give notice as explained by the Privy Council in ***Olint***[156]) it is highly probable that another competent attorney would have ascertained and would have disclosed that:

(a) Dr. Braga did not have authority to bring the breadth of claims which he brought for disclosure of the Plaintiffs' affairs in Cayman. This is also shown as discussed above by reference to the May 2011 Judgment and the Order then made for the retrieval of the ***Bankers' Trust*** type of disclosure. The unwarranted disclosure as shown by Schedule 4 of the Norwich Pharmacal Orders, went so far as to identify 34 allegedly "related entities and individuals" and covered "all" documents relating to Arnage and Brooklands and those 34 other entities and individuals. That breadth of disclosure went far beyond what was necessary to identify Katia Rabello as the UBO of Securinvest through her connection to Arnage and Brooklands.

[155] ***Midland Bank v Hett, Stubbs Kemp*** [1979] Ch 384, approved by the Court of Appeal in ***Martin Boston Co v Roberts*** [1996] 1 P.N.L.R. 45 at 50., and as discussed in ***Jackson & Powell*** op cit, para 11-086
[156] Above.

(b) The statutory fee structure under which Dr. Braga himself stood to be remunerated by way of a percentage of the recoveries on behalf of the Petroforte Estate, was, at least, one capable of incentivizing his conduct in a way that could affect his objectivity and credibility as a party and as a witness[157].

(c) The contingency agreement into which Dr. Braga had entered on behalf of the Petroforte Estate with OAR was, at least arguably, champertous. As mentioned above, OAR, was a company owned and/or controlled at all material times by Dr. Braga's legal team and was, through the OAR Contingency Agreement, entitled to a success fee of between 20% and 30% of the value of recoveries by the Petroforte Estate (30% being the applicable rate in respect of assets recovered from outside Brazil).

(d) A champertous agreement had also arguably been entered into with BVI solicitors, Martin Kenney & Co[158] who instructed the Defendant on behalf of Dr. Braga and advised him and OAR in respect of actions taken outside Brazil against the Plaintiffs.

(e) Thus, OAR and Martin Kenney & Co both had a significant personal interest in the actions taken against the Plaintiffs in Cayman and in the other jurisdictions where steps were taken to identify and seize their assets for the Petroforte Estate by use of the Cayman Disclosure.

(f) Before acting for parties so incentivized under the cloak of champerty, any competent attorney was obliged at least to have ascertained the interests of those

[157] He stood to receive at least 6% of recoveries: see ***Decision of the TJSP*** at Vol C4.K PAGE 33

[158] As confirmed by them in response to requests for Further and Better Particulars and exhibited at Appendix 1 of the Reply to the Defence dated 21 April 2015

instructing him and to inform this Court of the arrangement[159]. Champerty was then and still remains an offence in the Cayman Islands. It is therefore probable that this Court would not have entertained applications presented on the basis of instructions from parties to such arrangements, at least not without first being satisfied that the arrangements were fair and that it could rely on representations made by or on behalf of parties who were so incentivized; see ***Quayum and Six Others v Hexagon Trust Company (Cayman Islands) Limited*** *[2002] CILR 161 and* ***In the Matter of ICP Strategic Credit Income Fund Limited and ICP Strategic Credit Income Master Fund Limited*** *[2014] (1) CILR 314.*

352. It would have been a legitimate concern of this Court whether Dr. Braga and those advising him, were acting in the interest of Petroforte creditors or in their own interests.

353. At the very least, disclosure of the arrangements would likely have led this Court to enquiries which would have revealed Dr. Braga's intentions to use the Cayman Disclosure more widely than was strictly necessary or permitted to assist the STJ to resolve the Securinvest appeal.

354. At all events, had the Defendant not failed in its duty to have notified the Plaintiffs of the applications, the Plaintiffs would themselves likely have raised these concerns with the Court.

355. Further and in any event, it was an abuse of process for the Norwich Pharmacal applications to have been made on the misleading bases on which they were, citing the

[159] The flagrant nature of the incentive later became apparent from a **Financial Times** article "***Fund sees Brazilian fraud as next big thing in emerging markets'***, contributed by Joe Leahy from Sao Paulo, December 8, 2013. In this article it is revealed that Martin Kenney had entered into a litigation funding deal with an investment fund (Platinum Partners) and in which Jack Simony of Platinum Partners discussed the potentiality of funding for offshore litigation and citing the arrangements with Martin Kenny, opined that while expensive to fund "The rewards of a successful case however, can be huge. Mr. Kenny said his firm was close to recovering R$900M in a Brazilian fraud case involving the former owner of a local bank, Banco Rural". See Exhibit "RBM3" to Mr. Macaulay's 9th Affidavit, December 2018 Hearing Bundle, Tab3.3.

need for urgency and gagging orders which were, in retrospect, clearly unjustified. See again, the analysis above from the May 2011 Judgment, reflecting on the consequential loss of opportunity.

356. No hypothetical reasonably competent attorney can be assumed to have been willing to act in an abuse of the process of the Court, and certainly not without full and frank disclosure being made. It is probable that had such disclosure been made, the Norwich Pharmacal applications would have been stayed for being champertous (see **Grovewood Holdings Plc v James Capel & Co Ltd** [1995] Ch 80) or until, at the very least, the Plaintiffs had been given the opportunity to respond, that loss of opportunity about which they now complain and are found to have suffered.

357. Finally, on this issue, I considered that if this Court were to accept the Defendant's proposition, the fiduciary duties which the Defendant plainly owed to the Plaintiffs would be deprived of any content. It would mean that no duty of loyalty at all would effectively be owed to clients (especially to clients who might most need protection). The fact that documents which should never have been disclosed contain information potentially damaging to the client, may not be regarded as meaning that a client should lose its right to argue that the information was confidential and should never have been disclosed in the first place.

358. I am satisfied from the foregoing examination of the Plaintiffs' case, that the Defendant did owe to each Plaintiff respectively, the contractual and fiduciary duties of care, confidence and loyalty and that these duties were breached by the Defendant.

359. The breach is for present purposes proven, not just by the obtaining and disclosure of the Cayman Disclosure, but also by enabling or facilitating its adverse use against the Plaintiffs, in the circumstances to be further examined below.

The Defence: No Causation of loss

360. The Defendant's response to the allegations of causation of loss has been various and complex. They have argued variously that the Cayman Disclosure had no character of confidentiality. This argument as I understood it, was a restatement of their "no confidence in inequity" point, which they latterly abandoned.

361. They also argued that it was only the Norwich Pharmacal Disclosure – that which was obtained by dint of the first Order from Equity Trust- that caused the Plaintiffs' (in particular Katia Rabello's) losses. And, that in event, as she was obliged in any event, to disclose the crucial fact that she was the UBO of Securinvest, that crucial element of the Norwich Pharmacal Disclosure could, for that reason also, have had no quality of confidentiality. This argument, linked to the argument that any other attorney would have obtained this disclosure, means that the Defendant should be excused from having obtained the disclosure.

362. Further, that the damage was done by the Norwich Pharmacal Disclosure and this was inevitable. Moreover, as Katia Rabello was under a legal obligation to disclose her UBO status to the STJ and maintains[160] that had she done so, Securinvest (and by association herself) ought to have and would have been released from the Petroforte bankruptcy, the losses were caused not by the Defendant's actions on behalf of Dr. Braga but by Katia Rabello's lie.

[160] In her explanatory 3rd Witness Statement to be considered fully below.

363. This argument is encapsulated in the Defendant's written submissions[161] as follows:

> "*The Plaintiff's case, as set out in Mr. Macaulay's eighth affidavit and Ms. Rabello's third witness statement, is that if Ms. Rabello had told the truth to the STJ then Securinvest would have been released from the bankruptcy.*[162] *On that basis the answer to the case is very simple – the Plaintiffs' losses were caused by Ms. Rabello's lie. If Ms. Rabello had told the truth then Securinvest would have been released from the bankruptcy and Ms. Rabello's assets would never have been incorporated in it. Further Dr. Braga, who came to Cayman specifically to ascertain the UBO of Arnage and Brooklands, would not have done so. Thus there would have been no Cayman Disclosure. It is important to note that this causation point does not turn either on the fact that it is a lie, or on the motivation for that lie. It turns on the fact that it is Ms. Rabello's own actions which have caused the loss*".

364. This in other words, is a defence that whatever breaches the Defendant may have committed, there was a break in the chain of causation of loss when Katia Rabello's lie was revealed resulting in the STJ's final dismissal of Securinvest's appeal[163]. Plausible though this argument might at first appear, there are two clear and telling responses from the Plaintiffs.

365. First, this argument of the Defendant goes only to the question of what was Katia Rabello's duty of disclosure to the STJ and her failure to fulfill that duty. The argument does not address the case against the Defendant in relation to the loss of opportunity to appear before this Court at First Instance and to have prevented the wider abuse, beyond the STJ, of the Cayman Disclosure in Brazil against Katia Rabello and Fernando Toledo and the consequences arising from that wider abuse.

366. In other words, this argument of the Defendant on causation can be relevant, if at all, only to the loss of Securinvest's assets as that was the issue affected by the duty of disclosure

[161] For this hearing Listed for 3-14 December 2018, Composite Submissions Bundle Tab 2 paragraphs 147-151.
[162] December 2018 Hearing Bundle Tab 1.5 [10] and Tab 2.3 [9].
[163] The argument was similarly presented on 3 March 2016: "*It doesn't matter whether the actions of the relevant party were dishonest or fraudulent. What matters is whether it broke the chain of causation. So, it wraps up into the causation point*" See transcript at Vol J.2 Tab 3 pages 356-357.

to the STJ. And this must be so also, notwithstanding the Defendant's further argument that had Securinvest been released from the Petroforte Bankruptcy, so would Katia Rabello have been released. The converse situation must be considered also: had she not been taken into the Petroforte bankruptcy in the first place as a result of the abuse of the Cayman Disclosure, she would not have remained in it, whatever the outcome for Securinvest.

367. Moreover, if Securinvest is ultimately released and consequentially Katia Rabello as well, there still will have been significant losses sustained in the meantime such as could be attributed to the Defendant's breaches of duty.

368. Secondly, the Defendant's response would overlook a very pertinent aspect of Ms. Rabello's explanation, in her third witness statement, for her lie to the STJ[164]:

> "*Given the logical consequences in the Petroforte bankruptcy proceeding of my admission to being the UBO of Securinvest [(viz: that Securinvest would have been shown not to be owned by any Petroforte interest and so entitled to be released from the bankruptcy)] this Honourable Court is rightly concerned as to why I chose not to take this course. In essence, as I explain below , the problem was that, had I made the admission, very serious collateral issues would have arisen affecting Banco Rural and me from the perspective of the relevant regulator of the bank; namely the Brazilian Central Bank.*"

369. It would follow, if this explanation came to be accepted by the Court upon an examination of Ms. Rabello's evidence on assessment of quantum of loss, that she was justifiably concerned that disclosing that she was UBO of Securinvest would not only result in the dismissal of Securinvest's appeal[165] and the extension of the Petroforte Bankruptcy to herself, but also that it would result in the destruction and loss of Banco Rural.

[164] As described above and as set out in her own words below in response to the Defendant's *ex turpi causa* defence.
[165] Although, as set out above at para. 368, she asserts that it ought not to have had that consequence.

370. It is already established that the assessment of quantum will proceed on the basis of my conclusion that the Cayman Disclosure was, indeed, the cause of losses to be quantified[166].

371. For the present purposes of summary judgment on liability, I will set out briefly below, how it is that I find the Cayman Disclosure to have had that consequence.

Adverse use of the Cayman Disclosure

372. The Cayman Disclosure (the confidential nature of which is undeniable and is described in paragraphs 73- 88 of the Reply to the Defence)[167] related not only to Sabino Rabello and Katia Rabello's ultimate beneficial ownership of Arnage and Brooklands but also contained numerous other documents including:

(a) Documents expressly naming Sabino Rabello, Katia Rabello and Fernando Toledo.

(b) Documents relating to the Note Purchase Transaction (including the Defendant's own work product).

(c) Documents concerning both TLB and the Rabello family (the Trade Link Bank documents) which were directly relevant to both the May 2007 and the August 2009 Retainers.

(d) Documents relating to Fernando Toledo's personal and business affairs connected to EFHL and TLB.

373. The Cayman Disclosure has been heavily relied upon by Dr. Braga in proceedings in Brazil, the United States, the BVI and Belize, contrary to the Plaintiffs' interests.

[166] It was also accepted in the ***August 2016 Judgment***, that all of the Cayman Disclosure was available to the Brazilian Courts and would have influenced the outcomes before them.
[167] Under the heading "The Disclosure of Documents and Information"

374. The Cayman Disclosure has also been relied upon by the Brazilian Regulatory authorities in regulatory proceedings unconnected with the Petroforte Bankruptcy.

Adverse use of the Cayman Disclosure before the Brazilian Courts

375. As mentioned above, the Cayman Disclosure has been specifically relied upon by Dr. Braga in applications before the Brazilian Bankruptcy Court, the TJSP and the STJ. In particular, it clearly was relied upon for placing Katia Rabello into the Petroforte Bankruptcy and, inferentially, by the STJ in refusing Securinvest's appeal.

376. While this was the subject of dispute between the parties before[168], there really is no longer any doubt about this and it is confirmed by the expert evidence both of Roberto Figueiredo on behalf of the Plaintiffs and Roberto Liesegang on behalf of the Defendant.

377. Moreover, in his affidavit of 17 February 2011, Dr. Braga admitted that he had provided the totality of the Equity Trust documents (including Bankers Trust documents) to the STJ (Justice Andrighi)[169]. Dr. Braga also filed the OAR Report dated 29 June 2010[170] on the STJ Precautionary Measure File (which both summarized and quoted from the Equity Trust disclosure). It is agreed that Dr. Braga filed the totality of the Cayman Disclosure on File 1819 (the file of the OAR Investigation directed by Judge Beethoven in connection with the Petroforte Bankruptcy)[171].

378. The Cayman Disclosure was persuasive in the key applications before the Brazilian Courts. It was fundamental to the 28 October 2010 Bankruptcy Order made by Judge Beethoven against Katia Rabello, the 9 August 2011 STJ Judgment refusing

[168] See, for instance, ***Judgment 10 August 2016*** (above), where at paras 22 – 24, despite the Defendant's argument to the contrary, it is noted that the Plaintiff's case is and always has been that the totality of the Cayman Disclosure caused damage.
[169] Bundle H3/D/45 [87].
[170] Bundle I/81B/171).
[171] As confirmed by Defendant's expert Roberto Liesegang in his 6th Affidavit at [9.2] Core Bundle Vol 2 Tab 16.

Securinvest's appeal and which, in turn, formed part of the basis for the TJSP's Judgment of 27 September 2011, refusing Katia Rabello's appeal[172].

379. By the Defendant's own admission[173], the disclosure of the Norwich Pharmacal Disclosure by Dr. Braga to the Bankruptcy Court resulted in catastrophic consequences for Katia Rabello.

380. The foregoing findings in relation to the deployment of the Cayman Disclosure before the Brazilian Courts are not however, to be taken as a conclusion on causation of loss or still less, on quantification of loss. For instance as already explained[174] and will be explained further below[175], it is part of the Defendant's case that, to the extent the revelation of Katia Rabello's status as UBO of Securinvest affected the outcome in Brazil, this was information that she was herself obliged to disclose in any event in the context where Securinvest had already been taken into the Petroforte Bankruptcy, before the obtaining of the Cayman Disclosure.

Adverse use of the Cayman Disclosure by the BCB

381. As also already mentioned, following the 28 October 2010 Bankruptcy Order, the Bankruptcy Court also referred the matter to the BCB for investigation with that investigation leading to adverse publicity against Katia Rabello and Banco Rural, and a complaint dated 21 March 2012 ("the BCB 2012 Complaint"), specifically based on the Cayman Disclosure[176].

[172] See Reply to Further Request For Further And Better Particulars of The Reply To The Defence. Core Bundle Vol 1 Tab F2-31 pp 453-454.
[173] See for example, paragraph 17 of its submissions for the March 2016 Hearing: Core Bundle Vol 1 Tab.6 at page 7.
[174] At paragraphs 280-285 above.
[175] At paragraphs 427-428 below.
[176] All as described in the Statement of Claim at paragraphs 168 to 218 of the Statement of Claim.

382. Further, as averred in the pleadings[177], the provision of the Cayman Disclosure also led to the BCB intervening in Banco Rural's affairs and the placing of Banco Rural into compulsory liquidation on 2 August 2013.

BCB Administrative Proceedings

383. The adverse use of the Cayman Disclosure by the BCB also resulted in formal administrative proceedings against Katia Rabello and Banco Rural in March 2012.[178] By way of the BCB Complaint[179], the BCB alleged (as already mentioned above) that as Katia Rabello is the actual owner of Securinvest, certain credit transactions entered into by Banco Rural in favour of Securinvest were in violation of Brazilian law prohibiting the provision of credit to Securinvest as an "associated" company.

384. The use of the Cayman Disclosure by the BCB was in contravention of paragraph 1 (e) of the Retrieval Order of this Court dated 25 July 2011[180].

385. The BCB proceeded on the basis of the Judgments of the Brazilian Courts which had themselves made reference to the wrongfully obtained Bankers Trust aspects of the Cayman Disclosure; the BCB referring to aspects of it and the information it disclosed as principally set out in Judge Beethoven's decision of 28 October 2010. Of importance in this regard was an original letter from Judge Beethoven (2892/2010 - Docinho) dated 3 November 2010, confirming that Katia Rabello was the beneficial owner of Arnage and Brooklands and consequently "controller" of Securinvest.

386. The documents and/or information obtained from the Cayman Disclosure and expressly set out in the BCB Complaint included:

[177] Statement of Claim paragraph 192.
[178] See Plaintiffs' Reply to Request #2 in Replies dated 21 August 2015 to Defendant's Further Request for Further and Better Particulars: Bundle F2, pages 386 to 397.
[179] Bundle I Tab 78
[180] Core Bundle Vol 1 Tab 18.

(i) Arnage and Brooklands subscription documents[181];

(ii) the 2009 Costa Rican corporate restructuring[182]; and

(iii) correspondence between Katia Rabello and Securinvest[183]

387. A copy of the Regulatory Decision imposing a fine of 250,000 Reais upon both Ms. Rabello and Banco Rural is exhibited in evidence[184]. This too expressly referred to and relied upon the Cayman Disclosure, referring inter alia, to the same subscription documents[185] and to the 2009 Costa Rican restructuring.

388. This decision is under appeal and the outcome is still awaited but unless set aside, the fine must be paid[186]. At present the fine is therefore cited by Katia Rabello as being an item of loss and so as an item of the damages she is entitled to recover from the Defendant.

Adverse use of the Cayman Disclosure in other jurisdictions

389. The Cayman Disclosure has repeatedly been used against the Plaintiffs in other jurisdictions causing what they allege to be extensive losses and catastrophic damage. For present purposes, it will I think suffice to note that I accept that, at least in relation to the resistance of such proceedings in Florida, the BVI and Belize, the Plaintiffs must have incurred significant costs.

[181] Bundle I Tab 78 page 19.
[182] Bundle I Tab 78 pages 23-25.
[183] Bundle I Tab 78 page 21 (2nd Paragraph).
[184] Vol I tab 79 - the BCB's Decision, page 54.
[185] Vol I Tab 79 page 46.
[186] Per Mr. Akiwumi on Day 7 of the hearing – transcript December 13, 2018, page 60.

The fourth element for summary judgment: proof of causation of "some" loss

390. As already mentioned, even at this summary judgment stage, the Plaintiffs must establish beyond argument, that some loss was caused by the Defendants' breaches of duty. And given the size of the claim, this must be significant in amount. If the Plaintiffs can at this stage establish only some *de minimis* amount, it would, in my view, be an abuse of the process of the Court to allow this action to proceed any further. This must be correct, although the Plaintiffs may not yet be in possession of all material that would be relevant to their pleading out of the issues on causation and loss.

391. I do not understand the Plaintiffs to disagree.

392. Instead what they assert through Mr. Akiwumi, (also as already mentioned), is that they can indeed show at this stage that significant losses were unarguably incurred both in terms of legal costs and damages and that they are therefore entitled to summary judgment on liability now, with the larger proof of quantum to be established later at the assessment of quantum.

393. The authority cited for this proposition is **Lunnun v Singh and others**[187], a decision of the Court of Appeal of England and Wales. In that case it was held that the fact that default judgment had been entered in favour of the plaintiff for damage to his property caused by water leakages from the defendant's adjacent property, did not absolve the plaintiff from having to prove causation of loss and quantum in respect of each individual head of loss.

[187] 1999 WL 477360

394. The principles, as they would also, in my view, apply to a case like the present upon the grant of summary judgment on liability with damages to be assessed, were summarized by Lord Justice Clarke:[188]

> *"..In my judgment the relevant principles can be deduced from* ***Turner v Toleman***[189] *and* ***Maes Finance Limited and Another v A Phillips & Co***[190]*, to both of which my Lord, Mr. Justice Jonathan Parker, has referred. They may be summarized as follows:*
>
> *…*
>
> *4 On the assessment of damages the defendant [in a case like this, following a grant of summary judgment] may not take any point which is inconsistent with the liability alleged in the Statement of Claim.*
>
> *5 Subject to 4 the plaintiff may take any point which is relevant to the assessment of damages.*
>
> *6 Such points will include [(where applicable)] the following:*
>
> *(i) Contributory negligence: see the passage quoted by Mr. Justice Parker from* ***Maes Finance****; [to the effect that contributory negligence could be relevant on an assessment of damages following judgment on liability, but only if the judgment had not settled an issue on which an allegation of contributory negligence would depend].*
>
> *(ii) Failure to take reasonable steps to mitigate (see the same passage from Maes Finance).*
>
> *(iii) Subject to (5) below, causation.*
>
> *(iv) Quantum [this is of particular relevance here] [emphasis added].*
>
> *(v) Causation. As the Vice-Chancellor put it in* ***Maes:***
>
> *The defendant cannot thereafter contend that his acts or omissions were not* ***causative*** *of <u>any</u> loss to the plaintiff [****emphasis added****]. But he may still be able to argue, on the assessment, that they were not causative of any particular items of alleged loss.*

[188] At pp7-9
[189] Unreported decision of the Court of Appeal, delivered 15 January 1999 per Lord Justice Simon Brown and Mr. Justice Wilson
[190] Unreported decision of the High Court per Sir Richard Scott V-C, transcript dated 12 March 1997.

> *Moreover, he may do so even if the statement of the claim alleges a particular loss was caused by the tort.*
>
> *In **Turner v Toleman** Lord Justice Simon Brown, with whom Mr. Justice Wilson agreed, as my Lord has indicated, quoted the following statement by Lord Justice Waller in refusing leave to appeal on paper in that case:*
>
> > *"What loss and damage was caused by this defendant's negligence must be part of the exercise of assessing damages."*
>
> *Lord Justice Simon Brown expressed the view that that was plainly correct and that it accorded with his own experience over many years."*

395. Those principles are equally applicable to the present case for the purposes of drawing the appropriate line between the judgment on liability against the Defendant for its breaches of duty and the assessment to come of the quantum of loss and/or damages.

Election

396. In this action, each of the Plaintiffs claim, in the alternative, (i) damages, (ii) equitable compensation or (iii) an account of profits received as a consequence of the Defendant's breach of fiduciary duty.

397. As regards (ii) and (iii), there is an election to be made by the Plaintiffs. The principles, as well as the procedure, were explained by the House of Lords in ***Attorney-General v Blake (Jonathan Cape Ltd Third Party)*** as follows per Lord Nichols of Birkenhead**:**[191]

> ***"****I should refer briefly to breach of trust and breach of fiduciary duty. Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorized profit. If they do, they are accountable. Whether*

[191] (2000) 3 WLR 625, [2001] 1 AC 268

> *the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant."*

398. And by the Privy Council in ***Tang Man Sit v Capacious Investments,*** per Lord Russell, as follows[192]:

> "*Faced with alternative and inconsistent remedies, the plaintiff must choose or elect between them. He cannot have both. The basic principles governing when a plaintiff must make his choice is simple and clear.* ***He is required to choose when but not before judgment is given in his favour and the judge is asked to make orders against the defendant****. A plaintiff is not required to make his choice when he launches proceedings. He may claim one remedy initially and then by amendment claim another.* ***He may claim both remedies but he must make up his mind when judgment is being entered against the defendant." [Emphasis added.]***

399. It is accepted that the Plaintiffs must elect between remedies but the Defendant, through Mr. Simpson, argued that they were bound to do so before obtaining summary judgment on liability.

400. Having regard to the dictum above from the Privy Council, this argument is plainly wrong.

401. The Defendant proffered an account of the "profits" by way of fees earned from the Braga Retainer, for which it says it could only possibly be found accountable. This was done through the affidavit of Neil Sherlock, its Chief Financial Officer. He averred that USD362,117.50 was the amount earned.

402. Notwithstanding that the Plaintiffs maintained that they were not obliged to elect until "*when judgment is being entered against the Defendant*" in keeping with the Privy Council's dictum, I was told by Mr. Akiwumi that one of the Plaintiffs, EFHL, upon judgment being entered, would elect for an account of profits from the Defendant. The

[192] [1996] 1 AC 514.

other Plaintiffs, each of whom would be entitled to do so, would elect instead for the assessment of damages or equitable compensation.

The available remedies

403. It should be helpful for me to express my views at this stage on the nature of the remedies which will be available on the assessment of quantum (apart from an equitable account for profits already mentioned).

404. Given that the Defendant has been found liable for breaches of fiduciary as well as contractual duties, the Plaintiffs are entitled to claim compensation on two different bases: equitable compensation or damages at common law.

405. The Plaintiffs also seek compensation under the supervisory jurisdiction of the court for breaches of professional conduct, citing **Udall v Capri Lighting Limited: in the Matter of Richard Oxley Whiting, A Solicitor**[193]. I will return to this issue below.

406. As regards the bases for assessment of equitable compensation for breach of fiduciary duty, the case law has been evolving, as very helpfully explained in **Jackson & Powell**[194].

407. Equitable compensation is now firmly recognized in English law as a remedy for breaches of fiduciary obligation.

408. There is however, a clear distinction to be observed between the traditional remedies for breach of fiduciary duty involving non-disclosure by the fiduciary of his interest in a transaction affecting a client[195] or for a fraudulent breach of trust[196] and a claim for damages for breach of fiduciary duty.

[193] [1988] QB 907.
[194] Op cit, at [3-013] – [3-017].
[195] As classically examined and explained in ***Nocton v Lord Ashburton*** [1914] A.C. 932

409. As was settled by the Privy Council in **Brickenden v London Loan & Savings Company of Canada**[197], in the former set of circumstances, the non-disclosure renders the transaction voidable at the election of the client (as the beneficiary of the fiduciary duty owed) and considerations as to the causative effect of the non-disclosure do not arise.

410. In the latter set of circumstances, the case law now explains the requirement for the showing of a causal link such that it would be inappropriate to regard **Brickenden** as laying down a contrary principle of general application.

411. In **Swindle v Harrison**[198] the Court of Appeal had to consider to what extent proof of a causal link between a breach of fiduciary duty and loss should be established if compensation or damages were to be awarded. The case involved a claim by Mrs. Harrison against her haplessly named solicitor Mr. Swindle, for failure to disclose a small profit he stood to make from an arrangement he made with his bank to provide her with a secured loan for the promotion of her restaurant business. When her restaurant failed, Mrs. Harrison was unable to meet the loan payments and the charge, secured against her home, was enforced. She lost her home and any equity acquired in the business venture.

412. She counter-claimed against Mr. Swindle for her entire loss, alleging that he was in breach of duty in failing to reveal the profit he stood to make from the loan arrangement,

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[196] Where the remedy would be reparative, such as by an account or other form of restitution of a trust fund: see for insightful discussions on the different remedies: "***Where there is discord, may we bring harmony***": ***AIB Group (UK) V Mark Redler and the Perils Facing Equity",*** Mathew Hoyle, Oxford University Press, Undergraduate Law and "***Loss of Chance and Breach of Fiduciary Duty, The Requirement of Certainty of Loss***" Simone Degeling (2016) 28 SAcLJ 825.

[197] [1934] 3 DLR 465, at 469 per Lord Thankerton: "*When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's actions would be solely determined by some other fact, such as the valuation by another party of the property proposed to be mortgaged. Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant".*

[198] [1997] 4 All E.R. 707

notwithstanding that its terms had been quite reasonable and would in any event, have been readily accepted by her, given her then dire need for financing.

413. She relied on the dictum of Lord Thankerton in **Brickenden**, arguing that she did not need to prove that the breach of fiduciary duty caused her losses. The argument failed, the Court of Appeal declaring that, as distinct from claims for breach of fiduciary duty involving non-disclosure, considerations of causation applied to claims for compensation for non-fraudulent breaches of fiduciary duty (per Lord Justice Evans, following **Bristol & West Building Society v Mothew**[199]) and that it is necessary to satisfy the "but for" test of the common law if damages were to be recovered (per Lord Justice Hobhouse). Lord Justice Mummery, the third member of the Court, expressly recognized the availability of equitable compensation as a remedy for breach of fiduciary duty. Having observed that common law considerations of remoteness and foreseeability were generally irrelevant to restitutionary remedies for breach of trust or fiduciary duty, he held that:

> *"Although equitable compensation, whether awarded in lieu of rescission or specific restitution or whether simply awarded as monetary compensation, is not damages, it is still necessary for Mrs. Harrison to show that the loss suffered has been caused by the relevant breach of fiduciary duty. Liability is not unlimited. There is no equitable by-pass of the need to establish causation"*[200].

414. In ***Target Holdings Ltd v Redferns,*** the need to show the connection between the breach of trust and the loss in a claim for equitable compensation, was also recognized by the House of Lords per Lord Browne-Wilkinson:[201]

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[199] [1998] Ch 1 CA.
[200] At 733h.
[201] [1996] 1 A.C 421, 439. ***Target Holdings v Redferns*** has been explained and upheld by the Supreme Court, its widespread academic criticism notwithstanding, in ***AIB Group (UK) v Mark Redler*** [2014] UKSC 58, [2015] AC 1503.

> "*Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.*"[Emphasis added.]

415. The words in emphasis, being an adaptation and approval of dictum from **Canson Enterprises Ltd v Boughton & Co**[202], will also inform the approach to the exercise of assessment of loss.

416. **Swindle v Harrison**, **Target Holdings Ltd v Redferns and Brickenden** (all above) have been followed and applied in this jurisdiction in **AB Junior and Madame B v MB and Four Others**[203]. In that case it was found that equitable compensation was an available remedy for the trustees' non-fraudulent breach of trust in failing to disclose information to their beneficiary, information which was relevant to the valuation of the beneficiary's interests in the trust. The appropriate basis for the calculation of equitable compensation was to enquire into whether or not a loss resulted from the failure of the trustees to disclose and to quantify that loss. Thus, by implication, a causation analysis in the context of a non-fraudulent breach of trust.

417. Accordingly, in their claims for compensation for loss caused by the Defendant's breaches of fiduciary duty, the Plaintiffs must establish causation. However, in assessing compensation, the objective is to compensate for the consequences of the breach of fiduciary duty and in so doing a common sense view must be taken of what loss occurred from the breach and so falls to be compensated.

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[202] (1991) 85 D.L.R (4TH) 129, at 163 per McLachlin J.
[203] 2013 (1) CILR 1, among other cases discussed at pp102 -114.

418. The remedy is truly compensatory, not punitive[204], and so there is no power to make an exemplary award (as the Plaintiffs also pray).

419. Any claims for compensation for breach of the contractual duties (or in negligence for breach of tortious duties of care if pursued) must, of course, be proven on the usual common law bases.

The supervisory jurisdiction to order compensation

420. As mentioned above, the Plaintiffs also claim that the Defendant's conduct is such (both in terms of its actions against them on behalf of Dr. Braga and its continuing allegations of misconduct and attacks upon their reputation in the manner of its Defence[205]) that the Court should exercise its supervisory jurisdiction and order compensation for breach of the professional conduct rules, following **Udall v Capri** (above).

421. While these are compelling arguments on which to respond to the allegations in the Defence, I am not persuaded that they provide the distinct and separate basis required for the invocation of the Court's supervisory jurisdiction leading to the making of an award of compensation or an award of wasted costs, the latter, as I will now explain, being the basis as already applied in this jurisdiction, for the application of the supervisory jurisdiction[206].

422. The Plaintiffs rely upon dicta from **Udall v Capri** which suggests that the Court has a very wide discretionary jurisdiction "*to supervise the conduct (of an attorney as its*

[204] ***Harris v Digital Pulse Pty Ltd*** [2003] N.S.W.C.A. cited in ***Jackson & Powell*** op. cit, at [3-016]

[205] These include references to the Mensalao Scandal, criticisms of the Plaintiffs honesty and integrity inconsistent with the Defendant's duty of loyalty (as explained by Campbell J in ***Chiefs of Ontario v Ontario*** 2003 CanLII 32351, [2003] O.J. NO 580 and their submissions on *ex turpi causa*, to be discussed below.
The Plaintiffs, through Counsel, also submit that the Defendant should be estopped from raising such allegations having expressly and/or impliedly represented by its conduct that it would seek to protect the Rabello family and the Plaintiffs' interests in relation to the matters alleged.

[206] As discussed and applied in ***Al-Ibraheem v Bank of Butterfield*** 2000 CILR 88, Further Proceedings reported at pages 277 and 507

officer) and to visit with penalties any conduct which is of such a nature as to tend to defeat justice in the very cause in which the (attorney) is engaged"[207].

423. That principle was applied in **Udall v Capri** where the professional misconduct involved the failure to honour an undertaking given to the court. The principle was adopted as contained in a passage from the earlier authoritative judgment of Lord Wright delivered on behalf of the House of Lords in **Myers v Elman**[208] by which the jurisdiction of the courts to impose wasted costs orders upon attorneys for gross neglect or inaccuracy in the conduct of a matter, was settled. There the jurisdiction is described as "*not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently... exercised in order to compensate the opposite party in the action.*"

424. **Myers v Elman** was itself followed and applied by this Court in the **Al-Ibraheem** judgments cited above.

425. The jurisdiction is both discretionary and summary in nature. It is "*only available where the conduct of the (attorney) is inexcusable and such as to merit reproof*" by the Court[209]. And, being summary in nature, only where the enquiry to be undertaken will not involve the resolution of extensive factual issues or counter-allegations. Otherwise, the appropriate redress is by way of an action at law for negligence – see ***Udall v Capri*** (above) at page 917 C, quoting from ***Myers v Elman*** (also above).

426. Given the supervisory and summary[210] nature of the jurisdiction, as well as the debatable question whether it might be used to make an extensive award for unliquidated damages

[207] Citing ***Stephens V Hill*** (1842) 10 M & w 28, per Abinger C.B.
[208] [1940] A.C 282, 319.
[209] ***Myers v Elman***, (above) at 917 E.
[210] Albeit the procedural strictures were regarded as not being determinative of whether or not a wasted costs enquiry should be engaged in this jurisdiction: see ***Al-Ebraheem*** (above) 200O CILR at pp 290-300.

of the sort claimed by the Plaintiffs here, I would not consider this a case suitable for its application, egregious though the breaches of duty appear to be.

427. Here, the Plaintiffs have open to them the other clear remedies of equitable compensation for breaches of fiduciary duties or damages for breaches of the contractual duties[211].

Particulars of some loss

428. To the extent that the Plaintiffs must now show that they have suffered some loss, I am satisfied that they have met this test. In setting out below the particular heads of pecuniary loss as identified, I do not prejudge the assessment exercise; I simply identify those heads under which I am satisfied the Plaintiffs will certainly be able to recover some substantial loss.

429. The other much larger claims, such as for the loss of Securinvest's or Banco Rural's assets[212], must of course, satisfy the causation tests discussed above.

430. In particular, I am satisfied for the purposes of summary judgment on liability (and subject to specific proof at assessment of quantum), that the Plaintiffs have suffered the following pecuniary losses, connected to legal fees and disbursements caused by the litigation engendered by the Cayman Disclosure (as set out at para 220 of the Statement of Claim):

(i) Legal fees and disbursements incurred by Brazilian Counsel in respect of (a) the Court Proceedings in Brazil; (b) the BCB Investigation; and (c) proceedings outside Brazil in excess of USD15,000,000;

[211] The latter as based, for instance upon Clause 1 of the 7 August 2009 Terms of Engagement Letter which states:
"*We will provide our legal services with reasonable care and skill and in accordance with the professional standards expected of us and in a timely manner*" Vol B Tab 20 Exh FT1 pages 185-192 of the bundle
[212] As pleaded at paras 186 and 187 of the Statement of Claim

(ii) Legal fees and disbursements incurred by Cayman Islands Counsel in the Cayman Islands Proceedings and assisting in proceedings outside the Cayman Islands in excess of US$850,000;

(iii) Legal fees and disbursements incurred by U.S. Counsel in connection with the U.S. Proceedings and assisting in proceedings outside the U.S. in excess of US$1,000,000;

(iv) Legal fees and disbursements incurred by BVI Counsel in connection with BVI Proceedings and assisting in proceedings outside the BVI in excess of US$100,000;

(v) Legal fees and disbursements incurred in Belize in connection with the Belize Proceedings and assisting in proceedings outside Belize in excess of US$25,000.

431. During the hearing, the Defendant pressed, through Mr. Simpson, for proof of payment of these fees and disbursements. In response, the Plaintiffs were unable to show actual payment of anything like the US$17 million posited above from the Statement of Claim, instead, at this stage proposing to show that through a company Gladbeck Capital Ltd owned by Katia Rabello and other companies affiliated with her had in fact paid US$1,875,000 as part of these legal fees.[213] This was money which Mr. Macaulay testified was actually paid to his firm and then paid out, including to Cayman Islands lawyers and Counsel. In support of the Plaintiff's case he confirmed that in connection with "*taking steps to mitigate their loss and to set aside the orders obtained by the Defendant on behalf of Dr. Braga in the Cayman Islands, the Plaintiffs incurred substantial Cayman Islands legal costs and disbursements in excess of US$850,000 together with substantial further Brazilian and US legal costs and disbursements*"[214].

432. I conclude that questions over whether or not Gladbeck Capital Limited itself actually made these payments on behalf of the Plaintiffs, or from whatever other source they

[213] As explained in Mr. Macaulay's 10th Affidavit sworn on 10 December 2018 (paragraph 7).
[214] As pleaded at para 173 of the Statement of Claim.

might have been paid, are matters for proof at the assessment hearing, along with other matters for quantification of loss or damage.

433. This is of course, without prejudice to any proper application the Plaintiffs might make for an interim payment on the basis that some quantifiable loss can now be shown beyond argument.

The Defendant's strike-out application

(i) The ex turpi causa defence: Katia Rabello's lie to the STJ

434. It is an inescapable conclusion that the presentation of the Costa Rican structure to the STJ was – as Katia Rabello herself came to admit when pressed by this Court in these proceedings for an explanation[215] – an artifice capable of misleading the STJ.

435. She maintains however, that there was no intention to deceive the STJ so as to defraud the Petroforte estate. Her explanations must also therefore be again considered in the context of her response to the ex turpi causa defence of the Defendant and this will be done below.

436. The issue to be decided now therefore, is whether Katia Rabello's lie to the STJ can be invoked in this action by the Defendant, in support of its *ex turpi causa* defence, to the extent of striking out the Plaintiffs' claims because, in the manner contemplated by GCR Order 18 r 19, it fails to disclose a reasonable cause of action or for being an abuse of the process of the Court.

437. In this context – (as well as in the earlier context discussed above of her (and the other Plaintiffs') pleading of the loss of opportunity to limit the harmful deployment of the

[215] In her Third Witness statement of 9 November 2018, December 2018 Hearing Bundle, Tab 1 (Red).

Cayman Disclosure in Brazil) – Katia Rabello's explanation for her lie to the STJ is highly relevant.

438. It is therefore convenient to set out here in her own words, her explanations, as taken from her third witness statement filed in this Court in these proceedings:[216]

> "*In particular, I am responding to the Court's request for clarification as to the motivation relating to Securinvest's deliberate failure to provide the STJ with the UBO information requested in its 22 September 2009 Order.*
>
> *The STJ Order presented the Rural Group and me with a serious dilemma.*
>
> *Collectively, we knew that there never was any direct or indirect involvement by Petroforte or any of its affiliates in the ownership or control of Securinvest or the Rural Group and that therefore there was no common economic group between the Rural Group/Securinvest on the one hand and the Petroforte Group on the other. On this basis, as we understood the relevant bankruptcy law to be at that time, we believed that there was no legal basis by which Dr. Braga could keep Securinvest within the Petroforte bankruptcy or to pursue any Securinvest asset other than Sobar….*
>
> *A transparent declaration by me, acknowledging my status as UBO of Securinvest, I believe and understand would have fully satisfied the STJ that Petroforte had no ownership or management interest in Securinvest, thereby providing the STJ with the substantive basis for rejecting Dr. Braga's contention of a common economic group. As a result, I believed that had I made the correct UBO declaration, Securinvest would have been excluded from the Petroforte bankruptcy.*
>
> *I also understood that, if Securinvest and I were successful in the STJ appeal, so as to free Securinvest from the Petroforte bankruptcy, this would not give Securinvest the right to ownership of Sobar, which, logically would remain subject to a resolution on the merits of the revocation action.*
>
> *Given the logical consequences in the Petroforte bankruptcy proceeding of my admission to being the UBO of Securinvest, this Honourable Court is rightly concerned as to why I chose not to take this course. In essence, as I explain below, the problem was that, had I made this admission, very serious collateral issues would have arisen affecting Banco Rural and me*

[216] December 2018 Hearing Bundle, Tab 1 paras 6 to 19.

from the perspective of the relevant regulator of the bank, namely the Brazilian Central Bank (BCB).

Under the applicable regulatory regime, common ownership by my family of Securinvest (100% through the First and Second Plaintiffs) and Banco Rural (54%) meant that transactions between Securinvest and Banco Rural should have been classified and disclosed as related party transactions and subject to the BCB's rigorous restrictions on related party transactions. Had the true nature of the relationship between Securinvest and Banco Rural been disclosed to the BCB, given the extensive transactions between Banco Rural and Securinvest, Banco Rural (the main asset of the RURAL Group) and I would have been exposed to severe legal and administrative sanctions.

Regrettably, it is against this background that I made the choice not to make a full and frank disclosure to the STJ that I was the UBO of Securinvest. Paradoxically, it was clearly in my interest to declare my UBO status for the purposes of the Petroforte litigation; however, for reasons I have stated in this Statement, namely protection from the significant risk of legal and/or regulatory proceedings against Banco Rural and me for the breach of the relevant banking laws and regulations, I elected not to declare this status.

At the time of my decision not to disclose Securinvest's UBO to the STJ, I knew that proceedings had already commenced against me and other Banco Rural affiliates in 2008 as a result of disclosure of UBO information as to TLB, which had been provided by CIMA to the BCB in 2006[217].

In summary therefore, at the time of Securinvest's response to the STJ's Order regarding UBO disclosure, I knew that the Rural Group was the victim of an attempt by Dr. Braga to misappropriate hundreds of millions of dollars worth of non-Sobar assets based on the Rural Group's vulnerability to the BCB arising from the irregular nature of the Securinvest/Banco Rural relationship.

The cost of declaring my status as UBO of Securinvest would have been very high given the risks relating to the BCB and Brazilian banking law. Consequently, given the dilemma we faced, I decided not to disclose myself as Securinvest's UBO and instead disclose only the Costa Rican nominees while truthfully emphasizing to the STJ the key legal point that there was no connection between Securinvest's owners and Petroforte and that therefore no basis existed for any Securinvest assets to be subjected to

[217] I note in parenthesis here, that this is implicitly a reference to herself as an interested party behind the Note Purchase Transaction and a subject of the August 2009 Retainer.

the Petroforte bankruptcy, save for Sobar, which remained subject to the outcome of the revocation action:

> *"We would stress that what is important for the purposes of the law upheld by these interim remedy proceedings and according to the esteemed court ruling which granted an interim injunction, is that the Petitioner's shareholders, and the natural persons who are partners of those shareholders, do not have any relationship with the bankrupt party's group of companies."*[218]

My lack of candor with the STJ regarding the UBO of Securinvest had nothing to do with either the merits of Securinvest's appeal to the STJ or the Sobar property, which would have remained subject to Dr. Braga's revocation action following Securinvest's exclusion from the Petroforte bankruptcy. I and the Rural Group simply sought to vindicate our legitimate rights to the non-Sobar assets which Dr. Braga was trying to misappropriate, while at the same time avoiding the very serious collateral regulatory and legal problems for Banco Rural (the main asset of the Rural Group) and me, which could arise from the BCB receiving proof that Securinvest was not independent, in terms of its ultimate beneficial ownership, from Banco Rural.

In the absence of this huge legal and regulatory risk having nothing to do with Petroforte, I would have gladly disclosed my beneficial ownership of Securinvest to the STJ. Of course, in the absence of that risk, which I believe Dr. Braga knew I faced, I strongly doubt that he would have tried to misappropriate Securinvest's non-Sobar assets. Indeed, the existence of this overarching concern was subsequently validated by Dr. Braga's actions after obtaining the Cayman Disclosure in ex parte proceedings before this Court in May and July 2010, with the Defendant acting as his counsel in breach of the Defendant's duties to me. My fears were realized when I learned that Dr. Braga had requested Judge Beethoven to deliver to the BCB the confidential documents concerning my ownership of Securinvest, an action which was entirely irrelevant to the limited basis upon which he claimed to have been authorized by the STJ to seek cross border assistance from this Honourable Court."

439. The first point to note for present purposes, is Ms. Rabello's response to the allegation of her intent fraudulently to mislead the STJ.

[218] From the closing paragraph of Securinvest's submissions to the STJ (submissions to Justice Andrighi) of 5 November 2009, exhibited to Katia Rabello's Third Witness Statement, Exh 1 at December 2018 Hearing Bundle, Tab 1.1

440. In summary, her response as I understand it, (and as already briefly discussed above in the context of the Plaintiffs' summary judgment application) is that her lie had no fraudulent intent primarily because, had the STJ been misled, the result would not have been the successful extraction of the contentious Sobar assets from Petroforte. Instead, had the STJ acted on her misrepresentations, allowed Securinvest's appeal and reversed the extension of the Petroforte Bankruptcy over it, the validity of the Sobar Transaction would have remained to be resolved in the context of the Revocation Action.

441. Further, that Dr. Braga would then have been obliged not merely to allege fraud, as he was able to in support of the bankruptcy proceedings but instead, to prove it in the Revocation Action. Securinvest's non-Sobar assets, to which he could have had no entitlement to claim, would very likely therefore have remained where they belonged, with Securinvest because he would not have been able to prove the alleged fraudulent intermeddling in the Petroforte Estate.

442. This explanation of Katia Rabello's intent was of course, not something given to resolution on the summary basis so as to afford her (or the other Plaintiffs through her) a final answer to the Defendant's strike-out application. But conversely, neither was the Defendant's strike-out application which must also be taken summarily[219], a proper basis for rejecting it.

443. In short, the *bona fides* of her explanation is a matter of fact which could not be resolved without a trial, including cross-examination as to her intentions. The Plaintiffs' case was

[219] See GCR Order 18 r 19 (above) As the Notes to RSC (op cit) explain at 18/19/6: *"It is only in plain and obvious cases that recourse should be had to the summary process under this rule*". And at 18/19/10: *"A reasonable cause of action [such as should survive a strike out application] means a cause of action with some chance of success when only the allegations in the pleadings are considered"* (per Lord Pearson in ***Drummond-Jackson v British Medical Association [***1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, CA). So long as the statement of claim or the particulars (***Davey v Bentinck*** [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (***Moore v Lawson*** (1915) 31 T.L.R. 418, CA; ***Wenlock v Maloney*** [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA.".

therefore not amenable to being struck simply because (on the Defendant's view of it) it depends on Katia Rabello's intention to deceive the STJ.

444. Her explanation also gives rise to the question whether, if accepted by the Court, it might afford her a *locus poenitentiae*[220] from which she might urge this Court to uphold her claims, her lie to the STJ notwithstanding. If so, it would provide a definitive answer to the Defendant's strike out application which, again, must show that the Plaintiffs' case reveals no reasonable cause of action. The case law on this issue will be examined immediately below.

445. In light of her explanation, the Defendant could not have succeeded with its strike out application on the summary basis relying solely on its interpretation of her intentions in lying to the STJ. In this context, the Defendant needed to show that her explanation was not an arguable or plausible response to its allegations of illegality. The onus was on the Defendant to do so and, given her untested and therefore as yet unrefuted explanations, the onus was not discharged.

446. The principle of illegality (as a defence to a claim) was recently and authoritatively considered and restated by the UK Supreme Court in the case of **Patel v Mirza**[221].

447. The facts were that Mr. Patel, the plaintiff, had transferred £620,000 to the defendant Mr. Mirza for him to bet on the price of shares in the Royal Bank of Scotland (RBS). Their agreement was based on the expectation that Mr. Mirza had access to inside information from his RBS contacts which would enable him to predict or anticipate movements in the market price of the shares. This agreement was illegal- it was a conspiracy to commit an

[220] Within the meaning of the case law as recently discussed by the Court of Appeal in ***Patel v Mirza [2015] Ch 271***, although now to be regarded as but a factor for consideration and subsumed within the proportionality principle recognized by the Supreme Court in the majority decision delivered by Lord Toulson to be considered below.
[221] [2017] AC 467

offence of insider trading contrary to section 52 of the Criminal Justice Act 1993. But the inside information, which would have moved the market, never arrived. The bid for shares was not placed and although Mr. Mirza said he would return the money, he decided to keep it. When he was sued by Mr. Patel for its return he pleaded illegality as the defence, invoking the time honoured legal maxims: *ex turpi causa non oritur actio* (from a dishonourable cause an action may not arise) and in p*ari delicto potior est conditio defendentis* (where fault is equal, the condition of the possessor is better) – in other words, where the parties are equally to blame, the position of the defendant is to be preferred, ie: "let the loss lie where it falls".

448. The nine Justices were unanimous that Mr. Patel should be entitled to recover his money and, which came to the same thing, that Mr. Mirza should not be permitted to keep the money because he would thereby have been unjustly enriched. The reasoning also was that Mr. Mirza was able to make full restitution of the money and Mr. Patel would neither be profiting from his admitted complicity in the illegal agreement, nor did he need to invoke the process of the court by way of reliance on it to prove his claim. In essence his claim was for his money handed over to Mr. Mirza, money by which Mr. Mirza would be unjustly enriched if it was not returned.

449. In his judgment on behalf of the majority, Lord Toulson identified tripartite policy considerations and adopted a 'range of factors' approach that a court should take when deciding on a defence to a claim on the basis that the claim should fail on account of some illegality by the plaintiff. At [120] he explained that:

> "***The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system****… In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider*

> *the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts*" [emphasis added].

450. In assessing whether it would be disproportionate to refuse relief to which the plaintiff was otherwise entitled (consideration (c) above), Lord Toulson explained that "various factors may be relevant" at [107]. In a claim where a party was attempting to enforce a contract, he explained that these factors could include how central to the contract or its performance the relevant conduct was, how serious a sanction the denial of the enforcement would be for the party seeking enforcement, whether denying enforcement of the claim would further the purpose of the rule which the conduct had infringed, and whether denying enforcement would act as a deterrent to conduct that was illegal or contrary to public policy.

Impact of Patel v Mirza in this case.

451. In seeking to strike out the Plaintiffs' claims on the ground of their illegality, the Defendant made no effective attempt to engage with the impact of ***Patel v Mirza.***

452. Instead, the Defendant has throughout repeated the refrain that if the claims succeed, then the Plaintiffs and Katia Rabello in particular, would have profited from her own dishonest wrong-doing. As Mr. Simpson put it during the final days of the hearing, asserting her reliance on illegality: "*giving back to Katia Rabello by way of damages against her attorney that which was correctly taken by the Brazilian courts*" and that she is guilty of "*a massive fraud on Petroforte*".

453. Yet, even a cursory reading of ***Patel v Mirza*** explains that a claim can no longer be dismissed[222] simply by reliance on the doctrine of *ex turpi causa*. The mere assertion that Ms. Rabello would be profiting from her wrongdoing as an automatic bar to the Plaintiffs' claims, fails to engage with the principles from ***Patel v Mirza***. As Lord Toulson explained at [100]:

> "*100. Lord Goff observed in the Spycatcher case, Attorney General v Guardian Newspaper Ltd (No 2) [1990] 1 AC 109, 286, that the "**statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case".** In Hall v Herbert [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view, at pp 175-176, that, as a rationale, **the statement that a plaintiff will not be allowed to profit from his or her wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.***
>
> ***That is a valuable insight, with which I agree."*** [Emphases added.]

454. With those principles in mind, it readily became apparent why the Defendant's strike out application based on *ex turpi causa* was bound to fail.

455. In the first place, even if the approach to the issue of illegality approved in **Patel v Mirza** could be applied here (about which I make no finding because the allegation in this case of illegal conduct is entirely moot) then clearly, the burden of making out this defence rests upon the Defendant. Yet the Defendant has not even attempted to say why the defence of illegality should apply to bar each and every one of the Plaintiffs' claims.

[222] As it was sometimes liable to be under the old rule in ***Tinsley v Milligan*** [1994] 1 AC 340 which was overruled by ***Patel v Mirza***.

456. Moreover, there are no allegations of illegality on the part of EFHL and Mr. Toledo. Accordingly, to the extent that those Plaintiffs can show loss or damage caused by the Cayman Disclosure, the Defendant may not argue that their claims are unsustainable or an abuse of process.

457. Secondly, so far as Katia Rabello herself is concerned, she makes no admission of illegal conduct nor has she been convicted of any in relation to the pivotal issue of the extension of the Petroforte bankruptcy. Her transgression, at least from the point of view of Judge Beethoven's extension of the bankruptcy to her, appears to have been the fact of her beneficial ownership of Securinvest and her lie to the STJ about that fact.

458. There is no reliance in her pleaded case, in order to claim loss against the Defendant, upon any illegality as between herself and anyone (including the Defendant as the counter-party for that matter). Her case is that the Defendant breached its duties and obligations owed to her and that these breaches resulted in loss and damage, in turn the result of court and regulatory actions in Brazil.

459. In no sense does she rely upon her own impugned conduct. As already mentioned, this is in two respects. First her lie to the STJ. While she offers an explanation, she does not suggest that her lie should be accepted as the truth by this Court in order to establish her claims. Acknowledging that she lied to the STJ, she explains that she had no fraudulent intent and no such intent could have prevailed in any event because the Sobar assets claimed by Petroforte would not have been released to her even if she had succeeded in Securinvest's appeal. And so, in light of the proportionality exercise advised by **Patel v Mirza**, it would be disproportionate to reject her claims against the Defendant on account of her lie, which would result only in an unjustified windfall for the Defendant.

460. Moreover, again when considering proportionality, it must be remembered that the alleged fraudulent misappropriation of Petroforte assets, allegations relating to events which preceded her time as head of the Rural Group – are, as yet, strictly to be regarded as unproven.

461. And so, even assuming the applicability of the ***Patel v Mirza*** principles, in order to invoke them to block the Plaintiffs claims, the Defendant must explain but has failed to even attempt to do so:[223]

(i) which acts it relies upon as constituting the relevant transgressions which would engage the illegality principle. Even if, (in the continuing irresolution of the Revocation Action and despite also the absence of any criminal charges) the Plaintiffs were to be regarded as guilty of the alleged "fraud" against Petroforte, the Plaintiffs have not sought to rely upon that fraud for recovery in this action. Their claim, primarily, is for recovery of the value of Securinvests's and Katia Rabello's non-Sobar assets which were lost as a result of the Defendant's actions which enabled the extension of the Petroforte bankruptcy to them by dint of civil[224], not criminal, legal measures;

(ii) what effect the enforcement of the claims would have upon the public interest (in Cayman or in Brazil, assuming without acknowledging, the relevance of the

[223] Instead, in its written submissions seeking to invoke public policy as a bar to the Plaintiffs' claims on the basis that they sought to pervert the course of justice in Brazil by Katia Rabello's lie to the STJ. See Defendant's Skeleton Arguments for Hearing 3-14 December 2018 paragraphs 172-175. And by a bold reliance on allegations of illegal conduct at Written Submissions for May 2018 Hearing, paragraphs 110-111.

[224] Recognising that in ***Laboratoires Servier v Apotex*** [2015] AC. 130, in the context of a claim for infringement of pharmological patents, the Supreme Court held, inter alia (while finding on the facts of the case that the public interest was not sufficiently engaged to invoke the *ex turpi causa* rule) that " *acts which constituted "turpitude" for the purposes of the ex turpi causa rule were not confined to criminal acts but extended to acts which were quasi-criminal in that they were contrary to the public law of the state and engaged the public interest, which was the foundation of the illegality defence; that non-criminal acts which engaged the public interest included dishonesty or corruption even in the context of purely civil disputes, and the infringement of rules which were enacted for the protection of the public interest and which attracted civil sanctions of a penal character*…". And see **Safeway v Twigger** [2010] EWCA Civ. 1472 (breaches of competition law) cited by the Defendant.

latter) and conversely, their denial would have upon the Plaintiffs. In the absence of proven illegality on the part of Katia Rabello in particular (and hence Arnage and Brooklands against whom the Defendant makes such assertions) it is difficult to see how the public interests in the Cayman Islands (or in Brazil for that matter) would be harmed by allowing the enforcement of her and Arnage's and Brooklands' claims. Conversely, denying these claims would allow the Defendant to escape from the consequences of its numerous and serious breaches of duty owed to the Plaintiffs because, entirely separately, unproven allegations by the Defendant itself of illegal conduct in Brazil have been made against one (but not others) of the Plaintiffs;

(iii) whether the denial of the claims would be a proportionate response to the (alleged) illegality. The Defendant has not sought to explain why denial of these claims would be a proportionate response despite the apparent harm suffered by the Plaintiffs. Let alone why denial of the claims would be proportionate to the undermining of the public interests which also demand (and would be in this case denied) the preservation and observance of the lawyer-client duties of confidentiality, loyalty and trust. Moreover, given Katia Rabello's explanation for her lie to the STJ, why it would be a proportionate response to block her claims entirely by way of strike out, instead of affording her *a locus poenitentiae* (as discussed above), on the basis of her stated intention not to defraud the Petroforte Estate of any of its assets.

462. Put shortly, the Defendant has failed to explain why the Plaintiffs' claims, or any of them, should be barred on the basis of the modern restatement of the illegality principle.

463. When properly understood and applied, the modern restatement of the principles present no clear basis for the denial of the Plaintiffs' claims. In particular, the Plaintiffs' do not plead any reliance upon any illegal activity as between themselves and anyone else, including in particular Securinvest. Their claims seek no recovery in respect of the Sobar Assets and so, in that respect, any allegations of fraud (illegality) , as yet unproven and yet to be resolved in the Revocation Action, are irrelevant to this action.. Here I emphasize the difference, as I understand it, between the extension of the Petroforte Bankruptcy on the civil (ie non-criminal) bases cited in the Brazilian Judgments,[225] and any proven criminal allegation of fraud[226].

464. Nor do the modern principles provide a proper basis upon which the Defendant might seek to strike out the Plaintiffs' claims on the summary basis upon which the Defendant proposes.

465. Any fraudulent intent behind Katia Rabello's "lie" to the STJ is a matter to be cross-examined upon at the assessment of loss stage and can go only to the question of causation of loss[227], not, in my view, to the question of the Defendant's liability for breaches of duty. These are important observations to be expanded upon below, in the context of addressing the Defendant's abuse of process "collateral attack" arguments.

[225] Viz: "***common economic group***" or "***lifting of the corporate veil***" to extend the Bankruptcy respectively to Securinvest and Katia Rabello.

[226] To the extent any such allegation ought now to be regarded as proven at this stage, the Defendant, in any event, would be precluded from relying upon such allegation against its former clients in order to bar an otherwise proper claim. See **In Re Thomas** [1894]1 Q.B. 747 where the English Court of Appeal roundly rejected such a pleading by solicitors against their former client.

[227] That is: whether she should be regarded as having been obliged to tell the truth and so whether, had she told the truth as she was obliged to do, the outcome for Securinvest would have been the same as that which resulted from the Defendant's breaches of duty.

(ii) <u>Abuse of process: collateral attack upon the Brazilian judgments</u>

466. The Court has a well settled jurisdiction – both as a matter of its inherent powers and expressly from GCR Order 18 r 19 – to strike out claims which amount to an abuse of its process.

467. The categories of conduct which might render a claim liable to strike out for being frivolous, vexatious or otherwise an abuse of process are not closed but depend on all the relevant circumstances and, for this purpose, considerations of public policy and the interests of justice may be very material[228].

468. The term "abuse of process of the Court" connotes that the process of the Court must be used *bona fide* and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation by striking out the offending pleading. See ***Notes to the RSC*** (ibid), citing ***Castro v Murray***[229]; ***Dawkins v Prince Edward of Saxe Weimar, Willis v Earl Beauchamp***[230].

469. The further manner in which the Defendant says that the Plaintiffs' claims are an abuse of process is that they are a collateral attack upon the Brazilian judgments and that in effect, the Plaintiffs seek to re-litigate the consequences of those judgments by challenging both the correctness of the judgments under Brazilian law, as well as the integrity of the judges who decided them. Further, that in so doing submits the Defendant, the Plaintiffs question the very integrity of the Brazilian judicial system itself.

[228] See ***Notes to the RSC*** (op cit) – ***18/19/18***, at page 352.
[229] (1875) 10 Ex. 213
[230] (1886) 11 P. 59, per Bowen LJ at 63.

470. The Defendant relies upon the statement of the law on collateral attack from Lord Diplock in **Hunter v Chief Constable of West Midlands**[231]. In that case there was an attempt by Hunter, one of the hapless Birmingham Six[232], to challenge his criminal convictions for 21 murders by way of a civil claim in damages against the West Midlands Police. In doing so he had to impugn in his civil action, the admissibility and authenticity of his confession upon which he had been convicted by the jury in the criminal case. This he sought to do by alleging that his confession to having planted the devastating bomb had been fabricated, following beatings at the hands of the police. Lord Diplock declared on behalf of the House of Lords that:

> *"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made".*

471. While the House of Lords was there concerned with precluding the potential abuse of process which would have been inherent in allowing a challenge to the integrity of a criminal conviction by way of re-litigation in subsequent civil proceedings, it is clear from the discussion of the older cases that the collateral attack principle is meant to be of wider application. And so, that it could apply as regards a challenge in later civil proceedings to the outcome in earlier civil proceedings.

472. At pp542-543 Lord Diplock stated:

> *"My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view,*

[231] [1982] AC 529, 541.
[232] As shown by their exoneration many years later when it was revealed that their confessions had indeed been fabricated by the police.

*simply and clearly stated in those passages from the judgment of A.L. Smith L.J in **Stephenson v Garnett** [1898] 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in **Reichel v Magrath** (1899) 14 App. Cas. 665, 668 which are cited by Goff L.J in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L.Smith L.J:*

> *"…the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court."*

The passage from Lord Halsbury's speech deserves repetition here in full:

> *"… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again"*

473. Despite the many criticisms in their pleadings and written submissions of the Brazilian judgments[233], the Plaintiffs, *in arguendo* through Mr. Akiwumi, have disavowed any reliance on an invitation to this Court to conclude that those judgments were wrong.

474. Instead, as I understand their argument, while the Plaintiffs protest what they regard as injustice at the hands of the Brazilian judges, it is the consequence of their judgments which forms the basis of their claims against the Defendant. Accordingly, the Plaintiffs' position is that they do not need to invite this Court to re-litigate the outcome or second-guess the correctness of the Brazilian judgments, a proposition which, as I already noted earlier in this judgment, it would have been inappropriate for this Court to entertain in any event[234].

[233] See as summarized in paras 164 -171 of the Defendant's written submissions for hearing on 3 -14 December 2018.

[234] In light of the settled principle that the decision of a foreign court taken in accordance with its own law is binding, notwithstanding that an English (Cayman) court would have decided the matter differently according to English law: ***Goddard v Gray*** (1870) LR 6 QB 139, 149 and ***Castrique v Imrie*** (1870) LR 4 HL 414

475. So for instance, while they regard the *ex parte* and summary manner of Judge Beethoven's extension of the Petroforte bankruptcy to Katia Rabello as unjust, their claim against the Defendant in that regard is for having, in breach of duty, obtained for Dr. Braga Katia Rabello's confidential information upon which Judge Beethoven relied in coming to his decision.

476. And that while Judge Beethoven's judgment may have been the most proximate cause of her loss, she does not need to challenge its correctness in order to hold the Defendant liable for its breaches of duty which also caused her loss.

477. In other words, the Plaintiffs say that it is not a challenge to the validity of the Brazilian judgments to seek to recover from the Defendant the losses which were incurred as the result of the Defendant's actions resulting in those judgments. Indeed, the opposite would be the case advanced, the losses being but the manifestation of the effectiveness of the judgments.

478. And moreover, that where the Defendant may not show that recovery should be barred on grounds of the illegality principle[235], there can be no abuse of process in seeking to recover the losses resulting from the Defendant's breaches of duty.

479. Understood as set out in those terms, it is difficult to see why the Plaintiffs' claims should be struck for being an abuse of process either by exercise of the Order 18 r 19 power or the inherent jurisdiction of the Court. And this is so notwithstanding that, in the latter context, the cases suggest that a wider discretionary power to strike out exists.[236]

[235] Discussed above.

[236] See Notes to RSC (op cit) 18/19/26 -18/19/38, where it is explained among other things, that resort to the inherent jurisdiction allows the court to conduct a full factual enquiry based upon evidence (unlike the guidance given in relation to the O.18 r 19 route)

480. Simply put – despite the critical tenor of much of their pleadings and arguments – as the Plaintiffs' case does not depend upon this Court having to conclude in any way contrary to the Brazilian judgments, there can be no finding of a collateral attack upon those judgments. For that reason, say the Plaintiffs, the Defendant's strike out application for abuse of process must be dismissed.

481. There is, however, a further point of principle which has arisen and which I think should be recognized, if only in passing.

482. The point arises because what is by no means clear from the case law, is the extent to which the collateral attack principle may be invoked for the preclusion of an action which seeks to challenge an earlier foreign judgment.

483. In light of my understanding of the Plaintiffs' case as set out above, I do not need to resolve this question raised by the Defendant as relating to the Plaintiffs' pleadings vis-à-vis the Brazilian judgments. In the absence of any collateral attack upon them, those judgments will be relevant but only to the issue of causation in the context of the assessment of loss or damages to come, and that exercise will in no manner involve a scrutiny or criticism of the correctness of those Judgments.

484. Following therefore, is but a brief examination of the case law relating to the question of collateral attack upon foreign judgments. This is for the sake of explaining why, in any event, I would not have considered it appropriate to strike out the Plaintiffs' claims on that basis.

485. There is a longstanding rule first settled in **Henderson v Henderson**[237], that it is an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings.

486. The abuse of process arises from the fact that in such circumstances, *res judicata* in the wider sense is deemed to have been established as between the disputing parties even though, in the strict, narrower sense, the matters raised had not actually been joined or adjudicated in an earlier action between them. The principle was explained by the Privy Council in **Yat Tung Co v Duo Heng Bank**[238]:

> *"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V-C in* ***Henderson v Henderson*** *(above) where the judge says (at p115):*
>
> > *"… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which the parties, exercising reasonable diligence, might have brought forward at the time."*

[237] (1843) 3 Hare 100
[238] [1975] A.C. 581, 590

487. This principle ("*the Henderson principle*") has been applied to preclude actions[239] being taken in England for the determination of matters which could and should have been determined not only in domestic but also in earlier foreign proceedings between the same parties[240].

488. However, as is trite law, the preclusive effect of a foreign judgment *in personam*[241] in subsequent proceedings in England is limited according to the doctrines of privity and mutuality; ie: the parties or privies to the earlier foreign proceedings must be the same as those to the subsequent English proceedings and must have been mutually bound by the outcome in the foreign proceedings. In other words, each party in the subsequent proceedings must have been party or privy to the earlier proceedings, and must claim or defend in the subsequent proceedings in the same right as they, or those to whom they are privy, claimed or defended in the earlier. Thus:

> "*It unquestionably is not the general rule of law that a judgment obtained by A against B is conclusive in an action by B against C. On the contrary,*

[239] In cases which have been the subject of strong criticism because of the assumption on which they proceeded that the *Henderson rule* should operate to preclude action in England in deference to action taken in foreign courts. See for instance **A Briggs *Foreign judgments and res judicata*** (1997) 68 BYBIL 355, 357, extensively discussed with approval by ***Peter Barnett QC*** in his book, ***Res Judicata, Estoppel, and Foreign Judgments,*** Oxford Monographs in Private International Law, at Chapter 6, and ***Res Judicata and Foreign Judgments: The Indian Grace***, by ***Simon Beckwith, The International and Comparative Law Quarterly*** Vol. 43, No. 1 (Jan 1994). These critiques, which also identify (***Briggs :Foreign judgments and res judicata: Desert Sun Loan Corp v Hill (1996) 67 BYBIL 596, 599)*** the danger of giving ready preclusive effect to foreign judgments which have not otherwise satisfied the standards for recognition and enforcement, draw support from the cautionary words of the House of Lords in ***Carl-Zeiss-Stiftung v Rayner & Keeler Ltd*** (No 2) [1967 A.C. 853, albeit relating to the preclusive effect of issue estoppel rather than to the abuse of process *Henderson rule* : '*Issue estoppel can be based on a foreign judgment, although in such a case the doctrine should be applied with caution because of the uncertainties arising from the differences of procedure in foreign countries*" [as taken from the headnote].

[240] See, for instance, ***House of Spring Gardens Ltd v Waite*** [1991] 1 Q.B. 338; [1990] 2 All .E.R. 990, CA) where it was found to be an abuse of the process of the Court in England and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue had been tried and decided by the Irish Court. In ***Fennoscandia Ltd v Clarke*** [1999] 1 All ER (Comm) 365, CA, where the claimant , C, was precluded from bringing proceedings in England against F Ltd to claim breach of a legal duty allegedly owed by F Ltd to C, C having already brought and lost proceedings against F Ltd in Delaware. F Ltd defended the English action by arguing (successfully) that C's claim did not identify a legal duty known to English law but, also, by arguing that (in any case) this was a claim which could and should have been raised in Delaware. These decisions are themselves the subject of convincing criticism because of their confusing interpolation of issue estoppel and the preclusive Henderson principle on abuse of process. See again ***A Briggs Foreign judgments and res judicata*** (op cit, ibid)

[241] Such as, for instance here, the Judgment of Judge Beethoven which rendered Katia Rabello bankrupt.

> *the rule of law is otherwise. …a judgment inter partes is conclusive only between the parties and those claiming under them.*"[242]

489. There is no privity of parties or mutuality of outcome as between the Defendant and the Plaintiffs in relation to the Brazilian judgments and the case at bar and the Defendant clearly may not and does not contend otherwise.

490. The Defendant's strike out application, based as it also is upon the *Henderson principle* (or for that matter upon *Hunter v Chief Constable of West Midlands* (above)) is therefore misconceived.

491. For the reasons explained above, so is its application as it is based upon the illegality principle.

492. The Defendant's strike-out application for abuse of process is, for those reasons, dismissed.

493. The Plaintiffs are granted summary judgment on liability with loss/damages to be assessed.

494. The Plaintiffs are of course entitled as they seek at paragraph 4 of their summons, to their costs.

[242] ***Gray v Lewis, Parker v Lewis (***1873) 8 Ch App 1035, 1059-1060 per Sir G. Mellish LJ. See, as these cases are discussed also by Barnett QC in ***Res Judicata, Estoppel, and Foreign Judgments*** op cit at pp 62 -74

495. I will accept submissions in writing as to the terms of the order to be made for the costs of these proceedings. Written submissions are to be exchanged between the parties within 4 days and submitted to the Court within 7 days.

Hon Anthony Smellie
Chief Justice

May 16 2019 – Judgment released in draft for sight of the parties and their advisors only.

July 24 2019– Judgment released in final form.