Ian Strang, Ashley Hoy, Nigel Pearmain v Jeffrey Giovannoni, Kate Anderson and Clare Nicolle (practicing as Voisin Advocates and Notaries Public)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	08 April 2021
Neutral Citation:	[2021] JRC 109
Court:	Royal Court

Text

[2021] JRC 109

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
Ian Strang, Ashley Hoy, Nigel Pearmain
Plaintiffs
and
Jeffrey Giovannoni, Kate Anderson and Clare Nicolle (practicing as Voisin Advocates and Notaries Public)
Princess Camilla de Bourbon des Deux Siciles
Defendant

Advocate A. D. Hoy **for the Plaintiffs**.

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

Authorities

Royal Court Rules 2004, as amended.

Strang and Ors v de Bourbon des Deux Siciles [2020] JRC178.

BNP Paribas Jersey Trust Corporation Limited v de Bourbon des Deux Siciles [2020] JRC267.

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

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

Perry v Raleys [2019] UKSC 5.

BNP Paribas Ors v Crociani Ors [2018] JCA 136.

Three Rivers DC v Bank of England No 3 [2003] UK HL 16.

Hearing (Civil) — re: amend answer and counterclaim

CONTENTS

THE MASTER:

Introduction

1 This judgment contains my decision in relation to an application by the defendant to amend her answer and counterclaim and applications by the plaintiff that:-

(i) the defendant has failed to answer or provide certain further information as required

and so is in breach of an unless order;

(ii) that summary judgment should be granted against the defendant in respect of her counterclaim; and/or

(iii) the defendant's counterclaim should be struck out under one of the grounds set out in Rule 6/13(1) of the Royal Court Rules 2004, as amended.

Background and procedural history

2 It is necessary to set out both the background to this dispute and the relevant procedural history.

3 A summary of the events leading to dispute was set out in a judgment of T. J. Le Cocq, Bailiff dated 7 th September 2020 reported at *Strang and Ors v de Bourbon des Deux Siciles* [2020] JRC178 at paragraphs 4 to 8 which I adopt for the purposes of this judgment.

4 Pursuant to the approach set out in paragraph 174 of the Court of Appeal's judgment cited by Bailiff Le Cocq, the defendant filed written contentions on 6 th March 2018. These contentions were prepared by Advocate Hoy and leading counsel in the United Kingdom (Tom Smith, Q.C.) and were approved by the defendant. They ran to some 46 pages in length.

5 Prior to the Court of Appeal sitting which took place over 4 days between 26 th February 2018 and 1 st March 2018, the defendant had also filed written contentions in support of her notice of appeal which were 24 pages in length and had responded to the written contentions of BNP (26 pages in length). Prior to the hearing of the appeal the defendant had therefore filed significant written contentions in addition to the written contentions she was permitted to file after the oral hearing by the Court of Appeal.

6 Bailiff Le Cocq's judgment then set out the procedural history of the present dispute in paragraphs 10 to 12 as follows:-

> ***"10. The instant proceedings began by the Plaintiffs' summons of the 20th June 2019 and particulars of claim were filed followed by an answer and counterclaim filed on the part of the Defendant, and a reply and answer to the counterclaim*** .
>
> ***11. During the course of a hearing for directions in this matter on the 28th October 2019, the Plaintiffs' alleged that the counterclaim filed by the Defendant on the 19th July 2019 ("the Counterclaim"), was liable to be struck out for, in summary, failing adequately to plead a case against the Plaintiffs. By Act of Court of the 28th October 2019 at paragraph 5, the Master ordered, amongst other things:-***

"The Defendant further by close of business on Friday 29th November 2019 shall provide particulars of paragraph 22 of her answer and counterclaim dated 19th July 2019, identifying all facts and matters relied upon as to why a lack of representation was detrimental to the Defendants' appeal, including what loss this caused to the Defendant."

12. As a consequence a further document entitled "Further Information" was filed by the Defendant on the 29th of November 2019 ("the November Pleading")."

7 The Bailiff's judgment was decided on the papers, but the relevant parts of his decision were set out in paragraphs 54 to 64 as follows:-

"54. In my Judgment, the cumulative effect of the Counterclaim and the November Pleading is not satisfactory. It seems to me that there may well be, should the matter proceed, scope to request further and better particulars over and above those already provided in the November Pleadings .

55. However, that is not what I have to consider. I must consider whether any arguable case is made out on the pleading .

56. It seems to be at least arguable that the Defendant has suffered a detriment as a result of not being represented in Court by Advocate Hoy or another competent advocate fielded in his stead. It has an air of unreality for the Plaintiffs to suggest that the absence of Advocate Hoy could have no possible detriment to the Defendant. It is not suggested that the Defendant was advised to dispense with Advocate Hoy's services and simply rely on written submissions before, he became ill. The Defendant was forced into the unwelcome position of being unrepresented through no fault of her own .

57. It is in my judgment at least arguable then that the Defendant has a case in negligence and/or breach of contract because of the failure of Advocate Hoy to attend (for reasons for which I accept he was not responsible) or for someone to be fielded either from Voisin or employed as an agent at no additional expense to the Defendant in his stead .

58. The Defendant's case, as pleaded, is in effect that she was denied the opportunity to advance her case and for Advocate Hoy to respond to all submissions during the course of the Hearing. That, in reality, may or may not have been to her detriment but I am certainly not in a position to say that it was not and could not have been so .

59. I am not satisfied that I understand sufficiently from the Defendant's pleadings what her positive case may have been if an application had been made for her to give evidence (even though that might have been

unlikely to have succeeded) or the case presented orally. Advocate Hoy is an able and experienced Advocate and I do not think it can be said that his presence and submissions before the Court of Appeal would have had a neutral or negative effect. They may not have taken the matter to a point where the Defendant prevailed in any of her arguments but that is not a matter that in my judgment I can assess at this point. The fact is that the determinations made in the Court of Appeal Judgment, significant as they may be, were made without Advocate Hoy's submissions at the hearing or those of alternate Counsel in his stead .

60. Has the Defendant suffered a detriment? I cannot at this point say. Has the Defendant pleaded a detriment? Yes, she has done so in express terms. Is that pleading adequate? In my judgment the pleading needs to be improved to explain what the Defendant's positive case might be. It seems to me that the assessment of the loss of a chance may well involve consideration of what arguments might have been put, whether or not any further evidence could have been received by the Court of Appeal, whether it might have been, and, if so, what the consequences might have been for the Defendant .

61. An inadequacy in the pleading in that way, however, is not fatal to the Defendant's Counterclaim which can in my judgment be improved by other interlocutory steps .

62. There is much in the Plaintiff's argument concerning the inadequacy of the Defendant's pleading but in my judgment those inadequacies can and should be addressed by an improvement to the pleading and not the draconian step of striking it out .

63. In short, I do not think that the Plaintiffs have discharged the extremely high burden on them to cross the threshold of a strike out under Rule 6/13(1)(a) which, of course, I must consider without reference to the evidence. Accordingly, I dismiss the application to strike out the Defendant's Counterclaim and direct the parties should place the matter before the learned Master for further consideration as to the adequacy of the pleadings .

64. I do not suggest that there is not a possibility that the Plaintiffs might apply again to strike out the Counterclaim once it is fully pleaded on whatever basis may then be appropriate. I do not think that it is necessary to reserve the matter to myself should the Master deem it appropriate that he deal with it."

8 Following the Bailiff's judgment, a hearing took place before me on 30 th September 2020. At this hearing the defendant firstly sought discovery of the plaintiffs' files which application was refused. This decision was not appealed.

9 The defendant was also required to provide further information about her counterclaim as set out in an appendix to the act of court of that date as follows:-

> *"1. of paragraph 23 of the Counterclaim that "the judgment of the Court of Appeal went against the Defendant" and of paragraph 19 i) of the Defendant's Further Information of 29 November 2019 that:-*
>
> *"The Court of Appeal found that the Camilla Trust was 'virtually distributed' and therefore that the Defendant's interest in the trust was paid out" and of paragraph 19 iii) of the Defendant's Further Information that "The Court of Appeal made adverse findings of fact against the Defendant on the paper submissions and hearing no oral evidence or submissions, …" and of paragraph 25 of the Counterclaim that the Plaintiffs "did not adequately prepare":-*
>
> *a. state the determinations made by the Court of Appeal that the Defendant disputes and the grounds upon which they are disputed, the basis upon which it is said by the Defendant that the Court of Appeal was not entitled to have made such disputed determinations including the basis or reasoning behind the disputed determinations and what it is alleged the Plaintiffs did or failed to do that caused the disputed determinations;*
>
> *b. state the different outcomes or improvement in the Defendant's favour that the Defendant alleges should replace such disputed determinations in 1.* and 2. and the grounds or bases of such different outcome or improvement in the Defendant's favour;
>
> *c. state the nature of the evidence at the Court of Appeal hearing that the Defendant says she would have given herself, including by any other witnesses, and the submissions and arguments additionally that should have been made at the hearing by Counsel for the Defendant that would have resulted in different outcomes or improvement in the Defendant's favour in the disputed determinations of the Court of Appeal, including but not limited to the following matters upon which oral submissions as appear from the transcripts, were made at the Court of Appeal hearing…"*
>
> *2. of paragraph 19 of the Defendant's Further Information "As a direct consequence of Advocate Hoy failing to attend the Court of Appeal hearing and/or the Plaintiff fielding an alternative advocate to attend the same, the Defendant has suffered the following loss/damage" and of paragraph 25 of the Counterclaim that the Plaintiffs "did not adequately prepare" state the submissions arguments and evidence that the Defendant alleges were not put to the Court of Appeal as a direct consequence of Counsel not attending the Court of Appeal Hearing;*
>
> *3. of paragraph 26 of the Counterclaim that "Further details of the quantum of the Defendant's Counterclaim will be provided in due course" provide such details;*

4. of paragraph 19 i) state the calculation of loss in that subparagraph and the loss to the Defendant from the Court of Appeal decision said by the Defendant to arise in light of the Royal Court's Order referred to in 1 (3) c. above by which the Defendant anyway had no entitlement to benefit from the Camilla Trust;

5. of paragraph 26 of the Counterclaim and paragraph 19 ii) of the Defendant's Further Information, in relation to the legal costs claimed to be incurred in relation to the Privy Council, state the costs that arise from the Appeal to the Privy Council in relation to the different outcome or improvement in the Defendant's favour that the Defendant alleges arises from Counsel's failure to attend the Court of Appeal hearing;

6. of the proceedings initiated against the Defendant in paragraph 26 of the Counterclaim and paragraph 19 iii) of the Defendant's Further Information the basis upon which it is said that these proceedings are founded on the findings of the Court of Appeal, how such proceedings arise from the absence of Counsel from the Court of Appeal hearing.

10 I was also informed during that hearing that in 2019 the Privy Council had refused leave in respect of the defendant's application for leave to appeal the Court of Appeal's decision, although leave to appeal had been granted to her children in respect of the Court of Appeal's conclusion that it was appropriate to treat the defendant's Trust as *"having been paid out"* (see paragraph 46 of the Court of Appeal judgment).

11 On 11 th November 2020, I issued an unless order requiring the defendant to provide answers to the matters set out in the Appendix to the Act of Court of 30th September 2020, failing which the defendant's answer and counterclaim would be struck out automatically without further order. The defendant was also required to pay the plaintiffs' costs on an indemnity basis.

12 On 27 th November 2020 the defendant provided answers to the matters set out in the Appendix, as follows:-

"Answer

Sub-para a — disputed determinations

The disputed determinations, the grounds on which they are disputed and the reasons why the Court of Appeal was not entitled to make them are as follows:-

1. The determination that it was appropriate to treat Camilla's Trust as having been paid out (para 46–50)

This is disputed on the following grounds:-

(a) such a determination was counterfactual: what in fact happened was that in

2010 the trustees of the Grand Trust appointed the trust property to the Fortunate Trust in breach of trust, so that it remained subject to the trusts of the Grand Trust;

(b) the Court of Appeal was wrong to attach any importance in this connection to the description of Camilla as "the principal beneficiary" of Camilla's Trust: that expression is not used in the trust instrument and is at most a nickname with no legal significance;

(c) the Court of Appeal was wrong to presume, i.e. to infer from:-

(i) the fact that Camilla had not brought a claim for breach of trust; and/or

(ii) the fact that she and her husband had not sought to join her children (who are not of full age) in the proceedings as persons interested in the outcome

that those interested in the Camilla's Trust were content that their interests had not been prejudiced by the events that had occurred

(d) no such inference could properly be drawn:-

(i) no inference could be drawn from the failure to make a claim in the absence of any duty to do;

(ii) a fortiori no such inference adverse to the Defendant's children could be drawn since they are not of full age;

(iii) no such inference could be drawn against the unborn issue of the Defendant and/or other issue of Madame Crociani interested under the trusts of Camilla's Trust;

(iv) it was clear that Christiana and her children were not content that their interests had not been prejudiced by such events since they had brought proceedings for breach of trust

(e) the Court of Appeal was wrong to find further support for treating Camilla's Trust as paid out on the basis of the considerations set out in para 49, namely:

(i) the suggestion that Camilla's actions might be characterised as knowing or dishonest assistance in breaches of trust in consequence of which the trustees could have treated her as liable for the whole loss caused to the Grand Trust;

(ii) the suggestion that if Camilla had asked for "disbursement under the power to advance capital to her the trustees would have acceded to that request;

(iii) the suggestion that it would be inequitable for Camilla to receive more than she might legitimately have expected because she could anticipate receiving the preponderance of the assets obtained by Madame Crociani from the Grand Trust

because there was no logical connection between those considerations and treating Camilla's Trust as paid out

(f) furthermore:-

(i) Camilla's actions could have been characterised as dishonest only if she had known that Madame Crociani was not a beneficiary and that the purported appointment to the Fortunate Trust was a breach of trust;

(ii) this was not the case and dishonesty was not pleaded or proved against Camilla;

(iii) there was no finding of fact that the trustees would have advanced capital to Camilla if she had asked for an advance: the trustees would have had to exercise their own discretion taking into account the interests of the other beneficiaries of Camilla's Trust and in particular those of her children and the other capital beneficiaries;

(iv) it was wrong to find that something would be inequitable on the basis of speculation and hypothesis

The determination that the question of acquiescence was fully raised on the pleadings by the Defendant herself (para 198).”

13 In answer to request 2 the defendant stated:-

“the submissions and argument not put to the Court of Appeal are as indicated in the grounds for disputing the determinations of the Court of Appeal.”

14 The answer to request 3 clarified that the costs of the unsuccessful application for leave to appeal to the Privy Council were approximately £120,000.

15 In answer to request 4 the defendant claimed $105,275,00.52 said to relate to the value of the defendant's Trust.

16 On 7 th December 2020, a further hearing took place before me where the plaintiffs sought clarification about whether the compensation claimed by the defendant included any claim in respect of the promissory note (see the original judgment of the Royal Court dated 11 th September 2017). The defendant later confirmed that no such claim was being made.

17 The defendant was also ordered within 7 days to provide to the plaintiffs' copies of all written submissions filed with the Privy Council. However, I refused the plaintiffs' request seeking information about why any arguments might not have been advanced before the Privy Council because such requests were seeking privileged information. Once the defendant had provided copies of its applications to the Privy Council the plaintiffs could

then analyse what arguments had been advanced and make any necessary submissions to me if arguments had not been advanced which were now the subject of the defendant's complaint against the plaintiffs.

18 On 22 nd January 2021 the defendant filed a draft amended answer and counterclaim. It is in respect of this document that permission to amend is now sought by the defendant as an answer to the plaintiffs' applications.

19 The material paragraphs for the purpose of this application are paragraphs 26, 27, 29, 30, 31, 32 and 33 which plead as follows:-

> *"26. Judgment in the Court of Appeal Proceedings was given on 25 July 2018 (the "Judgment"). On the Equitable Compensation Issue, the Court of Appeal found that the trustee was not required to reconstitute the Camilla Trust. The Court of Appeal's reasoning was, inter alia, that;*
>
> *a. equitable compensation is a discretionary remedy, and the court can take the remoteness of the interest into account in determining if reconstitution should take place ([26] of the Judgment):*
>
> *b. a relevant factor in assessing remoteness is whether a beneficiary enjoyed the benefit of the misapplication of trust funds ([30] – [33] of the Judgment):*
>
> *c. it was appropriate to treat the Defendants' trust as having been paid out, because the fact that neither she nor her children, as primary beneficiaries of the Camilla Trust, had made a claim for breach of trust in the Royal Court Proceedings meant that she could not now be heard to contend in favour of liability for breach of trust, and the Court was thus entitled to presume that the Defendants and children's interests in the Camilla and Grand Trusts were not prejudiced by the events that came to pass (see [46] of the Judgment);*
>
> *d. further considerations weighing in favour of treating Camilla's Trust as having been paid out were that (see [49] of the Judgment)*
>
> *i. the Defendants' actions might be characterised as knowing assistance in breach of trust, and therefore the trustees could have treated her as being liable for the whole loss caused to the Grand Trust;*
>
> *ii. if the Defendant had asked for a "disbursement" under the power to advance capital, the trustees would have acceded to such request;*
>
> *iii. the Defendant could anticipate receiving the preponderance of assets obtained by the settlor from the Grand Trust.*
>
> *27. The Judgment is disputed by the Defendant on, inter alia. the following grounds:*
>
> *a. it was inappropriate to treat the Camilla as having been paid out, because*

that is contrary to reality — in fact, the trustees of the Grand Trust had, in breach of trust, made an appointment of the trust property in 2010, and such appointments remained subject to the trusts of the Grand Trust:

b. the Court of Appeal was wrong to attach any importance to the description of the Defendant and her children as "principal beneficiaries" of the Camilla Trust, given such expression is not used in the trust instrument and is not a term that carries any legal significance;

c. the Court of Appeal was wrong to infer from the fact that neither the Defendant nor her children had brought a claim for breach of trust, that those so interested in Camilla's Trust were necessarily content that their interests were not prejudiced by the events that transpired, because:

i. there was no duty on either the Defendant or her children to bring the aforesaid claims;

ii. no inference adverse to the Defendant's children could be drawn. since they were not of full age;

iii. no inference can be drawn against the unborn issue of the Defendant, or other such issue as might be interested under the trusts of Camilla's Trust;

d. the Court of Appeal was wrong to derive further support from the various considerations set out in paragraph 49 of the Judgment (and summarised at paragraphs 25(d) above), in that there is no logical connection between these considerations, and the treatment of Camilla's Trust as having been paid out;

e. the Court of Appeal was wrong to find that the Defendant's actions could be characterised as knowing assistance in breach of trust, in that the Defendants' actions could not be characterised as dishonest, given she did not know that the settlor was not a beneficiary, and that the purported appointment in 2010 was made in breach of trust;

f. the Court of Appeal was wrong to find that the trustees would have advanced capital to the Defendant simply by virtue of her asking — the Royal Court made no such finding, and it is wrong to find that something is inequitable purely on the basis of speculation and hypothesis.

29. Further, the trustee (and First Plaintiff in the Royal Court Proceedings), BNP Paribas Jersey Trust Corporation Limited, has instituted various actions against the Defendant worldwide, such actions having been pursued based on Court of Appeal's finding (summarised at paragraph 26.d) above) that the actions of the Defendant amounted to dishonest assistance in breaches of trust (the "BNP Paribas Claims").

Particulars of breach and loss

30. It is averred that the Plaintiff acted in breach of the terms of the Retainer, and

further or alternatively its duties as particularised at paragraph 27 above, in that it:

a. failed to provide any representation for the Defendant at the Hearing;

b. failed to notify the Defendant of the possibility that Advocate Hoy would not be available to represent her at the hearing in sufficient time to ensure that the Defendant was able to make arrangements for alternative representation at the Hearing;

c. failed to secure alternative representation for the Defendant in Advocate Hoy's absence:

d. failed to put in place reasonable measures to ensure that the Defendant had alternative counsel available even in the event of Advocate Hoy's incapacity;

e. in all the circumstances, failed to take all steps as were reasonably necessary to preserve the Defendants' interests before the Court of Appeal;

f. further, and in all the circumstances, failed to exercise the reasonable care and skill expected of a full service law firm with significant experience in appellate litigation in the courts of Jersey, having knowledge of the Defendants' particular circumstances, needs and objectives.

31. But for the Plaintiff's breaches as aforesaid, the Defendant would have had legal representation at the Hearing, and was therefore unable advance the arguments set out at paragraph 27 above orally before the Court of Appeal. The Defendant would otherwise have had the opportunity to: a. persuade the Court of Appeal that the Equitable Compensation Issue ought to have been decided in her favour, and therefore to order reconstitution of the Camilla Trust; b. persuade the Court of Appeal that the findings of dishonest assistance (summarised at paragraph 26.d) above) should not have been made.

32. Further, or alternatively, it is averred that but for Plaintiff's breaches as aforesaid, the Defendant would not have incurred the costs of appealing to the Privy Council, and BNP Paribas would not have been had a basis for pursuing the BNP Paribas Claims.

33. Accordingly, the Defendant is entitled to damages from the Plaintiff representing; a. the loss of a chance to obtain an order for reconstitution of the Camilla Trust, the value of said Trust totalling US$ 105,275.090.52; b. further, or alternatively. i. the costs of appeal to the Privy Council, such costs including but not limited to counsel's and agents' fees totalling £187,590; ii. its potential liability in (and the costs of defending) the BNP Paribas Claims.

Submissions

20 At the outset at the hearing, I indicated that it was appropriate for the plaintiffs to make their applications on the assumption that leave would be granted to the defendant to amend her answer and counterclaim in the form supplied on 22 nd January 2021, with the defendant then responding to the plaintiffs' application and also setting out why the defendant should be permitted to amend its answer and counterclaim, with the plaintiffs then replying. Both parties were content with this approach.

21 Advocate Hoy therefore made the following submissions.

22 Firstly, the plaintiffs had no idea of the case they had to meet on causation, as the defendant on her approach would only advance her position at trial. The defendant had not answered what should have or would have been submitted had Advocate Hoy attended the hearing.

23 The defendant had responded to the concerns raised by the Court of Appeal which were available to the defendant, Advocate Hoy and his English Counsel and the transcript which had led to the written contentions being drafted, primarily by counsel. These had been approved by the defendant. There was therefore no loss of opportunity to respond to the Court of Appeal.

24 The lack of any oral interaction with the Court of Appeal in this case was not a defence because it was too nebulous to lead to any loss. If the defendant was arguing that oral interaction would have made a difference, then where such interaction was required should have been identifiable from the transcripts requiring the defendant to set out where some sort of response or submission should have been made in reply to particular points. The plaintiffs complained this had not occurred.

25 The legal arguments against BNP's appeal had been put by Advocate Robinson for Cristiana who, apart from one point, adopted the same approach as the defendant. There was little if anything that Advocate Hoy could have added to those submissions on the law and the detailed exchanges between Advocate Robinson and the Court of Appeal.

26 The only point of difference in respect of BNP's appeal between Cristiana and the defendant was on the question of the defendant's conduct and acquiescence, but that issue was dealt within the written contentions filed by the defendant on 6 th March 2018. Both in the material filed in advance of the Court of Appeal hearing and in the written contentions filed on 6 th March 2018 the defendant was not making any challenge to the findings of fact made by the Royal Court or seeking to file new evidence.

27 The question of the defendant's conduct was also ongoing because of the effect of paragraph 18 of the Act of Court of 11 th September 2017 issued by the Royal Court which created what the Court of Appeal had described as a locked box in respect of the

defendant's Trust. The effect of the Royal Court judgment also meant that BNP had been left *"holding the baby"*, as Advocate Hoy put it, because Madame Crociani had left the scene. Although the Royal Court had ordered her to indemnify BNP, that had not occurred.

28 The Royal Court had also made disclosure orders, including against the fifth defendant, to enable BNP to make good its indemnity. What the Royal Court had envisaged was full reconstitution of what the Court of Appeal described as Camilla's Trust by BNP (which in this judgment I refer to as the defendant's Trust), with BNP assisted by the defendant then making recovery from Madame Crociani. The scenario facing Advocate Hoy on appeal was having to deal with the findings of fact of the Royal Court in relation to the defendant's acquiescence plus BNP's criticisms of the defendant for failing to provide information about the whereabouts of Trust assets.

29 The Royal Court in its judgment dated 22 nd December 2020 reported at *BNP Paribas Jersey Trust Corporation Limited v de Bourbon des Deux Siciles* [2020] JRC267 (the "Sanction Judgment") described the four affidavits that the defendant had filed prior to the Court of Appeal hearing as providing ***"nothing material about the assets of Madame Crociani which was not already in the public domain or known to BNP"*** (see paragraph 2(xi) of the judgment). Advocate Hoy explained that he was referring to what was before the Court of Appeal because the question of the defendant's conduct was before the Court of Appeal and was not a matter he could deal with as counsel. Only the defendant could provide answers as to whereabouts of Trust assets.

30 The criticism of the Royal Court in the Sanction Judgment also led Advocate Hoy to make the submissions that the appeal to the Court of Appeal was dishonest (in hindsight) and therefore there could be no loss of a chance claim in respect of any dishonest appeal. Why the appeal was dishonest could be seen from the findings of the Royal Court in the Sanction Judgment.

31 Advocate Hoy fairly accepted that the Sanction Judgment was subject to an appeal, and that although the Court of Appeal refused an application by the defendant for a stay pending appeal of the Royal Court's ordered issued consequent upon the Sanction Judgment, the Court of Appeal had been careful not to express any view on the merits (see paragraph 19 reported at *Siciles C. de Bourbon des Deux v BNP Paribas Jersey Trust Corporation Limited* [2021] JCA 043).

32 In any event the defendant had not suffered any loss of opportunity because she had responded to BNP's criticisms about her conduct in her written contentions dated 6 th March 2018 at paragraphs 24 and 25.

33 Why the approach of the defendant was also dishonest was because the guardian for the children was acting in league with the defendant. On the one hand the defendant's children through their guardian were seeking full reconstitution of the defendant's Trust by virtue of

their appeal to the Privy Council for which leave had been granted; but on the other hand the defendant had not provided disclosure of any assets and had been found to be in contempt of court (see Commissioner Clyde-Smith's judgment dated 7 th October 2019 reported at *BNP Paribas Jersey Trust Corporation v Siciles C. de Bourbon des Deux* [2019] JRC 199 ("the Contempt Judgment"). This inconsistency could also be seen in the failure by the defendant's children to sue Madame Crociani for breach of trust to recover Trust assets, even though any such claim would not be prescribed. On the one hand the children were pursuing an appeal seeking reconstitution of the entirety of the Trust, yet they were not pursing Madame Crociani for breach of trust and the defendant was giving a false impression that she was assisting BNP. This was why Advocate Hoy contended the position of the defendant before the Court of Appeal was dishonest which dishonesty had continued.

34 In relation to the Privy Council appeal, a hearing date had yet to be fixed but whatever the outcome Advocate Hoy contended that the defendant would not had suffered any loss. If the appeal succeeded, there would be restitution. If the appeal was unsuccessful, it could not be said following a fully argued hearing before the Privy Council that there had been any loss of a chance in terms of Advocate Hoy's non-appearance before the Court of Appeal.

35 Advocate Hoy also referred me to *Perry v Raleys* [2019] UKSC 5 leading to the following submissions:-

(i) There was no loss of a chance where a party would have lost anyway;

(ii) A loss of a chance required an honest claim (see paragraphs 25 and 26 of *Perry v Raleys*); the counterclaim was not honest as was clear both from the Contempt judgment *BNP Paribas Jersey Trust Corporation v Siciles C. de Bourbon des Deux* [2019] JRC 199 and the Sanction Judgment.

(iii) Advocate Hoy also contended that the grounds of dispute in the draft amended counterclaim were no more than the grounds which the defendant wished to advance to criticise the Court of Appeal's decision.

(iv) The grounds of dispute were also put to the Privy Council and, other than in respect of the issue of the reconstitution of the Trust brought by the defendant's children, the grounds of dispute were otherwise rejected as a basis to interfere with the Court of Appeal's Decision.

(v) The defendant had not pleaded what the difference was between the written submissions filed on 6 th March 2018 and what Advocate Hoy could have said orally. In other words, Advocate Hoy argued there was no counter factual case pleaded. The counterclaim was therefore simply retaliatory to avoid paying fees. There was nothing to particularise as to what Advocate Hoy failed to do. What was set out as grounds of dispute were simply grounds of appeal where leave to appeal had been refused.

36 What Bailiff Le Cocq was looking for in his judgment at paragraph 60 was " ***consideration of what arguments might have been put"***. This had not happened.

37 In relation to the answers to the request for further information, the answer to paragraph 1a did not address what was alleged the plaintiffs did or failed to do that had caused the disputed determinations.

38 In respect of paragraph 1b what was required was set out in the request namely that the defendant was required to state the different outcomes and the grounds or bases of such different outcomes The defendant's response was an objection to the question but there had been no appeal against the court's order of 30th September 2020 requiring an answer.

39 The answer to paragraph 1c took the issue back to the effect of the written submissions filed on 6 th March 2018. The answer suggested that the Court of Appeal was wrong to make additional findings without the benefit of oral evidence. However the written submissions of 6 th March did not seek to adduce oral evidence or seek an adjournment to obtain oral evidence. The contrast between the March submissions and what was now being said led Advocate Hoy to repeat his submissions that the defendant's approach in this action and its appeal to the children's appeal to the Privy Council was not honest.

40 Advocate Hoy also contended that it was difficult to see how a trial would be conducted. He asked rhetorically whether the Royal Court would be required to go through the transcript with the defendant then raising its objections as to how any issues should have been dealt with. This was unrealistic. Even that approach required the defendant to set out what part of the conduct of the case she was criticising but neither the draft pleading not the answers to the request for information did so.

41 Seeking a trial before the Royal Court, to review how the Court of Appeal had conducted itself in respect of a judgment where leave to appeal had been refused, was fanciful. There was an absence of reality to attempt to invite the Royal Court to decide what the Court of Appeal would have done had Advocate Hoy been present without identifying what is said Advocate Hoy should have done.

42 In respect of the application for summary judgment, no affidavit was required because all of the evidence relied upon were acts and judgments of the Royal Court or documents filed with the Royal Court or Court of Appeal. An affidavit was not therefore necessary.

43 Advocate Mistry for the defendant made the following submissions.

44 Firstly, he emphasised paragraph 56 of Bailiff Le Cocq's judgment which stated that the plaintiffs' position had an air of unreality "to suggest that the absence of Advocate Hoy

could have no possible detriment to the defendant". He therefore emphasised the importance of oral submissions in an adversarial system, and so argued that Advocate Hoy's presence could have made a difference. The loss of a chance was that if there had there been oral submissions there was a percentage chance of the Court of Appeal reaching a different conclusion.

45 The Court of Appeal had itself recognised at paragraph 174 that there would be a disadvantage for the defendant.

46 The amended counterclaim set out the points of dispute with the Court of Appeal judgment. What had been lost was the opportunity to put those points which might have been put orally.

47 The defendant was not alleging negligence in respect of the grounds of appeal. Nor were any allegations made in respect of the content of the written contentions filed on 6 th March 2018.

48 Insofar Advocate Hoy relied on the Sanction Judgment, Advocate Mistry reminded me this was under appeal and that the Court of Appeal in its recent judgment did not express any view on the merits. There was therefore an arguable appeal against the Royal Court's Sanction Judgment.

49 Advocate Mistry accepted that there could not be double recovery if the children's appeal to the Privy Council was successful, but that did not mean that the defendant, if she was not allowed to benefit, had not lost an opportunity because of the effect of the Court of Appeal decision.

50 In relation to the issue of why the grounds of dispute were not put in the written contentions filed on 6 th March 2018, Advocate Mistry accepted he had not received from his client copies of any communications she had received between the conclusion of the oral submissions by the other parties and the filing of written contentions. Nor had he asked counsel instructed at the time for any papers.

51 Advocate Mistry still argued, notwithstanding that he did not have any material in respect of what happened between the end of the oral submissions of those parties and the filing of written contentions, that oral submissions would have made a difference.

52 He also repeated his submission that he needed the discovery of the plaintiffs' files to see what had been put.

53 Advocate Mistry also argued that the defendant was complaining about the Court of Appeal

judgment because this had been used against her in other proceedings. On this submission, he accepted that I could look at the Jersey proceedings alleging conspiracy against the defendant to see whether the pleaded case in Jersey alleged that the defendant and was bound by findings of the Court of Appeal.

54 In relation to the allegations of a breach of the order of 30 th September 2020, the plaintiffs' complaint was not about the adequacy of the answers but simply that the plaintiffs did not like the answers provided. To give effect to an unless order was also a high burden.

55 In respect of summary judgment, Advocate Mistry argued that there was no affidavit filed and therefore the plaintiffs were not entitled to argue for summary judgment. In any event, he argued that there was a realistic prospect of success because the absence of oral advocacy did not give rise to a trial being fanciful.

56 Finally, if the court disagreed with the defendant's approach and required more to be pleaded then more time should be allowed.

57 Advocate Hoy in reply made the following points:-

(i) I had power to order a payment into court as the price for not granting summary judgment;

(ii) There was no pleaded case setting out what steps the defendant took between the conclusion of oral submissions before the Court of Appeal and the filing of written contentions. This was necessary for a proper lost opportunity claim to be advanced;

(iii) Likewise the effect of the refusal of leave by the Privy Council was also relevant and had not been addressed; the grounds of dispute were in summary the points of appeal put to the Privy Council seeking leave and so there was no loss of opportunity;

(iv) The absence of oral submissions had been addressed by the filing of written contentions to the Court of Appeal coupled with the refusal of leave by the Privy Council.

(v) The written contentions filed also addressed all points raised on the transcript that were relevant to the defendant.

(vi) The question of knowing assistance was not raised in oral submissions with the other parties. If it had been it was not obvious what Advocate Hoy would have done, as it would have been for the defendant to set out what arguments she wished Advocate Hoy to advance and whether at that stage she wished to seek to file evidence.

(vii) In any event, the Court of Appeal's remarks were not definitive. The Judgment simply referred to the possibility that the defendant's conduct “ ***might”*** be

characterised as knowing assistance (see paragraph 48).

(viii) The discussions before the Court of Appeal also did not raise expressly the concept of the Trust having deemed to have been paid out.

(ix) Advocate Hoy referred to these grounds because there could not be a loss of opportunity claim in respect of matters not raised orally.

(x) Paragraph 32 of the amended answer did not deal with either the written contentions or the effect of the Privy Council appeal.

(xi) The plaintiffs' position was therefore that *"enough was enough"*. The defendant had been allowed significant opportunities to set out her case and had not done so. To give more time if the pleading was still inadequate simply recognised the unrealistic nature of the claim in the first place.

(xii) Finally, if the defendant was allowed to invite the Royal Court to review whether the Court of Appeal might reach a different conclusion, this would open the flood gates to relitigating claims where a party did not like the outcome.

Decision

58 In reaching a decision it is appropriate to commence by reviewing what Bailiff Le Cocq said in his judgment dated 7 th September 2020 about the importance of oral submissions. At paragraph 56 where he stated:-

> ***"It has an air of unreality for the Plaintiffs to suggest that the absence of Advocate Hoy could have no possible detriment to the Defendant."***

59 Those observations are not surprising because oral advocacy is at the heart of the adversarial system that operates in this jurisdiction and the defendant did not have the benefit of that advocacy before the oral hearing that took place before the Court of Appeal leading to the Court of Appeal's judgment dated 25 th July 2018 *BNP Paribas Ors v Crociani Ors* [2018] JCA 136A.

60 However, the Court of Appeal sought to address the lack of oral advocacy by allowing the defendant to have access to the live transcript that operated while the Court of Appeal was receiving oral submissions from other parties. It further allowed the defendant an opportunity to file written contentions after oral submissions had concluded to respond to any points raised during the oral hearing. The Court of Appeal took this approach because while it recognised that the lack of oral advocacy was a ***"disadvantage"*** for the defendant, to adjourn the Court of Appeal hearing would have been a ***"serious disadvantage"*** for the appellants. The Court of Appeal therefore concluded that this serious disadvantage outweighed any disadvantage the defendant would suffer which the Court of Appeal sought to militate against by allowing the defendant to file written submissions after the oral hearing. It is also right to observe that the Court of Appeal noted that the defendant had not

appeared at trial which is why it felt able to make the order it did.

61 I have set out the observations of the Court of Appeal because I consider that the lost opportunity for the defendant through Advocate Hoy to address the Court of Appeal orally must be set within the context of the approach taken by the Court of Appeal. The defendant's lost opportunity claim must therefore identify what is it that the defendant alleges she lost given she had the ability to file written submissions which she did, and which were, as noted above, lengthy. It is not enough just to say that she lost the benefit of oral submissions without addressing what she was permitted to do. The draft amended counterclaim and the answers to the requests for information do not address the context of what the defendant did file and why she has suffered a lost opportunity given her written contentions of 6 th March 2018.

62 In relation to the written contentions filed on 6 th March, the defendant responded to what was discussed orally before the Court of Appeal and did so in significant detail as the Court of Appeal itself observed. In filing those written contentions, the defendant chose not to apply or to seek to apply to file any oral evidence. The defendant is also not seeking now to contend that other oral evidence should have been filed. Rather her position is simply that making oral submissions of the points set out in paragraph 27 of the draft amended answer and counterclaim which are summarised as the grounds of dispute would have made a difference. It is not clear to me how oral submissions would have made a difference, when the defendant did not suggest in March 2018 and does not now suggest that additional oral evidence should have been put to the Court of Appeal or at least an attempt made to do so.

63 The defendant also does not explain why the grounds of dispute she now relies upon were not put in the written contentions. I consider she should have done to set out why she has an arguable claim for a lost opportunity.

64 The defendant in addition does not state why the Court of Appeal was not entitled to have made the conclusions it did based on the defendant having had an opportunity to file written submissions.

65 These omissions are significant because, as Advocate Hoy put it, the defendant's counterclaim, without an analysis of the impact of the written contentions, simply looks like the defendant setting out why it disputes the findings of the Court of Appeal rather than explaining what opportunity was lost due to the absence of Advocate Hoy to make oral submissions in the context of written submissions having been filed.

66 I should also make it clear that while I agree with Advocate Mistry that the defendant does not have to identify what different outcomes might have been achieved through oral representation because this is a matter for the trial court to assess, and so the defendant is not in breach of paragraph 1(b) of the appendix to the Act of Court of 30 th September 2020, this submission does not answer Advocate Hoy's other criticisms of the draft answer and

counterclaim.

67 The defendant's lost opportunity claim also has to be considered in the light of the Privy Council refusing the defendant leave to appeal (while allowing her children leave to appeal on the question of whether the remoteness of a beneficiary's interest under a trust affects whether or not a remedy is available). Again the draft amended counterclaim and the answers to the requests for information do not address the effect of the refusal of leave to appeal by the Privy Council and why she has suffered a lost opportunity notwithstanding this refusal. The complaints in the notice of appeal to the Privy Council, although worded slightly differently, in my judgment cover the grounds of dispute pleaded at paragraph 27 of the draft amended answer and counterclaim.

68 In other words, what the defendant is now arguing is a lost opportunity are matters which she did not put in her written contentions to the Court of Appeal, which were put before the Privy Council, but which were, other than the remoteness question, unsuccessful. Her draft pleading and answers to the request for information do not address either the failure to put matters in her written contentions the defendant now relies upon or the effect of the refusal of leave.

69 Nor does she address the effect of her children's appeal to the Privy Council. Yet this is also significant to her claim. If the appeal before the Privy Council is successful and what was referred to in the Court of Appeal judgment as *"Camilla's Trust"* is restored then subject to the reimposition of Order 18 of the Royal Court's Act of Court of 11 th September, 2017, Camilla's Trust will either have been fully reconstituted or the defendant will be able to apply to the Royal Court in future to benefit from that trust and to ask the Royal Court to lift the effect of paragraph 18. If the appeal to the Privy Council of the defendant's children is unsuccessful, then the defendant will not have lost any opportunity because the order of the Court of Appeal will have been upheld on the remoteness question.

70 Furthermore the defendant's approach requires an analysis of how a Royal Court trial would take place. The defendant appears to be inviting the Royal Court to go through the oral submissions made to the Court of Appeal with the defendant setting out at trial what should have been submitted.

71 The first problem with this approach is that, if the defendant at a trial can set out by reference to the transcript what should have advanced orally, this should have been inserted in her pleading and this has not occurred.

72 Secondly, there is an air of unreality about a trial taking place on this basis. What the defendant is inviting the Royal Court to do is to hold a trial to consider whether the Court of Appeal might have reached a different result although the Court of Appeal had the benefit of the defendant's written contentions and subsequently the Privy Council refused leave to appeal considering the same grounds of dispute the defendant claims should have been

put to the Court of Appeal.

73 The defendant has also not said what Advocate Hoy failed to do in light of the written contentions filed. Yet the defendant by paragraph 1a of the appendix to the Act of Court of 30 th September 2020 was required to set out what the defendant failed to do and has not done so. This order has therefore been breached and in a material way.

74 Advocate Mistry did contend that if I felt that more was required from his client, that his client should be allowed a further opportunity to provide whatever the court considered was necessary. However, the defendant was first ordered on 28 th October 2019 (at paragraph 5 of the Act of Court) to set out “all facts and matters relied upon as to why the lack of representation was detrimental to the defendant's appeal”. The order made on 30 th September 2020 was also clear and in November 2020 became subject to an unless order that the defendant's answer and counterclaim would be struck out automatically without further order if the defendant failed to provide answers to the matters set out in the appendix to the Act of Court.

75 My role, which is underlined by the overriding objective in Royal Court Rule1/6, is to engage in active case management. The draft counterclaim is not about a case where evidence was not adduced at an original trial. This is rather a claim where a trial has taken place but where the defendant chose not take part and which is based on an unsuccessful appeal following extensive written submissions. The defendant in this action has been given every opportunity to set out what it is that the plaintiffs failed to do in the context of both the steps that were taken by the defendant in filing written contentions and the effect of leave to appeal being refused but has not done so.

76 The suggestion that the defendant has been hampered due to a lack of discovery does not excuse the defendant's failure to plead her case. Discovery follows from pleadings which determine what are relevant documents. The defendant in any event had access to her own papers; the fact that they have not been provided to Advocate Mistry and that enquiries have not been made of the English barrister who in the main drafted the written contentions to analyse what approach the defendant decided to take when filing those contentions also does not help the defendant.

77 Insofar as Advocate Mistry complained that he had not had access to the plaintiffs' files, I refused access last September and the defendant has not appealed that decision. Lack of access is not therefore a justification either he or his client can rely on at this stage. This submission also ignores what was available to the defendant namely the transcripts, her own written submissions dated 6 th March 2018 and material in her own possession or that of her English barrister.

78 An unless order is a serious obligation intended to make it clear to a party that if they do not comply with court orders that a sanction may follow. In this case the orders I have referred

to were designed to give the defendant a final opportunity to set out her counterclaim to set out what it was that the plaintiffs failed to do in the context of both the steps that were taken by the defendant in filing written contentions and the effect of leave to appeal being refused. Without the clarity that I ordered to be provided, the plaintiffs still do not understand the case they have to meet. Neither do I. The consequence of any material lack of clarity was clearly known and understood by the defendant through her legal team. It is accordingly too late to allow the defendant a further opportunity to explain what has been required for many months. The defendant's approach is therefore not one that should be excused and the unless order should take effect.

79 I am also of the view that the approach the defendant wishes to take to invite the Royal Court to go through the transcript to assess whether the Court of Appeal might have reached a different conclusion without identifying the different submissions that could have been put by reference to particular passages in the transcript coupled with the refusal of leave by the Privy Council has an air of unreality about it (See *Three Rivers DC v Bank of England No 3* [2003] UK HL 16 at paragraph 158). A trial conducted on the basis of the Royal Court going through the transcript and the defendant at that stage identifying where oral submissions should have been made and what those would have been, when set against written contentions filed and the refusal of leave by the Privy Council to allow the Royal Court to evaluate whether the Court of Appeal might have decided matters differently appears to me to be wholly unrealistic and therefore improbable. It very much has an absence of reality. Accordingly, I am also satisfied that the plaintiffs are entitled to reverse summary judgment in respect of the counterclaim.

80 In relation to summary judgment, insofar as Advocate Mistry contended there was no affidavit filed and therefore the application was procedurally defective, I do not agree. What Rule 7 requires is an affidavit filed in support of evidence. However, the material before me only comprised transcripts, orders of the court and judgments of the Royal Court or the Court of Appeal. No other material was produced as evidence for me to consider in producing this judgment. I do not therefore consider that there was any evidence to be considered which required an affidavit. This objection on the part of Advocate Mistry for the defendant therefore fails.

81 I am also satisfied that a trial in the way the defendant wishes it to proceed is both vexatious and an abuse of process and should be struck out on this ground as well. On the facts of this case there is also no reasonable cause of action. While the lack of oral advocacy is arguably a breach of duty, to plead a reasonable cause of action also requires a party to show that any breach was causative of loss. The lack of any identification by the defendant of those parts of the oral submissions where oral advocacy would have made a difference and what should have been advanced in the context of an appeal and to require a trial to do so means that a reasonable cause of action in respect of causation has not been pleaded. The counterclaim is therefore struck out on this ground also.

82 Finally, in respect of the submissions made by Advocate Hoy in respect of the defendant's dishonesty, relying on *Perry v Raleys*, while there is force to his submissions about the

inconsistent approaches of the defendant in seeking to appeal to the Privy Council for her children on the one hand (through a guardian *ad litem*) and the findings of the Contempt Judgment and the Sanction Judgment on the other, these matters in themselves are not sufficient to persuade me to strike out the defendant's counterclaim or to grant summary judgment. Rather the counterclaim is struck out for the reasons already given. Such allegations of dishonesty, although there is a basis to make them for the reasons set out by Advocate Hoy, it is not appropriate in deciding whether or not a case should be struck out or summary judgment granted to make findings of dishonesty based on submissions. My decision has therefore been reached on the basis of the defendant's failure to plead its case and not on the allegations of dishonesty put forward by Advocate Hoy. Where his allegations would have been relevant is that, if I had been satisfied that the defendant had complied with the unless order and that a trial was necessary, I would have, as a condition of allowing the defendant permission to file her amended answer and counterclaim, required a payment into court of the plaintiff's fees because of the *prima facie* case of dishonesty raised by Advocate Hoy.

83 In conclusion, for all the reasons set out in this judgement the defendant's counterclaim is struck out because she has breached the unless order, the draft pleading pleaded does not show a reasonable cause of action in causation or loss, is vexatious and an abuse of process. The threshold to grant summary judgement is also met because to require a trial of the counterclaim on the basis of the case as pleaded asking the Royal Court to review a decision of the Court of Appeal to see if a different outcome might have been achieved is based on an absence of reality. Leave to amend the counterclaim is also refused.

84 The one qualification to the above is that while I have found that a beach of the unless order dated 11 th November 2020 had occurred, I consider I have to review whether the answer of the defendant should be struck out as well as the counterclaim. I was not addressed on this point during the hearing and therefore invited further written submissions from both parties on this issue. The decision I have reached is that because the arguments before me were about the counterclaim, although the unless order referred to the answer being struck out, there remains a defence raised which has been pleaded in addition to the defence of set off by way of counterclaim. This defence is that the plaintiffs agreed some form of cap on fees or a conditional fee arrangement (see paragraph 13 of the answer and the further information filed by the defendant on 29 th November 2019 where at paragraph 7 it was pleaded that the defendant relied upon an email from Advocate Hoy dated 22 nd September 2017 agreeing to a fee cap of £200,000). It is also right to observe however that the version of the answer filed on 16 th August 2019 does not refer to this fee cap. Despite this inconsistency, the decision I have reached however is that the arguments before me were about the counterclaim and, although the unless order referred to also striking out the answer, this would not be a proportionate response to the arguments before me because the breaches complained of (correctly in my view) by the plaintiffs related to the counterclaim alone. It is therefore only the counterclaim that should be struck out pursuant to the unless order.

85 I am confirmed in this conclusion because having consider the submissions filed on behalf of Advocate Hoy, I am not in a position to reach a view at this stage about whether a fee cap was reached. The email of 22 nd September 2017 referred to is from Advocate Hoy to a Patricia Kemayou and contains the following:-

> *"I discussed I would cut costs on these two matters at £200,000."*

86 What has not been made clear is what those discussions were and whether the email from Advocate Hoy was recording an agreement reached between his firm and the defendant or whether it was simply a proposal. I have also not been addressed on the adequacy of the discovery provided by the defendant on this issue. At present therefore there is a defence that is pleaded albeit clarity is required on that defence. Nor was I convinced that I had the full story before me from the plaintiff either.

87 When this judgment is therefore handed down to deal with the question of costs, I also wish to be addressed on what directions might be necessary to deal with this aspect of the dispute between the parties.