Camilla de Bourbon des Deux Siciles v BNP Paribas Jersey Trust Corporation Ltd

Jurisdiction:	Jersey
Judge:	Anderson JA, Crow JA, Perry JA
Judgment Date:	08 June 2021
Neutral Citation:	[2021] JCA 163
Court:	Court of Appeal

Text

[2021] JCA 163

COURT OF APPEAL

Before:

Jonathan Crow, Q.C.,

Lord Anderson of Ipswich KBE Q.C., and

David Perry, Q.C.

Between
Camilla de Bourbon des Deux Siciles
Appellant
and
BNP Paribas Jersey Trust Corporation Limited
Respondent

Advocate H. B. Mistry **for the Appellant**.

Advocate W. A. F. Redgrave **for the Respondent**.

Authorities

BNP Paribas Jersey Trust Corporation v Camilla de Bourbon des Deux Siciles [2020] JRC 267.

Siciles C de Bourbon des Deux v BNP Paribas Jersey Trust [2020] JCA 017.

Crociani v Crociani [2017] JRC 146.

BNP Paribas v Crociani [2018] JCA 136A.

Crociani v Crociani and Ors [2018] JRC 230C

BNP Paribas Jersey Trust Corporation v Siciles C. de Bourbon des Deux [2019] JRC 199

Siciles C de Bourbon des Deux v BNP Paribas Jersey Trust [2020] JCA 017

BNP Paribas Jersey Trust Corporation Ltd v Siciles C. de Bourbon des Deux [2020] JRC 195.

Siciles C. de Bourbon des Deux v BNP Paribas Jersey Trust Corporation Limited [2021] JCA 043

Royal Courts (Jersey) Law 1948.

In the matter of YY [2021] JRC 030.

Human Rights (Jersey) Law 2000

Gestur Jonsson and Ragnar Halldor Hall v Iceland (Applications 68273/14 and 68271/14)

Porter v Magill [2002] 2 AC 357

Barette v AG [2006] JCA 128.

Stubbs v The Queen [2018] UKPC 30.

Bisson v Minister for Infrastructure [2019] JCA 181

Dobbs v Triodos Bank NV [2005] EWCA Civ 468.

Hanif and Khan v UK (Applications 52999/08 and 61779/08).

Snooks and Dowse v UK [2002] JLR 475.

Le Boutillier v Minister for Planning and Environment [2012] JRC 095.

Locabail (UK) Ltd. v Bayfield Properties Ltd. [1999] EWCA 3004

Reg's Skips Limited v Yates and Yates [2008] JLR 191

Thomas v Kvaerner Govan Ltd. [2004] SC(HL) 1

MCC Proceeds Inc. v Bishopsgate Investment Trust plc [1999] CLC.

Durant International Corporation and Kildare Finance Limited v Federal Republic of Brazil and Municipality of São Paulo [2013] (1) JLR 273.

The Law of Contempt (4th edn., 2010)

1995 Ready Mixed Concrete case in the UK Restrictive Practices Court, cited at [77]

Caversham Trustees Limited v S. Patel and others [2007] JLR Note 60

Royal Court Rules 2004

Mr A v V Trustees Limited [2021] JCA 042

Official Solicitor v Clore and others [1983] JJ 43

Morgan v Carmarthen Corporation [1957] Ch 455

Civil Proceedings (Jersey) Law 1956

Court of Appeal — re Contempt of Court.

Anderson JA

1 This is an appeal against orders made by the Royal Court on 22 December 2020 imposing sanctions on the Appellant for contempt of court. The Royal Court (Commissioner Clyde-Smith and Jurats Blampied and Ronge) set out its reasons for those orders in an accompanying judgment (*BNP Paribas Jersey Trust Corporation v Camilla de Bourbon des Deux Siciles* [2020] JRC 267: "the Sanctions Judgment"). An earlier judgment of the Royal Court finding the Appellant in contempt of court ([2019] JRC 199: "the Contempt Judgment") had already been unsuccessfully appealed to the Court of Appeal ([2020] JCA 017: "the Contempt Appeal Judgment").

Background

2 The main elements of the background to this litigation are uncontroversially set out in the Sanctions Judgment at [2]. We briefly summarise here the principal developments since 2017.

3 In a judgment given after a lengthy trial on 11 September 2017 ("the Substantive

Judgment"), the Royal Court (Commissioner Clyde-Smith and Jurats Blampied and Ronge) held that the Appellant's mother, Madame Crociani, and the Respondent to this appeal ("BNP") had acted in breach of trust in 2010: *Crociani v Crociani* [2017] JRC 146. They were ordered jointly to reconstitute the trust, and Madame Crociani was ordered to indemnify BNP. At the same time, the court continued a world-wide freezing order against Madame Crociani which had been first granted on 4 August 2016. The Substantive Judgment was appealed unsuccessfully: *BNP Paribas v Crociani* [2018] JCA 136A.

4 BNP is said in the Sanctions Judgment [88] to have paid out some $115 million in compensation and more in costs, in satisfying the orders made against it and Madame Crociani jointly under the Substantive Judgment. Madame Crociani has paid nothing to BNP under the indemnity, save for a sum of less than £40,000 which we were informed was recovered from a bank account with BNP.

5 On 14 December 2018, the Royal Court (Commissioner Clyde-Smith and Jurats Crill and Thomas) made an order ("the December 2018 Disclosure Order") requiring the Appellant to inform BNP's Advocate in writing of her knowledge of assets held by or on behalf of Madame Crociani since 6 July 2015: *Crociani v Crociani and Ors* [2018] JRC 230C.

6 On 6 February 2019 the Appellant was ordered to pay £4,000 to BNP on account of costs by 20 February. That sum was not paid. On 21 February 2019 the Appellant was ordered to pay a further sum of £7,000 to BNP on account of costs by 7 March 2019. That sum was not paid.

7 In the Contempt Judgment given on 7 October 2019, the Royal Court (Commissioner Clyde-Smith and Jurats Blampied and Ronge) found that the Appellant was in contempt of court in having failed to comply with the December 2018 Disclosure Order (*BNP Paribas Jersey Trust Corporation v de Bourbon des Deux Siciles* [2019] JRC 199). The Appellant appealed against that finding, and the appeal was listed to be heard in January 2020. Before the hearing of that appeal, BNP's legal representatives wrote to the court on 25 November 2019 applying for an order debarring the Appellant from pursuing the appeal unless she complied with the costs orders which had been made in February 2019. Only after that application had been made did the Appellant pay the February 2019 costs orders, some nine months late. In the event, the Contempt Judgment was upheld in the Contempt Appeal Judgment: *Siciles C de Bourbon des Deux v BNP Paribas Jersey Trust* [2020] JCA 017.

8 On 25 February 2020, the Royal Court (Commissioner Clyde-Smith and Jurats Blampied and Ronge) gave the Appellant a further 49 days to comply on affidavit with the order of 14 December 2018. The court also made further disclosure orders against her. Time for compliance was subsequently further extended to 10 May 2020.

9 The Appellant produced a seventh affidavit on 11 May 2020. It was sworn on 1 July 2020.

10 On 28 September 2020, the Royal Court (Commissioner Clyde-Smith sitting alone) gave BNP permission to cross-examine the Appellant on her seventh affidavit in order to determine whether she had complied with the orders made on 14 December 2018 and 25 February 2020 and thereby purged her contempt: [2020] JRC 195. The hearing took place on 12 and 13 November 2020.

11 On 22 December 2020, for the reasons set out in the Sanctions Judgment from which this appeal is brought the Royal Court (Commissioner Clyde-Smith and Jurats Blampied and Ramsden) found that the Appellant had not purged her contempt and ordered:

> ***"1. that [the Appellant] shall pay a fine in the sum of two million pounds (£2,000,000);***
>
> ***2. that the said fine shall be paid within two months of the date hereof, and in default of payment [the Appellant] shall serve a term in prison of twelve (12) months; and***
>
> ***3. by way of a punitive costs order, that [the Appellant] indemnifies [BNP] for all of its costs of and incidental to these contempt proceedings from after the 25th February 2020 hearing to the date hereof; the amount of such costs to be agreed and if not agreed to be certified by the Judicial Greffier."***

The Court further ordered the Appellant to make a payment on account of £100,000 in respect of costs within 21 days (i.e. by 12 January 2021).

12 On the due date for payment of the £100,000 in respect of costs, the Appellant issued a Summons in the Royal Court for a stay, alternatively for an extension of time in which to pay. That application was due to be heard on 24 February 2021, but was subsequently withdrawn and the payment of £100,000 to BNP in respect of costs was made.

13 On 19 January 2021, the Appellant issued a Notice of Appeal asking this court (i) to quash the Royal Court's decision and "consequential orders" of 22 December 2020, (ii) to direct a fresh trial of the question whether the Appellant had purged her contempt, to be heard before a court not consisting of judges or jurats who had been party to the Substantive Judgment, the Contempt Judgment or the Sanctions Judgment, (iii) to grant a stay of the orders made by the Royal Court for the payment of the fine, the payment of costs, and the payment on account, and (iv) to award the costs of the appeal against BNP.

14 The application in the Notice of Appeal for a stay of orders made by the Royal Court was dismissed by the same composition of the Court of Appeal as sat on the present appeal, after an exchange of written submissions, in a judgment given on 15 February 2021 (*Siciles C. de Bourbon des Deux v BNP Paribas Jersey Trust Corporation Limited* [2021] JCA 043). As we stated in that judgment, we did not consider it necessary at that

stage to form a provisional view on the merits of this appeal.

Grounds of appeal

15 The Appellant's Notice of Appeal lists seven grounds of appeal: (1) the Royal Court reached conclusions of fact in breach of Article 15 of the Royal Court (Jersey) Law 1948, in that the Commissioner participated in making those findings; (2) the Appellant was denied a fair hearing before an independent and impartial tribunal, in that Jurat Blampied had made numerous findings of fact adverse to the Appellant in earlier judgments, which findings were repeated and interpreted in the Sanctions Judgment; (3) the Royal Court erred as to the basis on which it found that the Appellant had not purged her contempt; (4) having rightly accepted that the burden was on BNP to prove that the contempt had not been purged, the Royal Court failed to apply that burden correctly; (5) the Commissioner erred in failing to direct the jurats that it did not follow from the fact that the Appellant had told lies in relation to matters covered in earlier judgments that she was lying when she said in her 7 th affidavit that she did not have any knowledge or belief about the whereabouts of assets belonging to her mother; (6) the Royal Court did not give the Appellant a fair trial, as evidenced by the many erroneous findings of fact it made; (7) the fine of £2 million was disproportionate.

16 On 1 February 2021, the Appellant stated her intention of adding a further ground of appeal, namely (8) that the “punitive costs order” was unlawful. An Amended Notice of Appeal was filed on 27 April 2021. All eight grounds were the subject of written and oral submissions to the Court, the latter made remotely because of restrictions necessitated by Covid-19. We also received submissions relating to the issue of payment of the fine (should it be upheld) by instalments.

17 The grounds of appeal were supplemented, at the hearing before us, by what was described as a nuanced point which tied into the main grounds of appeal. The essence of that point is to be found in Mr Mistry's analysis of the judgment of Commissioner Clyde-Smith of 28 September 2020. Though the point was said to be of wider application, it seems to us to be principally relevant to the third ground of appeal and we therefore address it as part of our consideration of that ground.

18 We now consider the grounds of appeal in turn.

Ground 1: Role of the Commissioner

19 The Appellant's first ground of appeal is that the Royal Court reached its conclusions of fact in breach of Article 15 of the Royal Courts (Jersey) Law 1948 as amended, which requires the jurats to be the sole judges of fact and to determine the fine to be pronounced or imposed. This breach is said to be demonstrated by the Royal Court's repeated use of

the word “we” and “our” in its judgment.

20 The relevant law is not in dispute. Save in criminal cases where there is a jury or civil cases in which a judge sits alone under Article 17(2), Article 15(2) of the Royal Courts (Jersey) Law 1948 states that the jurats shall be “the sole judges of fact”. Article 15(3) further provides that “[i]n all criminal and mixed causes, the Jurats shall determine the sentence, fine or other sanction to be pronounced or imposed”.

21 Advocate Mistry for the Appellant draws attention to the frequent use of the first person plural in the Sanctions Judgment, in relation to both findings of fact (e.g. at [90]: “She has not purged her contempt and in our view, is deliberately withholding information from BNP about the assets of her mother”) and the determination of sanction (at [97]: “ In our view, the appropriate sanction for this contempt is a fine in the sum of £2 million, together with a punitive costs order …”). He comments that there is “nothing to suggest compliance with Article 15 of the Law”, and invites the Court to infer that “the Commissioner fully participated in the factual decisions and the decision as to sanction”.

22 There is nothing in that submission. The division of functions between judge and jurats is central to the operation of the Royal Court, and well understood by all who practise there. Commissioner Clyde-Smith confirmed as much when he said, in the course of the hearing on 12 November 2020, that “it will be a matter for the learned Jurats what level of fine [the Court] wishes to impose, if any …”. The jurats' findings of fact were incorporated into a single judgment, drafted by the Commissioner who was the sole judge of law. It is the usual practice in Jersey for judges to write on their own behalf and that of the jurats, and for Royal Court judgments to use the first person plural when expressing findings of fact, including in contempt proceedings: see e.g. *In the matter of YY* [2021] JRC 030 (Sir William Bailhache, Commissioner, and Jurats Thomas and Austin-Vautier). We reject the suggestion that the separate identity of the jurats and the judge as finders of fact and law respectively must be expressly stated on the face of the judgment, and find no basis in the judgment or otherwise for doubting that the elementary division of functions between judge and jurats was observed in this case.

Ground 2: Position of Jurat Blampied

23 By her second ground of appeal, the Appellant submits that she was denied a fair hearing before an independent and impartial tribunal, contrary to Article 6 of the European Convention on Human Rights (“ECHR”) as given effect by the Human Rights (Jersey) Law 2000. She complains that Jurat Blampied, a member of the court which gave the Sanctions Judgment, had already made adverse findings of fact against the Appellant in (i) the Substantive Judgment and accompanying disclosure order, (ii) a ruling of 31 July 2018 in proceedings relating to Grand Trust paintings, (iii) the Contempt Judgment, and (iv) the directions ruling of 25 February 2020. No such submission was made in relation to Commissioner Clyde-Smith, who was a party to each of those rulings: as we have noted in answer to Ground 1, his jurisdiction extended to questions of law rather than fact.

24 The right to an independent and impartial tribunal is recognised in Article 6(1) of the ECHR, which applies to both civil and criminal proceedings. It is not necessary, therefore, to decide the question whether the contempt proceedings in this case were “criminal” within the meaning of Articles 6(2) and (3) (an issue which is fact-dependent: see *Gestur Jonsson and Ragnar Halldor Hall v Iceland* (Applications 68273/14 and 68271/14, judgment of 22 December 2020, [75–83]).

25 A judge should not hear a case if he or she is actually or apparently biased against one of the parties to it. The legal test for apparent bias is well settled. It is whether

> ***“the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”***

(*Porter v Magill* [2002] 2 AC 357, per Lord Hope at para 103, cited in *Barette v Attorney General* [2006] JCA 128, paragraph 53).

26 The legal principles relating to impartiality in the context of earlier rulings in favour of one party or another were reviewed by Lord Lloyd Jones, giving the Opinion of the Privy Council in *Stubbs v The Queen* [2018] UKPC 30 at [16]:

> ***“A judicial ruling necessarily involves preferring the submissions of one party over another.*** However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally , *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 ***per Lord Bingham of Cornhill CJ at para 25***; *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 ***at p 299).*** However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which previous determinations were pronounced.”

27 That passage was cited with approval in *Bisson v Minister for Infrastructure* [2019] JCA 181 at [7], as (at [8]) was the warning of the English Court of Appeal in *Dobbs v Triodos Bank NV* [2005] EWCA Civ 468 at [7] about the dangers of an unduly defensive approach to

recusal:

> ***"It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved.*** It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be ***easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not."***

As was remarked in *Bisson*, that warning applies with at least the same force in the relatively small jurisdiction of Jersey.

28 Advocate Mistry submits that in view of his previous findings of fact, Jurat Blampied should not have been a member of the Court that gave the Sanctions Judgment. However he was unable to identify any previous finding or other specific factor that could suggest to a fair-minded and informed observer that Jurat Blampied's mind was closed in any respect relevant to the issues that he was called upon to decide. We specifically reject any suggestion that the Royal Court's warning in its directions of 25 February 2020 that the Appellant could face a fine "in the millions" was indicative of bias. On the contrary, it was entirely fair and proper to warn the Appellant at that stage of the seriousness with which the Court was provisionally minded to view a failure to purge her contempt.

29 The European Court of Human Rights held in *Hanif and Khan v UK* (Applications 52999/08 and 61779/08, judgment of 20 December 2011) that the personal impartiality of a judge or jury member must be presumed unless there is proof to the contrary ([139]). We were referred also to the separate requirement that a court must be "impartial from an objective point of view" ([138]), a test that, despite the safeguards attending the English jury system as a whole, the Court found not to be satisfied in *Hanif and Khan* because the foreman of the jury was a police officer who was personally acquainted with a police witness in the case.

30 The safeguards attending the jurat system were considered by the European Court of Human Rights in *Snooks and Dowse v UK* [2002] JLR 475 (a case in which Perry JA and I appeared for the United Kingdom). Having set out at [18]–[28] the qualifications for service as a Jurat, the respective powers of Bailiff and Jurats and the practice relating to summing-up and deliberation, the Court stated at [35] that:

> ***"… the Jurats are appointed by an electoral college made up of all existing members of the Royal Court and members of Jersey's legislature.*** The Jurats hold office until retirement age, in the absence of exceptional circumstances. There are thus a number of guarantees of structural independence and impartiality sufficient to satisfy art. 6(1)."

31 Similar points regarding the integrity of the jurat system in general were made by the Royal Court in *Le Boutillier v Minister for Planning and Environment* [2012] JRC 095 at [18]. In that case, specific personal circumstances – the connection of a jurat's wife with the National Trust of Jersey, which had opposed a previous planning application relating to the applicant's land – were sufficient for an order to be made that a planning appeal should be reheard. The present case however had no such special features as were found to exist in *Hanif Khan* and in *Le Boutillier*.

32 In short, we were presented with no basis on which it could be concluded either that Jurat Blampied lacked personal impartiality or that the jurat system as it operated in this case lacked the safeguards necessary to ensure impartiality from an objective point of view. Considerations of fairness are of course paramount: but Jurat Blampied's involvement at different stages was perfectly proper and indeed provided a degree of continuity that is likely to have been particularly useful in such a complex piece of litigation and that might be expected to have facilitated the timely despatch of the court's business. We find nothing in Jurat Blampied's prior involvement in the case to suggest to a fair-minded and informed observer that his mind was closed in any respect relevant to the decisions to be taken in the Sanctions Judgment.

33 A final, powerful reason for rejecting the second ground of appeal is that no application was made in advance for the recusal of Jurat Blampied in the sanctions proceedings, despite it being public knowledge that he had been party to the Substantive Judgment, the Contempt Judgment and the rulings of 31 July 2018 and 25 February 2020. The English Court of Appeal said in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [1999] EWCA 3004:

> ***"If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias.*** It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

We accept the force of those remarks. Where proper grounds are known before a hearing to exist for questioning the impartiality of a judge or jurat, it is incumbent on the objecting party to advance those grounds by way of a recusal application. Advocate Mistry did not represent the Appellant at the time, but could offer no satisfactory explanation of why, if Jurat Blampied's presence on the Royal Court was objectionable, a recusal application was not made in advance of the November 2020 hearing. The reality is that no cogent ground for objection existed then or exists now.

Ground 3: Test for purging contempt

34 The Appellant's third ground of appeal is expressed as follows:

> ***"The Court erred in reaching the conclusion both before and during the hearing that, if the Appellant maintained her position that she did not have knowledge or belief about the whereabouts of assets belonging to her mother, then she had not purged her contempt.*** This conclusion went further than that required by the Contempt Judgment of 7 October 2019. It followed from this conclusion that even if on oath the Appellant truthfully denied that she had knowledge or belief about the whereabouts of assets belonging to her mother, she would not have purged her contempt. Further, this conclusion contradicted the direction on 28 September by the Commissioner and in the Judgment under Appeal that the burden of proof was on BNP."

35 This ground of appeal has its origin in the December 2018 Disclosure Order, itself echoing the terms of a previous order of 11 September 2017, by which the Royal Court ordered the Appellant on pain of possible imprisonment to inform the BNP's advocate in writing within 14 days of her knowledge of assets which she believed, whether on the basis of information held by her or information for which she was entitled to call, had been held by or on behalf of Madame Crociani since 6 July 2015. It was the Appellant's failure to comply with the December 2018 Disclosure Order which caused her to be found in contempt of court by the Contempt Judgment of 7 October 2019, upheld by the Contempt Appeal Judgment of 29 January 2020. It was that same failure which she was then given a further 49 days to remedy by the Royal Court in its judgment of 25 February 2020.

36 The Contempt Judgment examined the Appellant's disclosure in response to each of the several elements in the December 2018 Disclosure Order in turn, finding it proved to the criminal standard that the Appellant had not complied fully with the December 2018 Disclosure Order and was therefore in contempt of court ([2019] JRC 199 at [53]–[59]). The Royal Court added at [60]:

> ***"The breach is serious.*** Given the context and background as shown by previous court findings, it is clear in particular, and we have no doubt, that [the Appellant] has been closely involved with the artworks from the 6th July, 2015, but has only disclosed information in response to artworks located and attached by BNP Jersey through its own efforts."

37 The Court of Appeal in the Contempt Appeal Judgment found that the Royal Court had properly applied itself to the need to make findings according to the criminal standard. It noted that the Royal Court's conclusions were

> ***"amply vouched by the documentation recovered by the Respondent during the present disclosure proceedings and referred to in its supporting Affidavits, to the full detail of which Camilla chose not to***

respond" .

The Court of Appeal further and specifically endorsed the finding of the Royal Court that the Appellant was actively involved in the November 2016 transfers of artworks, noting that on the evidence:

> ***"there is no room for reasonable doubt but that [Madame Crociani] was sharing information with Camilla, thus indicating that Camilla must have had greater knowledge or belief than she was prepared to admit in her Affidavits"***

([2020] JCA 017 at [33]).

38 The Appellant under her third ground of appeal disclaims any intention of seeking to challenge those findings, which it is indeed not open to her to do. However at the start of his oral submissions, Advocate Mistry criticised the characterisation of those findings by Commissioner Clyde-Smith in his judgment of 28 September 2020. He suggested that a mischaracterisation by the Commissioner of the Contempt Judgment and the Contempt Appeal Judgment had the effect of pre-judging the issue of the Appellant's knowledge and belief, and that the Commissioner's error was then imported into the Sanctions Judgment.

39 Particular objection is taken to the 28 September judgment at [3], where the Commissioner represented the Contempt Judgment and the Contempt Appeal Judgment as having found:

> ***".. that the fifth and sixth affidavits sworn by [the Appellant] were quite silent on important matters in respect of which the only reasonable conclusion was that she would have a belief, if not actual knowledge"*** .

Advocate Mistry's argument was that the Royal Court had held open the possibility of revisiting its finding of knowledge and belief, if the Appellant could produce evidence to rebut it; but that on the Commissioner's formulation of 28 September, which prevailed from that point on, the issue of knowledge and belief had been effectively determined and it was no longer open to the Appellant to provide evidence to rebut it.

40 We reject the submission that the Commissioner misrepresented the findings of the Royal Court and Court of Appeal. His formulation at [3] accurately summarised the findings of the Contempt Judgment at [53]–[60] and Contempt Appeal Judgment at [33]. Indeed Advocate Blakeley, who represented the Appellant before the Commissioner, seems to have accepted as much when he sought to resist as pointless the application for his client to be cross-examined ([2020] JRC 195 at [9(i)]; the submission was rejected at [24]). He did so by characterising the Contempt Judgment and Contempt Appeal Judgment as having found that "the Respondent has a greater belief than those set out in her previous affidavits", and had thus rendered the issue of belief "an argument which [the Appellant] can never win, no matter what she says". The fact that the Appellant's advocate could make a submission in those terms further illustrates that the finding whose origin is traced by Mr Mistry to the Commissioner's judgment of 28 September 2020, and which he seeks to use to call into

question the Sanctions Judgment, in fact originates in the Contempt Judgment, upheld on appeal.

41 The Commissioner pointed out that having made a finding of contempt, the Royal Court was now moving on to consider the issue of sanction, and as part of that exercise whether the contempt had been purged (judgment of 28 September 2020, [21] and [24]). These were however two stages of the same proceedings, and not (as was suggested to us) fresh proceedings in which the Royal Court was free to revisit its previous findings on contempt.

42 Nor is there anything in the criticism of the Commissioner's finding that “proof that the Respondent has not purged her contempt is to the civil standard” (judgment of 28 September 2020, [22]). That view was advanced by both counsel, and the ruling on the point was not appealed. Even if it had been wrong, it would have made no difference to the outcome: the Royal Court expressly found in the Sanctions Judgment that BNP had discharged its burden to both the civil and the criminal standard: (2020) JRC 267 at [73].

43 Further objection is taken to the cross-examination at the November 2020 hearing, whose purpose is said to have been to undermine the Appellant's credibility by examining historical events, rather than to question her about her knowledge and belief as to the whereabouts of the portfolio which BNP wished to find. That approach is said to have been inconsistent with the directions of 28 September 2020, and it is said that the Appellant should have had the opportunity at the hearing “by giving written and oral evidence to discharge her obligations under the December [2018] Disclosure Order”. The Court is criticised for holding, in the Sanctions Judgment at [55] and [71], that because the Appellant in her seventh affidavit had maintained her position as to the extent of her knowledge and belief, she had “not given the Court the information the Court believes she has”, and had therefore not purged her contempt. By taking this approach, the Royal Court is said to have precluded the possibility that the Appellant did not have knowledge about her mother's assets, and to have doomed her to failure even if she was telling the truth.

44 We reject this submission also. The Appellant had been given every opportunity to discharge her obligations under the December 2018 Disclosure Order, culminating in the judgment of February 2020 which offered her a final chance to purge the contempt which had been found in the Contempt Judgment and unsuccessfully appealed. She took advantage of that opportunity with her seventh affidavit, in which, as was held in the Sanctions Judgment at [55], she however maintained her position as to the limited extent of her knowledge and belief. Given the conclusion of the Contempt Judgment and Contempt Appeal Judgment that the Appellant had greater knowledge or belief than she had been prepared to admit – a conclusion which it was no longer open to her to challenge – it necessarily followed from the Royal Court's assessment of her seventh affidavit that she had failed to purge her contempt. We do not accept that the cross-examination of the Appellant was improper, or inconsistent with directions previously given by the Commissioner. Had that been the case, one would have expected the Appellant's then counsel, or the Commissioner himself, to challenge it at the time. Neither, finally, can we accept the proposition, which forms the basis of the “doomed to failure” submission, that the

Appellant may indeed have had no further knowledge about her mother's assets. That hypothesis, for which no new basis is put forward, is inconsistent with the Contempt Judgment and amounts to an inadmissible attempt to question it, outside the scope of an appellate process that has already been exhausted.

Ground 4: Burden of proof

45 By her fourth ground of appeal, the Appellant takes issue with the following proposition (underlined) from para [70] of the Sanctions Judgment:

> ***"We also accept that BNP cannot prove that Camilla possesses documents other than those that have been disclosed, but the purging of her contempt was to be measured by the production by her of documents relating to those matters specified in paragraphs 3(i), 3(ii) and 3(iii)."***

46 The paragraphs referred to are from the Royal Court's judgment of 25 February 2020 at [3], which it is convenient to set out in full:

> ***"The matter will therefore be adjourned for a date to be fixed, to take place as soon as possible, after the expiration of 49 days before the court as currently constituted in order for the court to ascertain the extent to which Camilla has then complied with the December disclosure order.*** Relevant to that consideration will be the extent to which she has provided the following categories of documents:-
>
> > ***(i) Documents evidencing transfers of funds to or from any accounts owned legally or beneficially by Madam Crociani after the 6th July, 2015;***
> >
> > ***(ii) Documents relating to or evidencing Camilla's knowledge or belief as the whereabouts during the period of time from the 6th July, 2015, of any artworks owned legally or beneficially by Madam Crociani at any point during that period including, for the avoidance of doubt, all art works listed in the world wide freezing and disclosure order made against Madam Crociani dated the 11th September, 2017;***
> >
> > ***(iii) Documents relating to or evidencing any knowledge or belief Camilla may have of any bank or wealth manager or other financial institution which holds or manages or may hold or manage any part of the proceeds of the investment portfolio formerly held in the Grand Trust; and finally***
> >
> > ***(iv) Camilla setting out her belief as to the whereabouts of any [of] the former assets of the Grand Trust including all the art works and the proceeds of the investment portfolio of the Grand Trust even if she has no specific documents evidencing this."***

47 The Appellant submits that having rightly accepted that the burden lay on BNP to prove that the Appellant's contempt had not been purged, and that BNP could not prove the Appellant to have possessed documents other than those which she had declared, the Royal Court erred by making the production of such documents a test for the purging of her contempt. She claims that the Court's readiness to infer contempt from the non-production of such documents, notwithstanding BNP's inability to prove that such documents were within her possession and the possibility that they were not, effectively reversed the burden of proof.

48 We do not accept that the Royal Court allowed BNP to discharge its burden of proof simply by pointing to the absence of documents in the stated categories. The Sanctions Judgment at [56]–[67] summarises a variety reasons for concluding that the Appellant knew more than she had been prepared to admit in her affidavits. These include multiple findings in the Substantive Judgment as to how closely the Appellant and Madame Crociani worked; an email to similar effect exhibited to the Appellant's seventh affidavit; the sharing of an apartment in Monaco by the Appellant and Madame Crociani; their use of the same adviser in Curacao to establish similar trusts of which each was a settlor; the Appellant's exercise of her powers as protector in relation to Madame Crociani's Apollo Trust; the Appellant's inability to explain the backdating of documents that were indicative of the Appellant's close involvement with Madame Crociani in respect of the Artworks; unsatisfactory disclosure regarding Madame Crociani's jewellery and ownership of non-voting shares in the Croci Group; and evidence from 2016 relating to one artwork from which the Court concluded that “[i]t is manifest that Camilla knows much more about the movement of this artwork and the reasons for it than she is disclosing”.

49 In its judgment of 25 February 2020 at [3], the Royal Court did not suggest that the Appellant's compliance with the December 2018 Disclosure Order would be assessed solely on the basis of the production of documents falling within the first three specified categories. It adopted a looser formulation, indicating that the extent to which she had provided documents falling into four categories would be “[r]elevant to that consideration”. The effect of so saying was not to set the Appellant up to fail, but on the contrary to give her fair notice of important respects in which the Court viewed her cooperation to have been deficient.

50 In view not least of its reference to other evidence at [56]–[67] of the Sanctions Judgment, we do not consider that the similarly-composed Royal Court in its Sanctions Judgment at [70] had any different understanding. The recollection of Advocate Redgrave (who appeared for BNP before us as he did below) is that the Royal Court at [70] was accepting that BNP could not prove the existence of any specific undisclosed document in the Appellant's possession (a point made by the Appellant), but adding that since the Appellant knew the court would be taking into account whether she had provided documents in the various categories listed, it was relevant that she had not done so. We accept that explanation, which is consistent with the judgment of 25 February 2020 and with the remainder of the Sanctions Judgment, and reject the fourth ground of appeal.

Ground 5: Absence of directions to Jurats

51 By her fifth ground of appeal, the Appellant submits that the Commissioner wrongly failed to give two directions to the jurats. That submission is made despite there being no suggestion that counsel then representing the Appellant made any request at the time for such directions to be given.

52 The Appellant claims, first, that a direction should have been given (analogous to a Lucas direction) to the effect that it did not follow from the fact that the Appellant was found in the Substantive Judgment and in the Contempt Judgment to have lied that she was also lying when she said in her seventh affidavit and in oral evidence that she had no further knowledge of assets belonging to Madame Crociani. Secondly, the Appellant claims that the jurats should have been directed to ask themselves why Madame Crociani would have given information to the Appellant about her assets if, in doing so, she would have opened herself to further punitive action.

53 The first point to consider is whether it could ever be appropriate to make directions in a case of this kind. Advocate Redgrave, appearing for BNP, put it to us in his written submission that:

> ***"While it is the case that in Jersey criminal trials when deciding on guilt jurats, like juries, are given directions by the judge in summing up before they retire (with the judge, in the case of jurats) to consider their verdict, this is to be viewed in context.*** In criminal cases no reasoned judgment is given. Summing up in open court (including to jurats) thus provides a record that demonstrates how the fact finders were directed to approach their task. No such need exists in civil cases, where a reasoned judgment is given which explains how the court reached its decision."

54 That conforms with our understanding of current Jersey practice. The procedure is justified, even in a case concerning sanctions for contempt of court, by virtue of the fact that a reasoned judgment is given.

55 We are, in any event, not persuaded that a Lucas direction would have been necessary or appropriate in the context of this case. Advocate Mistry pointed to the finding at [56] of the Sanctions Judgment that the Appellant "had lied and was continuing to lie" about the past, and submitted that the Court should have warned the jurats of the dangers of inferring from these lies that she was lying in her seventh affidavit and in her oral evidence about her knowledge and belief about the whereabouts of her mother's assets. But this was not the type of exercise on which the Royal Court was engaged. The reason given at [56] for doubting the picture painted in the Appellant's opening statement that she was caught in a battle between her mother and sister, and blamed by her mother for her sister's actions, was not that the Appellant was an inveterate liar but that her evidence to that effect was

inconsistent with findings in the Substantive Judgment about the nature of her relationship with her mother. Rather than inferring mendacity from previous mendacity, the Royal Court was testing oral evidence against established (and contradictory) facts. That is a standard exercise and not one appropriate for a Lucas direction.

56 The second point that the Appellant says the jurats should have been asked to reflect upon is why Madame Crociani would have chosen to cooperate, given what he characterised as the potentially punitive consequences to her of cooperation. It was open to the Appellant and her counsel to make such points to the Royal Court, to the extent that they had merit, and indeed the Appellant in her third affidavit at [8] and fifth affidavit at [10] suggested that her mother had withdrawn from discussion regarding assets because of her involvement in hurtful litigation with the Appellant's sister. That was however not the reason given when Madame Crociani went on the record (by letter dated 1 April 2020) to explain her non-cooperation: she referred in that letter not to the potentially punitive consequences of cooperation but rather to "the sacred right to privacy, the more so towards BNP". As is plain from the Sanctions Judgment at [13]–[15], the Jurats did consider Madame Crociani's own stated reason for non-cooperation and dismissed the correspondence as "patently artificial and contrived".

57 For all these reasons we reject the submission that there was an unlawful failure to direct the jurats, and with it the fifth ground of appeal.

Ground 6: Findings of fact / unfairness

58 By her sixth ground of appeal, the Appellant complains that she was not given a fair trial, as demonstrated by what are described as "the many erroneous findings of fact adverse to her" in the Sanctions Judgment. A number of instances were referred to in the Appellant's written contentions, though as will become apparent not all of these examples relate to findings of fact.

59 For the proper approach to be taken by this Court to decisions of fact by Royal Court we were referred to the judgment of the Court of Appeal (Steel, Jones and McNeill JJA) in *Reg's Skips Limited v Yates and Yates* [2008] JLR 191 at [99]–[100], which drew *inter alia* on the speech of Lord Hope in *Thomas v Kvaerner Govan Ltd.* [2004] SC(HL) 1 at [16]–[17] and the judgment of the English Court of Appeal in *MCC Proceeds Inc. v Bishopsgate Investment Trust plc* [1999] CLC at 420–421. Among the points made in those passages, and endorsed by the Court of Appeal in *Reg's Skips*, are the following:

> (i) The duty of the appellate court, not having the privileges, sometimes broad and sometimes subtle, of the court who heard and tried the case, is to ask itself whether it is in a position to come to a clear conclusion that the court which had these privileges was plainly wrong.
>
> (ii) An appellate court will be reluctant to reverse a finding of fact made by a trial

court after hearing and seeing the witnesses, though it will do so if satisfied that the finding is wrong. The reluctance is particularly great where questions of credibility and reliability arise, or where for any other reason the court which saw the witness was better able to make the finding than the Court of Appeal, which has only a transcript of the evidence.

(iii) The appellate court may however be as well placed to draw inferences as the first-instance court, whose judgment on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong.

60 We were referred also to the judgment of the Court of Appeal (McNeill, Crow and Calvert-Smith JJA) in *Durant International Corporation and Kildare Finance Limited v Federal Republic of Brazil and Municipality of São Paulo* [2013] (1) JLR 273 at [23]:

> ***"Even where there has been little oral evidence, in a complex case the court of first instance will have enjoyed a quite different opportunity to appraise and evaluate the evidence.*** First, because of the systematic way in which the evidence will have been adduced at trial and, second, because of the length of time taken. … Furthermore, it has been said that, where the questions concerned at first instance are complex, the trial judge is entitled to what, in other jurisprudence, is referred to as a 'margin of appreciation' (see *Biogen Inc. v Medeva Plc*)."

61 In the light of those statements of legal principle, we turn to the matters advanced under this ground in Advocate Mistry's written submission, which was not elaborated in oral argument.

62 The first example is not a finding on any disputed issue of fact, but rather a judicial comment (Sanctions Judgment at [11]) on the exhibit to the Appellant's seventh affidavit. The Appellant had herself volunteered in her affidavit that the documents were not set out in categories or organised in a logical manner, stating that this had been difficult for her and her advisors especially in light of the Covid-19 pandemic, that she had been advised that she was under no obligation to sort or organise the documents, and that she had considered it better to provide what she could as soon as she could rather than arrange the material. The Royal Court commented that the exhibit was hard to follow, that it was not arranged in any order, that it had no index and that no translation was provided for some 400 emails, mostly in Italian and French. The Court did however attempt its own broad categorisation of the documents, was provided with translations of some important documents (the exchange of letters considered at [13]–[15]), and noted that the missing attachments and pages identified by BNP were provided by Camilla prior to the hearing ([12]).

63 We reject the suggestion that these proper (and, we would add, justified) observations of the Royal Court formed part of the reasoning of its decision, or that they constituted an objectionable or even material finding of fact for that purpose, or that they were otherwise indicative of bias. Much as the Appellant claimed to have done, the Royal Court did its best with the materials provided and there is no suggestion that relevant emails or other documents were wrongly neglected or left out of account in its judgment.

64 The Appellant criticises, secondly, the Royal Court's observations at [12] that no emails had been provided from Camilla's own email account, and that emails to or from the director of her family office, Mr Ranalli, had been taken from Mr Ranalli's email account. She points out, correctly, that the disclosure order of 25 February 2020 had required such emails to be produced, without specifying from whose account they should be taken, and suggests that the Royal Court was wrong to voice suspicion on this score.

65 This is, once again, a challenge not to any allegedly incorrect finding of fact but to a judicial comment which the Appellant appears to have misunderstood. The Royal Court was not suggesting that there was anything improper in disclosing emails from Mr Ranalli's account. Rather, it was drawing attention to the potentially significant fact that no emails were produced from Camilla's own account and that where relevant emails to or from Camilla were produced, they were from the account of another person. That is relevant because, if the Appellant had conscientiously examined all material in her possession that related to her knowledge of her mother's assets, one might have expected some of her own emails to have been found and produced. The fact that no such emails were produced was properly considered by the Royal Court to be indicative (though not in itself conclusive) of a lack of effort on the part of the Appellant to comply with the Royal Court's directions.

66 The Appellant states, thirdly, that it was “unfortunate” that neither the Commissioner nor her then representative, Advocate Blakeley, objected to her being cross-examined, on the first day of the hearing, on documents which had been handed to the Court only on that day. So far as relevant to this submission, the documents were an affidavit with accompanying exhibits that had been sworn by Brandon O'Neil of Allen and Overy LLP on 14 October 2019 and served on the Appellant at the time. Those documents demonstrated that Madame Crociani, contrary to the Appellant's initial evidence, had a substantial interest through non-voting preference shares in the Stichting which ultimately owned the Croci Group of companies. The Appellant's evidence on this issue was summarised in the Sanctions Judgment at [16], and the shares were described at [64] as “an asset of Madame Crociani, of which Camilla clearly has knowledge, and which she has not disclosed in any of her affidavits”.

67 As to this, we observe not only that the documents in question had previously been served on the Appellant, but that it is fanciful to suppose that the Appellant did not know of her mother's substantial beneficial interest in the Croci Group, which owned numerous prestigious family properties and other assets (Substantive Judgment, [398]) and in which the Appellant herself had the substantial remainder of the beneficial interest. Indeed as the Royal Court recorded at [16], she had during her evidence volunteered the existence of

non-voting shares belonging to her mother, which had not been referred to in her affidavits, even before being shown the affidavit of Brendan O'Neil. Had her cross-examination on these documents been unfair or oppressive, Mr Blakeley would no doubt have intervened to say so. We reject the suggestion that the Appellant was ambushed, or that in this respect the trial was unfair.

68 It is further submitted on behalf of the Appellant that "given time and the help of professional advisers", she would have been able to give further details to the Court of a perpetual interest-bearing loan of €15,777,957.60 owed to Madame Crociani's company Croci International NV by Croci International BV, which in 2017 was assigned to International Future Ventures and Investments NV (Curacao), known as IVFI, and converted into class B non-voting shares. She asserts that the conversion of the debt took place "because, by reason of lack of funds, interest had not been paid on the loan" and submits that even if she should have disclosed her mother's ownership through Croci NV of the non-voting shares (which she denies), the Court should have taken into account that they were transferred to her mother because of the debt, had paid no dividend, were of little or no value and had been attached two years earlier in Curacao by BNP.

69 BNP does not accept the Appellant's explanation for the conversion of the debt, and refers to a set of accounts from 2017 which are said to indicate that Croci NV was a profitable company, its only apparent major source of income being payments of interest on the perpetual loan. BNP further submits that Croci NV's right to interest payments on the perpetual loan was itself an indirect asset of Madame Crociani, which required disclosure under the terms of the December 2018 Disclosure Order, and that the assignment of the loan resulted in Madame Crociani obtaining a substantial beneficial interest in the Croci Group which allowed her to benefit from the assets of the Group and which also fell within the scope of the December 2018 Disclosure Order.

70 Applying the principles summarised above, we find no basis in the material advanced to us by the Appellant for questioning or overturning the findings of the Royal Court in relation to Madame Crociani's interests in the Croci Group, or its assessment that those interests fell within the scope of the December 2018 Disclosure Order. The first paragraph of that Order required the Appellant to disclose, save where the information had already been disclosed in the trial papers in the action or was subject to legal professional privilege, her knowledge of assets held by or on behalf Madame Crociani since 6 July 2015. That phrase was broadly defined in the third paragraph of the Order, to include:

> ***"assets which [the Appellant] believes, whether on the basis of information held by her or for which she is entitled to call, are or were owned beneficially by [Madame Crociani] or from which [Madame Crociani] is or was able to benefit or which are or were under her direct or indirect control (to include those assets held by a third party in accordance with [Madame Crociani's] direct or indirect instructions) in the Island of Jersey or elsewhere whether such are or were held in her own name or not and whether such are or were solely or jointly owned"*** .

We decline to disturb the Royal Court's finding that Madame Crociani's interest in the Croci Group was an asset of which the Appellant had knowledge yet which she did not disclose in any of her affidavits (Sanctions Judgment, [64]). Even if it were the case that those assets were of little or no value, of which we have seen no evidence, there is in any event, as the Royal Court pointed out at [64], no *de minimis* exception in the December 2018 Disclosure Order.

71 Objection is taken, finally, to a reference in [58] of the Sanctions Judgment to the “apparent sale” of the Croci Group to the Appellant in December 2011, and to the ongoing involvement of Madame Crociani in the affairs of the group after that time. That reference was prompted by the inclusion of Madame Crociani among the addressees of an email of 11 September 2017, exhibited to the Appellant's seventh affidavit, sending out an agenda for a meeting concerning the Croci Group. The Court's words are said to amount to a suggestion that the sale was fictitious, and that the Appellant was lying when she had asserted its validity in her evidence on 12 November 2020. Had this point been put to the Appellant in cross-examination, she says she would have pointed out that since Madame Crociani's company Croci NV was a creditor of the Croci Group, it is scarcely surprising that she was concerned with a meeting in which the indebtedness of the Group was on the agenda.

72 We discern no merit in this point. The Royal Court found in the Substantive Judgment at [444] that the Appellant through her company Allimac Limited acquired Croci BV from her mother's company Croci NV, and that the proceeds came into BNP Jersey on 20 December 2011. That finding was set out in the Sanctions Judgment at [56(x)] and again at [59], and was plainly accepted by the Royal Court. As to the suggestion that the Appellant could have raised the question of the loan had she been asked about it in cross-examination, we recall that the Royal Court was already aware of the indebtedness of the group to Croci NV, referring to it in the Sanctions Judgment at [58].

73 We accordingly reject each of the supposedly erroneous findings of fact, and/or instances of unfairness, relied upon by the Appellant under her sixth ground of appeal.

Ground 7: Level of fine

74 By her seventh ground of appeal, the Appellant describes the fine of £2 million imposed on her as unprecedented in its size, disproportionate and based on both immaterial considerations and erroneous findings of fact. The Royal Court is said to have failed properly to take into account the circumstances of the December 2018 Disclosure Order and, in particular, the fact that BNP owned, had attached or knew the whereabouts of 20 of the 29 paintings and sculptures identified in that order.

75 The Royal Court rightly stressed, in its analysis of the applicable principles, both the need to protect the private interest of BNP in enforcing its indemnity from Madame Crociani and

the public interest in courts having the means to enforce their own orders.

76 The seriousness of the contempt, as gauged by the predicament of BNP, was encapsulated by the Royal Court at [88]:

> ***"Whilst BNP had been found liable for a breach of trust, jointly and severally with Madam Crociani and Mr Foortse, all of the assets estimated at some $132 million that were the subject of that breach of trust have been transferred ultimately to Madame Crociani, so that she alone has benefited from this breach.*** Her counterclaims against BNP in the substantive action were dismissed (paragraph 47 of the Substantive Judgment) and she was ordered to indemnify BNP for the amount it would have had to pay out under the judgment, Mr Foorste having been exonerated. BNP has to date paid out some $115 million in compensation and more in costs, whilst Madame Crociani continues to enjoy the benefit of the assets wrongfully received by her, assisted in our view by Camilla."

BNP's attempts to enforce against the assets of Madame Crociani, and the evidence for believing that the Appellant was deliberately withholding information from BNP about her mother's assets, were briefly recapitulated at [88]–[90].

77 As to the public interest, the various statements of principle relied upon by the Royal Court included (at [76]) these apposite words of Cameron JA, from a South African decision cited by Borrie and Lowe in their Law of Contempt (4th edn., 2010) at 6.3:

> ***"In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat.*** And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."

78 Having summarised the conclusions of comparative research carried out by Advocate Redgrave ([79]–[85]; see also [87]), the Royal Court stated at [86]:

> ***"The case before us is one in which a custodial sentence would, in our view, be justified in view of the seriousness of the contempt, but BNP have made it clear that, whilst it was always a matter for the Court, it did not press for this contempt to be sanctioned by a custodial sentence, its concern being to obtain information about the assets of Madame Crociani so that it can enforce the [Substantive Judgment].*** The Court has given Camilla notice that it had in mind the imposition of a substantial fine, not a custodial sentence, and she came into the jurisdiction to attend the hearing in that knowledge. The submissions of the parties were made on that basis and fairness dictates, therefore, that her contempt be sanctioned by a fine not by a custodial sentence."

The Royal Court was in our judgment correct both to describe this case as one whose seriousness would have justified a custodial sentence and to find that it was appropriate, in the circumstances which it described, for the contempt to be sanctioned by a substantial fine, with a period of imprisonment in default.

79 The judgment of 25 February 2020 stated at [7] that:

> ***"In terms of a fine, [the Appellant] needs to know that in view of the serious nature of her contempt the court will be thinking, if that contempt continues, in terms of [a] fine in the millions bearing in mind our understanding of her means."***

During the sanctions hearing on 13 November 2020 the Commissioner had said

> ***"Now, it will be a matter for the learned Jurats what level of fine it wishes to impose, if any, and I am not indicating what it might be, but it could range up to, let us say, a possibility of £5 million.*** What we need to know before considering a fine, a substantial fine against you, is your ability to pay. Now, you don't have to divulge your financial position to us in court unless you wish to say to us that you would not be in a position financially to meet a fine of that magnitude."

It cannot therefore be said that the Appellant was not warned of the likely level of the fine, or of the consequences of failing to produce evidence of inability to pay a fine of that size.

80 The Royal Court turned finally to its reasons for rejecting the Appellant's claims of poverty, and for its belief that she is a person of substantial wealth who is openly defying the orders of the Court ([91]–[97]), before determining at [98] that the appropriate sanction for her contempt was a fine in the sum of £2 million, to be paid within two months, and with a 12-month term of imprisonment in default of payment. No challenge is directed in the Notice of Appeal to the imposition of a period of imprisonment in default of payment, or to the length of that period.

81 We consider that Advocate Mistry's submissions under his seventh ground of appeal make no real headway against the Royal Court's careful and well-reasoned series of findings. He makes the valid point that so far as the researches of counsel had revealed, the fine of £2 million was far in excess of any fine for contempt imposed on an individual or trade union, and was only surpassed by a fine on a corporation in the 1995 Ready Mixed Concrete case in the UK Restrictive Practices Court, cited at [77]. But each case turns on its particular circumstances, as the Royal Court pointed out at [87(iv)]; very few defendants to contempt proceedings possess individual wealth on the scale that was inferred by the Royal Court from the factors listed at [92] of the Sanctions Judgment; and serious contempts are often punished in any event by an immediate sentence of imprisonment rather than a fine, a course which the Royal Court considered would have been justified in this case but did not take because of the particular circumstances set out in [86].

82 Advocate Mistry next submits that the Court should have asked what steps would need to be taken to realise a sum of £2 million within two months, as well as whether the Appellant could afford it. He describes it as extraordinary that, as the Royal Court recorded at [93], Advocate Blakeley said nothing in his closing submissions about the Appellant's inability to pay a substantial fine. His silence on that score was however not at all extraordinary if – as the Royal Court found – the Appellant was well able to afford it. The Royal Court had given clear warning of its intentions and was entitled to consider that the Appellant's failure to file an affidavit of means was an indication not of any negligent omission by her advocate but, rather, of an unwillingness on the part of the Appellant to state her means or to submit to cross-examination on the subject. Though Advocate Mistry did not refer us to it in this context, the Appellant in her eighth affidavit stated that "I did not instruct Advocate Blakey [sic] not to make submissions regards my ability to pay." She did not however claim that she had supplied Advocate Blakeley, or the Court, with the information that could have supported a submission that she was unable to pay.

83 For these reasons, we reject the seventh ground of appeal.

Ground 8: Award of punitive costs

84 A "punitive costs order" was imposed on the Appellant by the Royal Court at [74] on the authority of *Caversham Trustees Limited v S. Patel and others* [2007] JLR Note 60 (Commissioner Clyde-Smith and Jurats Le Brocq and King). In that case, a £30,000 fine and punitive costs order were made against the first respondent to mark the court's displeasure at the deliberate removal of a security given to the representor under a court order (a contempt which had subsequently been purged). The effect of a punitive costs order was said to be that the representor be indemnified for all its costs incurred in removing its security. It was not suggested that any costs which may have been unreasonably incurred or unreasonable in their amount should be irrecoverable, as would be the case under an order for costs to be paid on the indemnity basis. The judgment was not appealed. The Royal Court noted that in Caversham, it was clear that the punitive costs order itself constituted a substantial sanction, in that the costs were estimated at £278,000.

85 The Royal Court at [98] of its Sanctions Judgment appears to have been similarly expansive in terms of its understanding of "punitive costs", ordering without qualification that the Appellant "indemnify BNP for all of its costs of and incidental to these contempt proceedings from after the 25th February 2020 hearing to date".

86 By her eighth ground of appeal, the Appellant submits that the punitive costs order which the Royal Court purported to impose in favour of BNP was unlawful, and that the powers of the court in relation to costs are properly limited to awarding costs on the standard or the indemnity basis. Advocate Mistry submitted that an order that BNP's costs be paid on a solicitor and client basis, including any unreasonable amount or costs unreasonably incurred, would be contrary to the overriding objective set out in Rule 1/6(1) of the Royal

Court Rules 2004 to deal with cases justly and at proportionate cost. He did not however seek to suggest that an order for indemnity costs against the Appellant would have been inappropriate.

87 *Caversham* was, in Advocate Mistry's submission, the only case in which the purported power to award punitive costs had ever been used in Jersey. A search of the Jersey Law database for "punitive costs" suggests that this remains the case, though we note that in *Mr A v V Trustees Limited* [2021] JCA 042, the Court of Appeal (McNeill, Bompas and Bailhache JJA) cited the Sanctions Judgment as authority that the punitive costs order is a power available to the Court in contempt cases.

88 Mr Redgrave told us that BNP had not sought a punitive costs order from the Royal Court, or indeed any order that costs be taxed on a basis more favourable than the indemnity basis, and did not seek to persuade us that such a basis for assessing costs exists or was appropriate in this case. He pointed out that the Royal Court Rules 2004 provide for costs to be taxed on the standard or indemnity basis, the indemnity basis being defined at 12/5 as follows:

> ***"On a taxation of costs on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party."***

89 He added that although so-called "full indemnity" costs awards can be made in contested litigation, and are also typically made in relation to a trustee's costs in administering a trust, this simply means (*Official Solicitor v Clore and others* [1983] JJ 43) that

> ***"all costs shall be allowed except those which are unreasonably incurred or are of an unreasonable amount"*** ,

which is precisely the test applied to indemnity costs (with any doubt being resolved in favour of the receiving party) under Rule 12/5 of the Royal Court Rules 2004.

90 Borrie and Low in The Law of Contempt (4th edn., 2010) at [6.61] refers to old English authority for the award of "penalty costs" in contempt proceedings "as between solicitor and client". However, as Mr Redgrave pointed out, the only authority cited by the learned authors for the meaning of that phrase in the context of contempt proceedings, *Morgan v Carmarthen Corporation* [1957] Ch 455, suggests that under the then applicable rules, it in practice resulted in a basis of assessment that was less generous than the indemnity basis as it is currently understood in both Jersey and England. Romer LJ at 474 thought it would have been *"highly desirable"* for costs to be recoverable on an indemnity basis, "subject to the power of the taxing master to cut down or reduce some obviously exorbitant charge". Yet the applicable rules did not so permit, and even if they had done, the basis would have resembled a modern order for indemnity costs rather than anything

more generous to the receiving party.

91 The Civil Proceedings (Jersey) Law 1956 provides at art 1 that:

> ***"Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid."***

The jurisdiction of the Royal Court is on its face broad enough to justify the award of costs made by the Royal Court in this case. That does not however absolve us from our duty to determine whether the award of "punitive costs" was correct in principle.

92 A legitimate argument for ordering the fullest possible reimbursement of any costs incurred in a contempt application is that:

> ***"If a person is called upon to put his hand to some extent into his own pocket when bringing contempt to the notice of the court he will be deterred from doing so"***

(Morgan, per Romer LJ at 474). However, an order for the payment of indemnity costs under Rule 12/5 of the Royal Court Rules 2004 is already generous to the receiving party. To order costs to be paid even when they have been, without any doubt, unreasonably incurred and/or unreasonable in their amount would create perverse incentives and reward legal representatives who had run up unnecessary or excessive costs, contrary to the interests of justice and of public confidence in the legal profession. The appropriate way of punishing contempt will normally be a fine or other sanction, assessed and fixed at the moment of imposition. A costs order – or, more accurately, the element of a costs order that provides for the reimbursement of exorbitant costs that another party may have incurred – is inherently less suited to the function of penalty. That is both because of the public interest factors referred to above, and because in the words of Lord Evershed MR in Morgan at 471, "the order imposing the penalty would produce a result unknown and unquantified by the court", contrary to the principle that a penalty should be clear and ascertainable at the time when it is imposed.

93 Taking all these considerations together, and consistently with the submissions of both counsel before us, we consider that the appropriate order in this case was for BNP to have its costs paid on the indemnity basis. We have arrived at that conclusion as a matter of principle, and not because any suggestion was made to us that the costs of BNP's solicitors were unreasonably incurred or unreasonable in their amount. On the assumption that they were not, the substitution of an indemnity costs order should make no practical difference to the sums recoverable by BNP.

94 We therefore substitute for the punitive costs order of the Royal Court an order that the

Appellant pay to BNP on the indemnity basis the costs of and incidental to these penalty proceedings from after the 25 February 2020 hearing, the amount of such costs to be agreed and, if not agreed, to be certified by the Judicial Greffier. We are minded to order that the costs of this appeal are also paid by the Appellant to BNP on the indemnity basis, because the Appellant remains in contempt, but will hear counsel before making our final determination.

Payment by instalments

95 Under the terms of the Orders made on 22 December 2020, the Appellant was obliged to pay the entirety of her £2 million fine within two months, in default of which she was to serve 12 months in prison. We rejected her application for a stay on 15 February 2021, just a week before the fine fell due. Since then we were told that she has taken it upon herself to pay four instalments of £33,333.33. The vast majority of the fine thus remains unpaid, more than three months after it fell due.

96 The Appellant issued a further summons on 25 February 2021, after the deadline for payment of the fine had passed, seeking an order that she be permitted to make payment of the £2 million fine by way of instalments with minimum monthly payments of £33,333.33, thus effectively regularising the course on which she appears to have embarked. The effect of such an order would be to give her five years to pay the fine, on the assumption that payments are made promptly at the minimum level. Her summons was adjourned by the Royal Court on 15 April, pending the outcome of this appeal; but the Act of Court also noted Advocate Mistry's undertaking to amend the Notice of Appeal "so that the issue of a planned payment over five (5) years is before the Court of Appeal". Given that the appeal hearing was so close, the Royal Court appears to have taken the view that the matter would be better dealt with by the Court of Appeal. We have considered whether we should accede to this invitation, given that there is no appeal against a prior determination of the issue. However, since the matter is now raised on the Notice of Appeal and needs to be determined in the light of the conclusion we have reached on the other grounds of appeal, we now do so.

97 The principal difficulty faced by the Appellant, on this issue as on her previous application for a stay, is that she has not served any evidence of her means, of such a kind as would normally be required if an Order to pay a lump sum were to be varied in her favour by the substitution of an order for payment by instalments. Of her affidavit on 1 February 2021, in support of her alleged "inability to pay the sums ordered in the time scales the Court ordered" (described as her second point), we said in our judgment of 15 February at [24]:

> ***"As to the Appellant's second point, she says that she has "made the position very clear" regarding her inability to pay and that she has "demonstrated to the Court that [she] did not have access to funds to make payments of substantial sums to the Court".*** We reject that contention. She has not adduced any relevant evidence in support of this application at all. By 'evidence', we mean particulars identifying specific sources of quantified

income; we mean particulars identifying specific financial assets and/or tangible assets, their nature, their location, their value and (if relevant) any problems she might face realising them within a short space of time; we mean particulars regarding her ability to raise a loan secured on any illiquid assets that cannot readily be realised; we mean details of any efforts she has in fact made to realise any assets or raise any loans; we mean similar particulars of any assets that may not be held in her name but are held for her benefit or to which she may be entitled or have access. Her affidavit contains no such particulars at all. Instead, it simply makes generalised assertions about her inability to pay; it makes an unparticularised assertion that she does not have “huge cash reserves” without quantifying the cash reserves she does in fact have; it refers to unspecified “financial assistance” from her husband “and others” without identifying who those others are, or what resources they command, or whether they are willing to fund her liabilities in this litigation; and it discusses a “hypothetical scenario” which is of no assistance to her argument.”

98 The Appellant swore an eighth affidavit on 12 April 2021, in support of her application to pay the fine off by instalments. That affidavit gives none of the particulars to which we referred in our judgment refusing a stay, but points in the abstract to the difficulties that any person may face in realising assets held by corporate entities, and makes two “confirmations” to the Court:

> *“i) I am unable to raise with immediate effect the sum of £2 million;*
>
> *ii) My cash resources are not finite and based on affordability, especially in relation to the payment of legal fees as a result of BNP continued course of worldwide litigation and other daily expenses.* I am only able to afford to pay £33,333.33 per month towards the discharge of the Fine. This equates to *circa £400,000 per annum, which is a significant sum and represents a substantial effort which I hope the Court will appreciate.”*

The above passage from our judgment refusing a stay applies in the same measure to the Appellant's eighth affidavit. All that has changed is that the Appellant has made four instalment payments of £33,333.33 each, and offered to continue making such payments monthly until the £2 million is paid off. While those payments have as she said been accepted by the Viscount's Department, that is true only in a formal sense. In correspondence with Advocate Mistry exhibited to the eighth affidavit, the Viscount's Department commented on 22 February that

> *“Your client's proposed £33,333.33 per month is not satisfactory – as you say, it would take five years to pay the fine in full.* As stated above, the Court specified a period of two months for payment
>
> *In any event, we would not normally agree a payment plan with any person without having received full details of the person's income, assets and normal spending.* This may include disclosure of bank statements and we would also expect to see some reduction in spending so that payment of the fine is

prioritised. Here, we have no evidence other than your client's said inability to repay."

We accordingly reject any suggestion that the Viscount's Department has "accepted" the instalment plan put forward by the Appellant in anything other than the formal sense of taking receipt of the sums transferred. We also find that the Appellant has failed to discharge the burden on her to satisfy this court that she cannot pay the fine.

99 In his written arguments prepared for the Royal Court hearing of 15 April 2021, which he did not materially supplement at the hearing before us, Advocate Mistry did not suggest that the Appellant's eighth Affidavit remedied the defects that we had identified in our judgment of 15 February. Rather, he advanced submissions based on the Appellant's human rights to a fair trial and to property and family life.

100 As to fair trial, the Appellant expresses concerns about impartiality, and asks that "any decisions made on this application be looked at independently on the evidence before this court, rather than by reference to previous findings of fact against [the Appellant]". No substantive grounds are advanced for rejecting the conclusions that we expressed in our judgment of 15 February about the insufficiency of the Appellant's evidence of means. This Court must of course decide afresh the new issue of whether payment can be made by instalments; but to the extent that they may be relevant, we see nothing improper in making reference to previous rulings on the subject.

101 Also under this head, the Appellant relies on "the right not to incriminate herself and/or the right not to be coerced into incriminating herself", rights which she submits are applicable in "quasi-criminal proceedings such as contempt". It is argued that "forcing" the Appellant to make specific detailed financial disclosure for this application, where there is a real possibility that such disclosure will lead to further litigation, is a breach of the Appellant's right to a fair trial, guaranteed by Article 6 of the ECHR. This argument is misconceived. The Appellant is not being forced to make detailed financial disclosure; she seeks the indulgence of the Court regarding extended time to pay, and like any other litigant in a similar position may legitimately be expected to justify that request by submitting evidence of her means.

102 In her remaining submission, the Appellant repeats her concerns that if further detailed financial disclosure is made to the Court, her assets will be subject to further litigation either in this jurisdiction or elsewhere, contrary to her right to property (Article 1 to the First Protocol to the ECHR) and her right to respect for private and family life (Article 8 of the ECHR). But if the Appellant's evidence were to the effect that she cannot raise £2 million, it is hard to see that disclosure of that impecuniosity would encourage or assist BNP in its litigation. She is, in any event, not under any compulsion to make disclosure: it is simply that if she declines to do so for reasons of her own, she cannot hope to substantiate an application for permission to pay the fine by instalments. There is no human right to be accorded preferential payment terms without putting forward the evidence that could justify them.

103 For these reasons, we reject the Appellant's claim that there is sufficient evidence before this Court to make a determination that she is unable to raise £2 million, or to justify an application for payment in instalments. She has been after all on notice since 25 February 2020 that her contempt, if not purged, is likely to result in a fine in the millions; since 22 December 2020 that £2 million was to be paid within two months, on pain of imprisonment; and since our judgment of 15 February 2021 that further latitude is unlikely to be afforded without her submitting a full affidavit of means.

104 We do however take into account the fact that four payments of £33,333.33 have already been made (along with the payment of £100,000 ordered in respect of BNP's costs). This establishes at least some willingness, however inadequate, to engage with financial orders of the Jersey courts. Notwithstanding that the Appellant has long been on notice of the requirement to pay the fine in its entirety, and in order to allow for any last-minute logistical arrangements, we are prepared to make a final extension of the time for payment until 15 July 2021. If payment of the full amount due has not been made by the end of that day, the order for imprisonment in default of payment will take effect.

Conclusion

105 The appeal is dismissed, save as to:

(i) the order for punitive costs for which we substitute an order for costs to be paid on the indemnity basis, and

(ii) the extension until 15 July 2021 of the time by which the balance of the £2 million fine must be paid.

We will deal with any consequential applications on the papers.

Crow JA

106 I agree.

Perry JA

107 I also agree.