Philip Cowan Sinel v Moira Hennessy

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Jurats Ramsden, Austin-Vautier
Judgment Date:	14 April 2021
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Text

[2021] JRC 110

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., Commissioner, and Jurats Ramsden and Austin-Vautier

Between
Philip Cowan Sinel
Representor
and
Moira Hennessy
Respondent

Advocate J. S. Dickinson **for the Representor**.

Authorities

Sinel v Hennessy [2018] JCA 095.

James v Law Society and others [2017] JRC 047B.

Sinels v Hennessy & Others [2018] JRC 007.

Sinel v Hennessy [2018] JCA 095.

Royal Court Rules 2004 as amended.

Sinel v Hennessy & Others [2019] JRC 105.

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

Taylor v Chief Officer of the States [2004] JLR 494.

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

Caversham Trustees Limited v Patel and others [2007] JRC 215

Law on Contempt by Borrie & Lowe, 4th edition 2010

Contempt by Arlidge, Eady & Smith, 5th edition 2017

R v Derbyshire Magistrates Court ex p. B [1996] AC 487.

AMIEU v Mudginberri Station Pty Ltd [1986] 161 CLR 98.

Dicey, Morris & Collins on The Conflict of Laws, 15th edition

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Bourns inc. v Raychem Corp [1999] 2 Costs L.R. 72.

B and Others v Auckland District Law Society and Another [2003] 2 AC 736.

BNP Paribas v Camilla de Bourbon des Deux Siciles [2019] JRC 199

Contempt of Default Judgment and Costs Orders

THE COMMISSIONER:

1 The Representor applies by way of Representation for the Respondent to be found in contempt of orders made against her and for the imposition of substantial penalties. The hearing took place on Friday 22 nd January 2021 when the Court reserved its judgment.

2 The Representor acted for the late Kilian Hennessy, who died domiciled in Switzerland on 1 st October 2010, and acts for his son Gilles Hennessy who resides in Luxembourg. Before his death, Kilian Hennessy had sought advice from the Representor with respect to proceedings that it was anticipated would be brought after his death by the Respondent, who is his daughter.

3 In 1998, Kilian Hennessy had deposited FF371,500,000 (the equivalent of approximately €56 million) with Royal Bank of Scotland International Limited in Jersey. The account was closed on 8 th June 2010, shortly before his death and the last known address for the account was "Mr K Hennessy, c/o Philip Sinel & Co. PO Box 595, 11 Esplanade, St Helier, Jersey, JE2 3QA".

4 The Swiss executors of Kilian Hennessy's estate (the "Executors") wished to inquire into what had happened to these monies and sought disclosure from the Representor of all documents within his possession or control relating to Kilian Hennessy and any trusts, foundations or other structures in which he may have been directly or indirectly interested or involved during his lifetime. Disclosure was refused. On 26 th May 2016, the Executors brought proceedings by way of Representation in Jersey against the Representor for information and documents held by him when acting for Kilian Hennessy. The final hearing of those proceedings was listed to take place during the period Monday 22 nd to Wednesday 24 March 2021, but we are given to understand were settled before that hearing on confidential terms.

5 In May 2015, the Respondent received a package sent by an anonymous person under cover of a Jersey postcard with the text "Again, I think you deserve the truth". The package contained documents, copied, it would seem, from the files of the Representor (the "Improperly Obtained Documents") which, as the Court of Appeal said in its judgment of 24 th May 2018 (*Sinel v Hennessy* [2018] JCA 095) at paragraph 4, on their face plainly attracted legal professional privilege by virtue of the lawyer/client relationship between the Representor and Gilles Hennessy.

6 The Respondent passed the Improperly Obtained Documents on to her Jersey lawyer, Advocate Damian James in June 2015. Eighteen months later, on 23 rd December 2016, Advocate James was instructed by her to send them to the Executors' Jersey lawyer, Advocate Adam Clarke, who, concerned at possible breaches of the Code of Conduct of the Law Society of Jersey, returned them.

7 Advocate James then sought guidance from the Chief Executive Officer of the Law Society of Jersey who, on 25 th January 2017, said this:

> *"In considering this matter in detail, subject to the caveats below, I make the following observations:*

The nature and content of the documents received by our client means that they were not intended for, or meant to be seen by, your client.

The nature of the receipt of the documents, as an anonymous package, indicates that disclosure is not inadvertent, but a deliberate act on the part of another person.

The accompanying note, disguised handwriting and nature of the contents gives rise to an indication of being improperly obtained by or through the sender (who is not the client). There is no suggestion *that your client has had any involvement in obtaining the documentation received*.

The circumstances under which the documentation came into your client's possession (i.e. anonymously) was arguably improper on any construction." (his underlining)

8 At the suggestion of the Law Society, Advocate James issued a representation seeking guidance from the Court, to which the Representor was convened and first became aware of the Improperly Obtained Documents having been received by the Respondent. In those proceedings, it became clear that the Improperly Obtained Documents had been sent by the Respondent directly to the Executors, who had in turn filed them with the Swiss court with jurisdiction over the estate of Kilian Hennessy.

9 On 22 nd March 2017, the Royal Court said this in its judgment (*James v Law Society and others* [2017] JRC 047B):

"48. …it is on the face of it difficult to identify a valid reason why [the Respondent] should have been sent documents which do not belong to her; on the face of it they must have been obtained improperly, and it would be unsurprising if a court were to determine that in those circumstances they ought not to be used .

… ..

52. In our judgment, when a Jersey advocate or solicitor — in either case an officer of this Court — receives documentation from any source other than his or her client which, on its face, he or she ought not to have because either it has been received by mistake or clearly belongs to someone else or is privileged, it is his or her duty not to read it, not to deploy it in any litigation on behalf of the client and to return it to the person entitled to it … In the present case, there is no adequate basis upon which it could be said, on the evidence currently available — and that position may theoretically change — that [the Respondent] is entitled to assert ownership of the Anonymous Package. That being so, Advocate James should not transmit the documents to Advocate Clarke even though he has been instructed to do so. To permit him to do so would circumvent the obligations which on the facts of this case the Court, having

regard to the apparent ownership of the documents, privilege, the Code of Conduct and the guidance, imposes on him."

10 In the meantime, on 1 st March 2017, the Representor had issued proceedings by way of Order of Justice against the Respondent and a number of other defendants. The relief claimed in the Order of Justice was injunctive only, to preserve confidentiality. The Order of Justice sought to restrain the giving of publicity to the Improperly Obtained Documents and their contents (that is, the information set out in the Improperly Obtained Documents), the delivery up or destruction of the Improperly Obtained Documents and any copies and the giving of assistance to the Representor to enable him to see that confidentiality continued to be maintained.

11 The progress of the Order of Justice as it directly concerns the Respondent is set out in the Act of Court of 30 th August 2019 by which the Court granted the Representor judgment against her in default, and is as follows:

(i) The Respondent was served with proceedings outside the jurisdiction at her home address in Belgium in accordance with an order of the Court dated 15 th March 2017.

(ii) On 18 th August 2017, the Respondent placed the proceedings on the pending list.

(iii) On 6 th September 2017, the Respondent issued an application to challenge the jurisdiction of the Court in relation to the proceedings (the "Jurisdiction Challenge") and thereby sought to set aside the order for service upon her.

(iv) On 12 th January 2018, the Court granted the Respondent's Jurisdiction Challenge and set aside the order for service, and this for the reasons set out in its judgment *Sinels v Hennessy & Others* [2018] JRC 007.

(v) On 24 th May 2018, the Court of Appeal overturned the Royal Court's decision and confirmed the Royal Court's jurisdiction in relation to the proceedings for the reasons set out in its judgment of the 24 th May 2018 (*Sinel v Hennessy* [2018] JCA 095), ordering the Respondent to pay the Representor's costs of the Jurisdiction Challenge and the appeal ("the Jurisdiction Challenge Costs"), such costs to be taxed on the standard basis.

(vi) On 22 nd August 2018, the Master of the Royal Court granted the Representor leave to amend the Order of Justice and ordered the Respondent to pay the Representor's costs of the application to amend, such costs to be summarily assessed on the standard basis ("the Amendment Costs").

(vii) On 21 st September 2018, the Respondent served her Answer to the amended Order of Justice.

(viii) On 25 th September 2018, the Amendment Costs were summarily assessed by

the Master of the Royal Court in the amount of £5,507.09, for which the Representor formally demanded payment.

(ix) On 5 th November 2018, the Royal Court gave directions for the preparation of the trial of the proceedings.

(x) On 1 st March 2019, the Jurisdiction Challenge Costs were taxed by an assistant Judicial Greffier of the Royal Court as being in the amount of £100,679.67. The Representor formally demanded payment of the Jurisdiction Challenge Costs from the Respondent on 5 th March 2019.

(xi) On 18 th March 2019, the Respondent issued an appeal from the Royal Court's taxation of the Jurisdiction Challenge Costs but she failed to take the necessary steps to arrange for a date to be fixed for that appeal to be heard, and it was deemed to have been abandoned by the Respondent, pursuant to Rule 20/2(4) of the Royal Court Rules 2004 as amended.

(xii) The Respondent did not comply with directions relating to the discharge by her of her discovery obligations, and the Representor was required to issue an application for further Court orders which were made on 17 th April 2019. The Respondent was ordered to pay the Representor's costs of that application, such costs to be summarily assessed on the indemnity basis.

(xiii) On 26 th April 2019, the Respondent provided her affidavit of discovery, a list of documents, her advocate's endorsement in relation thereto and copies of the documents in her list of documents.

(xiv) A pre-trial review hearing took place before Commissioner Clyde-Smith on 1 st May 2019 when Advocate Morley-Kirk made submissions to the Court which were to the effect that the Respondent did not want to come to Jersey to give evidence at the trial. At the pre-trial review hearing, the Representor applied for an order that the trial of the proceedings (then listed to commence on Monday 9 th September 2019) be heard in private in order to protect the confidentiality and privilege attaching to the Improperly Obtained Documents which application was granted by way of a judgment dated 10 th June 2019 (*Sinel v Hennessy & Others* [2019] JRC 105).

(xv) On 1 st May 2019, the Representor requested inspection of the original package of the Improperly Obtained Documents (together with the accompanying envelope and postcard) as received by the Respondent. The Respondent failed to provide those documents for inspection.

(xvi) The Respondent did not pay the Amendment Costs or the Jurisdiction Challenge Costs requiring further orders and on 15 th May 2019, the Master of the Royal Court ordered that:

> *"1. the [Respondent] shall be debarred from participating in the proceedings and her answer shall be struck out unless the [Respondent]*

by 5.00 p.m. Friday, 24th May, 2019 settles in full her liabilities to the [Representor] pursuant to costs orders dated 25th September, 2018 and 1st March, 2019; which liabilities amount to £106,851.93 including accrued interest for the period ending 15th May, 2019, with interest accruing at a daily rate of £8 until payment; and

2. the costs of this summons shall be paid by the [Respondent] on the indemnity basis, such costs to be summarily assessed if not agreed."

(the "Debarring Order").

(xvii) On 17 th May 2019, the Respondent served her witness evidence for trial and on 24 th May 2019 the Respondent served an expert's report.

(xviii) On 24 th May 2019, the Respondent's Answer was struck out because she had not settled her liabilities to the Representor, and thus she has been debarred from participating in the proceedings since 24 th May 2019. The Respondent is out of time to appeal the Debarring Order.

(xix) Further costs orders were made against the Respondent on 24 th September 2019 (£9,258.70) and on 30 th October 2019 (£8,590.90). We will refer to all of these costs orders as the "Costs Orders". In all, the Respondent owes over £124,000 to the Representor under the Costs Orders.

Default Judgment

12 On 30 th August 2019, the Representor applied for judgment in default against the Respondent pursuant to Rule 6/6/6(b) of the Royal Court Rules 2004, which provides that a plaintiff, after giving notice to the Greffier, may ask the Royal Court to pronounce judgment against a defendant if an answer has been struck out for any reason without the defendant having been given leave to file another answer.

13 Advocate Morley-Kirk, the Respondent's legal representative in the Island, had notice of the application and wrote to the Court shortly before the hearing in these terms:

"I refer to the Royal Court Rule 6/6(6) application which is due to be heard by the Samedi Court this afternoon and is listed as item 3 on the Table.

However, please note that this firm no longer acts for Madame Hennessy and I have not been able to contact Madame Hennessy to inform her of this afternoon's hearing.

As I understand it, she no longer has a lawyer in Jersey."

She then gave the Respondent's address in Belgium.

14 The Court granted judgment in favour of the Representor in default (the "Default Judgment") making orders against her in these terms:

> *"2. That no reference to any Improperly Obtained Documents or their contents shall be made public;*
>
> *3. that [the Respondent] be restrained from distributing or communicating the existence or content of any Improperly Obtained Documents to any other person;*
>
> *4. that [the Respondent] shall deliver up to [the Representor] or (at his option) destroy:*
>
> *a. the originals of any Improperly Obtained Documents as sent by post to [the Respondent];*
>
> *b. any and all copies of any Improperly Obtained Documents;*
>
> *c. any and all other mediums into which the information contained within any Improperly Obtained Documents has been conveyed;*
>
> *d. any and all materials which were made with the use of any Improperly Obtained Documents and/or any information contained therein;*
>
> *insofar as within her possession, custody or control;*
>
> *5. that [the Respondent] shall cause all persons within her control to take the same steps as apply to her under paragraph (c) above;*
>
> *6. that [the Respondent] shall identify by means of sworn affidavit (i) the persons or entities from whom she obtained any Improperly Obtained Documents, (ii) the circumstances in which any such Improperly Obtained Documents were obtained and (iii) the persons or entities, if any, to which she has disclosed the existence or content of any Improperly Obtained Documents.*
>
> *7. that [the Respondent] shall identify by means of sworn affidavit:*
>
> *a. any further confidential or privileged, or potentially confidential or privileged, information or documents which have come into her possession by whatever means and which pertain to [the Representor], Gilles Hennessy or Killian [sic] Hennessy;*
>
> *b. the circumstances in which such information or documents came into her possession;*
>
> *c. any steps taken with such information or documents including any dissemination of the same.*
>
> *8. that [the Respondent] shall provide a sworn affidavit within four weeks of this order confirming that she has complied fully with the foregoing obligations;*

9. that no use may be made of any Improperly Obtained Documents or of the information contained therein for any purpose, including but not limited to the Executors' Representation; …"

No written judgment was issued.

15 The Act of Court containing the Default Judgment had an extensive preamble produced by the Representor setting out the history of the proceedings and the Respondent's involvement in them. The reason for this was explained in the supporting affidavit of Advocate Robin Leeuwenburg of 28 th August 2019 at paragraphs 22 – 24:

"22. I have exhibited hereto a draft of the order which [the Representor] is now seeking against [the Respondent], pursuant to Rule 6/6/6(b) of the Royal Court Rules 2004, as amended (the "Draft Order").

23. I note that the Draft Order contains recitals (which I confirm are accurate) and which provide an overview of [the Respondent's] participation in the Proceedings. The recitals have been included on the basis of legal advice that [the Representor] has received (and in relation to which there is no waiver of legal privilege) for the purposes of enforcing the order abroad. The substantive orders contained at paragraphs 2 to 9 of the Draft Order mirror paragraphs a) to h) of the relief sought in the Amended Order of Justice subject to the same two additions which the Court made when giving default judgment against the Seventh Defendant in these proceedings (see Act of Court …namely (a) paragraph 1 of the Draft Order defines the Improperly Obtained Documents and (b) a four week timeframe having been included in paragraph 8 of the Draft Order.

24. [The Respondent] resides in Belgium and, given that she has misused the Improperly Obtained Documents in other jurisdictions and her past record in these proceedings, it seems to me highly unlikely that she will voluntarily comply with such orders and that it is inevitable that [the Representor] will have to take enforcement action against her abroad. In this context I observe that it is important that the recitals reflect the fact that [the Respondent] fully participated in the proceedings for 21 months (including, for example, by challenging jurisdiction, opposing [the Respondent's] application to amend the Order of Justice, taking steps to give discovery, issuing and abandoning an appeal from a taxation and serving witness evidence for trial) and that, due to her repeated failures to comply with Court orders, her Answer was struck out and she was debarred from participating in the proceedings."

16 It was recognised therefore that the Respondent, having abandoned the proceedings in Jersey and withdrawn her instructions from Advocate Morley-Kirk, was unlikely voluntarily to comply with any order made by this Court. The purpose of the Representor seeking judgment in default was to enforce the same against her in Belgium and Switzerland, for which he had received legal advice from Belgian and Swiss lawyers.

17 The proceedings against the other defendants to the Representor's Order of Justice can be summarised as follows:

(i) Advocate James and Advocate Clarke entered into consent orders agreeing to be bound by the Court's ultimate determination of the proceedings.

(ii) Midway through the trial, the Executors entered into a consent order in which, in essence, they agreed to destroy the copies of the Improperly Obtained Documents in their possession and not to make use of them in any jurisdiction or for any purpose.

(iii) The Respondent's French lawyer Amaury d'Everlange failed to appear before the Court on the return date, and the Representor was granted injunctive relief against him by default on 30 th June 2017. He does not appear to have taken any steps to comply with the terms of the Court orders and has now retired from practice.

(iv) The Law Society of Jersey has not played an active role in the proceedings.

Developments in Belgium and Switzerland

18 On the 20 th July 2017 the Respondent filed a criminal complaint against Gilles Hennessy with the Public Prosecutor's Office in Switzerland alleging fraud in relation to the missing monies. Letters Rogatory were issued by the Public Prosecutor's Office to the authorities in Jersey on 28 th September 2017 and 25 th February 2019 the responses to which revealed, *inter alia*, that Royal Bank of Canada Trust Company (International) Limited ("RBC") was the trustee of a trust called the 26 th March Trust.

19 After the Improperly Obtained Documents had been filed with the Swiss court, Gilles Hennessy and his children challenged the use of these documents on the basis they were confidential, subject to privilege and obtained unlawfully, arguments that were rejected by the Swiss court on 22 nd May 2018 for a number of reasons, including:

(i) The Improperly Obtained Documents were not confidential or privileged as a matter of Swiss law because they did not concern work done by the Representor in his capacity as a lawyer, but rather concerned his acting in a capacity as a wealth manager.

(ii) They concern the assets of Kilian Hennessy prior to his death and thus his estate.

(iii) As a matter of public interest, compliance with the mandatory provisions of Swiss inheritance law and discovery of the true estate of Kilian Hennessy outweighed any claim that Gilles Hennessy might otherwise have to confidentiality or privilege in respect of the documents or the contents of the documents.

20 On the 12 th September 2019 Gilles Hennessey filed a rejoinder in the Swiss proceedings acknowledging the existence of the 26 th March Trust, explaining that he and his children were the beneficiaries (with the Respondent being excluded), stating how the missing monies were settled into it by the late Kilian Hennessey and the wishes he had expressed namely that the trust fund was to benefit Gilles Hennessey and his children.

21 On the 23 rd December 2019 the Respondent issued proceedings in Switzerland against Gilles Hennessy, his children, RBC and others concerning the estate of Kilian Hennessy and seeking what is described as a *"Conciliation"* in respect of all of the assets of the estate. Specifically, in relation to the 26 th March Trust she alleges that the missing monies were transferred into the trust with the intention of evading the rules concerning hereditary reserve portions under Swiss law. She asks for the entire donation to be reduced and Gilles Hennessy, his children and RBC jointly and severally to pay to her the proportion due to her under Swiss law. The Improperly Obtained Documents are set out in the lengthy pleading is some detail. There are therefore two sets of civil proceedings before the Swiss courts in which the Improperly Obtained Documents are being used.

22 The Representor sought to enforce some of the Costs Orders before the French speaking Court of First Instance of Brussels, Civil Division, obtaining three favourable *exequatur* decisions on 22 nd March 2019 (before the Default Judgment), 6 th September 2019 and 20 th December 2019 which authorised the Representor to enforce these Costs Orders against the Respondent in Belgium.

23 These decisions were challenged by the Respondent, and on 13 th November 2020, she was successful in having them all revoked. The judgment of the Belgian Court is succinct, and we set it out (in translation):

> ***"Whereas under the terms of Article 25 § 1 of the Code of Private International Law, 'A foreign court decision is neither recognized nor declared enforceable if… the jurisdiction of the foreign court was based solely on the presence of the defendant or of property without any direct relation to the dispute in the State where the foreign court is based';***
>
> ***Whereas it has been noted that the dispute between [the Representor] and [the Respondent] concerns a succession opened in Switzerland, subject to Swiss law and handled by the Swiss courts; that [the Representor] is a foreigner there, being neither heir nor legatee; that the only link with the island of Jersey is the trust that the deceased would have set up there with the assistance of [the Representor], who himself only has a link with the Swiss case insofar as the succession of one of his former clients is at stake;***
>
> ***That, moreover, it is known that [the Respondent] is domiciled in Brussels; that she has no connection with [the Representor], of whom she is not a client, nor does she have any connection with the trust – all the more so as***

she maintains that the trust was created to remove from her eyes and from her assets a substantial part of her father's wealth; that, moreover, she did not make use of the documents before the Jersey court, since it is the Swiss court which is in charge of the division;

That it should also be borne in mind that [the Respondent] had challenged the jurisdiction of the Jersey courts, so that one cannot follow her opponent when he argues that she would have then, implicitly, admitted that jurisdiction;

Whereas there is therefore no connection between [the Respondent] and the island of Jersey; whereas, therefore, pursuant to Article 25 §1… of the Code of private international law, and without the need to examine the other documents, it must be said that the application is well-founded and it must be decided that the orders a quo are revoked;…"

24 The finding that the Respondent had not accepted the jurisdiction of this Court, bearing in mind her extensive involvement in the proceedings following the unsuccessful Jurisdictional Challenge, seems surprising and we are informed that it is the intention of the Representor to appeal the decision.

25 Counter claims by the Respondent in the Belgian proceedings for the Representor to produce documents relating to his instruction by Kilian Hennessy and the imposition of a penalty payment in the event that he did not comply were also dismissed by the Belgian court on the basis that they should be dealt with either in Switzerland or Jersey.

26 In her " *Citation en tierce opposition*" filed by the Respondent in the Belgian proceedings, she states that the Improperly Obtained Documents have now lost their significance. She says they are no longer confidential, and that Gilles Hennessy having renounced their confidentiality, it was difficult for her to understand how the Representor could now rely upon it.

27 In his affidavit of 16 th July 2020 in support of his Representation (the "Representor's Affidavit"), the Representor explains that he has not yet commenced proceedings to enforce the Default Judgment in Belgium with a view to obtaining the return or destruction of the Improperly Obtained Documents because of advice he has received from his lawyers in Brussels which he summarised in paragraphs 94–96 (in which he refers to the Default Judgment as "the IOD Judgment"):

"94. As at the date of this affidavit, [the Respondent] has not complied with, and is therefore in breach of the terms of the IOD Judgment. Indeed she is deliberately flouting its terms as shown by the facts set out above.

95. I have taken advice from Lydian, my lawyers in Brussels, about the steps that are

required in order to apply to the Belgian Court to seek further orders to obtain compliance with the IOD Judgment by [the Respondent]. Without waiving privilege it is my understanding that as a matter of Belgian law, and in overview, the [Belgian Court] will make an order requiring [the Respondent] to comply with the IOD Judgment or be sanctioned by that Court for contempt] only once the following conditions are met:

95.1 The Royal Court of Jersey must determine that [the Respondent] was served with the IOD Judgment;

95.2 The Royal Court of Jersey must determine that [the Respondent] has not complied with the orders contained in the IOD Judgment;

95.3 The Royal Court of Jersey must determine that [the Respondent] is thereby in contempt of its order; and

95.4 the Royal Court of Jersey must indicate that it wishes its orders to be enforced against [the Respondent] outside of its jurisdiction.

95.5 A series of sanctions are imposed. The Belgian Court can apply foreign sanctions but can take no other steps to compel compliance with orders.

96 It is therefore necessary for this Court to find [the Respondent] in contempt of the IOD Judgment in order for any action to be taken to secure her compliance via the Belgian Court."

28 Shortly before the hearing, the Court asked for some elaboration of this advice, in particular in respect to what is said at paragraph 95.5 of the Representor's Affidavit, which appears to state that whilst the Belgian courts will enforce " ***a series of sanctions"***, they will not enforce compliance with any injunctive orders of this Court. The Representor declined to waive privilege in respect of the advice he had received so as to assist the Court in better understanding the position and produced a letter from Lydian on 21 st January 2021 simply confirming that paragraphs 95 and 96 of his affidavit reflect the tenor of the advice given to him.

Service

29 The Default Judgment was served by the Representor upon the Respondent by way of service upon Viberts by the Viscount, initially without a French translation, on 28 th October, 2019, and subsequently with a French translation on 3 rd December, 2019. It was subsequently served, together with a French translation thereof, by way of service by a *huissier de justice* (a Belgian official authorised to serve proceedings and other documents in Belgium) (a ***"huissier"***) upon the Respondent at her home in Belgium on 17 th March 2020.

30 The Representation, a summons addressed to the Respondent, the Representor's Affidavit and exhibits thereto, and French translations of all such documents, were served by the Representor upon the Respondent by way of service (a) by a *huissier* upon the Respondent at her home in Belgium on 8 th September 2020 and (b) by the Viscount upon Messrs Viberts on 10 th September 2020.

31 The letter giving notice of the date fix, together with a French translation thereof, were served by the Representor upon the Respondent (a) by way of service by a *huissier* upon the Respondent at the Respondent's home address in Belgium on 4 th November 2020 and (b) by way of an email to Viberts on 6 th November 2020. The Respondent did not attend and was not represented at the date fix appointment.

32 A letter, together with a French translation thereof, giving the Respondent notice of the hearing of the contempt application (on Friday 22 nd January 2021) was served by the Representor upon the Respondent by way of service by a *huissier* at the Respondent's home address in Belgium on 11 th December 2020.

33 The bundles prepared for the hearing, together with (a) related covering letters and French translations thereof, (b) the Plaintiff's Written Submissions and a French translation thereof and (c) the Representor's approved but unworn Supplemental Affidavit and exhibit and French translation thereof were served by the Representor upon the Respondent:

The covering letters and French translations thereof were also emailed to Viberts on 12 th January 2021.

(i) by way of service by the Viscount upon Viberts on 12 th January 2021;

(ii) by way of service by a *huissier upon* the Respondent at her home in Belgium on 13 th January 2021; and

(iii) by way of delivery to the Respondent at her home in Belgium by courier on 22 nd January 2021, after failed attempts on 12 th and 21 st January 2021.

34 A sworn copy of the Representor's Supplemental Affidavit dated 11 th January 2021 and the exhibits thereto, covering letters, and French translations thereof, were served by the Representor upon the Respondent:

(i) by way of service by the Viscount upon Viberts on 14 th January 2021;

(ii) by way of delivery to the Respondent at her home in Belgium by courier on 15 th January 2021; and

(iii) by way of service by a *huissier* upon the Respondent at her home in Belgium on 18 January 2021.

35 The Respondent has not responded to any of these documents and did not appear at the hearing. The Court is satisfied, however, that she has been duly served and has had proper notice of the Default Judgment, the Representation, the date of the hearing and the allegations that she is in contempt of Court.

Finding of contempt

36 It is well established that contempt has to be proved to the criminal standard — see paragraph 25 of the Court of Appeal decision in *BNP Paribas Jersey Trust Corporation v Camilla de Bourbon des Deux Siciles* [2020] JCA 017.

37 The Representor has deposed on oath that:

(i) The Respondent has failed to pay any of the Costs Orders. Her successful resistance to his attempts to enforce the Costs Orders filed in Belgium put that beyond any doubt;

(ii) The Respondent has failed to comply with any of the orders made under the Default Judgment in that, in particular, she has not returned the originals or any copies she has of the Improperly Obtained Documents or provided any of the information required to be supported by affidavit. Furthermore, the Representor deposes that she has continued to use the Improperly Obtained Documents in three ways:

(a) Through Mr Beguin, her Swiss lawyer, in that she has utilised the Improperly Obtained Documents for the purpose of a letter (not exhibited), dated 24 th October 2019 addressed to the Justice de Paix in Lausanne;

(b) In the proceedings commenced against Gilles Hennessy, his children RBC and others in Switzerland on 23 rd December 2019;

(c) On 29 th December 2019 she again utilised the Improperly Obtained Documents for the purposes of an appeal against the decision of the Justice de Paix in Lausanne. This document was not exhibited.

38 The evidence before us is clear that the Respondent has failed to comply with all of the Costs Orders and the orders made against her under the Default Judgment. The requirement to comply with orders of the Court is strict. The Court has had no response from the Respondent at all but her intentions in this matter would be irrelevant, although they would be relevant to the issue of the sanction to be imposed—see *Taylor v Chief Officer of the States* [2004] JLR 494. It is in effect an objective test. She has submitted to the

jurisdiction of the Court and having done so has not complied with any of these orders. We therefore find proved beyond all reasonable doubt that she is in contempt of Court in respect of all of these orders.

Sanctions sought

39 By his Representation filed on 20th August 2020 (settled we understand by the Representor), he sought the following orders:

> *"C1 Order [the Respondent] to comply with all existing orders of the Royal Court;*
>
> *C2 Order [the Respondent] to cease utilising the Improperly Obtained Documents in proceedings in Belgium, Switzerland, France or anywhere else;*
>
> *C3 Order [the Respondent] to pay [the Representor] the following penalty payments:—*
>
> > *— GBP £1,000,000.00 for each failure to comply with the injunctions issued to it…;*
> >
> > *— GBP £10,000.00 for each day of delay in fulfilling the obligations imposed on her…;*
>
> *C4 Make such further Orders as the Court regards as being appropriate in relation to [the Respondent's] contempt of the Royal Court's orders;"*

40 At the hearing, Advocate Dickinson was given leave to amend the somewhat surprising assertion under C3 that the penalties for the Respondent's alleged contempt should be paid to the Representor personally. Any such penalty is paid to the Court. Looking at the breaches specified in the Representation, the Representor was seeking a total fine for the failures to comply with the injunctions of £3 million.

41 Advocate Dickinson made the following submissions:

> (i) In the recent case of *BNP Paribas Jersey Trust Corporation Limited v Camilla de Bourbon des Deux Siciles* [2020] JRC 267, the Royal Court imposed a fine of £2 million, together with a punitive costs order, upon the respondent for failing to comply with the Court's earlier orders for disclosure. We note that this decision is under appeal.
>
> (ii) In doing so, the Court drew upon its previous decision in *Caversham Trustees Limited v Patel and others* [2007] JRC 215, several decisions of the English courts and two leading texts, namely *Law on Contempt* by *Borrie & Lowe*, 4th edition 2010 and *Contempt* by *Arlidge, Eady & Smith*, 5th edition 2017. The Court recognised that,

despite the underlying subject matter concerning the entitlements of private parties to assets, contempt raised a matter of public interest because disobedience of its orders " ***sullies the authority of the courts and detracts from the rule of law***" — see paragraph 76 of *BNP Paribas Jersey Trust Corporation Limited v Camilla de Bourbon des Deux Siciles* [2020] JRC 267. As stated in *Borrie & Lowe* at paragraph 1.3:

> " ***The rationale of both criminal and civil contempt is therefore essentially the same: upholding the effective administration of justice.*** If a court lacked the means to enforce its orders, and its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute."

(iii) He submitted that the public interest in enforcing the Default Judgment was stronger than in the case of *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2020] JRC 267. The orders were necessary to protect the privileged and confidential nature of the Improperly Obtained Documents. It has been long recognised that legal professional privilege is itself a fundamental rule of law. In *R v Derbyshire Magistrates Court ex p. B* [1996] AC 487 at 507, Lord Taylor CJ famously described legal professional privilege as much more than an ordinary rule of evidence, but as a fundamental condition on which the administration of justice as a whole rests. The ability of the courts to give effect to and protect such privilege is therefore of the utmost importance.

(iv) The ability of the law to protect legal professional privilege and its confidentiality, he said, is all the greater in modern times, with the rise of onerous data protection obligations and the increasing prevalence of unlawful hacking of sensitive information. The Representor had a significant professional, ethical and reputational interest in safeguarding the confidential and privileged information of his clients. Equally, he said, the Jersey legal system itself had a strong public interest in maintaining the reputation of the jurisdiction as one which safeguards the confidential and privileged nature of communications between its advocates and their clients.

42 As to the level of the fine to be imposed, he referred to paragraph 87 of the judgment in *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2020] JRC 267 where the Court extracted the following propositions:

> ***"(i) That there is no principle that a contempt committed in contumacious circumstances must always be sanctioned by imprisonment.*** The sanction to be imposed is a matter for the Court in the circumstances of the particular case and such a contempt can be met with a fine .
>
> ***(ii) That there is no limit to the extent of a fine that the Court can impose*** .
>
> ***(iii) That the amount of the fine must reflect the seriousness of the contempt and must bring home to the contemnor the Court's strong disapproval of orders not being complied with*** .

(iv) That the level of fines in the cases to which we have been referred are in no way binding upon this Court and do not establish any kind of range within which such fines should be placed. There is no guideline case in this respect, nor could there be given the very varied circumstances in which contempt proceedings take place .

(v) That the means of the contemnor must be taken into account and when information on that has not been forthcoming, the Court may make a realistic estimate. The reference in Law of Contempt to fines on individuals being less than those imposed upon companies is in the ordinary case reflective of the difference in their respective means."

43 Applying those principles to this case, Advocate Dickinson submitted that:

(i) The Respondent's contempt is especially serious. She has disobeyed every requirement of the Default Judgment and has continued to deploy the Improperly Obtained Documents in the Swiss proceedings, wilfully preferring her own perceived pecuniary interests to the clear order of the Court. She has also failed to settle obligations that she owes to the Representor in respect of the Costs Orders.

(ii) The Respondent's conduct throughout has been contumelious, engaging with the Court's processes when she feels that it suits her interests but wilfully ignoring them when the tide moves against her, culminating in the Debarring Order.

(iii) The Respondent's contempt is all the more serious having regard to the interests which the Default Judgment was designed to protect, namely the privileged and confidential status of documents improperly obtained from the files of a Jersey advocate. It is not simply a case of competing pecuniary interests, but instead engages one of the most fundamental protections recognised by law in the administration of justice.

(iv) The Respondent was served with the Representation on 8 th September 2020. She has been warned of the orders sought and has had more than ample time to purge her contempt.

(v) The Respondent is of considerable wealth, certainly comparable to that of the contemnor in *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2020] JRC 267, if not greater. A fine will not sufficiently bring home the Court's disapproval of the Respondent's behaviour, nor be likely to encourage compliance, if less than seven figures.

(vi) The Respondent is reputedly a billionaire. A fine of £1 million equates to 0.1% of such wealth (assuming in the Respondent's favour that her wealth was no greater than £1 billion).

44 As for the imposition of recurring fines, there were no known Jersey or English cases in

which recurring fines have been imposed, but support for the principle and practice of doing so could be found in the Australian decision of *AMIEU v Mudginberri Station Pty Ltd* [1986] 161 CLR 98. Having surveyed a range of English, Australian and American authorities, the High Court of Australia held that it did have the power to impose a daily recurring fine for contempt and that such a fine was warranted in that case, in which a union had mounted a picket line in breach of an injunction. The imposition of a daily fine was coercive, as well as punitive, designed to encourage them to lift the picket line (paragraph 27). The High Court of Australia had traced the source of its own powers to punish contempt to those of the English senior courts, which suggests that the English courts have power to impose recurring fines at common law, and presumably still do so.

45 Advocate Dickinson submitted that there was no principle of Jersey law which conflicts with the power to impose a recurring fine in cases of continuing contempt, as the Court had recently confirmed there is no limit on the extent of a fine that the Court can impose nor is there any decision or statute which impairs the ability of the Court to grant recurring fines in respect of the continuation of an existing contempt. The Respondent had the ability to purge her contempt by complying with the Court's order, and any objection to the continuing nature of the sanction is simply the natural corollary of the Respondent's refusal to purge her contempt.

46 Whilst the Representation did not expressly refer to the imposition of a punitive costs order, the Court had confirmed in *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2020] JRC 267 at paragraph 98 that it had the power to impose such an order, as indeed was imposed in the earlier case of *Caversham Trustees Limited v Patel and others* [2007] JRC 215.

Sanction for the contempt of the Default Judgment

47 The Court accepts the importance of its orders being obeyed and the importance of legal professional privilege to the administration of justice, but following the hearing it had a number of concerns in relation to the imposition of a sanction in relation to the orders under the Default Judgment, namely the delay in the enforcement of the Default Judgment in Belgium, the lack of clarity in the advice received as to Belgian law and the potential conflict between the orders of this Court and that of the Swiss court.

48 The Swiss court had jurisdiction over the estate of Kilian Hennessy and the heirs to that estate, namely the Respondent and Gilles Hennessy, and it has ruled that the Improperly Obtained Documents could be used as evidence in those proceedings. That being the case, would it be appropriate for this Court to seek to enforce orders against the Respondent that she must now destroy that evidence, namely the original and copies of the Improperly Obtained Documents, and must not use the information contained within them for any purpose, which would include the Swiss proceedings, when the Swiss court had ordered that she can use that evidence?

49 The Representor has satisfactorily addressed these issues with further written submissions. Taking firstly the concern in respect of the apparent delay in enforcing the Default Judgment in Belgium, the Representor has produced a detailed narrative explaining the steps that he has taken since August 2019. We accept that explanation and nothing therefore turns on the point.

50 Secondly, and without waiving privilege, the Representor has provided a further letter of advice from his Belgian lawyers Lydian dated 3 rd March 2021 which raises what Advocate Dickinson described as two nuances which he brought to our attention:

> (i) The authors of the Lydian letter identify that " *financial sanctions/penalty payments are usually expressed as being payable to the enforcing party*". If the order imposing these financial sanctions/penalty payments does not say that they are payable to the enforcing party (i.e. the Representor), then this " *may provide a basis for the party against whom enforcement action has been taken to seek to challenge the enforceability of such financial sanctions/penalty payments against them*."
>
> (ii) Secondly, the authors of the Lydian letter state that " *if, by way of financial sanctions/penalty payments, the Jersey Court orders [the Respondent] to pay both a financial sanction/penalty charge in a fixed amount and a daily recurring fine, we are of the view that a Belgian judge is more likely to enforce only the daily recurring fine unless the judge concludes that the fixed financial sanction/penalty payment is in respect of damages that [the Representor] suffered as a consequence of [the Respondent's] breach of the Default Judgment Order."*

51 In respect of the first nuance any penalties imposed for contempt will be payable to the Court as opposed to the Representor, as Jersey law regards contempt as an act against the Court in the administration of justice and any fine imposed is payable to the Court as a punishment. Such fines are not compensatory in nature. They are based upon the sum needed to meaningfully punish the contemnor, rather than any assessment of loss sustained by the victim in consequence of the contempt. The Jersey Court has the power to order damages in respect of an appropriate cause of action, but it would be quite distinct from the question of any fine for contempt which the Court would have no power to require the contemnor to pay to the victim. There is a risk, therefore, that an order for payment of fines to the Royal Court as opposed to the Representor for contempt may provide a basis for the Respondent to seek to challenge the enforceability of such fines.

52 In respect of the second nuance, the authors of the Lydian letter opine that a Belgian judge is more likely to enforce only the recurring fines, and not a fixed financial sanction/penalty payment unless it is satisfied that the latter is in respect of damages that the Representor has suffered as a consequence of the Respondent's breach of the Default Judgment. It is not contended on behalf of the Representor that any fine be imposed in respect of any damages suffered by him.

53 The position under Belgian law as we understand it appears to be broadly equivalent to the position under Jersey law for the enforcement here of foreign judgments. Under our customary law (which follows English law in this respect — see *Dicey, Morris & Collins* on *The Conflict of Laws*, 15 th edition, Rule 42) and under Article 3(2)(b) of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 only foreign judgments for a sum of money, not being a sum payable in respect of taxes or in respect of a fine or other penalty, will be enforced here. Ultimately, it may be that the Belgian courts will not reciprocally enforce the injunctive orders under the Default Judgment or any penalty imposed by this Court for the Respondent's failure to comply with them, in which event the only remedy for the Respondent in Belgium may be to action the Respondent afresh for the destruction/return of the Improperly Obtained Documents.

54 Notwithstanding the effect of this advice upon the prospects of successful enforcement in Belgium, Advocate Dickinson submitted that the case for holding the Respondent in contempt and imposing fines remained compelling for the following reasons:

(i) The extent to which Belgian law insulates the Respondent from the enforcement by the Belgian courts of the Default Judgment and any fines payable to the Royal Court does not detract in the slightest from the fact and extent of her contempt. She remains comprehensively in breach of the Royal Court's orders in the respects identified by these proceedings.

(ii) It would verge on the absurd if a party could flagrantly disobey orders of the Royal Court with impunity simply because they are fortunate enough to live in a jurisdiction whose courts may not enforce fines payable to the Royal Court.

(iii) Any order the Royal Court does make will of course be enforceable in Jersey. As mentioned above, the Respondent has purported to counterclaim against the Representor before the Belgian courts. The fact of an unpurged contempt and outstanding fines on the part of the Respondent may well be relevant in the event that the Respondent were to obtain any form of judgment against the Representor and seek to enforce the same before the Jersey courts.

(iv) Any inability to enforce fines in Belgium does not prejudice the ability to enforce such fines against assets in other jurisdictions. The Respondent is an extremely wealthy individual who may well have assets situated in jurisdictions whose courts are able to enforce fines imposed by the Jersey Court.

(v) The Respondent's attempts to deploy the Improperly Obtained Documents in flagrant contempt of the Royal Court's orders centre upon the Swiss courts. Findings of contempt and the imposition of commensurate penalties should, in the eyes of the Swiss courts, serve to underscore the Royal Court's dissatisfaction with the Respondent's contempt of its orders.

(vi) In the ultimate analysis the Royal Court retains the power, in the event that its fines go unpaid by the Respondent, to impose a custodial sentence.

55 Thirdly, as to the interplay between the Jersey and Swiss proceedings, Advocate Dickinson made the following submissions, in summary:

(i) The Swiss courts were concerned with the dispute between the heirs of Kilian Hennessy and had to decide whether to admit or exclude the Improperly Obtained Documents in evidence. The Improperly Obtained Documents do not form part of Kilian's estate at all; they relate to the relationship of lawyer and client between Sinels Advocates, and Gilles Hennessy in relation to a period after the death of Kilian Hennessy.

(ii) As a matter of private international law, the issues of admissibility of evidence are procedural issues governed by the *lex fori* (see *Dicey, Morris & Collins* at 7R-001 and 7–022). The Swiss courts were not seized of any dispute about the appropriate status of the Improperly Obtained Documents as a matter of Jersey law; that is a matter before the Jersey courts and governed by Jersey law. Accordingly, the decision of the Swiss courts (which was provisional) to admit the Improperly Obtained Documents in evidence is not a decision about the privileged and confidential nature of those documents as a matter of Jersey law; it is a decision upon a procedural issue governed by the *lex fori*, i.e. Swiss law.

(iii) A procedural decision of the foreign court under the *lex fori* to admit documents in evidence cannot strip those documents or the information within them of privilege or confidentiality as a matter of Jersey law. If that were so, the absolute nature of privilege conferred in recognition of the fundamental role which it plays in the administration of justice would be entirely vulnerable to the procedural decisions of any foreign tribunal made under any foreign law, which does not attribute the same weight to privilege as does Jersey law. The editors of *Dicey, Morris & Collins* state at paragraph 7–022:

> ***"In the context of English proceedings, whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant."***

(iv) In the Privy Council decision of *Bourns inc. v Raychem Corp* [1999] 2 Costs L.R. 72 Aldous LJ *held that:*

> ***"Raychem do not suggest that under English law privilege is lost in England because privilege cannot be claimed for documents in another country.*** To suggest otherwise would mean that a court, when deciding whether to uphold a claim for privilege, would need to be informed as to whether privilege could be claimed in all the countries of the world."

(v) The experts in Swiss law retained on both sides of the proceedings brought by the Representor against the Executors (now compromised) agreed that admissibility was a procedural issue which could be revisited by the Swiss court in light of any decision

which the Royal Court may make in respect of the Improperly Obtained Documents.

(vi) The Swiss decision was a procedural one made in proceedings to which the Representor was not a party and proceeded on what the Representor maintains was an erroneous basis that he was acting as a wealth manager, a basis accepted by the Executors as being incorrect and as recorded in the consent order signed by the Executors.

56 Advocate Dickinson posed the question: should the Court be less interested in the enforcement of its orders because a foreign court has treated the Improperly Obtained Documents as admissible in evidence? He submitted that it should not for several reasons:

(i) The Respondent is subject to the jurisdiction of the Royal Court and the Royal Court is entitled to expect parties to obey its orders. The Court's powers to hold a party in contempt exist to protect the fundamental requirement that court orders be obeyed in order for the machinery of justice to operate effectively.

(ii) The Swiss court's decision on admissibility only arises because the Respondent sought to put the Improperly Obtained Documents before it in circumstances where, as the Royal Court recognised at a very early stage, she knew or should have known that these were not documents which should be in her possession in the first place. In the context of the representation brought by Advocate James (see paragraph 9 above), the Royal Court itself observed that: “it is on the face of it difficult to identify a valid reason why [the Respondent] should have been sent documents which do not belong to her; on the face of it they must have had been obtained improperly, and it would be unsurprising if a court were to determine that in those circumstances they ought not to be used.” The Court of Appeal later described the Improperly Obtained Documents as material which on their face plainly attracted legal professional privilege by virtue of the lawyer/client relationship between the Representor and his client — *Sinel v Hennessy* [2018] JCA 095 at paragraph 4. On any view (and as both the Law Society of Jersey and the Court of Appeal recognised), it would have been obvious to the Respondent that these were not documents which she should have received. It would be wrong (and verges on perverse to suggest) that the Respondent's own actions in deploying obviously confidential and privileged materials, wrongfully in the eyes of the Jersey Court, should effectively insulate her from enforcement of an order of the Jersey Court that she should do no such thing.

(iii) There is no suggestion that the Swiss court would have required the Respondent to put the Improperly Obtained Documents in evidence; the Swiss court has simply determined that they are admissible in evidence under the *lex fori*. The Default Judgment operates *in personam* as against the Respondent, requiring her not to use the contents of the Improperly Obtained Documents. In the absence of any Swiss decision requiring the Respondent to make use of the Improperly Obtained Documents, there is no conflict with the Royal Court's order that she should not do so because they are (as a matter of Jersey law) privileged and confidential. Nothing in the Default Judgment Order requires the Respondent to do anything which would put

her in breach of a foreign order. In short, even if the Swiss courts would permit (though not require) the Respondent to make use of the Improperly Obtained Documents, the Royal Court is entitled to require her not to do so in view of their privileged and confidential nature. Again, any other conclusion would entail recognising an enormous, hitherto unknown, and obviously false exception to privilege – namely that documents privileged as a matter of Jersey law may not be disclosed save insofar as the procedural laws of any other country would treat them as admissible in evidence.

57 We accept the thrust of the submissions made by Advocate Dickinson on behalf of the Representor. The Improperly Obtained Documents came into existence in the course of a relationship between the Representor, a Jersey practising lawyer, and Gilles Hennessy, formed in Jersey for the provision of Jersey legal advice. It is a relationship governed by Jersey law as are the rights of privilege and confidence that arise in respect of the Improperly Obtained Documents. The Respondent sought to challenge the jurisdiction of the Jersey Court to adjudicate on these rights, with the Court of Appeal confirming the Court's jurisdiction. She accepted that jurisdiction by participating fully in the Jersey proceedings up until the Debarring Order took effect, a year to the day after the Court of Appeal had given its decision in the Jurisdiction Challenge.

58 It is helpful to be reminded of the words of Lord Taylor CJ in the case of *R v Derby Magistrates' Court* at 507 and 508 that the privilege does not exist for the claimant's sake alone. It is ***"a fundamental condition on which the administration of justice as a whole rests"*** and exists ***"in the wider interests of all those who hereafter might otherwise be deterred from telling the whole truth to their solicitors."***

59 We have considered the Improperly Obtained Documents and as the Respondent has said, they appear to be of little significance now. It might be argued that the cat is out of the bag and privilege cannot help putting it back.

60 That, however, is to miss the point. The relevance or value of the information contained in the Improperly Obtained Documents is of itself irrelevant. In the Privy Council case of *B and Others v Auckland District Law Society and Another* [2003] 2 AC 736 privileged documents had been disclosed for a limited purpose, namely an inquiry into allegations of professional misconduct. Lord Millett said this at paragraph 69:

> ***"69 …The documents are privileged because they were created for the purpose of giving or receiving legal advice.*** If they are not produced voluntarily, production cannot be compelled. If they are produced voluntarily, the right to withhold production no longer attaches to them. In that sense the privilege may be said to be lost. But they are the same documents, and it is not inappropriate to describe them as privileged. Their inherent characteristics are the same. The policy which protected them from unauthorised disclosure is the same. The cat is still a cat. It can be put back in the bag."

61 Privilege is absolute and involves no balancing act, as he made clear at paragraph 71:

> ***"71 The fact that the claim is to recover the documents is made on equitable grounds does not mean that it must yield to an overriding countervailing public interest.*** The documents are both confidential and privileged. Whether a claim to the return of such documents is based on a common law right or an equitable one, the policy considerations which give rise to the privilege preclude the court from conducting a balancing exercise. A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits will be respected: see *Goddard v Nationwide Building Society* [198] QB 670, 685, ***per Nourse LJ."***

62 Bearing in mind the Respondent's own admission that the Improperly Obtained Documents have lost their significance (to her), it is difficult to understand why she refuses to destroy or return them as ordered, in particular when they had clearly been obtained by someone improperly, or to give an explanation as to why that is impossible (see *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2019] JRC 199 at paragraph 44). The burden placed upon her under the Default Judgment is small. However, we accept that difficulties in enforcing the Default Judgment in Belgium or elsewhere should not deter the Court from taking what steps it properly can against those who have submitted to its jurisdiction, but who chose to disobey its orders and this because of the broader public interest in obedience to its orders. It is important, in particular, for the Court to play its part in upholding and enforcing legal professional privilege, bearing in mind its importance in the administration of justice.

63 The Representor proposes a fine of £3 million for the failures to comply with the injunctions under the Default Judgment and a recurring fine of £10,000 per day for the failures to comply with her obligations under the Default Judgment. Advocate Dickinson placed some reliance on the case of *BNP Paribas v Camilla de Bourbon des Deux Siciles* [2020] JRC 267 as supporting the level of fine sought, but in our view the facts here are distinguishable. Whilst we have defined them as the "Improperly Obtained Documents" we have seen no evidence that the Respondent had any involvement in their improper removal. They appear to have been sent anonymously to the Respondent at a time when she and the Executors were trying to discover where a large amount of money held by the late Kilian Hennessy had disappeared to. It is perhaps understandable why she retained these documents for some eighteen months, but once the matter came before the Jersey Courts and in the light of the Default Judgment, they should of course have been destroyed and/or returned.

64 Whilst the penalty we impose must be large enough to bring home to the Respondent, an apparently wealthy woman, the Court's disapproval of its orders not being complied with, the penalty must reflect the seriousness of the conduct and in our view the Respondent's conduct here is not to be equated with the conduct of the respondent in *BNP Paribas v*

Camilla de Bourbon des Deux Siciles [2020] JRC 267. We regard the level of financial penalty sought as disproportionate.

65 We intend, therefore, to impose a total fine of £100,000 upon the Respondent for her contempt of the orders under the Default Judgment. Such a fine is substantial, more properly reflects the conduct of the Respondent and, notwithstanding her apparent wealth, is sufficient to bring home to her the Court's disapproval of her conduct. In the light of the orders of the Swiss court in respect of which our initial concerns have now been addressed, we think it appropriate to give the Respondent a final opportunity to purge her contempt. This judgment and associated Act of Court in translation must be served upon her and we will adjourn the application until 10:00am on the 6 th July 2021 for this purpose. If she has not applied to purge her contempt by that date, then this fine will be imposed.

66 Whilst the Court may well have the power to impose recurring fines for contempt, this will be the first time that this Court, and we believe any English court, has been invited to impose such a penalty. The circumstances here are quite different from those that applied in the case of *AMIEU v Mudginberri Station Pty Ltd.* and out of caution, we decline to do so in this case, notwithstanding the second nuance in the advice from Lydian that the Belgian court is apparently more likely to enforce a recurring fine in favour of this Court. A recurring fine has the capacity to increase without limit to sums that may become quickly disproportionate. The suggested fine of £10,000 per day, for example, would amount to £3,650,000 after one year if unpaid, and these are sums payable to the Court.

67 By reference to the advice received by the Representor from Lydian summarised in paragraph 27 above we confirm:

(i) that the Respondent was served with and has had more than adequate notice of the Default Judgment and the Representation (and the other documents referred to above);

(ii) that the Respondent has not complied with any of the orders under the Default Judgment;

(iii) that the Respondent is in contempt of this Court by failing to do so; and

(iv) that this Court wishes the Default Judgment to be enforced against the Respondent outside of Jersey, including in Belgium

Sanction for the contempt of the Costs Orders

68 As we have said the Respondent participated voluntarily in the proceedings here, having lost her Jurisdiction Challenge, and thus submitted to this Court's jurisdiction. Costs Orders were made against her, arising out of her conduct of those proceedings, and they have not been paid. There is no excuse for their non-payment and no question as to the Respondent's ability to pay them.

69 The current position is that the Representor's attempts to enforce three of the Costs Orders in Belgium have failed, although it is his intention to appeal the decision of the Belgian court. Even so and again this should not deter the Court from taking what steps it properly can against those who have submitted to its jurisdiction, but who chose to disobey its orders and this because of the broader public interest in obedience to its orders.

70 Again, by reference to the advice received by the Representor from his Belgian lawyers summarised in paragraph 27 above we confirm:

> (i) that the Respondent was served with and has had more than adequate notice of the Costs Orders and the Representation (and the other documents referred to above);
>
> (ii) that the Respondent has not complied with any of the Costs Orders;
>
> (iii) that the Respondent is in contempt of this Court by failing to do so, and
>
> (iv) that this Court wishes the Costs Orders to be enforced against the Respondent in Belgium.

71 We intend, therefore, to impose a total fine of £10,000 upon the Respondent for her contempt of the Costs Orders. We again think it appropriate to give the Respondent a final opportunity to purge her contempt. This judgment and associated Act of Court in translation must be served upon her and we will adjourn the application until 10.00am on the 6 th July 2021 for this purpose. If she has not applied to purge her contempt by that date, then this fine will be imposed.

Conclusion

72 In conclusion:

> (i) We adjourn the sanctions to be imposed upon the Respondent for her contempt of the Default Judgment and the Costs Orders until 10.00am on the 6 th July 2021 in order to give her a final opportunity to purge her contempt.

73 We decline to make a punitive costs order against the Respondent, but in the light of our findings we order her to pay the costs of the Representor of and incidental to the Representation on the indemnity basis to be taxed if not agreed.