Phillip Cowan Sinel (trading as Sinels) v Moira Hennessy and Damien James and Adam Clarke and Luc Jean Edourd Argand (as executor of the estate of the late Killian Hennessy) and Marie Emanuelle Michelle Argand (as executor of the estate of the late Killian Hennessy) and Sylvain Michael Bogensberger and Amuary D'Everlange and The Law Society of Jersey

Jurisdiction:	Jersey
Judge:	Bompas JA
Judgment Date:	18 April 2018
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Text

[2018] JCA 071

COURT OF APPEAL

Before:

George Bompas, Q.C., sitting as a Single Judge

Between
Phillip Cowan Sinel (trading as Sinels)

Plaintiff
and
(1) Moira Hennessy
Defendants
(2) Damien James
(3) Adam Clarke
(4) Luc Jean Edourd Argand (as executor of the estate of the late Killian Hennessy)
(5) Marie Emanuelle Michelle Argand (as executor of the estate of the late Killian Hennessy)
(6) Sylvain Michael Bogensberger
(7) Amuary D'Everlange
(8) The Law Society of Jersey

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

Authorities

Sinels v Hennessy and Others [2018] JRC 065A.

Sinels v Hennessy and Others [2018] JRC 007.

James v Law Society of Jersey and Others [2017] JRC 047B.

Crociani v Crociani 2014 (1) JLR 426.

Stuart v Goldberg Linde [2008] 1 WLR 823.

Human Rights (Jersey) Law 2000.

Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993

HSBC Trustee (CI) Lt v Kwong and others [2018] JRC 051A.

Jersey Evening Post v Al Thani [2002] JLR 542.

R v Derby Magisgtrates Court ex parte B [1996] 1 AC 487.

Appeal — application for leave to appeal a judgment of the Royal Court dated 27 March 2018

Bompas JA
Introduction

1 Before this court is an application by the plaintiff, Advocate Philip Sinel (trading as Sinels), for leave to appeal from a judgment of the Royal Court (Sir William Bailhache, Bailiff) given on 27 th March, 2018, (*Sinels v Hennessy and Others* [2018] JRC 065A). In the judgment

the Bailiff gave reasons for refusing to make an order for redactions to the Royal Court's earlier judgment of 12 thJanuary, 2018 (*Sinels v Hennessy and Others* [2018] JRC 007) " **to the extent that it referred to the Hennessy family"**. The plaintiff now asks also for various ancillary orders relating to the publication of those two judgments and other matters. These orders are directed, in particular, at restraining publication of the two judgments, as well as any judgments on the question of leave to appeal from the 27 th March, 2017, judgment, until after the determination of appeals in relation to them.

2 In this judgment I shall refer to the 27 th March, 2018, judgment as "the Anonymisation Judgment", and the 12 th January, 2018, judgment as "the Set Aside Judgment". There is a further judgment to mention, this is one given by the Royal Court (Sir William Bailhache, Bailiff) on 29 th March, 2018, (unpublished) refusing the plaintiff leave to appeal from the Anonymisation Judgment. I shall refer to this as "the Appeal Judgment".

3 The matters which give rise to the plaintiff's application can conveniently be summarised by reference to the plaintiff's Order of Justice which began these proceedings on 1 st March, 2017. There are eight defendants named in the Order of Justice, but on the applications which led to the three judgments I have just referred to it is only the first defendant, Ms Moira Hennessy, who has been joined as a party. She is the daughter of the late Mr Killian Hennessy referred to below.

4 The plaintiff is an Advocate and provides legal advice to clients. In general the plaintiff will owe duties of confidentiality to his clients, and a client will be able to assert a claim to legal professional privilege in respect of materials containing or evidencing or relating to his seeking of legal advice from, or the giving of legal advice to him by, the plaintiff.

5 The late Mr Killian Hennessy died on 1 st October, 2010, in, and domiciled in, Switzerland. His last will dated from 2002. By this he appointed Luc Argand and Marie Emanuele Argand as his Executors. They are the fourth and fifth defendants in the plaintiff's action. The sixth defendant, Sylvain Bogensberger, is the Executors' special attorney.

6 The plaintiff asserts that before his death Mr Killian Hennessy had consulted him for legal advice. The plaintiff states that this was anticipation of proceedings which he believed were likely to be brought by the first defendant following his death.

7 On 26 th May 2016, according to the plaintiff's Order of Justice, the sixth defendant as special attorney for the Executors issued a Representation against the plaintiff seeking certain information and documents. In the Representation it appears to be said against the plaintiff that the plaintiff cannot not rely, as against the fourth to sixth defendants, on any duty of confidentiality he might have owed to Mr Killian Hennessy, or on any claim to legal professional privilege Mr Killian Hennessy may have had, as a basis for refusing to give explanations or documents.

8 Meanwhile, it appears that in May 2015 the first defendant had received a small package of documents from, on her account, an anonymous sender. The contents of the package are described by the plaintiff in his witness statement of 13 th October, 2017, made on the application which led to the Set Aside Judgment, and in greater detail in an Amended Order of Justice dated 7 th December, 2017. Broadly, the package contains documents (which I shall call "the Documents") being copies of documents, generated in the course of the plaintiff's professional work for a Mr Gilles Hennessy, a son of Mr Killian Hennessy, and on their face likely to be privileged and confidential to Mr Gilles Hennessy. Mr Gilles Hennessy still is, according to the plaintiff, one of his clients. The Documents are therefore themselves in all likelihood privileged and confidential.

9 It appears that after receiving the Documents the first defendant passed them over to her advocate, Advocate James. He is the second defendant. Some 18 months later she instructed the second defendant to disclose the Documents to the third defendant, Advocate Clarke. He is the advocate for the fourth to sixth Defendants. After this The second defendant sought assistance from the Law Society of Jersey, and then from the Royal Court, as to the approach which properly ought to be taken in relation to the Documents, having regard to the fact that judging, from their nature and content they were, or were likely to be, privileged and confidential.

10 On 22 nd March, 2017, the Royal Court (Sir William Bailhache, Bailiff, with Jurats Grime and Pitman) gave a judgment on Advocate James' application to the Royal Court. This judgment, *James v Law Society of Jersey and Others* [2017] JRC 047B, was anonymised for publication as regards the name of Mr William Hennessy and, indeed as to the names of any of the Hennessey family members. The conclusion reached by the Royal Court on the substance of the application was that Advocate James ought not to transmit the Documents to Advocate Clarke, notwithstanding the instructions given to him.

11 In his proceedings the plaintiff seeks various heads of relief in relation to the Documents, principally delivery up of the Documents and any copies, and injunctions from distributing or communicating the existence or content of the Documents.

12 What led to the Set Aside Judgment, the judgment which the plaintiff wished to have redacted, was an application by the first defendant. Service of the plaintiff's representation on the first defendant out of the jurisdiction had been ordered; and she was applying to have that service, and the order for it, set aside on the ground that there was no serious issue to be tried: her contention was that it was for Mr Gilles Hennessy and not the plaintiff to assert any rights in relation to the Documents based on confidentiality or privilege. The first defendant's application was held in open court and open to the public. There was no reporting restriction. Inevitably, the plaintiff's Order of Justice will have been read and considered by the Court, and in their submissions to the Court the parties' advocates will have referred to it. Central to these submissions will have been the relationship between the plaintiff and both Mr Killian Hennessy and Mr Gilles Hennessy and the significance of

this to the Documents. The Set Aside Judgment records that the plaintiff asserted that he was enforcing the claims concerning the Documents with the approval of Mr Gilles Hennessy.

13 The Royal Court, in giving the Set Aside Judgment, accepted the first defendant's contention on the application. But, importantly, when handed down on 12 th January, 2018, the Set Aside Judgment contained no anonymisation of any named individuals, whether or not parties to the plaintiff's proceedings. Thus, when explaining the context of the application and the identity and relationship of the parties and of Mr Killian Hennessy and Mr Giles Hennessy, the Set Aside Judgment contained the names of the individuals referred to. It was stated, therefore, that the plaintiff had acted professionally for Mr Killian Hennessy, that in the administration of the latter's estate a dispute had arisen with the plaintiff concerning the production of information and documents, and that the plaintiff had acted and was continuing to act professionally for Mr Gilles Hennessy who was his client.

14 The Set Aside Judgment is now subject to a pending appeal, the plaintiff having been given leave to appeal by the Royal Court.

15 When the Set Aside Judgment was handed down the plaintiff was given by the Court two weeks to make an application for anonymisation of the judgment for publication; and on the last day of the period, and after, therefore, copies of the handed down judgment had been distributed to the plaintiff and the first defendant, and in all probability more widely, the plaintiff made an application by summons, joining only the first defendant, for the published judgment publication to be in anonymised form, with redactions " **to the extent that it refers to the Hennessy family"**. The plaintiff was requiring an amended version of the Set Aside Judgment to be prepared by the Royal Court with redactions from the original, and that amended version to be the one passed to the Judicial Greffe Publications Department for publication. The plaintiff was not seeking an injunction, whether against the first defendant, or against all the parties to his action, or against anyone else, to restrain either use being made of, or reference being made to or to any content in, the handed-down judgment; and no restraint was sought against anyone in respect of the fact that Mr Killian Hennessy and Mr Gilles Hennessey were clients of the plaintiff.

16 This application of the plaintiffs was rejected by the Royal Court in the Anonymisation Judgment. In essence the Royal Court founded itself on the fact that the first defendant's jurisdiction challenge had been heard in open court, and that this pointed to the Set Aside Judgment remaining unredacted for publication having regard to the principle of open justice; and the Royal Court rejected the case that any member of the Hennessy family, including Mr Gilles Hennessy, had any basis for claiming a right to have references to the Hennessy family removed from the handed down version of the Set Aside Judgment in the interests of privacy.

17 On the plaintiff's application for leave to appeal against the Anonymisation Judgment, which led to the Leave to Appeal Judgment, the Royal Court concluded that an appeal

against the exercise of the Royal Court's decision concerning redaction had no real prospect of success, and that there was no other reason for giving leave. The Royal Court did, however, direct that there was to be a stay, of 8 days (subsequently extended), in relation to the publication of unredacted versions of the various judgments, to give the plaintiff an opportunity to seek to have from the Court of Appeal leave to appeal from the Anonymisation Judgement before there had been publication of an unredacted version of the Set Aside Judgment and the Anonymisation Judgment.

18 Out of deference to the many detailed arguments put forward by Advocate J Dickinson on behalf of the plaintiff I have set out at some length my reasons for my order on the plaintiff's application.

The leave to appeal test

19 For the Plaintiff Advocate Dickinson submits, and I accept, that the test for leave to appeal is that explained in *Crociani v Crociani* 2014 (1) JLR 426 at [50] to [51]. In summary, it must be shown that:

(i) the appeal has a real prospect of success; or

(ii) the question to be raised on the appeal is one of general principle falls to be decided for the first time; or

(iii) there is an important question of law on which further argument and a decision of the Court of Appeal would be to the public advantage.

The grounds of appeal

20 There are seven grounds put forward by the plaintiff for contending that the Anonymisation Judgment was in error. Before setting these out it is to be noted that the plaintiff has not directed any argument at the basis on which the Court of Appeal will approach the question whether the Anonymisation Judgment may be interfered with.

21 As to this, if the Anonymisation Judgment involved the exercise of a discretion, the Royal Court having first had to identify and then place a weight on the various factors to be taken into account, the requirement on appeal would be familiar: the plaintiff would need to show that the Royal Court misdirected itself as to the principles governing the exercise of its discretion, or that the Royal Court took into account matters which were not open to it, or failed to take into account matters which properly it should have done; or that it reached a conclusion which is plainly wrong.

22 However, the plaintiff relies on an English Court of Appeal case, the case of *Stuart v Goldberg Linde* [2008] 1 WLR 823, a case on the striking out of an action as an

abuse where it raised issues which should have been raised in previous proceedings, for proposition that the first instance decision whether a second action is an abuse is not the exercise of a discretion but is an evaluation of a series of different factors.

23 Based on this the plaintiff points out that, where human rights are engaged, Article 7 of the Human Rights (Jersey) Law 2000 makes it unlawful for the Court to act in a way which is incompatible with a Convention Right. It is then submitted that in the present case the decision which the Royal Court had to reach did not involve any discretion: there was only one right answer. For this reliance is placed on the English Court of Appeal case of *Global Torch Ltd v Apex Global Management Ltd* [2013] 1 WLR 2993, a case in which it was held that where there are competing Convention principles, relevantly the Article 6 principle of open justice, and the Article 8 reputational rights an individual has, what is involved is a balancing exercise. In that case the individuals seeking privacy failed on the basis that in the circumstances the first instance judge had been entitled to reach the conclusion he had having conscientiously carried out the balancing exercise.

24 So far as concerns the approach on appeal, the *Goldberg Linde* case relied upon by the plaintiff contains the further point: while the appeal is not from the exercise of a discretion, the approach will nevertheless be almost the same as that on an appeal from the exercise of a discretion. This is because the decision in question involves the balancing of various factors in order to arrive at the conclusion. Thus, so Sir Anthony Clarke MR pointed out a paragraph 82 of his judgment in that case, " ***The line between the approach of an appellate court reviewing the exercise of a discretion and its role reviewing a decision of this kind is very narrow.*** This is because the decision whether a second action is an abuse of court involves the court balancing a series of different factors before reaching its conclusion".

25 For present purposes it is unnecessary to decide whether or not the plaintiff is correct in the submissions which I have just described. I assume that he is.

26 In summary, the plaintiff's grounds of appeal are that:

(i) the rejection of the plaintiff's application for anonymisation risks causing prejudice to the plaintiff's proceedings started by his Order of Justice of March 2017;

(ii) the Anonymisation Judgment is inconsistent with the position taken by the Royal Court when giving judgment on the Representation of Advocate James for directions concerning the Documents;

(iii) the Royal Court was mistaken when thinking it relevant as a factor against anonymisation of the Set Aside Judgment that the plaintiff's proceedings were, in substance, proceedings on behalf Mr Gilles Hennessy whose rights they sought to assert;

(iv) the Royal Court's reasoning was flawed when the Bailiff stated in the

Anonymisation Judgment that " ***the only privileged material referred to is the fact that the Plaintiff acted for the late Mr Killian Hennessy and also for Mr Giles Hennessy — and yet that information is already known to the First Defendant and others"***;

(v) the Royal Court was mistaken when holding that any claim to privilege which the late Mr Killian Hennessy might have had now belonged to his Estate and not to the plaintiff or Mr Gilles Hennessy;

(vi) the Royal Court was mistaken when holding that publishing the Set Aside Judgment in anonymised form would prejudice the public interest in publication of the Set Aside Judgment; and

(vii) the Royal Court failed to recognise and give effect to the rights of the plaintiff and his clients under Article 8 of the European Convention on Human Rights ("the Convention"), these rights involving in the present case a " ***legitimate expectation of privacy attaching to their confidential and privileged relationship***."

27 The plaintiff's written submissions in support of the application for leave to appeal address both the question whether (as the plaintiff submits) the appeal has a real prospect of success, and the question whether (again as the plaintiff submits), the appeal would raise a point of general principle to be decided for the first time, or that the appeal raises an important question of law.

28 As to this second question the plaintiff relies on two particular considerations. First, it is argued that what makes the present case one suitable for appeal, regardless of the appeal's prospects of success, is that the question of anonymisation arises in a previously unconsidered and unique situation, the case of lawyer and client, where there is said to be " ***a powerful expectation of privacy, engaging both the client's and the lawyer's Article 8 ECHR rights***." It is also said to be novel, and worthy of particular consideration by the Court of Appeal, that on the plaintiff's case the Documents came to the possession of the First Defendant by unlawful means.

Real prospect of success?

29 The Royal Court assumed, in favour of the plaintiff, that after a judgment had been handed down the Court could direct the preparation of a second, redacted, version of the judgment as the version to be published. The question is whether, the Royal Court having that power, the plaintiff has a real prospect on appeal of successfully showing the Royal Court's decision to refuse to exercise the power to be flawed so that it is open to the Court of Appeal to reverse the decision.

30 In my judgment the plaintiff's first ground of appeal does not have a reasonable prospect of success. When it considers the Set Aside Judgment the Court of Appeal will have before it

the original, unredacted, version. It will be irrelevant to the Court of Appeal's consideration of the plaintiff's appeal whether or not there has been a second version disseminated via the legal publication services.

31 What is more, the plaintiff's substantive proceedings are not directed at concealing the fact that he has acted for Mr Killian Hennessy and Mr Gilles Hennessy. His Order of Justice describes that fact, which it is the very foundation of his case as regards the Documents. That fact was made public by the plaintiff, if not before, then with the hearing in public of the first defendant's application to set aside service. Yet further, assuming in the plaintiff's favour that his proceedings succeed at trial, doubtless he will secure the disposal of the Documents (and copies) as he seeks; but there is nothing sought in his proceedings, and no other basis, for preventing the defendants from deploying or giving publicity to the fact of the plaintiff's relationship with Mr Killian Hennessy and Mr Giles Hennessy.

32 One particular matter should be mentioned. The plaintiff sets out in his Amended Order of Justice dated 7 th December, 2017, the statement that " *Gilles Hennessy is, in any event, aware of the steps that Advocate Sinel is and has taken to recover the … Documents and agrees with them"*. Mr Gilles Hennessy is not a party to the proceedings. Accepting what the plaintiff states, Mr Gilles Hennessy will have consented to the plaintiff's bringing and conduct of his proceedings and, therefore, of his bringing into the public domain the fact that he is and was a client of the plaintiff.

33 In the skeleton argument put forward by Advocate Dickinson on behalf of the plaintiff on this application, there is a further contention made to support the first ground of appeal. This is that the plaintiff and Mr Gilles Hennessy each have rights under Article 8 of the European Convention on Human Rights ("the Convention") which would be put at risk unless redactions are made to the Set Aside Judgment. Article 8 gives everyone the right to respect for his private and family life, his home and his correspondence; and the Article stipulates that, subject to specified exceptions, the right is not to be interfered with by a public authority. The exceptions are, materially, that the interference must be in accordance with the law and necessary in a democratic society for various matters, including the protection of the rights and freedoms of others.

34 In the present case what is submitted on behalf of the plaintiff is that the Article 8 right to respect for privacy is a right not to have the fact of the relationship between him and Mr Gilles Hennessy explained in the Set Aside Judgment, as published, unless redactions are made which obscure Mr Gilles Hennessy's identity.

35 The difficulty which the plaintiff faces is that both the Court's historic practice and Article 6 of the Convention generally require a court hearing to be in public; and in the present case no attempt was made to argue, before the hearing of the first defendant's set-aside application, that that hearing should be in private. Of course, there are many situations in which hearings are in private and the parties' names are anonymised in the listing of the hearings. The usual indicator for a private hearing is that holding the hearing in public

would defeat the ends of justice. And, where a hearing is in private, any judgment is likely to be private or, if not, is likely to be given in a way that it may be disseminated without impacting on the reasons which led to the hearing being in private in the first place. Sometimes a judgment given following a public hearing will be anonymised; but this will be an unusual case, the anonymisation most likely being to protect the identity of a vulnerable third party. Ordinarily, if there is to be anonymisation, that will be done in the handed down version of the judgment, not by later redaction of the judgment for publication: later redaction is even more unusual.

36 As the Bailiff pointed out in the Anonymisation Judgment: " ***In support of his application the Plaintiff refers to*** *JEP v Al Thani* [2002] JLR 542, *In Re Sanne Trust Company Ltd* [2009] JRC 025B ***and*** *In the matter of the C Trust* [2012] JRC 098. ***These cases emphasise the importance of justice being done in public and the principle of publishing judgments in order that firstly the public can be satisfied that justice is being done, and secondly so that the reasons for Court decisions will be understood and guide subsequent cases in the future"***.

37 In the skeleton argument in support of the plaintiff's application to this court for leave to appeal Advocate Dickinson has referred to a recent case, that of *HSBC Trustee (CI) Lt v Kwong and others* [2018] JRC 051A, decided after the Anonymisation Judgment had been given in the present case.

38 In that case the Royal Court (Sir Michael Bird, Commissioner) refused in principle to anonymise for publication a judgment given on an application to the court for directions made by a trustee. The Commissioner in his judgment made reference to *Jersey Evening Post v Al Thani* [2002] JLR 542, the case put before the Bailiff on the Anonymisation application and referred to by him in the Anonymisation Judgment. At paragraph 20 the Commissioner said this about the *Al Thani* case:

> ***"20. As matters have developed, in addition to procedural hearings as described at para 21 of the judgment in Al Thani, there appear to us to be at least three categories where public justice may yield to some other factor. These are (i) cases concerning minors or other persons under a disability; (ii) where sitting in public or issuing a public judgment would defeat the very objective of proceedings so that the court could not do justice; and (iii) where the right to privacy outweighs the interests of public justice."***

The procedural hearings described in paragaraph 21 of the judgment in *Al Thani* were those where the court sat in private, or in chambers, as a matter of administrative convenience, rather than where it sat *in camera*, in other words in secret or private, in order to preserve confidentiality.

39 At paragraph 21 the Commissioner expanded on the rationale which had led to the development of the three categories of cases he had just referred to:

> ***"21. Examples of (i) are public law cases concerning children e.g. whether they should be removed from their parents. An example of (ii) is where an injunction is sought to restrain disposal of monies pending trial or the provision of information to enable stolen assets to be traced on the basis that sitting in public would defeat the objective by enabling the proposed defendant to hide the monies in question; and examples of (iii) are proceedings for ancillary relief in matrimonial cases (see*** *L -v- L* [2016] 1 WLR 1259 ***where it was held that anonymisation of judgments in such cases should normally be made in order to preserve the privacy of the parties)."***

40 At paragraph 22 the Commissioner commented as follows, quoting from the *Al Thani* case:

> ***"22. In Al Thani, the Court, having referred at paragraphs 26 and 27 to the fact that, in England and Wales, applications for the blessing of a momentous decision by trustees ("blessing applications") or where the trustees were surrendering their discretion to the Court ("surrender applications"), were normally held in private, went on to say at para 28:–***
>
> > ***"We think it would be unwise to be too dogmatic as to when the court should sit in public and when it should sit in private to hear Article 47 applications.*** As Hart J rightly emphasized, the categories adopted in Re S are not watertight, and some cases may even fall outside them. The jurisdiction conferred by Article 47 of the Trusts Law is a wide one. It has been employed to the great advantage of settlors, trustees and beneficiaries since the Trusts Law came into force. But we think it can be said that the courts in this jurisdiction have accorded a greater importance to the need to respect the confidentiality of private trusts than has been the case elsewhere. It has certainly been the practice in Jersey to sit in private to hear applications falling within categories (b) and (c); but it has been the practice occasionally to sit in private to hear cases falling in category one. The underlying rationale is a desire not to undermine the confidence which lies at the root of the relationship between a trustee and the beneficiaries, particularly of a discretionary trust. In striking the balance between the principle of open justice and the rights of individuals to respect for the confidentiality of their private business arrangements, the Court must have regard to the purpose of the Article 47 jurisdiction. Its broad purpose is to assist those concerned with the administration of trusts to resolve their differences and to seek judicial guidance or direction in an orderly context but in a relatively informal and flexible manner. When hostile litigation is being conducted, it must naturally be conducted in public in the ordinary course of events. But where the Court is sitting administratively, or is exercising a quasi-parental jurisdiction to protect the interests of all the beneficiaries of a trust, the Court

should generally sit in private. Although the Human Rights (Jersey) Law 2000 is not yet in force, we have considered whether this approach might be in conflict with a convention right under the European Convention on Human Rights. Article 6(1) of the Convention provides –

> ***"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*** Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" .

In our judgment the phrase "or the protection of the private life of the parties so require[s]" is sufficient justification, absent any compelling reason to the contrary, for resolving to sit in private to hear this kind of application under Article 47 of the Trusts Law."

We would add that Article 47 is now Article 51 of the Trusts (Jersey) Law 1984 as amended. References in the quotation to categories (b) and (c) are to blessing applications and surrender applications respectively. We shall hereafter refer to these two categories of application as 'direction applications'."

41 At paragraphs 23 and 26 the Commissioner made the following observation about directions applications in trust cases.

> ***"23. In practice, the Court proceeds as envisaged in paragraph 28 of Al Thani. In other words, it sits in private to hear direction applications. We are not concerned for the purposes of this case with any other instances (whether related to trusts or not) where the Court may sit in private and we say nothing further about such cases*** .
>
> ***…***
>
> ***26. It is also to be noted that direction applications are usually brought at the instance of a trustee for its guidance and protection. Thus, if the application were to be heard in public or an unanonymised judgment were to be published, the beneficiaries would find their privacy invaded as a result of a decision taken by another party (i.e. the trustee)."***

42 Then, at paragraph 27 the Commissioner explained as follows concerning the Court's practice:

> ***"27. However, the Court is conscious of the importance of public justice and accordingly its practice is that, if a written judgment is produced, it will normally arrange for the judgment to be published but in anonymised form. The judgment will, so far as possible, contain the full reasoning and factual description contained in the judgment but will simply omit names and any other matters which would permit identification. Publication of an anonymised judgment serves two important purposes:–***
>
> > ***(i) Whilst such a procedure does not fulfil the objectives of public justice (as described above) to the same full extent as would be served by a hearing in public, it is the next best thing.*** It enables the public to see what the Court is doing and why. For example, in public law children's cases, publication of the judgment enables the public to see the sort of circumstances in which the Court will remove children from the care of their parents. This enables the public to assess whether the Court is being too proactive or not proactive enough in such cases. Publication of an anonymised judgment therefore serves an important purpose. As Lord Neuberger MR said in *H -v- News Group Newspapers Limited* [2011] 1 WLR 1645 ***at para 35:–***
> >
> > > ***"35. ….More particularly, there is much in the point that the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between an unidentified well-known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information."***
> >
> > ***In other words, full information about a case without names is more helpful than publication of names but with no detail*** .
> >
> > ***(ii) Publication of full reasons, even in anonymised form, enables the legal profession to be aware of any developments in the law.*** Even in cases which do not involve new law but merely application of settled principles to the facts of a particular case, it is

> often helpful to the profession to see how the Court applies established law to particular facts. This enables them to advise their clients with greater precision in future cases."

43 What is important to observe is that in the *HSBC* case the Court was concerned with a judgment following a directions hearing, in a trust case, which had been in private. This is apparent from the following passage at paragraph 33 of the judgment:

> ***"33. However, subject to exceptions such as these, this Court's policy is clear, namely that although direction applications will normally be heard in private, any reasoned judgment should be published subject to anonymisation so as to protect the privacy of those involved and to ensure that full disclosure to the Court is given by the parties …"*** .

44 As to this the conculsion of the Court in the *HSBC* case was expressed as follows:

> ***"34. In our judgment, this policy strikes the appropriate balance between, on the one hand, the privacy rights of the beneficiaries under Article 8 European Convention of Human Rights ("ECHR") (respect for private life) and the interests of justice as summarised at paras 24 and 25 above and, on the other, the importance of public justice and the Article 10 ECHR rights in respect of freedom of expression."***

45 It is correct, as the plaintiff submits, that following a hearing in public the Court has power to direct that an anonymised version of the judgment is to be published, rather than the judgment handed down without any anonymisation. There is a balancing exercise to be carried out when anonymisation is proposed, although the normal position will be that the published version of the judgment will be the one already given. There needs to be a good reason if this position, which is founded on past practice as well as Article 6 of the Convention, is not to be preponderant.

46 In the present case the Royal Court was never invited to consider sitting in private. How the Royal Court would have decided such an application is, for present purposes, academic, although it is difficult to see any good basis for there being a private hearing. Further, there is no suggestion of the plaintiff having sought at or before the hearing to have a reporting restriction, or to have the parties and the Court avoid making reference to any individual's actual names.

47 Given this, it is impossible to see how in the present case either the plaintiff or Mr Gilles Hennessy could have expected (a) the fact of their relationship not to be made plain during the hearing of the application to anyone who cared to take an interest, and (b) then only afterwards to be entitled prevent publicity being given to that fact in the Royal Court's published judgment. There is nothing particularly remarkable in the fact that Mr Gilles Hennessy was the plaintiff's client. Plainly the plaintiff and Mr Gilles Hennessy had had no

difficulty with the prospect of that fact becoming public, as no steps were taken to seek to have that fact kept private by having the hearing of the Set Aside application in private or otherwise restricting reporting of the fact or reference to the Hennessy name in connection with the plaintiffs' clients.

48 For the plaintiff Advocate Dickinson is correct when pointing out that in the Anonymisation Judgment the Bailiff did not refer expressly to Article 8 of the Convention as giving a right to the plaintiff or Mr Gilles Hennessy that was in play in relation to the actual redactions sought to be made to the Set Aside Judgment. However, the Anonymisation Judgment is clear in showing that the Bailiff appreciated the claim being made by the plaintiff to be that he and Mr Gilles Hennessy had a right to privacy for the fact of their relationship which should be balanced against, and in the particular case outweigh, the usual practice of publishing of unredacted judgments given following hearings in public. This appears from the remarks of the Bailiff in paragraphs 4 and 5 of the judgment. He considered and quoted from the speech of Lord Taylor of Gosforth in the English case of *R v Derby Magisgtrates Court ex parte B* [1996] 1 AC 487 at page 507, and continued “The case is good authority to support the contention that legal professional privilege is such an important human right that it has priority over other public interest factors”.

49 As was open to the Royal Court, the Royal Court's conclusion was that in the circumstances of the case there was insufficient to outweigh the usual practice. In this connection the Royal Court appreciated, and took account of, a factor relied upon by the plaintiff to reinforce the Article 8 right, namely the plaintiff's contention (as the Bailiff summarised it) that “the relationship between the plaintiff and his client would never have come into the public domain if the first defendant had acted correctly and given the documents back”.

50 The second ground of appeal is without real prospect of success. The fact that the judgment on Advocate James' Representation was handed down in a redacted form following a public hearing demonstrates that the Royal Court has power to give anonymised judgments. It does not follow that in any particular case it necessarily will. As correctly submitted by Advocate Dickinson in his written submissions, Advocate James' Representation was one in which the Court was being invited to give guidance on a matter of professional conduct, the application not being dissimilar in substance to an application by a trustee or other fiduciary for the Court's guidance; and judgments on such applications usually are given in a way to preserve the anonymity of third parties.

51 In the Anonymisation Judgment the Bailiff reasoned that the present proceedings are of a different character from such applications as mentioned in the previous paragraph. The proceedings are ordinary hostile litigation which are ordinarily conducted in public and which ordinarily result in judgments which make open reference to material persons and facts, where these are relevant to the decision and the reasons, without any attempt at anonymisation. The Set Aside Judgment was entirely in line with this approach. There was no good reason for the Royal Court to prepare a second version of the judgment for reporting purposes; at any rate, as the Bailiff explained, there was no reason which

outweighed the general policy reasons pointing away from the introduction of redactions into a second version of the Set Aside Judgment.

52 The third ground of appeal is that there was a flaw in the reasoning of the Royal Court demonstrated in the following statement in the Anonymisation Judgment: " ***there is no reason to afford anonymity in litigation brought on behalf of a third party, and every reason no to do so"***. The statement conveys that the Royal Court regarded it as a relevant consideration pointing against anonymisation of the Set Aside Judgment that, as the plaintiff stated, the proceedings were brought with the support of a third party who was to be benefitted by the proceedings. The third party referred to was, of course, Mr Gilles Hennessy.

53 Advocate Dickinson's skeleton argument in support of the plaintiff's present application does not deal separately with this third ground of appeal. Be that as it may, the ground is in my judgment of no substance. The ground of appeal criticises the Bailiff for having considered as a factor pointing against redaction of the Set Aside Judgment that the plaintiff's action had been brought on behalf of Mr Gilles Hennessy. That was a relevant factor, in my judgment, which it was open to the Bailiff to take into account: ordinarily a party's identity is disclosed, and a third party for whose benefit litigation is brought and whose claims are asserted by a party should not be in a better position.

54 The fourth ground of appeal seeks to criticise the Bailiff's comment that "The only privileged material referred to is the fact that the plaintiff acted for the late Mr Killian Hennessy and also for Mr Gilles Hennessy — and yet that information is already known to the First Defendant and to others".

55 The skeleton argument in support of the present application submits that "the purpose of anonymisation is not to withhold information from the parties to the Set Aside Judgment, but to avoid both the publication of that information to the world at large and the use by the Respondent of a judgment which contains such information".

56 The second part of this argument is mistaken. First, the plaintiff's application does not seek any order restraining the first defendant from using the handed-down Set Aside Judgment: it was concerned with the form of the document to be delivered to the Judicial Greffe Publications Department for publication. The relief sought is for the Set Aside Judgment to "be anonymised, prior to publication, to the extent that it refers to the Hennessy family".

57 Secondly, the Bailiff was quite correct in reasoning, as he did, that "the only privileged material which is referred to is the fact that the Plaintiff acted for the late Mr Killian Hennessy and also for Mr Gilles Hennessy — and yet that fact is already known to the First Defendant and others". That fact had been discussed in open court on the hearing of the Set Aside Application. There could therefore be no objection to the first defendant using that information; and, it follows, there could be nothing to require the first defendant to

refrain from using the handed-down Set Aside Judgment.

58 The first part of the argument is a repetition, in another form, of the complaint that the Royal Court should not have rejected the plaintiff's request for a second, redacted, version of the Set-Aside Judgment, to be prepared for the purposes of being delivered to the Judicial Greffe Publications Department for reporting. As to this, the Royal Court held, correctly, the question whether or not to accede to the plaintiff's request involved the evaluation of competing considerations; but reasons needed to be advanced, if the Royal Court were to accede to the request, reasons which outweighed to usual principle of publicity for court proceedings (including the judgments given in relation to proceedings in public). However, it was plainly relevant to the exercise of that discretion that the plaintiff's request was directed at obscuring a fact, namely the identities of Mr Killian Hennessy and Mr Gilles Hennessy as his clients, which was already in the public domain.

59 The fifth ground of appeal is another ground without any real prospects. It is based on the proposition that the Royal Court referred to and mistakenly relied upon a conclusion it had expressed in the Set Aside Judgment (namely that any relevant claim for legal privilege or confidentiality, so far as concerned Mr Killian Hennessy's relationship with the plaintiff, lay with the executors of Mr Killian Hennessy's estate). When, therefore, the Royal Court stated in the Anonymisation Judgment that "… it seems hard to see why there should be any redaction of the judgment in relation to reference to Mr Killian Hennessy", the plaintiff's argument is that the Royal Court was making a material error.

60 Although the skeleton argument in support of the plaintiff's present application is vigorous in its criticism of the Royal Court's reaching of the conclusion in the previous paragraph, it is not argued that what seems to be an elementary proposition of law is in fact wrong. Further, while it is argued that the Royal Court should not have relied upon the conclusion, and instead should have noted that " *the views of the executors were not before the court hearing the application for anonymisation of the Set Aside Judgment*". This is fanciful. The Executors were parties to the plaintiff's proceedings. If they had considered that there was some risk of unwelcome publicity for the relationship between the plaintiff and Mr Killian Hennessy, no doubt they would have objected. On the other hand they were already engaged in proceedings with the plaintiff founded on that very relationship, so must have been ready for the fact of the relationship to come into the public domain.

61 Finally, so it is argued by the plaintiff, the position of Mr Killian Hennessy should have had no bearing on the Anonymisation Application so far as concerned the position of Mr Gilles Hennessy, and the Royal Court was in error in thinking that it did. This argument distorts the point made by the Royal Court in the Anonymisation Judgment. This point was that the extent of the redactions sought went further than could possibly be justified. That was a fair point. It was not for the Royal Court to recast the plaintiff's application, if the application were too wide.

62 The sixth and seventh grounds of appeal may be considered together. The argument is

first, that the Royal Court failed to appreciate that redaction of the Set Aside Judgment would not impact adversely on the principles behind the policy of publishing without redaction judgments given following hearings in open court; and secondly, that the Royal Court paid insufficient regard to the Article 8 Convention rights of the plaintiff and Mr Gilles Hennessy.

63 The first part of this argument falls down. There must be something of weight to set against the policy of publishing without redaction judgments given following a hearing in public. The argument put forward, however, is that the identities of the Hennessy family have no relevance to the principles considered and developed in the Set Aside Judgment. But this misses the point. The plaintiff's proceedings concern the Hennessy family, as they centre on documents and information generated in the course of his acting for members of that family. On the plaintiff's argument, there would be few cases in which the judgments would reveal even the names of the parties.

64 The second part of the argument has, for the most part, been dealt with already in this judgment. It is unnecessary to repeat what is set out in paragraphs 45 to 49 to above. There is one point to note. The ground seeks to contend for the plaintiff's having a separate privacy right from that of his client which the Royal Court failed to consider. The difficulty with this argument is that if the plaintiff's client has been content for his identity as a client of the plaintiff to be asserted in public, it cannot possibly be for the plaintiff to assert that he has any separate or better right to privacy as to the identity of the client than the client had.

The conduct of the hearing of plaintiff's application to the Royal Court for leave to appeal

65 The skeleton argument in support of the plaintiff's application to this court for leave to appeal to the Court of Appeal contains criticism of the way in which the Royal Court dealt with the hearing of the application before the Royal Court. Two principal arguments are made. First, it is said that the Bailiff had prepared, in advance of the hearing of the application, a draft judgment in which leave to appeal was to be refused. Second, it is said that the Bailiff refused to allow the plaintiff's Advocate to address oral argument on the application.

66 It is not necessary for me to give any detailed consideration to these arguments, as the application before me is a fresh application, and the arguments have no bearing on my decision on the substance of the application. I should record, nevertheless, that I have read both a note of the hearing prepared by the plaintiff's lawyers and, and a transcript of the hearing, and see nothing irregular. When preparing for the oral hearing of an application there is nothing in principle wrong for the Court, equipped with skeleton arguments (as was the case here), to prepare a draft judgment setting out the material facts and issues, and even to set out in the draft judgment a provisional view where the Court thinks appropriate. What matters is that, at the hearing the Court listens, and gives consideration, to the arguments deployed at the hearing, and only reaches a final conclusion and decision after

having given consideration to those arguments. The Royal Court in the present case did hear oral argument from the plaintiff's advocate on principal points made on the plaintiff's behalf, and did allow the plaintiff's advocate to develop those points. It cannot be said that the Royal Court had prejudged the plaintiff's case.

67 A further point is made on behalf of the plaintiff, namely that in the Appeal Judgment the Bailiff demonstrated that, when approaching the Anonymisation Judgment, the Royal Court had in error taken it that it was a matter for the discretion of the Royal Court whether or not to accede to the plaintiff's request. As it seems to me this attaches too much significance to what is said in the Appeal Judgment. What is important is that decision in the Anonymisation Judgment was, on the face of the judgment, arrived at by a process of identification and evaluation of factors relevant to the weighing of the competing Convention principles, that of open justice and that of the individual's right to privacy.

Some other reason for giving leave?

68 The plaintiff submits that there is a point of general principle to be decided for the first time, this concerning “the circumstances in which the confidential and/or privileged nature of any relationship and in particular lawyer/client relationship, and the lawyer's and client's legitimate expectation of privacy in the same, warrants the redaction of the client's personal identifying information from a published judgment”.

69 The form in which the suggested point of principle is couched is revealing. An appeal to the Court of Appeal will not be a moot. As the skeleton argument on behalf of the plaintiff asserts, “the [plaintiff's] application for anonymisation … comes against the background of highly unusual facts …”. The issue on appeal will be whether or not, in the circumstances of this particular case, the Royal Court erred in its decision to refuse to anonymise for publication a judgment given following a hearing in public. This raises no point of general principle: the only question is whether the balancing exercise conducted by the Royal Court was flawed and therefore liable to reconsideration by the Court of Appeal, the suggested flaw being that the Royal Court gave insufficient weight to the “legitimate expectation” which the plaintiff contended for as having survived that previous conduct of the proceedings down to a time after the hearing of the Set Aside application. Nothing is added by the plaintiff's invoking the alleged fact that the Documents came into the possession of the first defendant by unlawful means: that is part of the context of the proceedings of which the Royal Court was aware.

70 The plaintiff's skeleton argument does not address separately any submissions towards the question whether the present case involves an important question of law on which further argument and a decision of the Court of Appeal would be to the public advantage. I have considered that question, however, and cannot see any such question of law. Fundamentally the Anonymisation Judgment involves the carrying out of a balancing of competing rights, having identified and given consideration to relevant factors. And in my judgment the factors identified and addressed in the Anonymisation Judgment, and the

carrying out of the balancing exercise, do not suggest any important question of law for argument and decision by the Court of Appeal.

Conclusion

71 In the result, the plaintiff's application for leave to appeal is refused. The consequence will be that the Set Aside Judgment, along with the Anonymisation Judgment, the Appeal Judgment and this present judgment may all be published without any redaction.