Ian Strang, Ashley Hoy, Nigel Pearmain & Others v Camilla de Bourbon des Deux Siciles

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	07 September 2020
Neutral Citation:	[2020] JRC 178
Date:	07 September 2020
Court:	Royal Court

vLex Document Id: VLEX-850641768

Link: https://justis.vlex.com/vid/ian-strang-ashley-hoy-850641768

Text

[2020] JRC 178

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, **Esq.**, Bailiff

Between
Ian Strang, Ashley Hoy, Nigel Pearmain & Others
Plaintiffs
and
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.

BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others [2018] JCA 136A.

BNP Paribas Trust Company v de Bourbon des Deux Siciles [2019] JRC 199.

re Esteem Settlement [2000] 150.

Office Depot International (UK) Limited v UBS Asset Management (UK) Limited [2018] EWHC 1494.

Global Asset Capital, Inc and another v Aabar Block SARL and others [2017] EWCA Civ 37.

Summers v Fairclough Homes [2012] UKSC 26.

Channon v Lindley [2002] EWCA Civ 353.

Feakins v Bairstow [2005] EWHC QB 1931

Striking out — application to strike out the Defendant's Counterclaim

Bailiff

THE

1 This is an application by Ian Strang, Ashley Hoy, Nigel Pearmain and others, practising as Voisin Advocates, Solicitors and Notaries Public ("the Plaintiffs") against Camilla de Bourbon des Deux Siciles ("the Defendant") seeking to strike out the Defendant's counterclaim pursuant to Rule 6/13(1)(a) of the Royal Court Rules 2004.

2 Rule 6/13(1)(a) of the Royal Court Rules 2004 is in the following terms:-

> ***(1) The Court may at any stage of the proceedings order to be struck out or amended any claim or pleadings, or anything in any claim or pleading, on the ground that:-***
>
> > ***(a) it discloses no reasonable cause of action or defence, as the case may be;"***

3 Sub-paragraph (2) of the same Rule provides:-

> ***"(2) No evidence shall be admissible on an application under paragraph (1)(a)."***

4 The Plaintiffs' action against the Defendant is for unpaid fees incurred whilst the Plaintiffs were retained by the Defendant as her legal advisers in and about an application to the Court of Appeal that resulted in the Judgment in *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [2018] JCA 136A ("the Court of Appeal Judgment"). The general background to the case in which the Plaintiffs acted for the Defendant can be found in the Court of Appeal's Judgment at paragraphs 2 – 10 and I do not propose to set it out in this Judgment.

5 The background with regard to the Plaintiffs' claim in this case can be briefly stated. In or around October 2017 the Plaintiffs were instructed by the Defendant to act for her in connection with a trust claim. In that claim the Royal Court had held, amongst other things, that the Defendant had acquiesced in or assisted in the breach of trust by her mother by which various sums were transferred out of a trust known as the Grand Trust as, in effect, part of a course of conduct which deprived the Defendant's sister of access to the family's wealth.

6 The Defendant appealed to the Court of Appeal. That Appeal gave rise to the Court of Appeal Judgment. The hearing in the Court of Appeal took place between the 26 th of February 2018 and the 1 st March 2018. Advocate Ashley Hoy of the Plaintiffs ("Advocate Hoy") had conduct of the Defendant's case.

7 On the 20 th February 2018, the court was informed that Advocate Hoy had been taken into hospital and that there may be difficulty with his recovery in time to deal with the Defendant's appeal scheduled to take place during the following week. On the 21 st February 2018 it was confirmed that Advocate Hoy would be unable to appear. The Plaintiffs were unable to offer or secure the services of alternate counsel to appear in his stead. Accordingly, at the hearing, the Defendant was unrepresented.

8 The Court of Appeal Judgment considers how the court approached these circumstances. At paragraph 174 of the Court of Appeal Judgment it says this:-

> ***"It was apparent that if we were to adjourn Camilla's appeal we would also have to adjourn substantial parts of the appeals of BNP Jersey and Appleby Mauritius.*** At short notice, this would cause not only difficulty in relation to ongoing proceedings before the Royal Court, where various accounts had been ordered, but also a significant delay in the hearing of the ***appeals and a waste of both court time and litigants' costs in preparing for the appeals.*** We recognised that Camilla was not in any sense culpable for Advocate Hoy's indisposition, but we were faced with a position where either there would be a

> serious disadvantage for BNP Jersey and / or Appleby Mauritius, or a disadvantage for Camilla. In the circumstances that Camilla, unlike BNP Jersey and Appleby Mauritius, had not appeared in the Royal Court to give evidence or to argue the case, we considered that the fairest outcome was to proceed with the appeals and allow Camilla's advisers to make written submissions by 12 noon on Tuesday 6 th March. In making that order we recognised that Camilla would have the advantage of transcripts of the proceedings during the week of the 26 th February….."

9 It is inherent in those statements that whereby the Court of Appeal determined that any disadvantage to the Defendant in not being represented was outweighed by the substantial disadvantage to other parties in any adjournment of the case, nonetheless the Defendant did at least suffer some potential disadvantage at least by her lack of representation which the Court of Appeal sought to address by dealing with the matter in the manner that is set out above.

10 The instant proceedings began by the Plaintiffs' summons of the 20 th 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 28 th October 2019, the Plaintiffs' alleged that the counterclaim filed by the Defendant on the 19 th 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 28 th 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 19 th 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 29 th of November 2019 ("the November Pleading").

13 It is the Plaintiffs' case before me that, taken together, neither the Counterclaim nor the November Pleading disclose a claim.

The Court of Appeal Judgment

14 This matter has been decided at the request of both parties on the papers. As a preliminary point, however, the Defendant relying on Rule 6/13(2) set out above, objected to the use of

by the Plaintiffs of the Court of Appeal Judgment. It was argued that, in accordance with authority, as no evidence could be admitted in an application of this nature, the facts pleaded by the Defendant should be taken as correct for my purposes and the Court of Appeal Judgment cannot be used to support the Plaintiffs' case. This would be to go beyond the pleadings, so it is argued, and would be to admit evidence.

15 I do not agree. Where there is a judgment of the Court of Appeal that arose out of the very substance of the this case and in which the Court of Appeal dealt with some of the aspects of the complaints in these proceedings it would to my mind be unrealistic for me to treat the Court of Appeal Judgment as if it did not exist. To the extent the Court of Appeal said what it said and did what it did, there is no issue of fact that would need to be determined by the Jurats. It is part of the procedural story and, so it seems to me, can be considered in that context.

16 I do not, therefore, exclude reference to the Court of Appeal Judgment as is apparent from the references above and below. However, I must be mindful of the fact that the Defendant would dispute some of the determinations made by the Court of Appeal and undoubtedly may lay some of those determinations at the door of her lack of representation by the Plaintiffs.

The Defendant's Claim

17 As I have already stated the Defendant's claim is set out in the Counterclaim and the November Pleading. The essence of the case as pleaded in the Counterclaim is that:-

(i) the Defendant wished to appeal against the judgement of the Royal Court;

(ii) it was an express or an implied term of the Agreement between the Defendant and the Plaintiffs that the Plaintiffs would provide full legal services (which included representation for a hearing before the Court of Appeal);

(iii) Advocate Hoy failed to attend and the Plaintiffs sent no alternative representation;

(iv) the lack of representation was detrimental to the Defendant's appeal;

(v) The Court of Appeal Judgment went against the Defendant.

18 At paragraph 26 of the Counterclaim, the Defendant says that details as to quantum would be provided but set a minimum of €2m in connection with an appeal to the Privy Council.

19 It was to the allegation that a lack of representation was detrimental to her appeal that the Master made the Order on 28 th October 2019 set out at paragraph 11 above.

20 The November Pleading in essence:-

(i) States that the Defendant discussed with Advocate Hoy in September 2019 the nature of his instructions which were to set aside a disclosure order and to appeal or to seek clarification in respect of a particular point in the Royal Court proceedings;

(ii) States that Advocate Hoy, in an email, agreed to cap costs on those two matters in the sum of £200,000;

(iii) Suggests that it was an express term between the Defendant and the Plaintiffs in relation to the appeal/clarification of the Royal Court proceedings that the Plaintiffs would advise, prepare and represent the Defendant in the Court of Appeal. The Defendant makes a reference to an email from the Plaintiff dated 21 February 2018, concerning at the representation of the Defendant by the Plaintiff in the Court of Appeal in the following terms:-

> *"while in England, our client might well be expected to brief alternative Counsel, there is, of course, a large pool of QCs available.* That is not quite the same in Jersey. While there are a number of Advocates at Voisin (not all are in the Litigation Department) and they simply do not have the experience of Court of Appeal matters that Ashley enjoys. You will be aware of this from your own personal experience.
>
> *I am therefore not in a position to offer up alternative Counsel at this late stage"*.
>
> This, so the Defendant asserts, is an acceptance that representation in the Court of Appeal was something that the Plaintiffs' were engaged to provide;

(iv) States that no disclosure has been provided by Advocate Hoy as to his medical condition and therefore the Defendant avers that it was not as serious as described and this goes to the heart of the terms that she has pleaded.

(v) Asserts the Plaintiffs owed a number of duties to exercise care, skill and diligence including being able to provide advice and representation at court hearings, not to place themselves in a position where they could not provide representation; to act at all times in the Defendant's best interest and in the event the Plaintiffs could not provide representation to secure a suitable alternative. The Defendant alleges breaches of those duties.

21 The alleged breach of duties are particularised at paragraph 14 of the November Pleading and all of those particulars relate to the failure, as alleged, by the Plaintiffs to provide legal representation to the Defendant in the Court of Appeal.

22 At paragraph 15 of the November Pleading, the Defendant indicates that she is entitled to:-

"(i) repayment by the Plaintiff of the costs of and associated with the loss a chance or similar of the Court of Appeal Hearing;

(ii) repayment by the Plaintiff of the costs of and associated with the appeal to the Privy Council … Had there been representation at the Court of Appeal Hearing, it is averred that matters would have been clarified and arguments tested by the Judges of Appeal;

(iii) in the alternative, equitable compensation …;

(iv) interest on the costs of and associated costs pursuing the appeal to the Privy Council, on an equitable compensation, at such equitable rate or rates as the Court thinks fit".

23 At paragraphs 16 and 17 of the November Pleading, the Defendant pleads negligence and particularises that negligence as a failure by the Plaintiffs to take all necessary steps to protect her interests, failure to follow her instructions meaningfully to apply to adjourn the Court of Appeal Hearing and/or failure to advise the Defendant to make an application to appeal the decision of the Court of Appeal; and failing to ensure that there was adequate staffing in place to deal with the possibility of illness.

24 Furthermore, the Defendant pleads particulars of loss and damage flowing from the consequence of Advocate Hoy's failure to attend the Court of Appeal Hearing and cites as particulars the fact that the Court of Appeal found that the Camilla Trust was "virtually distributed" and therefore the Defendant's interest in the said Trust was paid out – a loss that she quantifies in the sum of US$105,275,090.52 and the legal costs incurred in applying for leave to the Privy Council. She also asserts that the Court of Appeal made adverse findings of fact against her and heard no oral evidence or submissions.

Findings of the Court of Appeal

25 It is correct that the Court of Appeal Judgment contains a number of findings against the Defendant.

26 At paragraph 30 the Court said:-

"The improperly enriched beneficiary cannot benefit twice and the trustee who has committed the breach of trust may have done so at the instigation of, or upon request, by or with the consent of a beneficiary."

27 At paragraph 31 the Court said:-

"…where a beneficiary of full age and capacity participates in the breach, consents to it, releases his claim or later acquiesces in the breach, such

acting provides the trustee with a defence to the claim of that beneficiary: *Re Pauling's Settlement Trusts* [1962] 1 WLR 86".

28 At paragraph 46 the Court said:-

> ***"No claim was made by Camilla…that there had been a breach of trust.*** In such circumstances one need not enter into discussion as to the juristic characteristics of acquiescence, concurrence, waiver or release or confirmation of the transaction in breach of trust…..Camilla…..does not and cannot now contend in favour of liability for breach of trust…."

29 At paragraph 47 the Court of Appeal said:-

> ***"There is a further reason for reaching the view that, in the exercise of the discretion, it is appropriate to proceed upon the basis that there should no longer be a trust fund held for Camilla's trust….***by the Summer of 2011… Camilla was playing a leading role in the fight entirely to cut off Cristiana from the family wealth…."

30 At paragraph 48 the Court said:

> ***"Camilla was not a trustee, but Madame Crociani and Camilla were acting together dishonestly and setting up breaches of trust.*** As a matter of law, Camilla's actions might be characterised as knowing assistance in breach of trust."

31 At paragraph 49 the Court said:-

> ***"….the trustees could have treated Madame Crociani and Camilla as liable jointly and severally for the whole loss caused to the Grand Trust….but, in the alternative, they could have taken the view that had Camilla instead asked for a disbursement….they would have acceded to it…on the balance of probabilities, Camilla can anticipate receiving, if she has not already received, the preponderance of assets obtained from the Grand Trust by Madame Crociani."***

32 At paragraph 190 of the Court of Appeal Judgment, reference is made to paragraphs 431 and 444 of the Royal Court's Judgment that " ***show that [Camilla] had the requisite degree of knowledge in relation to the breaches of trust of BNP Jersey to justify a defence of acquiescence against her, whether or not she thought that Madame Crociani was through the foundation a beneficiary of the Grand Trust."***

The Plaintiffs' case

33 In essence the Plaintiffs' argument before me is that the November Pleading does not improve upon the Counterclaim and that taken together they do not disclose a reasonable cause of action or defence because they do not identify any loss. It is argued that the Defendant is seeking to re-litigate matters that are the subject of the Court of Appeal's Judgment.

34 In particular, the Plaintiff points out that the Judgment of the Royal Court of 7 th October 2019 (*BNP Paribas Trust Company v de Bourbon des Deux Siciles* [2019] JRC 199) where at paragraph 19, Clyde-Smith, Commissioner, said:-

> ***"On 29 March 2019, BNP Jersey filed a claim for damages against Camilla for conspiracy with Madame Crociani to injure BNP Jersey by unlawful means, by jointly breaching the worldwide freezing order dated 4 August 2016"*** .

35 This demonstrates, so the Plaintiffs assert, that proceedings commenced by BNP had nothing to do with the findings made in the Court of Appeal Judgment. In terms of the potential of the Court of Appeal to hear more evidence, the Plaintiffs refer to paragraph 190 of the Court of Appeal Judgment which says:-

> ***"…. findings of fact are not challenged nor is it easy to see how they might be challenged by Camilla, given that she did not attend in the Royal Court to give evidence"*** .

36 The Plaintiffs assert that the protections afforded by the Court of Appeal protected the Defendant's interests.

37 In essence, the Plaintiffs argue that the Counterclaim and November Pleadings do not plead how it is the Plaintiff's failure to appear for the Defendant, having filed the various documents ordered in the Court of Appeal's directions, in fact caused any loss to the Defendant. In their skeleton argument the Plaintiffs argue that neither the Counterclaim nor November Pleading asserts or identifies the conclusions or findings of the Court of Appeal that caused loss, the conclusions that were wrongful, and why they were wrong; the conclusions that are wrong as a result or consequence of the Plaintiffs' actions or inactions; or the actions or inactions of the Plaintiffs that caused the Court of Appeal to make any wrongful conclusions or findings.

38 The findings in the Court of Appeal's Judgment were to the effect that the Defendant failed to allege breach of trust against her Trustees and could not now do so. She was guilty of dishonestly assisting her mother to remove assets from the Grand Trust and to keep them from her sister. She had acquiesced the breaches of trust and therefore her Trust was deemed to be distributed to her.

39 In these circumstances the Plaintiffs assert that actionable loss is an essential element of the cause of action that the Defendant brings, she cannot or has not pleaded actionable loss and accordingly her Counterclaim must fail. She cannot establish any loss that arose as a direct consequence of the Plaintiff's actions or inactions, so it is alleged.

The Defendant's case

40 Much of the Defendant's arguments are, quite naturally, based on the contents of her Counterclaim and the November Pleading. The Defendant's main position is that the Plaintiffs must accept or have accepted that failing to attend the Court of Appeal was negligent and any dispute on causation of loss can only be resolved by reference to the facts of the case and therefore her case should not be struck out. Alternatively, she says that the strike out should be adjourned until after full discovery has been given.

41 I pause to observe that given that the Plaintiff's claim before me is proceeding under Rule 6/13(1)(a) then it must proceed without reference to evidence which might flow following discovery. The Defendant is protected however, by the high threshold that has to be met. The Defendant's case must be unsustainable on the pleadings for the Plaintiffs strike out to succeed.

The law on striking out

42 The approach by the Court to striking out particularly under Rule 6/13(a) is well understood and has been fairly characterised by the Defendant in her skeleton argument.

43 The jurisdiction to strike out is a summary one, and is limited to plain and obvious cases. It is not appropriate on an application to strike out under Rule 6/13(a) to conduct a protracted examination of the facts of the matter and all documents relating to it, in order to establish whether there is a reasonable cause of action or defence;

44 The Court should give reasonable latitude to a pleading before holding that it should be struck out. In *re Esteem Settlement UJ* [2000] 150 the Court of Appeal said:

> ***"The function of pleadings is to set out the material facts on which the parties will rely at trial to establish their causes of action or defences, and which the parties will seek at trial to establish by relevant and admissible evidence.*** It is no part of the function of advocates to seek to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading whether so as to improve it or to make it less effective. It is no part of the function of the Royal Court to lend itself to any such endeavours on the part of advocates. Formal pleading is an art, not a science, and to seek to achieve some abstract level of perfection in pleadings is not consistent with the objective I have stated, or of value in terms of time,

effort or expense."

45 A pleading may be struck out as disclosing no reasonable cause of action or defence pursuant to Rule 6/13(1)(a) if the factual allegations made in the pleading would be insufficient to satisfy the Court to grant the relief sought. A reasonable cause of action or defence is one with some chance of success.

46 In the recent English case of *Office Depot International (UK) Limited v UBS Asset Management (UK) Limited* [2018] EWHC 1494 which involved, *inter alia*, an application to strike out, O'Farrell J referred with approval to the case of *Global Asset Capital, Inc and another v Aabar Block SARL and others* [2017] EWCA Civ 37 and the judgment of Hamblin LJ in which he stated that:

> ***"It was common ground that for the purpose of the present case the applicable principles concerning strike out and summary judgment may be conveniently summarised as follows*** .
>
> > ***(1) The court must consider whether the case of the respondent to the application has a realistic as opposed to fanciful prospect of success – in this context, a realistic claim is one that carries some degree of conviction and is more than 'merely arguable'*** ,
> >
> > ***(2) The court must not conduct a 'mini-trial' and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process*** .
> >
> > ***(3) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle and decide it'*** .

47 In *Summers v Fairclough Homes* [2012] UKSC 26, Lord Clarke giving the speech for the Supreme Court, said this:

> ***"The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the Claimant of a substantive right to which the court had held that he was entitled after a fair trial."***

48 There is therefore a high hurdle to be overcome by the Plaintiffs in seeking an order to strike out under Rule 6/13(1)(a).

Law on claims against legal advisers

49 The Defendant also refers to cases covering claims against legal advisers. In the English Court of Appeal's case of *Channon v Lindley* [2002] EWCA Civ 353, the Plaintiff claimed that due to the solicitor's negligence his case had been presented in a weaker way at trial than it should have been. The Plaintiff sued his solicitors claiming that if his claim had been better presented he would have achieved a better result. Potter LJ cited the following:

> ***"It has not been in dispute between the parties to this appeal, nor indeed was it in dispute before the judge that, given the uncertainty of what the District Judge would have ordered had the case been properly presented to him, the damages in respect of the defendants' negligence fell to be assessed on the 'loss of chance' basis.*** Thus, having decided that substantial loss had undoubtedly been suffered as a result of the deficiencies in the material put before the District Judge, the judge was faced with the uncertainty of assessment identified by Hobhouse LJ in *Allied Maple Group v Simmonds and Simmonds* [1995] 4 All ER 907, [1995] 1 WLR 1602 ***at 1621 of the latter report:***
>
> > ***"The judge will have to assess the plaintiffs' loss on the basis of the value of the chance they have lost….***This involves two elements: what better terms might have been obtained – there may be more than one possibility – and what were the chances of obtaining them. Their chance of obtaining some greater improvement, although significant, may be less good than the chances of obtaining some other lesser improvement. It ***will be a question for the judge, on the basis of the evidence….***which the parties place before him…to make his assessment of the value of what the plaintiffs lost.""

50 Of course it may be observed that this case was clearly one in which it was accepted that there was "uncertainty" relating to what the district judge would have ordered in the case had it been "properly presented to him". In the context of this case it would be necessary to establish that there is some prospect that, had Advocate Hoy represented the Defendant in the Court of Appeal, the outcome would have been better for the Defendant. Of course, in looking at that it is necessary to take the Defendant's pleadings at face value.

51 In *Feakins v Bairstow* [2005] EWHC QB 1931, the Court considered the correct approach to causation and damages when the Plaintiff contends that the case was not presented as well at trial as it could have been. The Court said:

> ***"The task of the court is to assess the chances of the Claimant's success at a notional trial if the solicitor had fulfilled his duty.*** To succeed the Claimant must establish that he had a real and substantial rather than a negligible chance of success. If the chance was more than negligible, the court must assess it. If the likely outcome would have been by way of settlement, in my view the court should take account of that. In *Mount v Baker Austin* [1998] PNLR 493 ***Simon Brown LJ stated:***

***"1. The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to Counterclaim) he has lost something of value i.e. that his claim (or defence) had a real and substantial rather merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' – the word used in a somewhat different context in** *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602 **– lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.**)

2. The evidential burden lies on the Defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where , as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

3. If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case .

4. If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospect of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the Defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure."

52 . The Defendant argues that the question for me is whether or not a reasonable cause of action is disclosed in the Counterclaim and the November Pleading. It is argued that the cause of action is clear in as much as it was alleged to be a breach of contract and negligence.

53 . The Defendant also argues that causation and loss are inevitably fact sensitive issues and will require an understanding of what happened at the trial, what was said or submitted at the Hearing that Advocate Hoy did not attend, what should have happened and what on the Defendant's argument would or should have been submitted. There would need to be evidence as to what the likely or indeed possible effect would have been should the matter had been dealt with with Advocate Hoy in attendance and whether or not a chance has been lost because the case was not presented in the way that it should have been.

Decision

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.