**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD0105 OF 2014 (ASCJ)**

**BETWEEN**


**(1) ARNAGE HOLDINGS LIMITED**
**(2) BROOKLANDS HOLDINGS LIMITED**
**(3) EAST FARTHING HOLDINGS LIMITED**
**(4) KATIA RABELLO**
**(5) FERNANDO TOLEDO**

**Plaintiffs**

**-AND-**

**WALKERS (a firm)**

**Defendant**

REPRESENTATION: Anneliese Day QC instructed by Anthony Akiwumi of Ettiene Blake and Richard Annette of Stuarts Walker Hersant Humphries for the Plaintiffs on the Defendant's Security for Costs Application and Ben Hobden of Conyers for the Plaintiffs on the Defendant's Leave to Appeal Application.

Mark Simpson QC instructed by Sebastian Said, Anna Snead and Daniel Hayward-Hughes of Appleby (Cayman) Ltd for the Defendant on its Applications

## RULING ON THE DEFENDANT'S APPLICATIONS FOR LEAVE TO APPEAL AND SECURITY FOR COSTS

1. The present matter arises out of an acrimonious dispute between the Plaintiffs claiming against the Defendant as their former attorney-at-law for breaches of fiduciary duty resulting

in confidential information belonging to the Plaintiffs being obtained by the Defendant for another client and deployed to the detriment of the Plaintiffs in Brazil. On 24 July 2019, I delivered judgment in final form[1] dismissing the Defendant's strike out and summary judgment applications[2] and granting instead the Plaintiffs' application for summary judgment on liability on their claims against the Defendant ("**the Judgment**").

2. On 26 July 2019, the Defendant filed its summons seeking leave to appeal against the Judgment and on the 19 February 2020, I dismissed that application. These are the reasons for that decision.

3. By its summons of 24 July 2014, the Defendant had also filed an application for security for its costs of the action to be provided by the Plaintiffs. I now also give reasons for refusing that application, the outcome of which was, of course, largely consequential on the outcome of the Judgment.

**Reasons for refusing leave to appeal**

4. This action has engaged this Court over the course of several years and has required the Court to deal with numerous applications. Eventually, after expensive interlocutory skirmishes and fits and starts, the Court heard the arguments herein to completion, on what were in effect, interlocutory cross-applications for summary judgment and striking out. The Judgment having been delivered, the Defendant required and sought leave to appeal. The requirement is as provided by section 6(f) of the Court of Appeal Law which reads:

> "*No appeal shall lie –*
>
> *(f) without the leave of the Grand Court, or of the Court, from an interlocutory judgment made or given by the Judge of the Grand Court except* .. (then follow seven exceptions none of which applies here).

[1] Judgment was released in draft on 16 May 2019 for comments. Extensive exchanges resulted in the Judgment not being released finally until 24 July 2019.
[2] Filed by summons dated 24 July 2014

5. It followed that the applicable tests for the grant of leave to appeal had to be applied. The test is settled and well known. As expressed in ***The Iran Nabuvat*** [1990] 1 W.L.R 1115, and applied many times in the past by this Court and the Court of Appeal,[3] it is whether the grounds for appeal show a "*realistic prospect of success*" or that there is a point in issue that should be considered by the Court of Appeal in the public interest. In ***Select Advantage***, Morrison JA expressed the first part of the principle in terms that: "*The general rule is that leave to appeal will be given only in the case of an appeal with a realistic (as distinct from fanciful) prospect of success.*"

6. In seeking to satisfy that test, the Defendant relies on a plethora of grounds of appeal, some 68 in all. I will not traverse each ground seriatim. For the present purposes of giving reasons for my decision, I think it should suffice to separate the grounds into two broad categories – those which challenge the decisions on findings of fact and those which go to substantive issues of law.

7. As to the first category which necessarily also challenge the exercise of discretion - it must be noted at the outset that, as the Rules of the Supreme Court advise[4], leave to appeal must not be given unless it can be shown that the discretion was exercised by the judge (i) under a mistake of law (***Evans v Bartlam*** [1937] A.C. 243) or (ii) in disregard of principle (***Young v Thomas*** [1892] 2 Ch. 134) or (iii) under a misapprehension as to the facts (ibid); or (iv) that he took into account irrelevant matters (***Egerton v Jones*** [1939] 3 All .E. r. 889 at 892 CA) or (v) failed to exercise the discretion (***Crowther v Elgood*** (1887) 34 Ch. D. 691 at 697) or

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[3] See for instance, ***In re Universal & Surety Co*** 1992-93 CILR 157; ***Streeter and K Coast Dev. V Immigration Board*** 1999 CILR 264, ***Telesystem International Wireless Incorporated v CVC Opportunity Equity Partners and Others*** 2001 CILR Note 21; ***In the Matter of Shanda Games Limited*** 2018 (1) CILR 352 and by the Court of Appeal in ***Select Vantage Inc v Cayman Islands Monetary Authority*** (Unreported CICA 4 October 2017), per Morrison JA sitting as a single judge of the court of Appeal.

[4] ***RSC 1999 Ed. Vol 1,*** Notes to Order 59/1/142, at page 1006

(vi) the conclusion which the judge reached in the exercise of his discretion was "*outside the generous ambit within which a reasonable disagreement is possible*" (***G v G*** [1985] 1 W.L.R. 647; [1985] 2 All. E. R. 225, HL).

8. Accordingly, to the extent that any of the grounds of appeal challenge findings of fact, my approach has been to test those grounds against the foregoing principles as to whether they could justify leave to appeal.

9. I concluded that they did not. For the reasons which follow, a primary consideration was that issues of fact were narrowly circumscribed for the purposes of these cross-applications and, so far as they related especially to whether or not summary judgment should be granted to the Plaintiffs, largely a matter of record. In other words, there was, in my view, very little scope for dispute as to the relevant facts and the conclusions in the Judgment based on facts would be very unlikely to be upset on appeal.

10. For instance, on the crucial issue whether the Defendant acted against the interests of the Plaintiffs as their putative clients, the Judgment notes at [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. That being so, the other primary factual issue which was central to the summary judgment application for liability for breach of fiduciary duty, was whether the Plaintiffs (or any of them) were indeed clients of the Defendant at the relevant time. It is this factual issue upon which the Judgment concludes in favour of the Plaintiffs, having regard essentially to the records of the Defendant itself and/or admissions latterly made in the Amended Defence[5] or evidence filed in the proceedings by the Defendant, sufficient to justify conclusions on the

[5] In relation to Arnage, Brooklands and EFHL.

summary judgment basis. This leaves the more factually complex issues of causation[6] and quantification of loss involving, among other things, questions as to the meaning and effect of judgments of the Brazilian courts, to be decided at trial.

**The manner of the Defendant's conduct of the case.**

12. Notwithstanding the plain facts upon which the summary judgment application proceeded, this has been a bitterly fought case. Every imaginable point of challenge was raised by the Defendant. Nothing was conceded until the latest possible moment when, in July 2017 (shortly before the resumption in September 2017of the adjourned hearing of the cross-applications) the Defendant changed tack and proffered admissions as to its attorney-client relationship with some[7] but not others of the Plaintiffs. The embattled and aggressive stance of the Defendant meant that the assistance to which the Court was entitled by way of co-operation and agreement between the parties for narrowing issues on points of fact and law, was never forthcoming. Cards were played as closely to the chest as possible and arguments strategically deployed or reserved by the Defendant at every stage, as if to "keep the power dry" for battle at a later stage.

13. That was the fraught environment in which the Court was called upon to resolve the competing interlocutory applications for strike out (on the part of the Defendant) on the basis that the claims disclosed no reasonable cause of action or were an abuse of process; and for summary judgment (on the part of the Plaintiffs), on the basis that there was no arguable defence to their claims.



[6] Beyond that the proof of which was required to justify summary judgment on liability.
[7] Arnage, Brooklands and EFHL.

14. It is also to be emphasized that the Defendant, while objecting to the Plaintiffs' application for summary judgment being heard, nonetheless persisted with this, its second application for the striking out of the Plaintiffs' claims.

15. In order of sequence, having earlier refused the Defendant's first strike out application based on allegations against the Plaintiffs of abuse of process[8], it was decided to hear the Plaintiffs' application for summary judgment on liability before finally hearing from the Defendant on this, its second strike out application. However, the issues being so inter-related, arguments in support of the opposing positions were deployed simultaneously throughout and there was never a suggestion from the Defendant that the Court could simply refuse to hear both sides on their opposing applications and direct instead that the case proceed to trial.

16. Rather, as noted at [16] of the Judgment:

> "*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 trial to proof)*[9]*, 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 an important aspect of the case*".[10]

17. Thus, both opposing applications had to be resolved and it was the decision in the exercise of discretion to do so and to arrive at judgment on both, that is the subject of the Defendant's first ground of appeal which must therefore be regarded as plainly unsustainable. The two competing applications simply had to be heard and determined and the period of time

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[8] After a bitter fought 14 day strike out hearing in April-May 2016 resulting in a written judgment delivered on **10 August 2016.**
[9] Here citing Grand Court Rules, Order 18, rule 19(1).
[10] Here while also describing at fn.5 the limited number of documents to be examined for the determination of the factual premises of the Plaintiffs' summary judgment application. Note also that only one witness of fact was required to give evidence. This was the attorney Mr McCaulay who was required for cross-examination on his Affidavit evidence, by the Defendant.

(fourteen days) spent in doing so[11] can itself be no determination of whether or not it was right to seek to determine these applications. As the Judgment records at [17]-[19]:

> "*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-applications at this stage.*
>
> *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 Defendants case) were sufficiently amenable to resolution on the incontrovertible facts, to allow for their summary determination at this stage.*
>
> *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 is established.*"

18. Against that background, it lies ill in the mouth of the Defendant to complain about the procedure employed for the resolution of the two antithetically opposed applications. The summary judgment process was in fact initiated by the Defendant when its first application for striking out was filed. It was in response to that application that the Plaintiffs filed their summary judgment application, which was then countered by the Defendant's second strike-out application. The Defendant was as resolute in its insistence upon the determination of its strike-out applications as the Plaintiffs were in the determination of their summary judgment application.

19. The resolution of these applications was in this case also plainly the better way to proceed in terms of case management.

20. In this regard, the Court is always mindful of its duty to fulfill the Overriding Objective of the Grand Court Rules which requires that cases are managed in a manner which will bring about a just, expeditious and economical outcome. And in this regard, it must also be recognized

[11] Not - as the Defendant contends at [7] of its written submissions – 14 days spent in determining only the Plaintiffs' application and only two days spent in determining its strike out application. The overlapping issues were examined simultaneously throughout.

that case management decisions are discretionary in nature. See ***Sir Martin Broughton v Kop Football (Cayman) Limited and Others*** [2012] EWCA Civ 1743 at 51 , a case in which case management orders made against the background of a fairly complex factual matrix were upheld. As Lewison LJ there stated:

> "*Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained.*"

21. Not being able to agree with the Appellant's view that it could meet this (or the other procedural tests relating to when a summary judgment might properly be appealed against), I refused leave to appeal in respect of Ground 1.1 which complains of there having been conducted an "*inappropriate mini trial.*"

22. By way of further consideration, it is appropriate to also note here that the following relevant observations appear at [2] of the judgment in ***Broughton v Kop Football,*** per Lewison LJ:

> "*In paragraph 7.2 of Jackson LJ's report on costs in civil proceedings, he put forward the view that he regarded it as vital that the Court of Appeal supports first instance judges who make robust but fair case management decisions. This principle has been affirmed on a number of occasions in this court, see for example* ***Deripaska v Cherney*** *[2012] EWCA Civ 1235 and* ***Stokors SA v IG Markets Limited*** [2012] ALL ER (D) 31. (Nov)"

**Further grounds of appeal**

23. Ground 1.2 complains of "*the citation of 50 authorities by the Plaintiffs and a further 35 authorities by the Judge*" as to which Ground 2 elaborates in terms that:

*"(The Judge) came to his conclusions on a procedurally unfair basis, in particular in:*

*2.1 citing no fewer than 35 cases, textbook extracts and articles which were not referred to by either party, or by him, at the hearing;*

*2.2 relying on an analysis of his 2011 set aside Judgment which the Defendant had no fair opportunity to meet;*

*2.3 relying on expert evidence which had not been relied upon by the Plaintiffs at the summary judgment hearing (see paragraph 57.5 below);*

*2.4 relying on factors which might have led to a different outcome from his 2011 set aside decision [351] , had a hypothetical reasonably competent attorney been instructed, which the Defendant did not have a fair opportunity to meet*".

24. I address each aspect of Ground 2 as follows.

2.1. It is misleading to assert that the reference to additional case authorities, textbook extracts and articles was procedurally unfair because no reference was made to them at the hearing. A number of the case authorities while not referred to during the latter days of the hearing, were referenced in earlier skeleton arguments and went to the uncontroversial principles which apply to summary judgment and strike out applications. These are all cited in the Rules of the Supreme Court 1999 Edition, the well-known source of these principles which is primarily cited in the Judgment. Other cases, textbooks and articles complained about, all relate to the points of law raised by the Defendant itself in arguments and which, as shown by these sources, should have been cited by the Defendant but were not. Moreover, the Court having been compelled to and having done its own research, the well-known textbook which cites and discusses the cases and articles, was brought to the attention of the parties inviting their further submissions in relation to them. No response was forthcoming from the Defendant. In particular, I am here referring to the textbook and cases dealing with the topics of issue estoppel, res judicata and collateral attack upon the Brazilian judgments, all of which were central, not only of the Defendant's Defence to the Plaintiffs' claims, but also to its application

to strike out. Without enumerating the references to the cases, textbook and articles (which the Defendant itself has opted not to do in its grounds of appeal. I refer to pages 141 to 149 of the Judgment where they are discussed. The fact that the Court had brought the textbook (citing the case authorities and articles) to the attention of the parties, was reminded by the Court on 29 July 2019 when this was accepted and acknowledged by the Defendant. It is therefore surprising to see this ground of appeal being relied upon.

2.2 and 2.4. Again, it is misleading for the Defendant to suggest, as it does here, that the Court relied upon an analysis of the earlier 2011 set aside Judgment ("**the 2011 Judgment**') which the Defendant "had no fair opportunity to meet." It was the Defendant who in its submissions sought to rely upon the 2011 Judgment in support of its Defence. This was based upon the proposition that the Plaintiffs had no sustainable claim against it because, in light of the 2011 Judgment, any other reasonably competent attorney not owing fiduciary duties to the Plaintiffs would inevitably have achieved the same results of disclosure for Dr Braga. In order to substantiate this argument, the Defendant had to and did rely upon an analysis of the 2011 Judgment, an analysis to which the Plaintiffs responded. The Court's treatment of this issue is at pages 101 -108 ([342] to [359]) of the Judgment. Here the Court also analyses the evidence which showed the misleading nature of the representations made to the Court by the Defendant on behalf of Dr Braga, at the *ex parte* hearing which led to the 2011 Judgment. The Defendant also relied upon the 2011 Judgment in its response to the Plaintiffs' claim for loss of opportunity, as a consequence of the Defendant's actions, to limit their (especially Katia Rabello's) exposure, to the consequences of Dr Braga's campaign in Brazil against the Plaintiffs. The treatment of these arguments is at pages 67 -81 of the Judgment.

2.3. There was nothing improper about the Court relying upon the expert evidence filed in the earlier summary judgment applications in 2016, in deciding finally upon the cross- strike out application and summary judgment on liability. That evidence was already before the Court for the purposes of the proceedings generally and were made relevant to all the applications because of the Defendants assertions as to what reliance was placed upon the disclosure material placed before them, by the Brazilian Courts.

**Grounds 3-9**

25. These grounds appear to also complain essentially about "procedural unfairness", inadequate deliberation or erroneous conclusions. As to procedural unfairness, I consider this issue also as having been addressed by the immediately foregoing analyses and conclusions. As to inadequate deliberation and erroneous conclusions, those must surely be matters for examination having regard to the rules identified above as governing the assessment of findings of fact. There is little more that can be said here – the Defendant has not shown that it has a real prospect of successfully disturbing the primary findings of fact upon which liability for breach of duty was found to be established.

**Grounds 10-20**

26. These grounds, while criticizing the factual bases upon which the attorney-client relationships with the Plaintiffs were found to be established, also criticize the Judgment's analysis of the law on the subject. I have already I think, addressed the factual basis of these grounds of appeal to explain why they show no prospect of success.

27. As to the legal analysis on this subject of the attorney-client relationship, the Defendant's challenge invites the Court to ignore the basic standards for establishing the relationship as clearly set out in ***Trillium Motor World Ltd v General Motors of Canada Limited*** 2015 ONSC 3824 and in the other cases, all as adopted and applied by this Court in the Judgment.

28. I agree with the Plaintiffs' submissions, that the Defendant's arguments during the summary judgment proceedings (and generally in the action) attempted to break up the deeply rooted 25-year attorney-client relationship between the Rabello family and the Defendant into discrete artificial "retainers", involving certain persons and entities affiliated with the family but not others. In fact, as the Judgment recognizes, from 1985 until 2010, the Defendant was the exclusive Cayman Islands law firm engaged by the Rabello family, including Mr Toledo as a de facto family member, and the Defendant handled all Cayman Islands legal matters (of which there were many) for all individuals and entities affiliated with the Rabello family.

29. In short, the Defendant has not shown a real prospect of disproving the findings as to the attorney-client relationships, either as a matter of fact or in law. The Plaintiffs, in their written submissions in response at [2.27] to [2.33] provide an effective response to these grounds of appeal which I regard as unanswerable.

**Causation - grounds 3, 9, 21-25, 33-36, 48, 51-58 and 60-61**

30. The Defendant's main argument under this head is that it should escape summary judgment for liability because the primary judgment of the Brazilian Courts which first placed the Rabello interests (through their company Secureinvest) into the Petroforte bankruptcy - that of Judge Beethoven of August 2007- preceded the actions taken by the Defendant in Cayman in 2010 to obtain disclosure in aid of Dr Braga's campaign against the Rabello interests. But this argument, while chronologically correct, invited the Court to overlook the principle that for the purposes of summary judgment on liability, the Plaintiffs did not have to prove causation as to every loss claimed; rather they simply had to prove causation as to <u>some</u> loss, which, as the Judgment explains, they clearly did.

31. For instance, the clear reliance by Dr Braga upon the Cayman Disclosure before Judge Beethoven in October 2010 to place Katia Rabello into bankruptcy by extending the Petroforte bankruptcy over her personal assets, clearly established the causative link between the Defendant's conduct, the breach of duty owed to her, and her loss arising from her assets being taken by the Petroforte bankruptcy. Moreover, the further proceedings launched by Dr Braga in Brazil, the USA , BVI and Belize in 2010 and 2011 by reliance on the Cayman Disclosure, clearly caused significant loss if only in the form of legal fees and expenses, as well as the freezing of Ms Rabello's assets. Thus, even if there turns out to be some merit in the Defendant's argument that the loss of Secureinvest's non-Sobar[12] related assets was caused by events which preceded the Defendant's breaches of duty, in any event that remains an issue for further proof of causation and quantification of loss, as the Judgment has determined.

**Causation - the question of Katia Rabello's "lie" to the STJ.**

32. Here, the Defendant's breaches of duty having been established by the Judgment, I think it will suffice to simply adopt the submissions of the Plaintiffs in response to the Defendant's arguments without expressing any views on the merits which will ultimately go to whether the loss of Securinvest's assets, or any of them, was caused by the Defendant's breaches:

> "2.35 *The Defendant correctly notes the Plaintiffs' position that, if Ms Rabello had disclosed to the STJ in late 2009 that she was the UBO of Securinvest, based on applicable Brazilian law, Securinvest should have been released from the Petroforte bankruptcy; however, this is irrelevant for purposes of the Plaintiffs' entitlement to summary judgment.*
>
> *2.36 In fact, Ms Rabello did not disclose her UBO status to the STJ, and the Defendant had no right to disclose her UBO status or any other information to Dr*

[12] Sobar being the asset of the Petroforte estate which Dr Braga alleges to have been stripped away from Petroforte through Securinvest, by a conspiracy between Ari Natalino (the former head of Petroforte) and Sabino Rabello, the patriarch of the Rabello family. By moving against all Securinvest assets, Dr Braga sought to take assets of far greater value than Sobar.

*Braga or the STJ. In her Third Affidavit, referred to specifically at paragraphs 368 and 438 of the Judgment, Ms Rabello explained her rationale for not making this disclosure, i.e.; that had she told the truth to the STJ she would have solved the issues with Petroforte but would have in turn created a huge issue with the BCB.*[13] *She therefore decided to use Costa Rican nominees in order (truthfully) to show to the STJ that there was no common economic group with Petroforte, thereby entitling Secureinvest to be released from the Petroforte bankruptcy, while at the same time, avoiding serious legal problems with the BCB.*

*2.37 As between Ms Rabello and the Defendant, she had the right to maintain the confidentiality of her status as UBO of Securinvest, and the Defendant had no right to switch sides to represent Dr Braga and provide Ms Rabello's highly sensitive information to him for use in legal proceedings against her and her companies.*"

33. For the purposes of summary judgment on liability, the Judgment establishes that the October 2010 proceedings launched in Brazil against Ms Rabello (to the detriment also of some if not all the other Plaintiffs) and which were based on the Cayman Disclosure, were not only probative of breach of duty but also provided a sufficient causal link with losses which were significant and so sufficient for establishing liability. Just to what extent, if at all, the loss of Securinvests' non-Sobar assets was also caused, remains a matter for the trial at the further causation and quantum stage.

**More on loss**

34. The Defendant criticizes the Judgment for having found that proof of some significant loss comes from the evidence that Ms Rabello paid significant legal fees, first in seeking to limit the extent of the Cayman Disclosure in the actions in Cayman, the BVI, the USA and Belize in 2010 and 2011 ("**the 2010 Actions**") and since then, in these proceedings. In this regard, the Defendant raised rather technical points to the effect that as Ms Rabello had been bankrupted, she was in no position to make these payments of legal fees as any assets available to her should be regarded as belonging to her bankrupt estate. While the basis for this

[13] Brazilian Central Bank.

proposition was not explained as a matter of Brazilian law, I will simply note here that there was unrefuted evidence that through her company Gladbeck, Ms Rabello affirmed to having paid some USD300,000 in fees and there were undisputed payments of USD900, 000 by Banco Rural, which was owned as to 26% by Ms Rabello and USD675,000 by Rural International Bank (Bahamas) which was wholly-owned by Banco Rural, as confirmed in Mr Macaulay's 10th Affidavit. The basis upon which the Judgment proceeded in this regard is set out at pp 116 to 118 and 126 to 128.

35. For the present purposes of giving reasons for refusing leave to appeal on this issue in particular, I also adopt the following submissions of the Plaintiffs:

> "*2.45 At the December 2018 hearing, the Plaintiffs clarified that only Ms Rabello, through her company Gladbeck and other affiliated companies, had actually paid the legal fees arising from the 2010 Actions based on the Cayman Disclosure which form the causal link to losses resulting from the Defendant's breaches; however, this fact does not affect the right of all the Plaintiffs to summary judgment on liability, as pointed out by Plaintiffs' counsel in its 17 July 2019 letter to the Court on this issue. As set out above, Ms Rabello and her 100% beneficially owned holding companies Arnage and Brooklands were one and the same. It is irrelevant that payments to attorneys defending the joint interests of Ms Rabello, Arnage and Brooklands, as a result of the Defendant's breaches, were not paid directly from Arnage and Brooklands.*
>
> *2.46. As for Mr Toledo, he too suffered some direct monetary loss – expenses required for meeting with counsel in defending the 2010 Actions – as well as substantial time dedicated to these proceedings. See in this regard Mr Macaulay's testimony at transcript of December 2018, Day 5, page 72 and Mr Toledo's 5th Affidavit at [8] to [9].*"

36. For the foregoing reasons the Defendant has failed to show a realistic prospect of successfully appealing against the findings in the Judgment on the causation of loss issue- relating to its grounds of appeal 3, 4, 26-27, 34-37, 49-50, 59 and 62.

***Ex Turpi Causa* - grounds 63-68**

37. This too is a bifurcated issue carrying implications for both the questions of liability and quantum. The Judgment deals only with the former, deciding that the Defendant had failed to show that the Plaintiffs, because of their alleged illegal conduct (more specifically Ms Rabello's "lie" to the STJ or her alleged involvement in the alleged Petroforte fraud), had forfeited the right to sue the Defendant for its breaches of duty.

38. As regards the latter, whether the Plaintiffs will be able to establish that their losses were caused by the Defendants' breaches or more proximately by the alleged illegal conduct, the Judgment treats as a matter for examination at the quantum stage.

39. However, as regards its grounds of appeal against the findings in the Judgment on illegality as a bar to the claims, it remains clear that the Defendant has no realistic prospect of success.

40. Given the irrefutable facts which establish the lawyer-client relationship between the Defendant and the clear breaches of the duties arising from that relationship, it is to say the least remarkable, that the Defendant's primary tactic throughout these proceedings has been to attack the Plaintiffs on the basis of allegations of criminal misconduct in Brazil, even while there has been no conclusive finding by the Brazilian Courts in that regard.

41. The Defendant's invitation to this Court to treat the findings of the Brazilian Courts upon which the Petroforte bankruptcy was extended to Ms Rabello as proof of criminal conduct was simply impermissible, given the contested status of those proceedings insofar as they involve the question of whether the only alleged Petroforte assest, the Sobar plant, was fraudulently stripped away from the Petroforte estate. That question remained to be determined in the Revocation Action which Dr Braga had himself instituted but failed to prosecute, a fact which he (through the Defendant) failed to disclose to this Court when

obtaining by ex parte application the Cayman Disclosure, by alleging the very fraudulent conduct which he was aware was yet to be determined in the Revocation Action.

42. While no criminal contempt charges were brought against Ms Rabello in relation to her "lie" to the STJ, taken at its highest, this seems to have been the directly provable misconduct upon which the Defendant rested its plea of *ex turpi causa*. It was therefore important that her motive for telling the "lie" and its potential impact, were examined. The Costa Rican structure through which her ultimate beneficial ownership of Securinvest was to be hidden from the STJ was an artifice capable of and intended to mislead the STJ, as Ms Rabello herself admitted to this Court.

43. It is unnecessary to rehearse here the explanations given by Ms Rabello and stoutly supported by her legal adviser Mr Macaulay and by Machado Meyer (the independent experts on Brazilian law). They are outlined above herein from her attorney's submissions. The Judgment deals with this issue extensively at pp128 -140, concluding at [462] that *"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"*.

44. In its present submissions on leave to appeal, the Defendant merely criticizes the conclusions in the Judgment on bases which appear to misunderstand the reasoning in the Judgment. See [55] to [64] of the Defendant's written submissions. These arguments will nonetheless have to be assessed by reference to the reasoning in the Judgment itself and so there is little point in traversing them here. Suffice to say that the arguments are misconceived because they rely upon the notion that the extension of the Petroforte bankruptcy to Securinvest and Ms Rabello's on the basis of the Brazilian legal theory of *common economic group* (as appears to be the case in relation to Securinvest from the STJ's decision) and (albiet less clearly so from

Judge Beethoven's October 2010 Judgment, citing *"lifting of the corporate veil"* in the case of Ms Rabello), is a basis for the summary striking out of the Plaintiffs' claims on the ground of ex turpi causa. This is simply an untenable basis upon which to invite this Court to conclude that Ms Rabello (or any other Plaintiff) was implicated in the Petroforte fraud, especially in light of the fact that that very question of fraud was yet to be resolved in the only action in which it could properly be resolved – the very Revocation Action which Dr Braga had instituted but failed to prosecute. In this regard, the reasoning in the Judgment does not turn upon a finding, as the Defendant asserts at [62], that there was a distinction to be drawn between civil and criminal fraud. The distinction drawn in the Judgment at [463] is between bankruptcy on the basis of legal theories which are civil in nature (ie: *"common economic group"* and/or *"lifting of the corporate veil"*) and any proven criminal allegation of fraud.

45. Further, as regards Ms Rabello's "lie" to the STJ, the Defendant has failed to address at all in its submissions, the Judgment's proper treatment of this issue as giving rise also to questions to proportionality and public interest.

46. For the foregoing reasons, the Defendant failed to show a realistic prospect of success on grounds 63-68.

**Security for costs - the Defendant's application**

47. As the Defendant acknowledges in its written submissions, its application for security for costs only arises to the extent that its primary applications for summary judgment or strike out did not dispose of the entirety of the Plaintiffs claims. In the event, as the Judgment found in favour of the Plaintiffs' claims on liability, the Defendant must be taken as having conceded that its application for security for costs could not succeed.

48. To be clear, that is indeed as I have found but it might be helpful to explain my primary reason, which is that an order for security for costs against the Plaintiffs would be wrong in principle because the liability of the Defendant for more than minimal loss is now established. In other words, the Plaintiffs are shown to have proven claims against the Defendant in respect of which money is likely to be due to the Plaintiffs, not the other way around so as to justify an order for security for costs.

49. It is well established that the Court has a discretion whether or not to order security for costs and would have to consider, whether, in all the circumstances, it should make such an order[14]. The relevant factors have been identified by this Court in numerous cases[15], applying **Sir Lindsay Parkinson & Co v Triplan** [1973] QB 626 as reaffirmed more recently by the English Court of Appeal in **Keary Developments Ltd v Tarmac Construction Ltd** [1995] 3 All E R 534.

50. Among the relevant factors to be considered as recognized in the case law and which I find especially to arise here are:

(a) whether the Plaintiffs' claims are plainly bona fide with a reasonable prospect of success, a factor satisfied here by the finding of liability in the Judgment in favour of the Plaintiffs.

(b) whether the Plaintiffs' want of means asserted by the Defendant has been brought about by the Defendant's conduct.

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[14] This is after satisfying itself that the threshold test has been satisfied. This test, in the case of a local company such as the 1st, 2nd or 3rd Plaintiff, is whether the court is satisfied that there is reason to believe that the company will have insufficient assets to satisfy a costs order made against at the end of the day: see section 74 of the Companies Law as applied by the Court of Appeal in ***BTU Power Management Co v Hayat*** 2011 (1) CILR 315 and by this Court in ***Cesar Hotel Co (Cayman) Limited and others v Ryan and Others*** [2012] (2) CILR 164. In the case of Ms Rabello and Mr Toledo who are Plaintiffs in person residing outside the jurisdiction, the threshold test (to be discussed further below) is expressed in Order 23 rule 1(a) of the Grand Court Rules in these terms:

"*Where, on the application of a defendant to an action or other proceedings it appears to the Court... that the plaintiff is ordinarily resident out of the jurisdiction... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just*".

[15] Among the reported cases, going back to ***J.M Bodden and Son International Limited v Dettling and Sparks*** 1990-91 CILR 220 and more recently in ***Gong v CDH Cina Management*** 2011(1) CILR 57 and as still more recently re-examined in ***AHAB v SICL ,Al Sanea and others*** 2017 (2) CILR 605

51. It is especially having regard to these two factors that I concluded that the Defendant should not be granted security for costs. The reasoning is as follows, adopting in part the helpful submissions of the Plaintiffs.

**The Plaintiffs' claims have good prospects of success**

52. In considering this – factor (a) above – the Hong Kong Court of Appeal in the case of ***Win Source International Ltd v William Alvin Hui & Others*** [2006] HKEC 5 dismissed the Defendant's appeal from an earlier decision refusing security and held that:

> *"It was a sufficiently clear case for the likelihood of success to be taken into consideration. There is a high degree of success on liability. Quantum is more questionable, but unless the plaintiff only obtains nominal damages, it may be taken to have succeeded".*

53. This is directly relevant here given the finding of liability in favour of the Plaintiffs in the Judgment. Moreover, the Defendant's admissions within the Amended Defence, in so far as they relate to Arnage and Brooklands, clearly entitle those corporate Plaintiffs to summary judgment on liability. And as the Judgment found, the Defendant has no prospect of defending the claims of personal Plaintiffs Katia Rabello and Fernando Toledo on the issue of liability either. In the circumstances, security should not be granted.

**The Plaintiffs' want of means has been brought about by the Defendant.**

54. In relation to this – factor (b) above – this has long been a material factor in the Court exercising its discretion and heavily mitigates against security for costs being ordered against a Plaintiff in circumstances where the want of means has been brought about by the Defendant.

55. In that respect, as held in the English case of ***Farrer v Lacy Hartland & Co (Security for Costs)*** 1885 28 Ch.D at 485 **:**

> *"To have required security for costs on the ground of insolvency which (if the plaintiff was right) the defendant has wrongly caused, might have been a denial of justice".*

56. This approach was followed by Kingsmill Moore J in ***Peppard v Boqoff*** [1962] IR 180 at 187 where he said:

> *"To order security would be to allow the defendants to defend an action by reason of an impecuniosity which they have themselves wrongfully and deliberately produced, a result which a Court would strive to avoid".* See also ***Security for Costs*** by Jonathan Buttimore.[16]

57. In the leading case of ***Sir Lindsay Parkinson & Co Ltd v Triplan*** (above) the English Court of Appeal specified seven matters the Court should consider when exercising its discretion and endorsed the fact that the Court should consider:

> *"whether an order for security might enable a defendant to defeat a claim on the ground of the plaintiff's impecuniosity which the defendant himself has caused"* (paragraph 623).

58. The English Court of Appeal following the ***Sir Lindsay Parkinson*** principles in ***Keary Developments Ltd v Tarmac Construction Ltd*** (above) also held that:

> *"The Court will be properly concerned not to allow the power to order security to be used as an instrument of oppression ... particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity"* (per Gibson L.J).

59. Again, the English Court of Appeal applied the ***Sir Lindsay Parkinson*** principles, as reaffirmed in ***Keary,*** in the more recent case of ***Spy Academy Limited v Sakar International Inc*** [2009] EWCA Civ 985 in refusing to uphold a previous order for security giving particular consideration to the *stifling effect* the granting of security would have on the prosecution of the Plaintiff's claim, as well as because:

> *"the claimant can say here that its want of means has been brought about by the conduct of the defendant"* **p15.**

[16] Jonathan Buttimore, *'Security for Costs'*. Blackhall Publishing, pages 32-33.

60. The same approach has also been followed in this Court. See ***Grand Cay Development Limited (in liquidation) v. Griesal and Three Others*** (per Levers, J.): May 19th, 2004, the 2004-05 CILR Note 18 of which provides:

> *"Where an action is commenced by a liquidator against directors of the company in respect of their alleged breaches of fiduciary duty and misappropriation and the defendants' conduct brought about the financial distress of the company, to order security for their costs would be oppressive".*

61. This I consider to be directly analogous with the present case. In the ***Grand Cay*** case, the Defendant directors of a company to which they owed fiduciary duties, in breaching those duties, caused the financial distress of the company. The liquidator of Grand Cay successfully resisted the Defendants' application for security for costs. Whilst the Defendant in this case was the Plaintiffs' legal counsel, by breaching the fiduciary duties owed to them, the Defendant may be regarded prima facie, as having bought about any consequential financial distress the Plaintiffs may currently be subject to. It follows that an order for security in the instant case against them and in favour of the Defendant would be oppressive, wholly inappropriate and unjust.

**Applications against Katia Rabello and Fernando Toledo as Plaintiffs outside the jurisdiction**

62. As mentioned above, an application made against Plaintiffs who are resident outside the jurisdiction is made pursuant to Order 23, rule 1 (a) of the Grand Court Rules which provides (again for convenience) that:

> *'Where, on the application of a defendant to an action or other proceedings it appears to the Court... that the plaintiff is ordinarily resident out of the jurisdiction... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just'.*

63. Ms Rabello (who lives in Pomsit) and Mr Toledo (who lives in Miami) are plainly therefore ordinarily resident outside of the jurisdiction. However, to begin with, it is clear from the

recent case law ***AHAB v SICL and others***, above at [9] and [10] that an order for security may not be made against a foreign plaintiff on the merely discriminatory basis of the foreign status. It is for a party seeking security to "*adduce evidence to show that on objectively justifiable grounds relating to obstacles to or the burden of enforcement there is a real risk that it will not be in a position to enforce an order for costs against the plaintiff [where he resides] and that in the circumstances, it is just to make an order for security.*" At [15] the Court reiterated that real risks of unenforceability must be shown to exist "*on objectively justified grounds*" and at [24] and [25] endorsed what had been said by the English Court of Appeal in ***Nasser v United Bank of Kuwait*** [2002] 1 WLR 1868 and ***Bestfort Developments LLP v Ras Al Khaimah Inv Auth*** [2016] EWCA 1099.

64. Moreover, the only costs which could potentially be ordered by way of security would be the additional costs of enforcing the Costs Order in the jurisdiction in which the plaintiff is resident. See ***Elliot v. Cayman Islands Health Care Authority*** 2007 CILR 1631 applied and followed in ***Gong v CDH China Management Company Limited*** 2011 (1) CILR 57**.** In the latter case, the Court only ordered security in the sum of $10,000 (which was estimated to be the cost of enforcing the costs order in China). There is some evidence from the Defendant's experts as to the likely difficulties of enforcing a costs order in Florida or Brazil.[17]There is however, no proven basis for claiming that enforcement in Florida, where Mr Toledo resides, or in Brazil where Ms Rabello resides, would be more difficult than in Cayman so as to justify anything like the order for $4.796 million sought by the Defendant.

65. Further, I accept that security should also not be ordered against Ms Rabello for the further following reasons. First, the Defendant's reliance on the Bankruptcy Judgment of Judge

[17] As discussed at [12] – [17] of its written submissions relying on expert evidence of a US and Brazilian lawyers.

Beethoven dated 28 October 2010 to support a conclusion that she *"will not have sufficient assets to satisfy a costs order in favour of the Defendant at the conclusion of the proceedings"*[18] is premature having regard to the fact that the processes of appeal against that Judgment were not yet completed at the time of the hearing of these cross-applications.

66. Further, and in any event, the very basis on which the Defendant maintains that Ms Rabello would allegedly not be able to satisfy a costs Order – her bankruptcy – was clearly the direct result of the Cayman Islands disclosure which the Defendant is found to have wrongfully and in breach of duty, obtained for Dr. Braga. See in particular the Order of Judge Beethoven dated 28 October 2010,[19] based on Dr. Braga's Petition of 25 October 2010[20] which very extensively relied upon the documents obtained from the Cayman Islands.

67. To order security in these circumstances would, in my view, be oppressive.

68. Alternatively, I accept, as the Plaintiffs submit, that in any event had there been circumstances to justify an order, any order for security would be relatively conservative and certainly not at the exaggerated levels of $4.796 million suggested by the Defendant, but more in line with the approach taken in ***Gong*** and in keeping with the principles as more recently re-examined in ***AHAB v SICL and Al Sanea (both above)***, and which would require that costs relate only to any additional costs of enforcing in Florida or in Brazil.

**The outcome of the STJ Appeals raises an uncertainty which negates the appropriateness of a Security for Costs Order in this case.**

69. As mentioned above, in the event that Ms Rabello is ultimately discharged from personal Bankruptcy and Securinvest is released from the Petroforte Bankruptcy, this would release a significant amount of assets which would mean that Section 74 of the Companies Law (in so

[18] Paragraph 18 of the Affidavit of Christopher Russell sworn on 4 February 2015.
[19] A copy of Judge Beethoven's Judgment dated 28 October 2010 is at File B, Tab 20/7 of the Hearing Bundle.
[20] A copy of Dr. Braga's Petition dated 25 October 2010 is at File B, Tab 20/6 of the Hearing Bundle.

far as it relates to Arnage and Brooklands directly) would not be applicable and there would be no basis for any security to be granted as against them. Similarly, there would be no basis to exercise the general discretion as against Ms Rabello.

70. With the outcome of the final Appeals being awaited as at the time of the hearing but nonetheless being intrinsically linked to the question of whether the Plaintiffs could discharge any potential liability for costs, I concluded that it would be premature and unsafe to grant the application; particularly considering the oppressive affect an order for security at anything like in the terms sought by the Defendant would have in these particular circumstances where any want of means, at this moment in time, is to be regarded as a direct result of the Defendant's conduct.

71. Furthermore, even if the Defendant's assertion that the Plaintiffs' have insufficient assets to meet any future liability for costs is correct (although denied by the Plaintiffs as per Mr Toledo's second Affidavit), the granting of security would stifle what are now found to be meritorious and genuine claims. This, in itself, would be wholly unjust.

72. The stifling of a proper claim is a factor, in addition to the Plaintiff's impecuniosity resulting from the Defendant's conduct, which the Courts have routinely considered as weighing heavily against the granting of security for costs.

73. This too was made abundantly clear in ***Sir Lindsay Parkinson*** where one of the *'special circumstances'* which was central to the decision not to order a security was, as per Cairns L.J at 627:

> *"the fact that the result of an order for security in this case might well result in the claimants being unable to proceed at all with the claim which admittedly is a bona fide claim".*

74. Furthermore, it is obvious that, again if the Defendant is correct, then the security sought, in its inordinate amount of $4.796 million, would stifle the continuation of the litigation. The

fifth factor Mars-Jones LJ listed in ***Sir Lindsay Parkinson & Co*** for the Court to take into account is:

> *"whether there are any grounds for thinking that the defendants are using the application to prevent the plaintiff's case from coming before a tribunal"* (at 623).

75. I do not doubt that this is the ultimate aim of the Defendant when one considers the unjustifiably excessive and disproportionate amount of security sought. Precluding the action continuing by ordering the Security the Defendant seeks, would be both unjust and oppressive in the circumstances.

76. Finally, as was accepted in the case of ***Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor*** [1990] B.C.C. 694, it is not essential conclusively to adduce evidence to show that as a result of an order for security, the Plaintiffs would not be able to pursue the proceedings. In this respect, Nourse LJ at 697 of ***Trident***, held that there is:

> *"no authority that holds there has to be a certainty that it will be unable to pursue the proceedings. I think that a probability is enough".*

77. Taking all of the above factors into consideration, I decided to dismiss the Defendant's application for security for costs.

Hon Anthony Smellie
Chief Justice

8 August 2020.

GRAND COURT CAYMAN ISLANDS