IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 5 of 2020
(FSD 105 of 2014 (ASCJ))

BETWEEN:

WALKERS (A FIRM)

Appellant

AND

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

Respondents

BEFORE:

The Rt. Hon Sir Alan Moses, Justice of Appeal
The Rt. Hon. Sir Bernard Rix, Justice of Appeal
The Hon John Martin, Justice of Appeal

Appearances: **Mr Mark Simpson QC, Mr. Nico Leslie, Mr Sebastian Said and Mr Daniel Hayward-Hughes for the Appellant**
Mr Graham Chapman QC, Mr Ben Hobden, Ms Roisin Liddy-Murphy and Ms. Sean-Anna Thompson for the Respondents

Heard: **18, 19 and 20 November 2020**

Draft circulated To attorneys: **7 January 2021**

Judgment delivered: **1 February 2021**

<u>JUDGMENT</u>

Sir Alan Moses

1. Walkers are a Cayman Islands law firm. They are defendants to a claim brought by five plaintiffs each of whom claim they were at various times clients. The First and Second Plaintiffs, Arnage Holdings Limited and Brooklands Holdings Limited (Arnage & Brooklands), are

Cayman Islands companies owned and controlled by Katia Rabello, the Fourth Plaintiff. She is a member of a prominent Brazilian family. East Farthing Holdings (EFHL), the Third Plaintiff, is a Cayman Islands company of which Mr Toledo, the Fifth Plaintiff, is the sole shareholder; he is a close and trusted friend, also regarded as a member, of the Rabello family.

2. In their Statement of Claim the Plaintiffs allege that in 2010, in breach of duties of trust, loyalty and confidence owed to them as clients or former clients, Walkers' accepted instructions from Dr Braga, a Brazilian court-appointed trustee in bankruptcy for the estate of a petrochemical conglomerate in Brazil ("Petroforte").

3. It will be necessary to consider in greater detail proceedings initiated by Dr Braga in Brazil and in the Cayman Islands and their effect on the Plaintiffs. By way of introduction I record that the Rabello family owned substantial assets and business interests in Brazil, including the Rural Group which included Banco Rural S.A. and Rural Leasing S.A.

4. The Petroforte Group had been a major fuel and industrial concern, owned and controlled by Mr Natalino da Silva, which fell into bankruptcy in 2003. A Rural Group company, Securinvest, owned by Arnage and Brooklands, entered into collusive dealings with Mr Natalino designed to defraud creditors by depleting the Petroforte estate through a series of sham sale and leaseback agreements involving Banco Rural.

5. Dr Braga, as administrator of the Petroforte bankrupt estate, sought to recover the shortfall in the assets of the Petroforte estate by proceedings in the Brazilian courts which led to the incorporation of the assets of Securinvest into the Petroforte estate.

6. Dr Braga then sought to identify the ultimate beneficial owner (UBO) of Securinvest, the company which had been used in Brazil as a vehicle of fraud on the Petroforte bankruptcy estate. For this purpose, he needed to come to the Cayman Islands where Arnage and Brooklands were incorporated. Walkers accepted his instructions.

7. On his behalf they obtained from the Grand Court two Norwich Pharmacal disclosure orders on 27 May 2010 and on 2 July 2010. The second disclosure, it is alleged, revealed that it was Katia Rabello who was the UBO of Securinvest. She was also President of Banco Rural. Armed with this information, the Courts in Brazil extended the Petroforte bankruptcy to her personal assets, which included Banco Rural and the Hotel Nacional in Brasilia; Katia Rabello was herself made bankrupt. The losses claimed are alleged to flow from the incorporation of Securinvest's and Katia Rabello's assets into the Petroforte estate. The inclusion of these assets into the Petroforte

estate is alleged to have been the consequence of Walkers' breaches of duty in accepting instructions from Dr Braga and, in accordance with those instructions, obtaining disclosure of Katia Rabello as UBO.

8. This is an appeal by Walkers, with leave of the President of this court, against a judgment of the Hon. Anthony Smellie, Chief Justice, handed down on 24 July 2019. He ordered summary judgment in favour of the Plaintiffs as to liability with "*loss/damages*" to be assessed. He dismissed an application by Walkers to strike-out the Statement of Claim on the grounds of illegality.

9. The proceedings in which the Plaintiffs, respondents to the appeal, have sought to recover these losses have occupied the Grand Court over the period of many years, starting with the service of the writ and Statement of Claim in 2014, some three years after the Chief Justice had first considered setting aside the Order for Disclosure in April 2011. They have been bitterly fought and, even if this appeal fails, will remain unresolved.

10. The Chief Justice was in a unique position to understand these proceedings having been involved at most but not all the stages of the complex history of the dispute. It is, therefore, not surprising that he would wish to cut through what he regarded as "*hostile litigation marred by allegations and counter-allegations of abuse"* (Judgment ("J") [6]) and to achieve some resolution. He took the view that the issues of liability advanced by the Plaintiffs were "*sufficiently amenable to resolution on the incontrovertible facts, to allow for summary determination at this stage"* (J [18]).

11. The essential question for this appeal is whether, applying undisputed principles as to the circumstances in which summary judgment may be given, it was open to the Chief Justice to make that order. Many of the issues which go to resolving that question will also assist in determining Walkers' attempt to strike out the claim by way of their cross-appeal.

Principles relating to Summary Judgment

12. Summary judgment should not be entered under Order 14 of the Cayman Island Grand Court Rules unless there is no real prospect of success (see e.g. the citation of *Swain v Hillman* [2001] 1 All ER 91 at 95, in *Southdown Regency Development Ltd v Cayman National Bank Ltd* [2007] CILR Note 4). Nor should a judge "*usurp the position of the trial judge by embarking upon a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination"* (see *Wenlock v Moloney* [1965] 1 WLR 1238. 1244B-C). In *Swain*, Lord Woolf MR referred to the need to avoid what he called a "*mini-trial*". To conduct

"*an inappropriate mini trial on disputed facts is an error of principle"* said Etherton C in *Allied Fort Insurance Services v Ahmed* [2015] EWCA Civ 841 at [103]).

13. Of the many authorities cited, at least in written argument, *Allied Fort Services Ltd* is of particular assistance because in that case the essence of the complaint was that the defendant insurance brokers had acted dishonestly (see at [83]). Moreover, Etherton C said this:

> *"[80] Further, although summary judgment is not precluded in a case in which the honesty of one or more of the parties is in issue, particular caution should be exercised before depriving a party of the opportunity of rebutting allegations of dishonest conduct: comp. ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, [2003] CP Rep 51, at [55], and Wrexham Association Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237, [2008] 1 BCLC 508, at [51], [57] and [58]. As Sir Igor Judge P, with his wealth of experience handling both civil and criminal cases, wisely observed in that case:*
>
> > *"[57] I do not underestimate the importance of a finding adverse to the integrity to one of the parties. In itself, the risk of such a finding may provide a compelling reason for allowing a case to proceed to full oral hearing, notwithstanding the apparent strength of the claim on paper, and the confident expectation, based on the papers, that the defendant lacks any real prospect of success. Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate. In short, oral testimony may show that some such cases are only tissue paper strong. As Lord Steyn observed in Medcalf v Weatherill (2003) 1 AC 120 at paragraph 42, when considering wasted costs orders:*
> >
> > > *"The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the Court had allowed the matter to be tried".*
> >
> > *And that is why I commented in Esprit Telecoms UK Ltd and others -v- Fashion Gossip Ltd, unreported, 27 July 2000 that I was troubled about entering summary judgment in a case in which the success of the claimant's case involves, as this one does, establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court.*
> >
> > *[58] This collective judicial experience does not always, or inevitably, provide a compelling reason for allowing the case to proceed to trial, nor for that matter require the judge considering the application to reject the conclusion that there is no real prospect of a successful defence of the claim if he is satisfied that there is none. That is not what the Rules provide, and if that had been intended, express provision would have been made. It is however a factor constantly to be borne in mind, if and when, as here, the reason for concluding summary judgment is appropriate is consequent on a disputed finding, adverse to the integrity of the unsuccessful party."*

The factual background to the proceedings is not simple and straightforward. The length of the written evidence deployed by the parties both on the application for, and the discharge of, the freezing order and relied upon by both sides on the hearing of the summary judgment application, as well as the length of the hearing challenging the freezing order, should immediately have sent a warning signal to the deputy Judge. The fact that, in the event, argument before the deputy Judge took up two days and his judgment runs to 48 pages comes as no surprise."

14. The Chancellor continued at [97] by citing Lord Hobhouse in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [158]:

> *"It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is 'no real prospect', he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made 'findings' of fact. He did not do so. Under RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise.*"

15. Etherton C concluded:

> *"[101] Lord Hobhouse is plainly correct in saying that the decision whether or not to engage at all in the exercise of determining the case summarily before trial is a discretionary management power. If the court decides not to do so, that decision can only be challenged on appeal in the same limited circumstances as any other case management decision.*
>
> *[102] The position is quite different, however, if the judge has decided to embark on the exercise and has reached a decision that the defendant or the claimant has no real prospect of succeeding at trial. Lord Hobhouse called that "an assessment". It is plainly not a case management decision of the usual interlocutory kind since the judge's order granting summary judgment finally determines in favour of the applicant the whole case or that part of it which is the subject of the application on the basis of the strength of the respective arguments of the applicant and the respondent on the substantive dispute. Further, it is a decision which the appeal court is in as good a position as the first instance judge to make.*
>
> *[103] The appeal is nevertheless not a rehearing but a review. The degree of respect given by the appeal court to the first instance judgment is likely to depend on the reason for the order granting summary judgment. If the reason turns on a pure point of law, without any material factual dispute, then the appeal court will simply decide whether the first instance decision was correct or incorrect. The position may be different where the first instance judge has made an evaluative judgment on the facts likely to be established at trial or has made a multi-factorial decision: compare Trust Risk Group SpA v AmTrust*

Europe Ltd [2015] EWCA Civ 437 at [31]-[43] and [72]. Even if, however, that distinction is correct in theory, it is unlikely in practice to be of significance since, on any footing, the appeal court will interfere if satisfied that the first instance judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or her. Conducting an inappropriate mini-trial on disputed facts on a summary judgment application is an error of principle and, moreover, will usually lead to a conclusion that the first instance judge was acting outside the area of permissible reasonable disagreement in concluding that the respondent to the summary judgment application has no real prospect of success at a trial." (my emphasis).

16. As *Allied Fort* underlines, the impact of depriving a party of a trial, the opportunity for cross-examination, is all the greater in a case such as this where the Plaintiffs make serious allegations of misconduct on the part of a legal firm, who in their turn accuse the principal Plaintiff, Katia Rabello, of serious fraud and participation in Rural Group corporate structures designed to "*create a cloak of legality for the transfer of assets* as part *of a clear conspiracy to injure creditors"*, to adopt the words of the highest civil appeal court in Brazil.

17. Mr Chapman QC asked this court to approach the judgment with the restraint appropriate to interlocutory decisions as if the Chief Justice had made a case-management decision, as, indeed, he said he had (J [18]) and (J [21]). To the extent that he had decided whether or not to entertain the summons and cross-summons that is correct. But *Allied Fort* teaches that the position of the Court of Appeal, where the judge has granted summary judgment, is not the same as where it is faced with an interlocutory, case-management decision. The judge does not find facts, he makes an assessment. The Court of Appeal is in as good a position as the judge to make that assessment. If the judge has conducted what the Chancellor described as an 'inappropriate' mini-trial he will have erred in principle. It is difficult to conceive of any mini-trial which would be appropriate.

18. English courts have identified a number of indicia of an impermissible mini-trial; they include the length of argument, the treatment of contested evidence, the resolution of issues before full discovery, and the drawing of inferences on incomplete evidence. This judgment is challenged on all these bases.

19. Although it will be necessary to examine some, but by no means all of the facts detailed by the Chief Justice, the overall impression created by the process by which he reached his conclusions is one of a contested trial, but with only one witness who was cross-examined and without full discovery.

20. The hearing lasted sixteen days, in May and December 2018. The bundles before the Chief Justice extended to over 31,000 pages including 600 pages of pleadings, 21 affidavits on behalf of the Plaintiffs, including evidence served during the course of proceedings and fifteen affidavits and statements on behalf of Walkers. The parties provided 84 authorities.

21. Both parties blame each other for what happened. It seems to me irrelevant who was at fault. The Chief Justice was clearly concerned to save the courts in the Cayman Islands from a lengthy and heated dispute which covered a period of at least thirteen years, involving different jurisdictions and serious allegations. But it is not possible to escape the impression that having embarked on this process with such laudable intention, he became immersed in a lengthy process unsuited to summary resolution.

The essential issues justifying summary judgment

22. The Chief Justice took the view that if "*liability could be clearly and readily established"* (J [20]) then the court should give judgment, citing *European Asian Bank AG v Punjab and Sind Bank (No 2)* [1983] 1 WLR 642 at 654 and *Re Omni* [1998] 1 CILR 275. But the Chief Justice recognised that if the Plaintiffs were to be entitled to summary judgment on the issue of liability, he had to be satisfied that Walkers had no reasonable prospect of success in contesting a number of issues. Those issues were identified by the Chief Justice at the outset of his judgment at (J [24]):

> *"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."*

23. The Chief Justice concluded that each of those elements had been proved to the extent that the Plaintiffs were entitled to summary judgment (J [26]). The Chief Justice was satisfied that the causation of *some* significant (J [37]) loss had been established to the extent that there was no real prospect of establishing to the contrary. But he suggested that the causation of particular heads of loss remained to be established (J [29]). Moreover, in refusing Walker's cross-application which depended on allegations of illegality, the Chief Justice concluded that those accusations went only to issues of causation and not to liability (J [465]). As I shall point out later, when I turn to the defence of illegality, the Chief Justice did consider that the defence of illegality was relevant to most of the issues of quantum but did not think it was an arguable defence to liability. Nor did he think it was arguable in relation to the one head of loss on which he founded the liability which formed the basis of his summary judgment. He said:

> *"[28]...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, 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

24. The case may perhaps be more readily understood by reference to the Statement of Claim. The Plaintiffs claim that Walkers had been the long-standing attorneys to the Rabello family since 1985; each of them asserts that they were at various times clients of Walkers. The Statement of Claim relies upon a Rabello family retainer, a general retainer for the now deceased Sabino Rabello, his family, heirs, the Trade Link Bank (TLB) and Cayman companies and affiliates (including the Plaintiffs, Arnage and Brooklands and EFHL).

25. The history of these claims starts in 1985 when Walkers incorporated TLB to operate as an investment bank, licensed within the jurisdiction of the Islands, and conducting investments on behalf of the Rabello family and others largely based in Brazil. Walkers assisted TLB on a number of occasions between 1992 and 1998. In 1998 Walkers incorporated the Third Plaintiff, EFHL, on the instructions of Sabino Rabello to hold the family's majority shares in TLB. The single share shareholding was first held as nominee by a partner in Walkers, then transferred to Sabino Rabello and on his death, on the instructions of his widow, to Mr Toledo, the fifth Plaintiff.

26. In June 2000 Walkers were expressly retained by Arnage and Brooklands and by TLB in relation to a Note Purchase Transaction. This is an important moment in the history of what the Plaintiffs describe as the long-standing relationship between Walkers and the Rabello family. It was relied upon particularly by them and by the judge as establishing the relationship of lawyer and client between Walkers and all of the Plaintiffs (see J [52]ff).

27. Investered Companhia Securitizadora de Creditos Finaceiros, was a member of the Rural Group, incorporated in Brazil in May 2000; TLB was registered shareholder. It was re-named

Securinvest Holdings S.A. (Securinvest) in 2003. By a Note facility in 2000, Securinvest provided a $40 million Note to Arnage and Brooklands for sale to TLB in return for TLB financing Securinvest's business in Brazil. Katia Rabello was the 50% beneficial owner with her father of Arnage and Brooklands and 50% ultimate beneficial owner, with her father, of Securinvest. Walkers admit that Arnage and Brooklands were clients at that time and also admit that they owed ongoing duties of confidentiality to what they describe as former clients (Amended Defence 33, 38), whilst denying owing them any contractual, tortious or fiduciary duties once the retainer ended in 2000 or shortly thereafter, some ten years, as they seek to emphasise, before accepting a retainer from Dr Braga in 2010.

28. Fernando Toledo, who had begun working for the Rural Group in 1991, became a Director of TLB in 2003 and then President and Managing Director when Sabino Rabello died in 2005. Walkers advised TLB and the Rabello family as to the possible formation of trusts to hold shares in TLB and in 2006 in relation to Sabino Rabello's estate and Grant of Probate. Neither of these occasions are relied upon by the judge as of particular significance but they do form part of the pleaded case as to Walkers' knowledge of the Rabello family and of its business affairs.

29. Of more significance, according to the Chief Justice, was what he described as the May 2006 retainer (see J [67]ff). By then the Rabello name had found itself associated with the corruption described as the "Mensalao Affair" involving payments for promotion and preferential legislation. Some payments had been made or arranged through Banco Rural. There was a hostile miasma around the Rural Group. Katia Rabello, by then President of Banco Rural, was indicted in March 2006 with some 40 others. Under the May 2006 Retainer Robert Macaulay, the Rabellos' overseas counsel in Miami, instructed Walkers to take steps to distance the family from TLB in the light of the Mensalao investigations (J [75]). There were teleconferences, emails and a meeting to that end. They culminated in Walkers issuing Notarial Certificates to show that named members of the family, including Katia Rabello, did not, at the date of those certificates, appear as members on the Register of either EFHL or TLB (J [76]).

30. Following the Brazilian Central Bank's (BCB) investigations as to links between the Rabello family, Banco Rural and TLB, the Cayman Islands Monetary Authority (CIMA) issued a formal request for documents on behalf of BCB including a copy of the Register of Officers and Directors of TLB. Walkers were retained in May 2007 (the 2007 Retainer) to provide legal advice to resist that request (J [91]ff). They were required 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"* (J [92]). Walkers tried to fulfil the purpose of their engagement by attempting

to restrict full disclosure to a redacted version of the TLB register, so as not to disclose any other than those who were the current officers and directors. They failed.

31. The Chief Justice relied upon this engagement:

> *"[97] 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."*

32. In August 2007 Walkers were retained to dissolve TLB, following discussions, according to Mr Toledo, as to increased regulatory scrutiny (J [99]-[100]). Walkers deny that any of the Plaintiffs became clients pursuant to the 2006 or the 2007 Retainers.

33. It is on the August 2009 Retainer that both the Plaintiffs and the Chief Justice place the greatest reliance, in the context of Walkers' previous involvement (J [99]ff). The information disclosed by CIMA in May 2007 had been used by BCB, contrary to its undertakings to CIMA, as the basis for criminal proceedings against Katia Rabello, three other members of the Rabello family and four other defendants, alleging that they had given false information as to the stockholding and joint management of Banco Rural and TLB. (J [103] - [104]).

34. On 5 August 2009 Mr Macaulay asked one of Walkers' partners for help in relation to what was regarded as a violation of Cayman monetary law, the MOU and correspondence between CIMA and BCB:

> *"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 by the Chief Justice].

35. Walkers accepted the retainer, confirming their expertise. Correspondence between Mr Macaulay and Walkers followed. Walkers were sent names of the Brazilian defendants including Katia Rabello. Mr Austin-Smith of Walkers wanted information as to the identity of the client:

"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]

36. 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]

37. 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")."

38. The Chief Justice identified further correspondence in which Walkers protested at the use of material provided by CIMA in criminal proceedings. He notes, as a further sign of an ongoing lawyer/client relationship, the payment by Mr Macaulay of fees invoiced by Walkers even after acting for Dr Braga (J [123]).

39. The final retainer to which the Chief Justice refers relates to Walkers' advice in relation to the potential dissolution of EFHL. During the course of exchanges of e-mails Mr Macaulay referred to the decision of "the client" to dissolve EFHL. The Chief Justice understood that as a reference to Mr Toledo and the Rabello family (J [130]-[132]). There appears, he says, to be nothing in the exchanges to suggest Walkers understood otherwise (J [133]).

The Chief Justice's Ruling on the Lawyer/Client Relationship

40. The principles to be applied in identifying a solicitor-client relationship were agreed, both before this court and below, to have been correctly expressed in *Trillium Motor World Ltd v General Motors of Canada Limited* 2015 ONSC 3824. For the purposes of this appeal the most important proposition is that whether such a relationship exists is a question of fact which requires the court to conduct a careful examination of the evidence in its totality and to weigh all of the relevant facts (see the passages cited by the Chief Justice at J [302] and [303]). He quoted the twelve *Trillium* indicia, not all of which will be relevant or exhaustive in every case:

(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;*
>
> (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.*

41. The Chief Justice referred to other indicia where the interests of the beneficial owners are closely aligned or identical to the company for which a lawyer acts (J [305]). I shall consider that feature of his conclusion after commenting on his application of the *Trillium* indicia to the case of Katia Rabello and Mr Toledo.

42. The judge's conclusions applying the *Trillium* indicia were:

> "*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*." (J [304])

43. In those earlier paragraphs the Chief Justice explained why Walkers had no reasonable prospect of resisting a finding that all of the Plaintiffs were or had been their clients.

44. The Chief Justice said that the effect of the retainers was to demonstrate that Walkers must have been aware of the Rabello family's vulnerable position and of the dire implications if it acted for Dr Braga, thereby setting the context for finding the lawyer/ client relationship (J [134] and [135]).

45. He referred to Katia Rabello's sworn averments that she had relied upon Walkers to act on her behalf in the Islands and that she believed that she was a client (J [127] - [128]). He considered that the fact she was a client was 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 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 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.*
> *(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 to Katia Rabello in the Defendant's own client database as explained by Feena Christian in her second affidavit 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."* (J [139])

46. The Chief Justice made similar findings in the case of Mr 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".*

> (b) *Mr. Macaulay's email of 7 August 2009 to the Defendant expressly named Mr. Toledo as a client.*
> (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 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 lnternational Inc, equally with his connections to TLB and EFHL*
> (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".*
> (h) *As in the case of the other Plaintiffs, many confidential documents relating to Mr. Toledo were obtained by the Defendant and disclosed to Dr. Braga.* (J [140])

47. Walkers admit that Arnage and Brooklands were former clients and that EFHL was a client at the date of the Braga retainer but they deny that either Katia Rabello or Mr Toledo had ever been clients (Amended Defence at para 3). Was there no reasonable prospect of establishing this aspect of their defence?

48. Identification of the asserted lawyer/client relationship depends on findings of fact. Apart from the US attorney, Mr Macaulay, no evidence was heard at this stage, there was no cross-examination of witnesses whose credibility may well have been in issue, and full discovery had not yet taken place. Mr Chapman QC, like the judge, pointed out that the affidavit evidence on behalf of Walkers was limited and did not include senior partners who would be expected to have had dealings with members of the Rabello family and their corporate associates.

49. But there was no obligation on Walkers to call evidence which might be available at trial, after full discovery. They were entitled to stand or fall on the contention that the Plaintiffs' evidence was disputed and, taken at face value, did not establish that there was no reasonable prospect of rebuttal. There was affidavit evidence in relation to the August 2009 retainer, pointing out the omission of Mr Toledo as a client in the retention letter agreed with Mr Macaulay. There was further affidavit evidence to explain the extent to which Walkers admitted errors. But their failure to adduce more evidence does not establish that there was no further evidence to be called. It is worth recalling that this was not a trial; no inference should have been drawn from the absence of further evidence on behalf of Walkers.

50. It was apparent from the pleadings that there were to be hotly disputed issues of fact as to the relationship between Walkers and the Plaintiffs. There was nothing, on the pleadings or as a matter of law, which showed that the Defence was bound to fail or that the disputes could be resolved by examination of some of the evidence and some of the documents.

51. Moreover, a conclusion that the relationship of lawyer and client did exist had severe consequences for the professional status of Walkers. That is not to accord them any higher consideration than any other defendant on the Islands but *Allied Fort* is a reminder that a court should be reluctant to reach a conclusion of serious professional misbehaviour without allowing those so condemned a full opportunity to be heard and to challenge and be challenged at trial.

52. The Chief Justice's summary of the evidence (at J [139]) was the explicit basis for his finding that the *Trillium* indicia identified Katia Rabello as a client (J [304]). The only retainer to which the Statement of Claim links her is the Retainer of August 2009 (Statement of Claim paras 62 and 65). She is not named in the instructions, nor did Mr Macaulay refer to her when asked who the ultimate client was, even though Walkers' associate, Mr Austin-Smith had queried whether it was *"TLB or the various individuals facing prosecution?"*. His evidence does not suggest that he regarded Katia Rabello as a client; so far as he was concerned the only client was EFHL, the only one referred to in the retainer letter signed on 9 August 2009.

53. The Chief Justice relied on the purpose of the retainer to assist in Katia Rabello's defence of the Brazilian proceedings (J [117] [139(a)]) and (J [139(d)]). But that proves too much; it seems most unlikely that the six other Brazilian defendants indicted were all clients of Walkers, or at its lowest, it is arguable that they were not.

54. He refers to the fact that the August 2009 Retainer was on-going at the time of the Braga retainer [139(c)]. His assertion (J [139(c)(i)] that Walkers advised the US Attorneys on her behalf assumes the very thing which must be proved. He refers to references and connections to Katia Rabello by dint of references to the Rural Group and TLB (J [139(e)] and fn 60) but the second affidavit of a legal secretary at Walkers, Feena Cray, says there is no record of her ever having been recorded as a client.

55. Moreover, Walkers wish to advance a contrary argument arising out of the purpose of the 2009 Retainer. When they challenged the use in Brazil of confidential information from the Cayman Islands, it was, so Walkers argue, designed to separate TLB from Banco Rural. Naming EFHL, the owner of TLB, but not Katia Rabello assisted in maintaining that separation. That purpose would have been defeated if she was a client alongside EFHL.

56. Katia Rabello's own belief that she was a client and evidence that she relied on Walkers to act for her in the Cayman Islands is not evidence incapable of challenge, particularly when her character and credibility are bound to be in issue. She has, unfortunately, been convicted of conspiracy, money laundering and fraudulent remittance of funds abroad for which she was sentenced to 16 years 8 months imprisonment. She has now been released and the convictions were not in relation to the subject-matter of the instant appeal. The Chief Justice records that she says she was wrongly convicted. But in so far as the conclusion that she was a client depends on her evidence, it is plainly open to attack on grounds of credibility.

57. Walkers contend that the *Trillium* indicia establish that Katia Rabello was not a client. There was no written contract with her; there was no file in her name and she was not named in their database; there were no meetings nor correspondence with her; there were no instructions given by her; Walkers had never said that they had acted for her; no legal advice nor documents had been created specifically for her.

58. These arguments are not conclusive but it does not seem to me possible to say that they are not reasonably arguable. They are ripe for contest and challenge in the light of all the evidence and full disclosure.

59. The Chief Justice observed that Mr Toledo, unlike Katia Rabello, *was* referred to in Walkers' records as a client. But the evidence of Mr Austin-Smith, supported by Feena Cray was that that was an error. He had originally been named in Mr Macaulay's instructions of 7 August 2009 but, according to Mr Austin-Smith he had been omitted following a telephone conversation

between the two. The final retainer letter signed by Mr Macaulay, as I have already recalled, did not name him. But Walkers' record of him as a client was not corrected. The Chief Justice does not refer to this evidence.

60. The Chief Justice also relied upon Mr Toledo's position as Managing Director of TLB (J [140c]) but the directors of TLB are not necessarily personal clients. The retainer was negotiated on behalf of EFHL of which Mr Toledo was beneficial owner. It will be necessary to consider later the proposition that as beneficial owner of EFHL he became a client of the lawyers whom EFHL had retained.

61. Mr Toledo did meet Walkers and communicated regularly in relation to TLB and the Rabello family but that does not necessarily lead to the conclusion that he personally was a client.

62. The judge correctly referred to the fact that the failure to perform a conflict search in 2010 led to a belated admission and apology. But, again, that does not dictate a conclusion that he was a client in 2009 in the light of the evidence as to the discussion between Mr Austin-Smith and Mr Macaulay.

63. Mr Austin-Smith accepted that his first affidavit erred in his assertion that Mr Macaulay's firm was the client (see J [140(g)]). But it is not clear how that assists in establishing who the client was, let alone that it was Mr Toledo.

64. The judge (J [140(h)]) refers to the confidential documents relating to Mr Toledo obtained through Walkers by Dr Braga. But, again, that is not an indication that Mr Toledo was a client.

65. I am far from saying that some of these matters were not indicia on which Mr Toledo may rely in support of the contention that he was a client. But, as in the case of Katia Rabello, neither individually nor as a whole do they establish beyond reasonable argument that he was.

Lifting the Corporate Veil

66. It is then necessary to turn to what the judge described as "*other indici*a" and in particular to his lifting the veil of those corporate entities who were admittedly clients. The circumstances justifying that approach could, according to the Chief Justice, include

> *"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." (J [305])

67. The Chief Justice referred to two cases, which he considered illustrated that situation: *Johnson v Gore Wood* [1992] BCC 474 and *Ratiu v Conway* [2005] EWCA Civ 1302, [2006] 1 All ER 1302. Both cases were relied upon by the Chief Justice for the proposition that a contractual retainer between a company and solicitors:

> *"could also give rise to fiduciary obligations of trust 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."* (J [309])

68. The Chief Justice relied on both of these cases to justify lifting the corporate veil, citing the approval by the Court of Appeal in *Johnson* (at p.485) of Staughton J in *RP Howard Ltd v Woodman Matthews & Co (A Firm)* [1983] QB 117:

> *"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,"* (citation at J [306]),

and Auld LJ in *Johnson* (at [78]):

> *"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."*

69. The Chief Justice said (J [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* ***Ratiu 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."*

70. The first point to be made about these cases is that a decision to lift the corporate veil is one that involves an intense scrutiny of the facts. *Petrodel Resources Ltd v Prest* [2013] 2 AC 415, to which Walkers referred in argument, is miles away from this case since it concerned the

possibility of using the assets of a company to satisfy a lump sum payment owed by a husband to his former wife. But it is authority for the proposition that the exceptional circumstances which permit disregard of the separate legal personality of a corporation are highly sensitive to the facts of the particular case (see Lord Sumption [9] and [52]).

71. More relevant are the trio of cases on which the Chief Justice relied. In *Howard* and *Ratiu* there had been trials. In *Johnson*, however, solicitors retained by a small company attempted to strike out a claim by the owner, to whom, for the purposes of the strike-out, it was accepted a personal duty was owed, as the Chief Justice records (J [308]). The Court of Appeal dismissed the application to strike out because the case was arguable: whether there was an inference to be drawn that the solicitors did owe a duty to the beneficial owner of the company was a matter which could only be determined on the facts at trial (p.99):

> "*In Ratiu the solicitor had acted for the Plaintiff's company, Regent's nominee Pristbrook, in a successful acquisition of one property and then acted against Regent itself in acquiring a further property. He sued for libel when the Plaintiff accused him of acting in conflict with his fiduciary duty. The trial judge had withdrawn from the jury the issue whether any fiduciary duty had been owed to Regent. The Court of Appeal ruled that that issue should not have been withdrawn; it was for a jury to decide whether such a duty was and continued to be owed notwithstanding the interposition of a nominee company (see Auld LJ at [87]).*"

It is worth noting that in the passage cited by the Chief Justice at [J 310], the veil is to be lifted where the facts require it (Auld LJ at [78]).

72. This case seems to me to confirm the importance of finding the relevant facts before drawing the inference of any fiduciary duty.

73. The facts relevant to whether a duty was owed to the beneficial owners of the Plaintiff companies are themselves a matter of dispute. At the time of the Arnage and Brooklands retainer which had begun and ended in 2000, ten years before the Braga retainer, there was, Walkers argue, no evidence that Katia Rabello had been involved in instructing Walkers or that any relationship of trust and confidence had been formed with Walkers. The Plaintiffs had withdrawn an allegation that the documents relevant to the Note Purchase transaction showed that she was the UBO of those companies. She was not an owner of EFHL.

74. Walkers put before the Chief Justice the Money Laundering Code of Practice which applied at that time. It was not binding and did not require checks on ultimate beneficial owners in relation to isolated transactions. Nonetheless the judge concluded in a number of places in his judgment

that Walkers must have known that Katia Rabello was the UBO (J [49], [54], [128] and [136]). Subject to the question of a *general* or *family* retainer, the issue as to the extent of Walkers' knowledge and how far it forms a legitimate basis for inferring fiduciary duties and duties of confidence remains, in my view, a matter to be determined after an examination of all the evidence in the case and full discovery.

75. Although Walkers accept that it did know Mr Toledo was UBO of EFHL it must be recalled that, whilst he had been mentioned in a letter from the prosecutor, he was not one of the defendants whose interests the 2009 Retainer was designed to protect. Further, any consideration of the extent to which his interests are to be aligned with the company, EFHL, and the extent to which he relied on the lawyer-client relationship with EFHL (J [305]) must take into account the arguments advanced in relation to his personal retainer to which I have earlier referred.

76. The Chief Justice's conclusions as to duties of confidence owed by Walkers seem to stem from his decision that all the Plaintiffs were or had been clients. This appears to derive partly from the position of the two non-corporate Plaintiffs as UBOs and partly from Walkers' relationship in general with the Rabello family. He said:

> *"This* [the Note Purchase transaction] *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 and obligations of trust and loyalty such that the Defendant was precluded from acting for Dr. Braga."* (J [326])

77. He continued (J [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 Brookland in respect of the Note Purchase Transaction in 2000 as the Defendant contends, but to all the Plaintiffs in respect of all their affairs."*

78. The Chief Justice seems to have likened Walkers' relationship with members of the Rabello family to a "*general retainer*". He said that Walkers had acted as the attorneys for the Rabello family in the Islands for many years (J [80] and [139]).

79. It is, at its lowest, arguable whether as a matter of law, such a general retainer could exist. On the facts as I have identified them above, a 'general retainer' could not provide an incontrovertible basis for summary judgment. Bearing in mind the consequences in relation to professional practice liability and standards of conduct, it is difficult to see how it is legitimate to rely upon any so-called general retainer. This case is likely to stand or fall on making good the allegations that the duties for which the Plaintiffs contend derive from particular retainers with individual corporate and non-corporate persons.

80. There remains the possibility that the Plaintiffs might establish some breach of duty of confidence or a fiduciary duty independent of the conclusion the judge reached that Walkers had been retained by all the Plaintiffs and thus owed a continuing duty of confidence. After all, Walkers had apologised and admitted it ought not to have accepted the retainer from Dr Braga. Walkers accepted that a duty of confidence continues to be owed to a former client once the retainer is over in relation to documents and information generated during the course of the retainer. Walkers admit they had documents showing how Securinvest was capitalised in respect of which there was a small risk of a leak. There was no evidence, we were told, that any of the documents disclosed came directly from Walkers but it was because of the risk that the documents which they continued to hold might be disclosed that they accepted that they should not have acted and apologised.

81. It might still be an open question whether, even if the non-corporate Plaintiffs were not clients, some tortious duty was owed if those persons could be said to be in contemplation as likely to be damaged if Walkers breached their duty to a corporate client, such as EFHL. But that was not the basis of the Chief Justice's decision and could not, in this case, in any event, be a matter for summary judgment.

82. The Plaintiffs repeat the arguments accepted by the Chief Justice. It would be wrong for me to express any view as to whether those arguments will succeed after a full trial on all the evidence and analysis following full disclosure. The Chief Justice's view depends, in essence, on his conclusion that all the Plaintiffs retained Walkers and had formed a lawyer/client relationship. In my judgment, it is not possible to say that there is no reasonable prospect of rebutting that proposition in relation to Katia Rabello and Mr Toledo.

83. I shall consider in relation to questions of loss the significance, if any, of the acceptance that the corporate Plaintiffs were or had been clients. A decision as to what, if any, duties Walkers owed to the non-corporate Plaintiffs, given their relationships to the corporate clients, must

await consideration of all the evidence and relevant documents. In a complex, disputed case such as this, a summary process was incapable of resolving that issue.

The Proceedings in Brazil: Causation

84. The judgments of the Bankruptcy Court, presided over by Judge Beethoven, appeals from him to the Tribunal de Justica Sao Paolo ("TJSP"), and from there to the Superior Tribunal de Justica ("STJ") in Brazil are central to this case and of particular relevance to issues of causation, Walkers' defence of illegality and to the credibility of some of the Plaintiffs' witnesses. Although for a large part of the time taken to present the case for the Plaintiffs in the court below the decisions of those courts were challenged, by the end of submissions the Plaintiffs purported to withdraw such a challenge and the Chief Justice took the view that he could grant summary judgment without the need for any impermissible collateral challenge to the decisions of the courts in Brazil (J [474]).

85. The background to the relevant proceedings is the bankruptcy of the Petroforte Group in Brazil. Dr Braga, the appointed administrator of the bankruptcy estate, petitioned the Bankruptcy Court to include within that estate the assets of those companies which had been involved in what was found to be a fraud on the creditors of the Petroforte estate, and the personal assets of their beneficial owners. He was, following a series of decisions and appeals in Brazil, ultimately successful; although the legal justification for his success in the Brazilian courts appears to remain a matter of controversy between the Plaintiffs and Walkers. There is no agreement on the precise meaning and effect of those decisions, both of which are, of course, issues of fact.

86. As I have recalled, the Petroforte estate had been fraudulently decapitalised by a series of sham sale and leaseback arrangements involving Securinvest, Banco Rural, both within the Rural Group and 'Turvo' a company owned both by one of Mr Natalino's companies, and by Securinvest.

87. On bankruptcy there was a huge shortfall between liabilities and assets, the equivalent to some US$ 682 million, which Dr Braga, who had been appointed in October 2003, sought to make good out of the assets from the companies and their owners who had been involved in collusive dealings with Mr Natalino; he was subsequently accused with 66 others of embezzlement.

88. Securinvest's conspiracy to defraud Petroforte of valuable assets included an ethanol plant, known as the 'Sobar plant'. Securinvest had been used as a front to conspire with Mr Natalino to re-purchase the plant.

89. On 6 December 2006 Dr Braga, in order to revoke the sale of the Sobar plant, began proceedings against Rural Leasing, part of the Rural Group and other companies (the 'Revocation Suit'). It is of note that Securinvest was not a party to these proceedings, although the Plaintiffs seem to contend that Dr Braga should have pursued the assets of its UBO, Katia Rabello, through this Revocation suit, a view the Chief Justice seemed to share (J [255]).

90. However, Dr Braga had no need to pursue that action. He chose instead to present a Petition dated 20 June 2007 by which he sought to incorporate the assets of a number of companies, their directors and beneficial owners on the grounds of their complicity in the fraudulent and collusive dealings designed to diminish the Petroforte estate. It is important to emphasise at this stage that the basis for so doing depended on participation in those dealings and *not* on any contention that Securinvest or companies within the Rural Group were part of the same economic group as Petroforte. They were not.

91. On 24 August 2007 Judge Beethoven, in the Sao Paolo Bankruptcy Court, granted the Petition on the basis advanced by Dr Braga. He concluded that the sale and leaseback operations were a sham (see citation at J [161]). Judge Beethoven explained the basis for incorporating Securinvest's assets and those of other companies and individuals, including those within the Rural Group:

> *"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 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."*

92. I should emphasise two points. First, this decision preceded and had nothing to do with the subsequent disclosure, in 2010, which Dr Braga obtained from the Cayman Islands as to the identity of the UBO of Securinvest, Katia Rabello. Second, the question whether Securinvest was part of the same economic group as Petroforte was not relevant to the decision to order the incorporation of Securinvest's assets within the Petroforte bankruptcy estate.

93. By its decision dated 30 September 2008, the TJSP upheld the decision of Judge Beethoven but, for the first time, made reference to an economic group:

> *"the fact is that the appellant* [Securinvest] *failed to conceal the more than obvious link of fraudulent nature between the Company* [Securinvest] *and the economic Group of Petroforte and Banco Rural."*

94. As the Plaintiffs point out there was no evidence that there was a Petroforte /Banco Rural economic group. But the decision of the TJSP seems also to have been based on the collusive dealings quite apart from any consideration of a common economic group:

> *"The transfer of the company's assets to others when being close to bankruptcy or during the legal term period is a reprehensible behavior in commercial relations, the reason for the insolvency. Such behavior justifies the disregard of the corporate identity and declaration of ineffectiveness of any harmful acts performed as well as any transfer of property or assets of the company, ordering the extension of the bankruptcy effects to the controllers and other companies controlled by them, even if administered by third parties." (p.9)*

95. Securinvest appealed to the STJ on the basis that there was no economic link between Petroforte and Banco Rural and sought a stay. It was in pursuit of this appeal, and a stay, that Securinvest lied about its beneficial ownership. It asserted correctly that its owners were Arnage and Brooklands but stated that neither of those companies had as shareholders anyone involved in the Rural Group or Petroforte. The Plaintiffs now admit that this was untrue because Katia Rabello owned Arnage and Brooklands, and therefore Securinvest, and at the time was President of Banco Rural's Administrative Council.

96. This lie and the efforts to lend credibility to the deception as to the true beneficial ownership figure significantly in issues as to causation and illegality. Walkers submit that, if she had told the truth in September 2009, then Dr Braga would have had no need to go to the Cayman Islands in search of the identity of the UBO of Securinvest. They add that if she had told the truth at that stage, in 2009, her personal bankruptcy and the losses would have incurred in any event. Walkers only became involved because of her failure to reveal the truth to the STJ, and her personal bankruptcy and losses were only incurred by virtue of her ownership of the company, Securinvest, which was central to the fraud on Petroforte's creditors.

97. On 22 September 2009 the STJ granted an injunction staying the proceedings provisional on disclosure which would unravel the identity of the shareholding in Arnage and Brooklands. The Judge Rapporteur, Judge Andrighi, was particularly concerned because it had been submitted that neither of those two foreign companies had among their shareholders any business or individuals involved in Grupo Rural *or* Grupo Petroforte. She sought within 15 days:

> *"...documents which specifically demonstrate who its* (Securinvest) *shareholders are, and, if any of these are legal entities, who the respective 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 unravelled and all the*

individuals with a direct or indirect share in the company's capital are revealed."

98. This triggered attempts to conceal ultimate beneficial ownership of Securinvest by showing that the shareholders of Arnage and Brooklands were two Costa Rican companies owned by two Costa Rican individuals (one of whom it was later said owned a launderette). This was intended to show the absence of any connection between Securinvest and either the Rural Group or Petroforte. Judge Andrighi had made it clear that she was interested in both of these groups.

99. The preparations for filing documents to answer the question posed by the STJ took place between September and November 2009. Walkers contend that at the time Securinvest filed an answer on 15 October 2009 to the STJ the Costa Rican structure was not in place and thus the response to the STJ was itself premature and doubly dishonest. On two occasions, 15 October 2009 and 5 November 2009, Securinvest concealed the ultimate beneficial ownership of Securinvest, identifying only the Costa Rican nominees as beneficial owners. The Plaintiffsstill insist that since they did not refer to them as *ultimate* beneficial owners, the filings were truthful "*on the material submissions"*.

100. The process by which the Costa Ricans were put forward as owners of Arnage and Brooklands involved the US attorney Mr Macaulay whose reluctance to admit participation during cross-examination is painfully obvious from the transcript; he eventually accepted that his participation in the process was open to criticism and was, at least on its face, in breach of his professional Code of Conduct. Both his participation and his reaction to it on questioning are relevant to his credibility in general and in relation to the issues of retainer to which he speaks.

101. Although Ms Rabello resisted the accusation of lying to the extent of describing it in the Plaintiffs' Reply as abusive (e.g 5.8), it is now admitted that she did lie. She now seeks to explain and justify her lie.

102. Neither Securinvest nor Banco Rural were, in truth, part of the same economic group as Petroforte. She says she believed that neither the assets of Securinvest nor of Banco Rural could, therefore, for that very reason, as a matter of law, be incorporated into the Petroforte estate (see her Third Affidavit [7]-[9] sworn, in November 2018, just before the resumption of the hearing before the Chief Justice). A transparent declaration of her status as UBO of Securinvest would have demonstrated to the STJ that it was not part of the Petroforte economic group and thus would have prevented Securinvest assets from inclusion in the Petroforte estate. Had Securinvest assets been excluded from the Petroforte bankruptcy, then her own personal

bankruptcy would not have followed, since it is clear that that was the consequence of the disclosure that she was the UBO of Securinvest.

103. She says her motive for concealing the truth of her beneficial ownership of Securinvest was to hide the corporate relationship between Securinvest and *Banco Rural* from the regulatory eyes of the BCB and not to hide any corporate relationship between Securinvest and Petroforte, of which there was none and therefore no need for concealment. She feared that to reveal the link between Securinvest and Banco Rural would have had serious regulatory consequences (see e.g. her third affidavit [12] and [13]).

104. On 27 April 2010, once he had identified the Costa Rican owners as being of limited means, Dr Braga obtained authority from the STJ to investigate Arnage and Brooklands in the Cayman Islands. The STJ stayed the incorporation of Securinvest assets into the Petroforte estate pending determination of its appeal.

105. On 28 April 2010, Dr Braga instructed Walkers to act in proceedings in the Islands to obtain *Norwich Pharmacal* and *Bankers Trust* orders from Equity Trust which had recently become the registered office of Arnage and Brooklands. It is Walkers' acceptance of these instructions which is the source of the allegations advanced against them in this case.

106. On 27 May 2010 Cooke J made the first *Norwich Pharmacal* and *Bankers Trust* orders *ex parte* against Equity Trust. Katia Rabello was not named in the Schedule to the first application, because, as Dr Braga affirms, he was at that stage concerned to establish that Securinvest was part of the Rural Group, (his 1st affidavit [30]). On 16 June 2010, the Chief Justice permitted receipt of such disclosure pursuant to the Confidential Relationships (Preservation) Law (CRPL). As a result, Equity Trust disclosed documents which showed that Katia Rabello was UBO of Securinvest.

107. In light of the fact that Equity Trust had only recently become the registered office of Arnage and Brooklands, further orders were obtained, against the previous registered office holder, the Canadian Imperial Bank of Commerce (CIBC); the first, on 2 July 2010 made by Henderson J and the second by the Chief Justice, amending his previous order. The orders were made in response to applications which for the first time specifically mentioned Katia Rabello as a target. On 4 August 2010 on CIBC's CRPL application, disclosure was made pursuant to the order of Henderson J.

108. In consequence of the new information that Katia Rabello was UBO of Securinvest, Dr Braga petitioned the Bankruptcy Court in Brazil to incorporate her assets into the Petroforte Estate. On 28 October 2010 that Petition was granted. The justification for the incorporation of those assets into the Petroforte estate was the involvement of Securinvest in the fraud perpetrated on Petroforte's creditors (and not on the basis of Securinvest belonging to the same economic group as Petroforte, which it did not). The Court ruled:

> *"there is 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….. 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.*
>
> 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 to be disregarded due to the clearly established a link with the Petroforte Group… Their shareholders, directors, controllers and managers are declared to be liable for irregularities found. I impose a freezing order to be placed on the assets of Katia Rabello… 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."* (page 6)

109. On Dr Braga's suggestion Judge Beethoven communicated with BCB, and subsequently the Court file was unsealed for BCB's inspection. It should be noted that the original decision of Judge Beethoven on 24 August 2007 also ordered disclosure of that order to the Central Bank and to the Public Prosecutor's Office.

110. On 3 January 2011, the TJSP denied Katia Rabello's motion to set aside the Order of Judge Beethoven.

111. There then ensued proceedings in the Cayman Islands, first started in December 2010 by Arnage and Brooklands, to set aside the disclosure orders. Their summons was amended in January and March 2011 to include Securinvest, Banco Rural and Ms Rabello.

112. On 20 May 2011, the Chief Justice ruled that the *Norwich Pharmacal* Disclosure was properly made but he ordered that the *Bankers Trust* disclosure be set aside and recalled from Brazil. Final Judgment was given on 25 July 2011.

113. It may be of note in the future that no complaint was made at the time by these parties, during the *inter partes* hearings, that Walkers was continuing to act for Dr Braga in resisting these attempts to set aside the disclosures.

114. The Chief Justice expressed concern in his judgment at the use which was made of this disclosure, and the inadequacy of the undertakings which ought, so he believed, to have restricted disclosure of the identity of the UBO of Securinvest to the STJ (see J [220] and [222]). He took the view that the extension of the bankruptcy to Katia Rabello personally had not been contemplated by the Grand Court when making its disclosure orders (see J [229]-[237]). However, he recalled that it was only the *Bankers Trust* orders which were set aside.

115. The *ex parte* disclosure proceedings and the subsequent *inter partes* set aside proceedings are of significance since they were the basis of the judge's views of causation of damage in respect of what he described as the loss of opportunity to respond to the *Norwich Pharmacal* applications in 2010 which was said to flow from the breaches of the duties owed by Walkers to their clients.

116. On 9 August 2011 the STJ dismissed Securinvest's appeal from the decision of the TJSP. The reasons are of significance in relation to issues of causation. The summary reads:

> *"1. In a situation in which two economic groups, united around a common purpose, promote a group of officially legal deals, but with the real purpose of siphoning of wealth from the company on the verge of bankruptcy, it is necessary for the judicial branch to also make changes in its procedure, in order to find effective means to turn to the contrary the harmful shady procedures, by punishing and blaming those involved.*
>
> *2. It is possible for the court to advance the decision of extending the effects of the bankrupt company to the affiliated companies in the contingency that having verified clear conspiracy to injure creditors, there is a transfer of assets to the siphoning off of wealth. There is no nullity in the delayed exercising of the right of defence in the circumstances.*
>
> *3. The extension of bankruptcy to the affiliated companies can be done independently of the initiation of an independent process. The verification of the existence of union among the companies can be done based on factual elements that prove the actual influence from a corporate group on the decisions of the other, independently of recording the existence of interest in the capital stock.*
>
> *4. In the circumstance of fraud for the siphoning off of wealth from the bankrupt company, at the expense of the group of creditors, perpetrated through the use of complex corporate forms, it is possible to use the technique of piercing the corporate veil with new clothing in order to reach the assets of all those involved."*

117. The STJ regarded itself as bound by the facts found in the lower courts, the Bankruptcy Court and the TJSP. On the basis of those facts it ordered the incorporation of the assets of Securinvest into the Petroforte estate. It deployed Art 50 to lift the corporate veil of those companies which had conspired to injure the creditors to "*reach the assets of all those involved*". It adopted this course as a punishment.

118. This decision provides powerful support for Walkers' argument that the Cayman disclosure had nothing to do with the incorporation of Securinvest's assets into the bankruptcy. The STJ made no reference to that disclosure or to Katia Rabello; it upheld the original decision of Judge Beethoven on 24 August 2007. Thus, the incorporation of Katia Rabello's personal assets can be seen to have been the result of the incorporation of Securinvest's assets into the Petroforte Estate and a consequence of the fraudulent dealings of the company of which she was the UBO, in addition to the fact of disclosure of that beneficial interest. Her personal assets may have been reached for another reason: her involvement as President of the Council in the Rural Group, which had played an essential role in the collusive arrangements.

119. Expert evidence adduced by the Plaintiffs asserts that the STJ erred in incorporating assets from Securinvest and deploying Art 50 because Securinvest was not part of the same economic group as Petroforte. Art 50 should not have been deployed to raise its corporate veil. But since STJ's decision is final and cannot be impugned the dispute is relevant only to Katia Rabello's motive: her belief that she needed to mislead the court in order to show the absence of a common economic group.

120. The decision is also of significance since it shows that Dr Braga could succeed in the incorporation of Securinvest's assets without the need for any revocation action. Before considering further the relevance of these proceedings to issues of causation and loss, I should refer briefly to subsequent events and proceedings in Brazil.

121. On 27 September 2011 the TJSP dismissed Katia Rabello's appeal against the order of Judge Beethoven incorporating her assets into the Petroforte estate. The basis upon which it did so was because:

> *"It is impossible to deny the close relationship between the appellant and (Securinvest), the institution used to decapitalize the main bankrupt party."*

The decision to lift the corporate veil is expressed to be because of the use of Securinvest for that purpose:

> "*The piercing of the corporate veil of the companies of which the appellant* [Katia Rabello] *is involved is well grounded both from the appealed ruling as well as from the reasons inferred from the diligent trustee…*"

122. This judgment was declared final on 7 November 2012 during a period when Katia Rabello made numerous attempts to challenge these decisions. Motions for clarification have been dismissed in 2014 and the STJ decision of 9 August 2011 concerning Securinvest was declared final and unappealable on 14 November 2014. The findings of Securinvest and Banco Rural's involvement in the fraudulent depletion of the assets of the Petroforte estate cannot now be challenged despite other proceedings concerning settlement and further attempts to appeal.

123. The BCB levied fines of R$ 250,000 (US$125,000) on Katia Rabello and Banco Rural on 13 March 2013 and in August 2013 Banco Rural was put into liquidation.

The Losses Claimed by the Plaintiffs

124. The Plaintiffs attribute their losses to the Cayman disclosure. The largest claim (Statement of Claim [203]) is the allegation that Arnage and Brooklands suffered loss as a result of Securinvest being placed into the Petroforte bankruptcy. This was said to be the result of the STJ's Order of 9 August 2011. The losses were estimated at US$ 400 million. It was subsequently accepted that that claim was overstated by US$100 million, the value of the Sobar assets which had been disposed of before the Cayman disclosure (said to be to another company within the Rural Group) and that part of the claim was abandoned during the first hearing of the summary applications in March 2016.

125. In the Reply it is contended that the Cayman disclosure was central to the STJ's decision (para.200).

126. The Statement of Claim also alleges that Katia Rabello's losses were in excess of US$ 500 million (para. 187).

127. In its summary (para. 220) the Statement of Claim alleges that the Plaintiffs suffered the cost of legal fees and disbursements in a number of jurisdictions, Brazil, the Cayman Islands, the United States, the BVI and Belize, as an alleged result of litigation to fight the consequences of the Cayman disclosure.

128. Central to Walkers' defence is the contention that any losses which the Plaintiffs suffered cannot be attributed to the Cayman disclosure. The argument as to causation is developed in two distinct ways.

129. First, it is contended that none of the Courts in Brazil which ordered the incorporation of the Securinvest assets into the Petroforte estate relied on the disclosure in Cayman that Katia Rabello was the UBO of Securinvest. The decision to incorporate those assets dated back to the decision of Judge Beethoven on 24 August 2007, upheld by the STJ on 9 August 2011. Both were based on Securinvest's collusive dealings designed to deplete the assets of the Petroforte Estate and thereby to defraud its creditors.

130. Once Securinvest and companies within the Rural Group, such as Banco Rural and Rural Leasing were shown to have been involved in this fraud, then it became possible for the corporate veil to be lifted, under Art 50, and the personal assets of their beneficial owners also to be incorporated into the bankrupt estate "*in finding effective means to turn to the contrary the harmful and shady procedures"*.

131. Second, it is clear that when Judge Beethoven put Katia Rabello into bankruptcy in October 2010 he did rely on the Cayman disclosure. But in relation to the alleged losses flowing from that bankruptcy Walkers contend that the fact that she was UBO of Securinvest would have been revealed in any event. In the December 2018 hearing the US attorney Mr Macaulay stated that her identity as UBO would have been disclosed to the STJ "*in a private manner which could not have been used by the BCB*" (Day 5), (the acceptance that given the opportunity, Katia Rabello's identity as UBO would have been revealed was repeated by her counsel at the same hearing two days later). As I have said, the question remains as to whether Katia Rabello's personal assets might have been reached in any event due to her involvement and/or ownership of members of the Rural Group.

132. Despite that admission the Chief Justice appeared to reach a conclusion that there was no reasonable answer to a claim based on the Plaintiffs' loss of opportunity to contest the *Norwich Pharmacal* applications:

> "*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 a loss of the earliest opportunity for the Plaintiffs to defend themselves in the context of the proceedings before this Court. Further, that this loss of opportunity arose from the Defendant's actions on behalf of Dr. Braga*." (J [193])

133. The Chief Justice reasoned that the Plaintiffs might have been able to prevent Dr Braga's use of the confidential information or, at least, confine it to the issue of the identity of the UBO "*which was pivotal to Securinvest's appeal to the STJ*" ([J [196]), or that they may have been able to

compel Dr Braga to prove fraud in the Revocation Action (as I have recalled Securinvest was not in fact a party to that action), or to compel disclosure of what the judge regarded as a champertous contingency agreement whereby Dr Braga was entitled to a success fee of a percentage of the value of the Petroforte estate ([J [197], [351f]).

134. I shall not dwell on Walkers' response to the views the Chief Justice expressed as to Dr Braga's behaviour. His strong criticism of Dr Braga seems to have been relevant to the issue of loss of opportunity but that loss did not, in the end, found his basis for giving summary judgment.

135. The Chief Justice concluded this part of his judgment:

> *"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."* (J [200])

136. He dealt with Walkers' arguments on causation by concluding that:

> *"[241]…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 reason 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."*
>
> *"[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."*

137. The Chief Justice later concluded that it was "*highly probable*" that had Katia Rabello been afforded the opportunity to make the case that the allegations of fraud should have been resolved in the Revocation Action before disclosure, then Dr Braga would not have been able to "*force her*" into bankruptcy without having first resolved that action (J [255]). He continued that had she been able to address the court in 2010 it was "*highly probable*" that strict orders would have been made to preclude the deployment of the disclosure against her personally in the Petroforte bankruptcy or disclosure to the BCB or used against Banco Rural. The Chief Justice concluded that those were matters "*well beyond the mandate given to Dr Braga by the STJ*" (J [260]).

138. The Chief Justice's repeated references to high probability bear the hallmarks of findings but, again, since they did not in the end form the basis of his summary judgment, it is not necessary to make further comment.

139. The Chief Justice recorded Walkers' argument that the incorporation of Securinvest's assets into the Petroforte bankruptcy was ordered before the Cayman disclosure (J [276]-[278]) and thus could not have caused the Plaintiffs' losses. He took the view that the extent to which the disclosure was relied upon by the STJ was a disputed question of fact (J [283]) and said:

> *"it still properly remains to be examined and resolved as a question of causation of loss __at the next stage__* (J [283])" (my emphasis).

140. Despite this view as to what remained in dispute, the Chief Justice concluded that Walkers' breach of duty must have caused some loss. He said:

> *"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. 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."* (J [290])

141. And he continued:

> *"[293] 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."*

142. The Chief Justice returned to the issue of causation when he reached his final conclusion as to whether some loss had been caused by the breach of duty (J [390]). It was agreed that it was necessary for the Plaintiffs to prove beyond reasonable argument that they had suffered some loss (*Lunnun v Singh* (1999) 7 WLUK 5).

143. He concluded:

> *"[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, 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): …."*

144. The Chief Justice then recited the Plaintiffs' claim set out in [220] of the Statement of Claim.

145. It is important to re-iterate that it is not the task of this court to resolve the dispute as to causation. The Chief Justice appears to have accepted he could not summarily dismiss Walkers' arguments that losses resulting from the incorporation of Securinvest assets into the Petroforte bankruptcy were not attributable to the Cayman disclosure (see e.g. J [283]).

146. Moreover, he seems also to have accepted that, in light of the argument that Katia Rabello would have revealed that she was the UBO of Securinvest, he could not give summary judgment in respect of losses attributable to her personal assets being included in the Petroforte estate (see e.g. J [429] which refers back to her claim for personal losses pleaded in the Statement of Claim paras 186 and 187).

147. In those circumstances it is difficult to see how the losses in respect of legal fees and disbursements were distinct and immune from Walkers' arguments as to causation. To be satisfied that those losses were, beyond reasonable argument, caused by the Cayman disclosure it was necessary, first to establish beyond reasonable argument that the revelation that Katia Rabello was UBO of Securinvest was caused by Walkers' breach of their duties to the Plaintiffs. The losses which the Chief Justice did find were attributable to those breaches were said in the Statement of Claim to be attributable to the use by Dr Braga of information obtained under the *Norwich Pharmacal* Orders (see e.g. in relation to the US proceedings Statement of Claim (J [205]), in relation to the BVI (J [209]) and in relation to Belize (J [215]).

148. However, nowhere does the Chief Justice explain how it is possible to dismiss summarily Walkers' reliance on the fact that Katia Rabello averred that it would have been in her interest, had she been given the opportunity, to disclose that she was UBO of Securinvest in order to distance it from the Petroforte economic group, and on her US attorney's acceptance that that fact would have been revealed in any event.

149. Walkers argue that the decisions of the courts in Brazil demonstrate that the lifting of Securinvest's corporate veil was due to its collusive dealings designed to defraud Petroforte's creditors. This started a chain of events which would have led to the incorporation of the assets of beneficial owners of the companies involved in the fraud. When there is added to this chain of events Katia Rabello's assertion that, given the opportunity, she would have revealed that she was Securinvest's UBO, the causation argument cannot be said to be incontrovertible.

150. How then can it be said that costs incurred in proceedings designed to discover information about the Plaintiffs' assets in other jurisdictions are distinct and immune from Walkers' arguments as to causation? The Chief Justice gives, as Counsel for the Plaintiffs accepted, no reason. The Respondents' Notice is no more informative. The Statement of Claim refers to Letters Rogatory issued by the Bankruptcy Court to the US District Court (J [205]) and proceedings in the BVI to obtain information about the Plaintiffs and their assets (J [209]) and similarly in Belize (J [215]). There are references to the US proceedings in Mr Macaulay's ninth affidavit.

151. It is, however, not possible to identify any reason why these losses can properly be distinguished from any other losses claimed. All are susceptible to Walkers' arguments on causation. Those arguments cannot, in my view, be dismissed as incontrovertible.

152. The Chief Justice accepted that the arguments as to causation applied to losses stemming from the incorporation of Securinvest's assets into the Petroforte estate and Katia Rabello's bankruptcy. There was no basis for approaching other losses in a different way. Only by a trial could these issues of causation properly be determined.

153. There is a further question as to whether those losses were incurred by the Plaintiffs. For the purposes of the instant appeal it is unnecessary to deal with the arguments fully. It appears that all the Plaintiffs save for Katia Rabello abandoned their claims to legal expenses, during the hearing in December 2018, though even the assertion that they had been abandoned was to some extent disputed. Thus, although the corporate Plaintiffs are admitted to have been clients, they do not appear to have suffered any of the losses which founded the order for summary judgment.

154. On the fifth day of the December 2018 hearing, during the two days of his evidence, Mr Macaulay conceded that none of the Plaintiffs had paid the legal costs claimed in the Statement of Claim (p.96). Katia Rabello had paid a sum of US$ 300,000 costs through a company called Gladbeck Capital. There was no documentary evidence that she was the source of the funds and Gladbeck had been struck off the register of BVI companies in 2016. The judge himself expressed scepticism but said the question of payments on behalf of the Plaintiffs (sic) were matters for proof at an assessment hearing (J [432]). If this was the only loss affording a basis for summary judgment it hardly seems incontrovertible.

155. I conclude that the issues of causation were substantial and could not be dismissed without trial. They require findings of fact as to the meaning and effect of the decisions of the Brazilian courts and the consequences which flowed from the incorporation by those courts of Securinvest into the Petroforte estate and the lifting of Securinvest's veil so as to expose Katia Rabello's own assets.

The ex turpi defence

156. Walkers' essential argument is that all of the losses claimed by the Plaintiffs stem from the collusive dealings of Securinvest and other companies within the Rural Group, all of which were designed to defraud the creditors of Petroforte. It was Katia Rabello's own deception and participation in that fraud, which brought about her personal bankruptcy and losses. It matters not that the fraud has been condemned only in civil proceedings rather than by criminal conviction (see e.g. *Parker v College of Ambulance Ltd* [1925] 2 KB 1).

157. If our courts in the Cayman Islands, it is argued, awarded the Plaintiffs compensation they would be giving back that which the Brazilian courts had taken away. For those reasons Walkers sought to strike out the claim.

158. The Chief Justice dismissed this application. He relied in particular on the modern explanation of the principle of illegality in *Patel v Mirza* [2017] AC 467. He said that Walkers had failed to explain why the defence should bar all the Plaintiffs' claims (J [455]). He understood that the defence was based on her lie (J [436]) and her explanation had not as yet been tested or refuted (J [445]).

159. Nor, he concluded, would it be proportionate to dismiss her claims summarily (J [461]) when what he regarded as her unproven fraud was weighed against the breaches of Walkers' lawyer-client duties (J [461(ii) and (iii)]).

160. Walkers' accusations of illegality go far beyond reliance on her lies as to the beneficial ownership of Arnage and Brooklands. They have, as I have already recalled, relied upon the fraudulent activities of companies within the Rural Group and not merely the lies to conceal her beneficial ownership of Securinvest (see e.g. paras. 9 and 22 of the Defence).

161. The modern statement of the law relating to the defence of illegality flows from the identification of the policy reasons for the doctrine: that a person should not be allowed to profit from his own wrong-doing and that the law should be coherent and not self-defeating (per Lord Toulson in *Patel v Mirza* (supra) [99]). Lord Toulson continued:

> *"[101] So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law. ….*
>
> *[120] 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 (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). 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. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

162. The Plaintiffs relied upon *Stoffel & Co v Grondona* [2020] UKSC 42 to demonstrate the process of evaluation required to assess the extent to which allowing their claim would damage the integrity of the legal system and whether it was proportionate to dismiss their claim on the grounds of illegality.

163. Stoffel & Co were solicitors who sought to resist a claim for their negligent failure to register a number of transactions relating to a mortgage on the grounds that the claimant had dishonestly agreed to lend her name and credit to enable the mortgagor to conceal his interest in the property from any lenders. The Supreme Court upheld the dismissal of the defence of illegality following the principles identified in *Patel*. Lord Lloyd-Jones said:

> "*..the essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. …in considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand. Finally, in this regard since the overriding consideration is the damage that might be done to the integrity of the legal system by its adopting contradictory positions, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations*." [26]…
>
> *"The motive for the wrongdoing which forms the background to this claim must, however, be distinguished from enlisting the court's assistance to make a profit from that wrongdoing. The relief sought from the court will be important here. (See Patel v Mirza per Lord Toulson at para. 109.) Clearly, it would be objectionable for the court to lend its processes to recovery of an award calculated by reference to the profits which would have been obtained had the illegal scheme succeeded."* [45]…
>
> *"The true rationale of the illegality defence,…is that recovery should not be permitted where to do so would be damaging to the integrity of the legal system*." [46]

164. Walkers relied on *Gray v Thames Trains Ltd* [2009] UKHL 33 and *Day v Womble Bond Dickinson* [2020] EWCA 447, [2020] PNLR 19 in contending that Katia Rabello was seeking compensation for a judicial order against her, based on her own personal

responsibility for the fraudulent collusive dealings of Securinvest and the Rural Group. They described her case as analogous to Gray's failed attempt to recover losses attributable to his detention for manslaughter or Day's attempt to recover the fines following breaches of countryside protection law.

165. *Day* shows that the courts will continue to apply the principles identified in *Gray*. The Court of Appeal expressly considered the state of the law following *Patel* [31]-[34], as explained in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841, [2018] 3 WLR 1651 at [87]-[90]. In *Day* the Court said:

> *"it is a rule of law and a manifestation of public policy that a civil court will not award damages to compensate the client for a disadvantage which the criminal courts have imposed on him or her by way of punishment for a criminal act for which he or she was responsible."*

Henderson has since been upheld by the Supreme Court, [2020] UKSC 43, [2020] 3 WLR 1124.

166. There are, as it seems to me, two insuperable objections to striking out the Plaintiffs' claim without a trial on the grounds of illegality.

167. First, although Katia Rabello admits attempting to deceive the STJ, the essential case against her is that she bears personal responsibility for the fraud which led to the incorporation of Securinvest assets and her personal assets into the Petroforte estate, and her ensuing losses. The decisions of the Brazilian Courts and in particular of the STJ to deploy Art 50 so as to incorporate the assets of the UBO of Securinvest, arguably, do not involve a finding of her own personal complicity in the fraud.

168. I am far from saying that at a trial her personal responsibility will not be established, but it is not an incontrovertible result of a proper analysis of the decisions in Brazil.

169. Second, it is clear that a proper assessment of the defence of illegality requires an evaluative judgment of all those factors identified by the Supreme Court. The court will have to assess the extent and gravity of her wrongdoing; much will depend on the facts as found at trial. In particular, a court will have to weigh, for the purposes of upholding consistency and coherency in the law, any proven fraud committed by Katia Rabello against any breaches of Walkers' duties to their clients, which, if proved, would clearly be damaging to the integrity of the law on the Islands. A court will have to determine whether, in the public interest it is proportionate to bar her claim on those grounds.

170. For those reasons I agree with the Chief Justice that the Plaintiffs' claims should not be struck out.

171. But the arguments as to this defence reveal a substantial difficulty in the Chief Justice's decision to order summary judgment in favour of the Plaintiffs. It is beyond argument, and was agreed by the Plaintiffs, that a successful deployment of the doctrine of illegality is a bar to a claim. The origins of the doctrine lie in the refusal of the court to "*lend its aid to a man who founds his cause of action upon an immoral or illegal act*" (per Mansfield CJ in Holman v Johnson (1775), cited by Lord Toulson in *Patel* [1]). Lord Toulson repeatedly refers to '*denial of a claim*' (see [120]).

172. The Chief Justice must have taken the view that the defence of illegality did not apply to those claims in respect of costs and legal expenses which formed the basis of his order for summary judgment. He considered that the defence could only have application to some but not all of the claims:

> *"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.* [455]*."*

173. He seems to have been doubtful whether the defence would succeed; he took the view that the allegations of fraud were unproven and should be resolved in the Revocation Suit and that, in any event they were allegations of criminal and not civil fraud (J [463]).

174. However, it is not necessary for the purpose of this judgment to reach a concluded view on the challenge to each of the views which the Chief Justice expressed in refusing to strike out the Plaintiffs' claim. It is sufficient, as I have done, to explain my reasons for agreeing with his refusal to do so.

175. But none of those views, which at this stage can only be tentative, explain how the Chief Justice came to distinguish between those claims which, in a summary judgment, escaped the application of the doctrine and those which did not. The Chief Justice gave no reason for the distinction he made.

176. I conclude that if, as the Chief Justice correctly concluded, the defence of illegality should await resolution after all the facts were considered at trial, then that must be so in relation to all the claims. The arguments advanced by the Plaintiffs as to why there should be a trial in relation to that issue demonstrate why the judge was wrong to order summary judgment

in respect of any of the Plaintiffs' claims. There is no rational basis for distinguishing some of those claims from others.

177. It is true that there are at present no specific allegations against EFHL and Mr Toledo, though I should express caution in relation to the latter who, in the close relationship which he asserts between him and the Rabello family and its business dealings, may not escape the accusation of involvement in fraud after full discovery, as Walkers indicated at the hearing of this appeal. In any event the cost and expense which formed the basis of the Chief Justice's order were losses which only Katia Rabello continued to claim.

178. I conclude that none of the arguments advanced by Walkers in their denial of any relevant lawyer/client relationship with the Plaintiffs, in relation to causation or in relation to the doctrine of illegality can be dismissed as incontrovertible. Each of them required consideration of the full facts and after full disclosure of documents at trial. None of the Plaintiffs deserved to be condemned in relation to the serious allegations of fraudulent conduct without a full opportunity to defend themselves at trial. Walkers should not have been condemned of serious breaches of their obligations as lawyers on the Islands without a full opportunity to defend themselves at trial.

179. I repeat, I understand and sympathise with the Chief Justice's wish to bring an end to what appeared to be interminable proceedings. But only a sensible compromise or a trial can achieve that result. I would allow Walkers' appeal against summary judgment and dismiss their appeal against the refusal to strike out the Statement of Claim.

Martin, JA

180. I agree.

Sir Bernard Rix, JA

181. I also agree.