

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

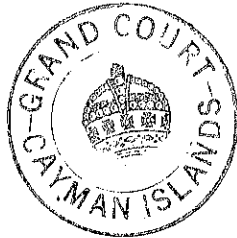
CAUSE NUMBER: FSD 105 of 2014 (ASCJ)

(Formerly 14 of 2014)

BETWEEN:

1. ARNAGE HOLDINGS LTD.
2. BROOKLANDS HOLDINGS LTD.
3. EAST FARTHING HOLDINGS LIMITED
4. MS. KATIA RABELLO
5. MR. FERNANDO TOLEDO

AND



WALKERS (A FIRM)

Plaintiffs

Defendant

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

On the 1st – 4th March, 7th – 10th March, 27th – 29th April, 2nd, 10th, 17th and 26th May 2016.
Judgment delivered: 29th July 2016.

APPEARANCES: Ms. Anneliese Day QC, and Mr. Anthony Akiwumi of Etienne Blake, instructed by Mr. Richard Annette of Stuarts for the Plaintiffs; and

Mr. Mark Simpson QC, instructed by Mr. Sebastian Said, Mrs. Anna Snead and Ms. Victoria King of Appleby, for the Defendant.

Bankruptcy proceedings in Brazil – plaintiffs claim against their former Cayman Islands lawyers for breach of fiduciary duty related to the disclosure of their confidential information in the Brazilian proceedings – whether the plaintiffs claim should be struck out for dishonest abuse of process of the court – principles applicable to striking out on grounds of dishonest abuse.

JUDGMENT

1. The Plaintiffs are companies and individuals who represent the interests of the Rabellos, a prominent Brazilian family.

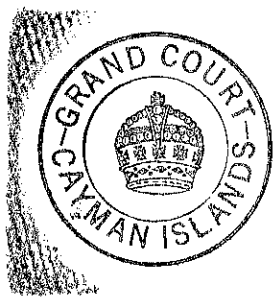
2. The Defendant is a local law firm who formerly advised the Plaintiffs (or at least some of them) and represented their interests within the Cayman Islands over the course of many years.

3. The Plaintiffs' case against the Defendant relates to alleged "catastrophic" loss and damages caused by decisions of the Brazilian Courts¹ by which the effects of the bankruptcy proceedings of a Brazilian group of companies – the Petroforte Group – were extended to Securinvest Holdings S.A ("Securinvest"), an important corporate interest of the Rabello family. The extension of the Petroforte bankruptcy was on grounds of fraudulent attempts at stripping away certain assets of the Petroforte Group to the detriment of its creditors, said to have been perpetrated by Ari Natalino de Silva, the former head of the Petroforte Group, acting in collusion with the Rural Group, controlled by Sabino Rabello², then patriarch of the Rabello family. The Rural Group was found to have acted in turn through Securinvest, which is incorporated in Brazil and whose shares are held by the First and Second Plaintiffs, Cayman Islands companies which are themselves owned and controlled by the Rabellos through the Fourth Plaintiff, Katia Rabello.

4. The First and Second Plaintiffs (together with Trade Link Bank- a licensed Class B bank), are the Cayman Islands entities which - along with Securinvest, Banco Rural and other entities - comprise the Rabello's Rural Group of companies. The fifth Plaintiff, Mr. Toledo, is a trusted associate - described as a "de facto member"- of the Rabello

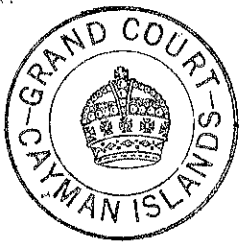
¹ At three levels: at first instance the Brazilian Bankruptcy Court, 8th District of Sao Paulo (hereinafter "the Bankruptcy Court"); at first appellate level, the Tribunal of Appeals for Sao Paulo ("the TJSP") and finally, the Superior Tribunal of Justice ("the STJ").

² Ari Natalino and Sabino Rabello are both deceased, the latter having been succeeded by his daughter Katia Rabello, as head of the Rabellos' Rural Group of Companies, in January 2005.



family and acted as director and later managing director of Trade Link Bank. In those capacities he too claims to be a client of the Defendant and joins in the family's claims against the Defendant.

5. The extension of the Petroforte Bankruptcy to Securinvest (and hence to other Rabello interests), proceeded on the basis of Brazilian legal theory that Securinvest and Petroforte had become, by dint of their collusive and fraudulent actions, a "common economic group".
6. On the Plaintiffs' case, of pivotal importance to the decision finally to extend the Petroforte Bankruptcy to the Rabello interests through Securinvest, was confidential information obtained in this jurisdiction by the Defendant, then acting on behalf of the Brazilian trustee-in-bankruptcy of the Petroforte Group, Dr Alfonso Alves Braga ("Dr Braga"). It was this information that revealed the hitherto undisclosed connection between the Rabellos and Securinvest, as will be further explained below.
7. The Plaintiffs claim in this action that by acting on behalf of Dr Braga in obtaining extensive disclosure of their confidential information, the Defendant breached the fiduciary, contractual and tortious duties which it owed to them.
8. Damages are claimed by the Plaintiffs in the order of hundreds of millions of dollars, said to represent the losses they sustained as a result of the extension of the Petroforte Bankruptcy to Securinvest and to the assets of other entities of the Rural Group.
9. Personal and reputational damage is also claimed to have been sustained, most directly by Katia Rabello who claims to have suffered loss of reputation and the value of her



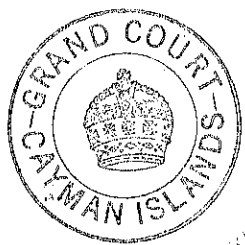
shares in Banco Rural as the result of her involvement with Securinvest having been made public in Brazil³.

10. The allegations against her in the bankruptcy proceedings pivoted most tellingly around her attempts to hide from the Brazilian courts, the fact that through her ownership or control of the First and Second Plaintiffs, the ultimate beneficial ownership ("UBO") of Securinvest was held by her family. This was the connection which Dr Braga had been mandated specifically by the STJ to investigate and, if possible, establish.
11. And it was this investigation that led him to this jurisdiction and resulted in his engagement of the Defendant on instructions to obtain *Norwich Pharmacal*⁴ orders of disclosure from this court - the disclosure which revealed to the Brazilian courts Katia Rabello's status as the beneficial owner of Securinvest.
12. The propriety of Dr Braga's actions in this jurisdiction was brought into question however, when on his instructions, the Defendant made further applications for disclosure and obtained further orders pursuant to the *Bankers' Trust*⁵ principle, resulting in the wholesale disclosure of confidential information about the Rabellos' corporate and other interests held in this jurisdiction and elsewhere.
13. As that breadth of disclosure had not been authorized by the STJ (which was at that time seized only of the extension of bankruptcy case as against Securinvest); the

³ She also serves a lengthy term of imprisonment in Brazil for her role in Banco Rural's involvement in the notorious "Mensalao" official corruption scandal in Brazil, which also resulted in regulatory action against Banco Rural relating to the facilitation of bribery payments.

⁴ *Norwich Pharmacal Co. v Customs and Excise Comms.* [1974] A.C 133.

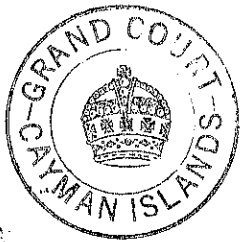
⁵ *Bankers Trust v Shapira* [1980] 3 All .E.R. 353- together with the *Norwich Pharmacal* disclosure herein after referred to variously as "the Cayman Islands Disclosure"; "Cayman Disclosure"; or "Cayman Documents". More precisely, Dr. Braga obtained orders on 27 May 2010 and 2 July 2010 respectively. Each of those orders granted *Norwich Pharmacal* and *Bankers Trust* disclosure.



Bankers Trust disclosure was deemed improper by this Court⁶ and those orders set aside for being “*premature, unjustified and impermissibly wide*”. This Court, by Order issued on 25th July 2011, (“the Retrieval Order”) also directed Dr Braga to take all possible measures to retrieve the unauthorized *Bankers Trust* disclosure and have it removed from the public domain in Brazil, including from the records of the Brazilian courts.

14. The *Norwich Pharmacal* disclosure was however, not impugned and the reliance upon it by the Brazilian Courts in arriving at their decision to extend the Petroforte Bankruptcy was therefore not affected by the Retrieval Order.
15. Much is said now by Mr. Simpson QC to turn upon this fact, in his prosecution of an application on behalf of the Defendant to strike out the Plaintiffs’ claim for being a “*deliberate and dishonest*” abuse of the process of this court. In essence, he alleges that the Plaintiffs have contrived to conceal from this Court the fact that the *Bankers Trust* disclosure had either not yet been placed before the Brazilian courts or had been successfully retrieved by Dr Braga in keeping with the Retrieval Order. And therefore, that it was not available to nor relied upon by the Brazilian courts when their respective decisions to extend the effects of the Petroforte Bankruptcy or to refuse appeals against its extension, were taken in relation to Securinvest and Katia Rabello.
16. This allegation arises against the background of (and is alleged to be contextualized by) the Defendant’s defence which is, in essence, that as the obtaining of the *Norwich Pharmacal* disclosure was authorized by the STJ for the purposes of discovering the

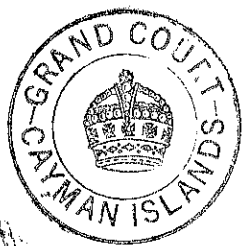
⁶ The subject of a written judgment in Cause FSD 025 of 2011 (ASCJ) delivered on 20th May 2011: 2011 (1) CILR 402



UBO of Securinvest and held by this Court to have been properly obtained, any other attorney instructed by Dr Braga would have obtained it if the Defendant had not acted for him in doing so. Thus, the Plaintiffs - who were through Katia Rabello under a legal and moral obligation imposed by the STJ to disclose it - are unable to establish a causal link between the Defendant's actions in that regard and any loss or damage they sustained.

17. But it would of course follow - and the Defendant implicitly recognises and is concerned - that the obtaining of the *Bankers Trust* disclosure may be regarded differently from the *Norwich Pharmacal* disclosure as a basis for the Plaintiffs' claim. It went beyond the scope of what was authorized by the STJ and beyond what was specifically necessary for revealing the UBO of Securinvest and so this Court's approval of the *Norwich Pharmacal* disclosure, would provide no defence to the extent that the *Bankers Trust* disclosure played a part in the detrimental outcomes in Brazil.
18. It is in this regard that the Defendant's application now to strike out the Plaintiffs' claim on grounds of abuse of process focuses upon the *Bankers Trust* disclosure - alleging that the Plaintiffs have attempted to misrepresent the true state of the Brazilian court files by false averments that the *Bankers Trust* disclosure was available to and relied upon by the Brazilian courts in arriving at their crucial decisions against Securinvest and Katia Rabello.
19. This would further set the stage, asserts Mr Simpson, for the Plaintiffs' claim - based upon latter averred amendments⁷ to their pleaded case - that it was the conduct of the

⁷By way of an important letter of 24 February 2015 amending paragraph 256 of the Reply to the Defence, about which more below.



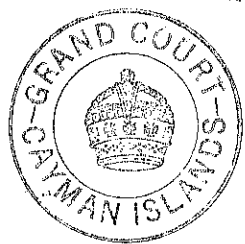
Defendant in obtaining not only the *Norwich Pharmacal* disclosure but also the unwarranted *Bankers Trust* disclosure, that resulted in the loss and damages suffered by them. In light of the condition of the Brazilian court files as it was known to the Plaintiffs at the relevant times, that claim is dishonest and should therefore be struck out.

20. This premise for the abuse of process/ strike out application, upon which I must now rule, arose in the further circumstances which I must now describe in some necessary detail.
21. On 1 March 2016, this Court had been presented with opposing applications. First, that of the Plaintiffs for summary judgment against the Defendant⁸ on the basis that, on the face of the pleadings and undisputed evidence, the Defendant had no realistic prospect of a successful defence. For its part, the Defendant cross-summonsed⁹ to strike out the Plaintiffs' case on the basis that it had no prospect of success, relying fundamentally, on this Court's approval of the *Norwich Pharmacal* disclosure.
22. It is however, important to note at the outset, that on the Plaintiffs' case as originally pleaded in its Statement of Claim, there was and still is, no express reliance upon a distinction between *Norwich Pharmacal* and *Bankers Trust* disclosure.
23. As set out in paragraph 170 of the Statement of Claim:

"170. In summary, the confidential documentation and information obtained by Dr Braga, through the Defendant's breaches of duty, facilitated Dr Braga's wrongful

⁸ Pursuant to Grand Court Rules, Order 14.

⁹ Pursuant to Grand Court Rules, Order 18, rule 19.



campaign to confiscate the non-Sobar¹⁰ Securinvest assets, the assets of Ms Katia Rabello and the assets of Rural Group in order to pay the debts of the Petroforte Estate despite there being no proper legal or moral basis for doing so in that:-

(i) the bulk of Securinvests assets (for example, the Hotel National, the TV station receivable, miscellaneous real estate etc....) were entirely unrelated to the Petroforte and Sobar issues;

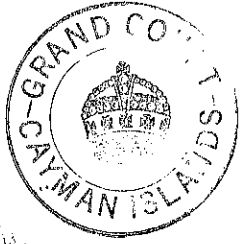
(ii) prior to the disclosure of documents in the Cayman Islands proceedings the STJ recognized the applicability of the common economic group rule to the extension of a bankruptcy to a third party and as a result entered the suspension order temporarily taking Securinvest out of bankruptcy (albeit that the Sobar property remained subject to a lien) which was subsequently ratified by further Court Orders;

(iii) however, following the wrongful disclosure of the confidential documentation and information from the Cayman Islands, the content of which was likely to prejudice any tribunal in Brazil against the Plaintiffs (especially after wide publication of confidential information in the Brazilian press), adverse order followed by adverse order began to be made against the Rabello family in Brazil as particularized below.”

24. And as set out in parts of paragraph 171:

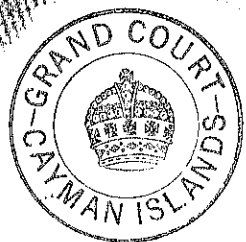
“171. By way of example only, the confidential information and documentation obtained by the Defendant for Dr Braga was instrumental in bringing about the following events (which are dealt with in greater detail below):-

¹⁰ “Sobar” being an ethanol plantation and factory in Brazil acquired by Securinvest and which was alleged by Dr Braga to have been the subject of the asset-stripping conspiracy between Ari Natalino and Banco Rural using Securinvest as the vehicle for the acquisition from Petroforte. “Non-Sobar” is therefore a reference to the other assets of Securinvest.



- (i) *On 29 June 2010, Dr Braga delivered the documents wrongfully obtained by the Defendant and a related petition to the STJ (Judge Andrichi) in Brazil.*
- (ii) *In or about June 2010, Dr Braga delivered the documents wrongfully obtained by the Defendant to the 18th Civil District Court of Sao Paulo (the "Bankruptcy Court").*
- (iii) *On 12 July 2010, the Bankruptcy Court (Judge Beethoven) in Brazil issued letters rogatory to the United States District Court for the Southern District of Florida.*
- (iv) *In August 2010, Dr. Braga commenced Ex-Parte proceedings in the BVI seeking further disclosure of documentation relating to the Rabello family and its assets.*
- (v) *On 25 October 2010, Dr. Braga filed a scandalous 103 page motion in the Bankruptcy Court referring extensively to the documentation obtained from the Cayman Islands proceedings and the BVI Proceedings.*
- (vi) *On or about 3 November 2010, the Plaintiffs became aware of the fact that there had been Cayman Islands disclosure when Ms. Katia Rabello was served with an Order of the Bankruptcy Court dated 28th October 2010 placing her assets into the Petroforte Bankruptcy in Brazil and referring the matter to the (Brazilian Central Bank, "BCB") for investigation. As a result of the Order dated 28 October 2010, Ms Katia Rabello was unable to continue to serve as an officer or director of a bank and had to resign from Banco Rural. She was also subject to biased and exaggerated press reports which have damaged her reputation irrevocably....".*

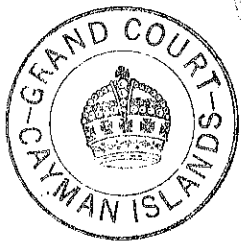
Thus, by way of example, the Plaintiffs' case as originally and still pleaded, alleges a direct causal link between the generality of the Cayman Islands disclosure obtained by



the Defendant and the extension of the Petroforte Bankruptcy to Securinvest , Katia Rabello and other Rabello interests.

25. The extent of the loss and damage is, of course, pleaded as a separate matter. The Plaintiffs' application for summary judgment against the Defendant thus proceeded on the basis that loss and damage would be quantified, once liability in respect of the breaches of duty was first established.
26. In moving the Plaintiffs' summary judgment application, the trite and settled principle was acknowledged by Ms Day QC , that the application could not succeed if this Court had to be called upon to resolve disputed evidence of facts, as that is the function of a full trial on the merits¹¹.
27. Moreover, the formal discovery process in the action had not yet been completed and so the full factual basis for a trial had not yet been settled.
28. For its part, the Defendant in support of its cross-summons to strike out the Plaintiffs' claim argued that they had no realistic prospect of proving that the Defendant had acted in breach of duty or caused their loss or damage. In essence, this too was to be argued on the basis described above and later developed in support of the Defendant's abuse of process/strike out application; viz: - that the *Norwich Pharmacal* disclosure had been properly obtained, the consequences of its disclosure inevitable and that the facts it revealed comprised the only evidence from the Cayman Islands disclosure relied upon by the Brazilian courts (to the exclusion of the *Bankers Trust* Disclosure). More particularly, this limited reliance on the *Norwich Pharmacal* disclosure, according to

¹¹ See *Allen v McAlpine* [1968] 2 Q.B 229; *Birkett v James* [1978] A.C. 297; and an early application of the principles from those cases in *Cayman Islands Civil Aviation Authority v Island Air Limited* 2003 CILR 483.



the Defendant, was confined to only certain aspects of which were before the bankruptcy judge at first instance¹², when he reached his crucial decision to extend the Petroforte Bankruptcy to Katia Rabello. Further, that later when the case came before the appellate courts - the TJSP (where the appeal against the Judge's extension of the Petroforte Bankruptcy to Katia Rabello was taken) and finally the STJ (which ultimately lifted its related stay of the action against Securinvest below to allow the extension proceedings to continue to conclusion) - they relied only upon the *Norwich Pharmacal* disclosure. Thus, this aspect of the Defence more specifically proceeds on the basis that, by the times of the appeals before the TJSP and the STJ, the *Bankers Trust* disclosure had been removed from the relevant court files, pursuant to the Retrieval Order.

29. As the *Norwich Pharmacal* disclosure had been properly disclosed, the Plaintiffs, say the Defendant, have no grounds for complaint relating to the TJSP's and STJ's later reliance upon it. Katia Rabello had been under a legal and moral obligation to comply with the orders of the Brazilian courts compelling her to disclose the UBO of Securinvest, the very matter confirmed by the *Norwich Pharmacal* order which revealed her status in that regard.
30. The battle-lines having been drawn in that way between the competing summary judgment and strike out applications then before this Court, the arguments were being presented by Ms Day QC for the Plaintiffs on their summary judgment application

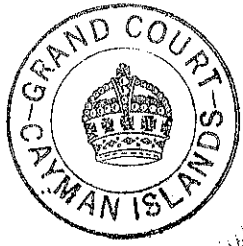
¹² Judge Luiz Beethoven Giffoni Ferreira ("Judge Beethoven"), by judgment on 28 October 2010 (consistent with his first judgment of 24 August 2007 by which he extended the Petroforte Bankruptcy to Securinvest and which had been appealed against to the STJ on ground that there was no link between Securinvest and Petroforte) extending the Petroforte Bankruptcy to the assets of Katia Rabello (following the disclosure of her status as UBO of Securinvest) and finding that there was a "common economic group" involving both Petroforte and the Rabello's companies.



when, on the morning of the 1st March 2016, Mr. Simpson QC raised the allegation of deliberate dishonesty by the Plaintiffs in the manner of their disclosure of the state of the file(s) that had been put before the TJSP; viz: as to whether it (or they) contained only the *Norwich Pharmacal* disclosure or the *Bankers Trust* disclosure as well.

31. Mr Simpson charged that the Plaintiffs had by letter from their local attorneys dated 16th June 2015, provided the Defendant with an electronic copy of File 2250¹³, the Bankruptcy Court file in Katia Rabello's case, representing it to be a complete copy when it was not. He alleged that the file had been "*filleted*" by the removal of important certificates and "*manipulated*" by the replacement on it of documents which had been taken off it pursuant to the Retrieval Order.
32. Mr. Simpson then referred to a memorandum which had been sent by Judge Beethoven to this court and a certificate coming from the Brazilian court files, which both appeared to confirm that the Retrieval Order had been complied with and so, implicitly, that the *Bankers Trust* disclosure had been removed from any file which could later have been placed before the TJSP at the time of its deliberations and decision. This was contrary, alleged Mr. Simpson, to the representations made by the Plaintiffs to the Defendant in the letter of 16th June 2015, then conveying what has come to be called the "June 2015 Drop Box" or "File 2250 Drop Box".
33. As Mr. Simpson then described it (from the transcript):

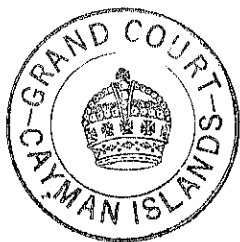
¹³ Now acknowledged to be the file which was before Judge Beethoven when he ordered the extension of the Petroforte Bankruptcy to Katia Rabello on 28 October 2010. File 0100, also of significance in the case, was the main Petroforte Bankruptcy case file. File 1819 or the "OAR investigation file", is another sub-file and that on which it is now acknowledged that the entirety of the Cayman disclosure was first placed. The arguments in this strike out application, revolved around how much of the Cayman disclosure had found its way to File 2250 at the time of Judge Beethoven's decision on 28 October 2010 and when that File (or a further sub-set of it) was later made available to the TJSP.



“What’s happened, My Lord, is in August of 2011, that Dr Braga implemented the order. And what happened, pursuant to that, is that the court officers, as their certificate showed, went to the file and they’ve removed the Bankers Trust documents. We don’t know whether all of them, but certainly large chunks of them. What has been filleted from the file is all evidence of their removal, the certificate showing they were removed. ... we had 5200 doc pages and no certificates of removal. They have been filleted. What has been put back on the file that was supplied to us last year [ie: the June 2015 Drop Box] is the Bankers Trust documents. So, my Lord, we’ve done a short extract of the file in the time available. This is what we were sent, and this is how the file stands (indicating)... it appears on the face of it to be conclusive evidence of dishonest filleting of the file to remove certificates of removal and dishonest putting back on the file of the Bankers Trust documents on which the plaintiffs now rely...”

34. Mr. Simpson summarized, at my request for the sake of clarity and certainty, the allegations in the following pointed terms on the 4th March 2016 (taken from the transcript of that date):

“On 15th (sic) of June, we received 5,200 pages of the file and that is this. [(indicating the binders)]. And that had been filleted, the certificates of removal have been taken off it, allegation 1. The Bankers Trust .. large numbers of Bankers Trust documents have been put back on it, allegation 2. And documents mentioned in this certificate [(indicating: that from the actual Brazilian court File 2250 certifying the retrieval of Bankers Trust material by Dr Braga in compliance with the Retrieval Order)] which are highly material had also been taken off it, allegation 3.”



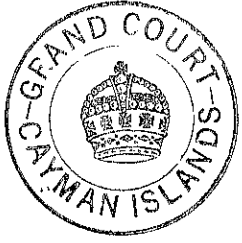
35. The actual state of File 2250 as it existed in the Brazilian courts and hence the state of the evidence to be deployed before this Court having been brought into doubt in that way, I was invited by Mr. Simpson to direct the Plaintiffs to produce a full copy of File 2250 itself¹⁴. Such an order from this Court was needed, said Mr. Simpson. He argued that while the Plaintiffs' Brazilian lawyers had always had access to the court files, there was still in place a sealing order over the files, granted upon the application of Katia Rabello to prevent the ongoing dissemination and abuse of her confidential information and which prevented the Defendant from access to the files.

36. In this way, Mr. Simpson then brought to my attention exchanges of correspondence between his client's attorneys, Appleby and the local attorneys for the Plaintiffs, Stuarts, in which the Plaintiffs' consent had been sought for the lifting of those sealing orders so that the Defendant could have direct access to File 2250 but in which that consent was refused. It thus became another plinth of Mr. Simpson's complaint of abuse of process as grounds for striking out the Plaintiffs' claim, that the Plaintiffs' consent had been withheld because those acting for them (whom he later identified as certain of their Brazilian lawyers and/or their Miami-based general counsel Mr. Robert Macaulay) sought to cover up the fact that File 2250 had been "*manipulated*" and "*filleted*" in the manner of its disclosure to the Defendant.

37. Again, as expressed by Mr. Simpson (in the transcript):

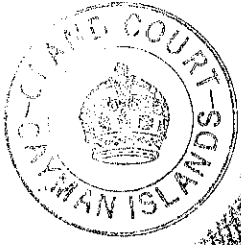
"So, in summary, My Lord, the provision of file 2250 by the plaintiffs goes both to the critical issue on the plaintiffs' case of what documents were before the TJSP when it heard Katia Rabello's appeal. And now it goes to the issue--- for which we await

¹⁴ This occurred on 1st March 2016.



explanation, I emphasize. As to whether this court's process has been abused by the plaintiffs knowingly withholding highly relevant documents from the defendant and from this court. And we submit it is clear on that basis that access to the file should be provided [to the Defendant]."

38. It is to be noted here, that at no stage was it suggested that the Defendant had itself been precluded from applying directly to the Brazilian Bankruptcy Court for access to File 2250 (with or without a supporting order from this court)- the absence of the Plaintiffs' consent notwithstanding. In fact, it transpired that even while raising the strike out/abuse of process application here, the Defendant had instructed its Brazilian lawyers to apply for and did obtain an order there for the unsealing of the file. This was said to have been done by reliance on an order given orally by me (but not yet perfected in writing) and by which I had expressed the intention that the Defendant should act mutually with the Plaintiffs to obtain access to File 2250. That order had been granted earlier in response to Mr. Simpson's application. However, although having preemptively and unilaterally obtained the order in Brazil, the Defendant's lawyers had not yet accessed File 2250, being aware that this Court required that that take place by way of mutual inspection by both sides through their independent Brazilian representatives.
39. Disclosure of File 2250 in its entirety to the parties was therefore formally ordered by me on the 1st March 2016, to be obtained by mutual inspection of the parties as being both justified and necessary to confirm what the Plaintiffs had disclosed or failed to disclose. The proceedings were adjourned until 7th March to allow for that to happen.



40. On resumption of proceedings on 7th March 2016, Mr. Simpson raised a further allegation of abuse of process which had been earlier adumbrated in the Defendant's written submission. This was that it had come to light from his client's discovery at the Brazilian courts¹⁵ that there had been, "*contrary to the Plaintiffs' representation that there was only a single file both before the Bankruptcy Court and the TJSP*", a separate file from File 2250, created for presentation to the TJSP and that that file¹⁶, conclusively revealed that the *Bankers Trust* disclosure had not been presented to the TJSP and that the Plaintiffs' representation that it had been, was therefore also deliberately misleading and dishonest.
41. In fact he explained, among the documents recovered on this file was a written submission by Dr Braga to the TJSP, informing the TJSP of the Retrieval Order from this Court and advising that the *Bankers Trust* material was not available to the TJSP for its consideration. The TJSP file was said by Mr. Simpson to have been discovered by Mr. Liesegang¹⁷ only because it had inadvertently not been sent back to the Bankruptcy Court for filing under seal with File 2250 and the rest of the files in the main Petroforte case. It had thus fallen outside the reach of the sealing order obtained by Katia Rabello.
42. What was even more alarming said Mr. Simpson, was the fact that previous written submissions dated 27 December 2010 from Dr Braga to the TJSP had been earlier disclosed to the Defendant by the Plaintiffs themselves on 5th March 2015, along with a selection of *Bankers Trust* hard copy documents bearing TJSP stamped numbers and

¹⁵ Conducted by a Brazilian lawyer Mr. Roberto Liesegang

¹⁶ A full hard copy of which was by this time accessed by the Defendant and provided to the Plaintiffs under cover of a witness statement from Mr. Roberto Liesegang, dated 5th February 2016.

¹⁷ As explained in his affidavit dated 5th February 2016 also filed in these proceedings.



which the Plaintiffs (per Mr. Annette) had represented as having come "from File 2250 and as being further proof that File 2250 contained the entirety of the Bankers Trust material" both when it was before Judge Beethoven and when it was submitted to the TJSP (my emphases).

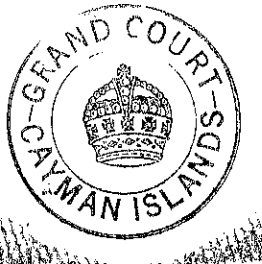
43. Mr. Simpson came in these new circumstances to allege that the Plaintiffs had "*cherry picked*" the disclosure of the hard copy TJSP file to the Defendant in order to perpetuate their earlier "misrepresentation" (said to have been given with the June 2015 Drop Box of File 2250), that it was the entire File 2250 that was transmitted to and relied upon by the TJSP. And their further false representation that it contained all the Cayman disclosure and so, that all of the Cayman Disclosure was available both to Judge Beethoven on the 28th October 2010¹⁸ and later to the TJSP, when the TJSP considered and rejected Katia Rabello's appeal.
44. Mr. Simpson further submitted that it was also therefore dishonest of the Plaintiffs to have asserted in their pleaded case (as later amended by averments), that File 2250 was in its entirety transmitted to the TJSP and relied upon by the TJSP.
45. To support his allegation of abuse, Mr. Simpson pointed to the letter of 16 June 2015 with which the June 2015 Drop Box had been provided by Stuarts and in which it was written, among other things, that "... *as we have already previously stated [a reference to earlier correspondence including a letter of 24 February 2015 to be examined in detail below] effectively the entire Cayman Islands disclosure was before both the Bankruptcy Court and the TJSP*".

¹⁸ When he extended the Petroforte Bankruptcy to her assets, including her majority interests in Banco Rural.

46. This was carried over into the pleadings, submitted Mr. Simpson, by way of replies to requests from the Defendant for further and better particulars, provided by the Plaintiffs on 4th December 2015.

47. There, at reply 19.1 the Plaintiffs aver that: *“the TJSP relied upon the Cayman Islands disclosure, namely all the documents referred to in Schedules A and B which were before it and considered prior to its making its decision..”*

48. This reply 19.1 was later cross-referenced by Mr. Annette in his aforementioned letter of 24 February 2015, in the penultimate paragraph of which he advised Appleby that:



“Our response dated 24 December 2014 in respect of your third request of 19 November 2014 and in connection with paragraph 259 of the Reply to the Defence, should thus be taken [(in light of the preceding paragraphs of this letter)] to be amended to include not only all documents annexed to Dr Braga’s Petition of 25 October 2010, but also all of the other Cayman Islands disclosure which was put before Judge Beethoven and relied upon in support of the application to place Katia Rabello into bankruptcy.”

49. Mr. Simpson points to other background circumstances (to be next examined) which he says are further revealing of the Plaintiffs’ dishonesty as perpetrated by their Brazilian lawyers and/ or Mr. Macaulay. However, he expressly granted exemption from such allegations for the Plaintiffs’ Cayman attorneys, especially Mr. Richard Annette. He conceded, properly in my view, that there was no basis for suspecting any collusion on his part.

50. It is indeed, by virtue of Mr. Annette's cautionary advice, that Mr. Simpson asserts that Mr. Macaulay had been alerted to the importance of the Plaintiffs' being able to rely upon the *Bankers Trust* disclosure -as distinct from the *Norwich Pharmacal* disclosure- having been seen and acted upon by the Brazilian courts.

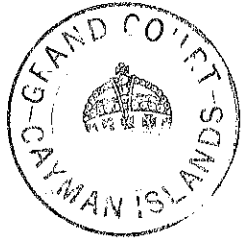
51. This further background begins with an email letter from Mr. Annette to Mr. Robert Macaulay on 22 February 2015- some four months before the June 2015 Drop Box was disclosed to the Defendant- and in which Mr. Annette's advice was as follows (emphasis in original) :

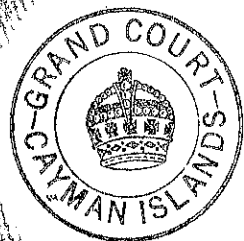
"The other side have a very good answer to the impact of the Bankers Trust Documents by saying they were all taking [sic] out of the picture as the result of an order from Cayman which we ourselves obtained; all that is then left is the Norwich Pharmacal Documents and the Chief Justice already found that they had been properly ordered to be disclosed."

52. This reasoning of Mr. Annette applied equally submits Mr. Simpson, to the case before the Brazilian courts at all levels. This he asserts was also recognized by Mr. Annette in an earlier passage in the same email to Mr. Macaulay:

"You will note that we are saying that the Bankruptcy Court, TJSP and STJ "relied upon" the totality of the Disclosure including the Bankers Trust Documents on the basis that all those documents were filed before the three courts. I have highlighted wording on this point in red in the draft letter¹⁹. I think there may be an important point here as to how we say to the Cayman Court that it was not only the Norwich Pharmacal

¹⁹ Then on 22 February 2015 sent in draft to Mr. Macaulay and later sent to Appleby on 24 February 2015.





documents which were important but also the Bankers Trust documents (simply by being placed on the Court File)".

53. Consistent also with that advice, Mr. Annette had two weeks earlier on 9th February 2015, advised as follows in an email to Mr. Macaulay (emphasis in the original):

" Documents filed in Brazil

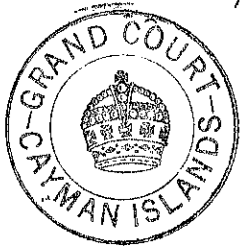
Cayman documents

We have discussed this a number of times and I know that you have told me that "everything" obtained from Cayman was filed with the Brazilian Courts.

However, we absolutely have to have crystal clear evidence so as to satisfy the Cayman Court in this respect.

Primarily this is very important to our case because Walkers appear to maintain that the only documents (or effectively the only documents) before the Brazilian Courts were the Norwich Pharmacal documents which the Chief Justice said were actually properly disclosed. We need to say that in fact all of the documents were before the Court (if that was the case).

We need to confirm this by way of a Brazilian Affidavit sworn by an attorney who has reviewed the Court Files and can confirm specifically what documents were filed with what court. The easiest way to do this would be to actually exhibit copies of the documents from the Court Files and have an Affidavit that states, for example: "I have reviewed the Court File in respect of the Bankruptcy Proceedings commenced against Katia Rabello in October 2010 and confirm that the attached copy documents were



filed with the Court". That is first hand evidence of precisely what was before the Court".

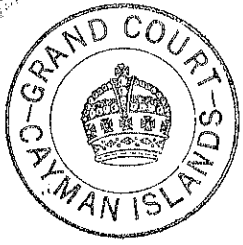
54. Mr. Simpson stresses the importance of the context of this advice from Mr. Annette to Mr. Macaulay: it was some five weeks before the hearing of the Defendant's strike out application which was then set to be taken (along with the Plaintiffs' cross-summons for summary judgment) on 17th- 19th and 25th-27th March 2015 but was subsequently adjourned to 1st -10th March 2016.

55. It therefore becomes obvious says Mr. Simpson, that the witness statement of Brazilian lawyer Viviane Barci de Moraes dated 27th February 2015 and filed in this action, was meant to be responsive to the advice given by Mr. Annette and so intended to be an important part of the Plaintiffs' response to the Defendant's strike out application. It reads as follows:

"1. I am a lawyer with the firm of Alexandre de Moraes Sociedade de Advogados, Sao Paulo, Brazil (the "Firm"). The facts and matters in this witness statement are within my own knowledge and are true and correct.

2. The Firm has represented Katia Rabello since November 2010 in connection with the Bankruptcy proceedings in Petroforte Brasileiro de Petroleo Ltda and others, State of Sao Paulo 18th Judicial Circuit Court (the "Bankruptcy Court") Case No. 1017402-40.2001.8.26.0100 (58300.2001.074201-2/002250) (the "Petroforte Case").

3. I have reviewed the Bankruptcy Court's file in connection with the Petroforte Case and confirm the following:



a. In December 2010 and January 2011, the Bankruptcy Court provided representatives of the Central Bank of Brazil ("BCB") with access to review and copy the Petroforte Case file, specifically including several hundred pages of documents obtained by the Petroforte bankruptcy trustee, Dr Alfonso Braga ("Braga") in proceedings in the Cayman Islands which were filed in the Petroforte Case in October 2010 (the "Cayman Documents").

b. On July 27, 2011, Braga filed a motion with the Bankruptcy Court requiring that it retrieve from BCB all of the copies of the Cayman Documents held by BCB.

c. On August 15, 2011, the Bankruptcy Court issued an order to BCB requesting return of all copies of the Cayman Documents.

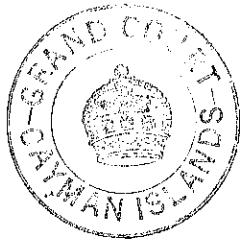
d. A portion of the Cayman Documents was returned to the Bankruptcy Court by BCB in December 2011, and the remainder was returned by BCB to the Bankruptcy Court in April 2012.

e. The Cayman Documents filed by Braga in the Petroforte Case have remained in the Bankruptcy Court file since October 2010".

56. This statement of Viviane de Moraes came after a brief declaration which she had separately first provided to Mr. Macaulay in Portuguese earlier on 27 February 2015 which, translated, reads as follows:

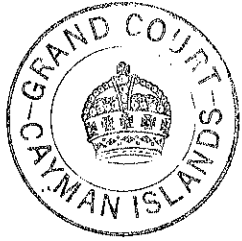
"Declaration

I represent for all due purposes that, as legal representative of Katia Rabello in case file No. 1017402-40-2001.8.26.0100 (583.00.2001.074201-2/002250), a number of



documents that originated abroad, including evidence obtained from the Cayman Islands Courts, are still to this date in the said case record, which currently comprises 41 volumes.”

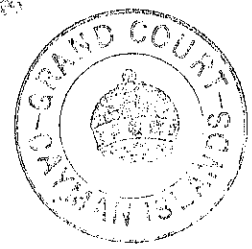
57. This Declaration was not sent by Mr. Macaulay to Mr. Annette for translation and presentation to the Defendant and this Court. Instead, as Mr. Macaulay acknowledged in his evidence, he prepared a draft witness statement based upon the Declaration and presented that to Viviane de Moraes for her acceptance and adoption as her evidence to be filed in this action. This became her witness statement as set out above.
58. The noticeable difference between the contents of the Declaration and those of the witness statement is further evidence of the intention to mislead asserts Mr. Simpson, which, in this instance he also asserts, is to be attributed primarily to Mr. Macaulay who had been alerted to the importance of the witness statement, by Mr. Annette's advice. Mr. Simpson also argued that both the Declaration and the witness statement are nonetheless consistent in what he insists is their specific reference to File 2250. This, he asserts, can only be a reference to Katia Rabello's Bankruptcy Court File as distinct from the general Petroforte Bankruptcy Court File or the OAR Investigation File 1819. It is clear beyond peradventure therefore he argues, that the Plaintiffs through Viviane de Moraes' statement, were representing that the entire Cayman disclosure had been placed upon and remained throughout upon Katia Rabello's File 2250 and this has been shown conclusively by Mr Liesegang's evidence, to be false.
59. Against this further background and that of the incomplete disclosure of File 2250 in the June 2015 Drop Box as well as the "cherry picked" disclosure of the file that went



to the TJSP²⁰, Mr. Simpson submitted that the following dates are of particular importance in revealing the intentions of the Plaintiffs to mislead the Defendant and this Court and are now, only because of this abuse of process inquiry undertaken under the aegis of this Court, accepted as common ground:

- 5th October 2010 – Dr Braga files the totality of the Cayman Disclosure on File 1819; ie: the file of the OAR Investigation directed by Judge Beethoven in connection with the Petroforte Bankruptcy (again citing Mr. Liesegang’s evidence which Mr. Simpson describes as “unchallenged”).
- 25th October 2010 – Dr Braga files his petition before Judge Beethoven on File 2250 (now acknowledged to be the Katia Rabello bankruptcy file). Some of the Cayman disclosure, although it is not yet clear exactly what aspects, is also acknowledged to have been filed with the petition.
 - 28th October 2010 – Judge Beethoven makes his Order making Katia Rabello bankrupt.
 - 1st December 2010 – the totality of the Cayman Disclosure is filed on File 2250 (again citing Mr. Liesegang’s evidence).
 - 27th December 2010- Katia Rabello appeals to the TJSP against Judge Beethoven’s bankruptcy Order.
 - 25th July 2011 – this Court makes the Retrieval Order directing Dr Braga.

²⁰ Later in more conciliatory terms described by Mr. Simpson as a separate TJSP file which excluded “all but a few of the *Bankers Trust* documents”.



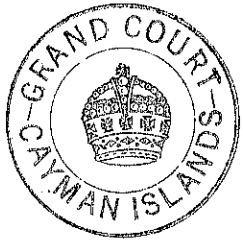
- 27th September 2011- the TJSP dismisses Katia Rabello's appeal.

60. By reference to that chronology, it is important to note says Mr. Simpson, that the Plaintiffs did not concede, until after their arguments were filed for this abuse of process/ strike out hearing, that the totality of the Cayman Disclosure had not been filed on File 2250 on 25th October 2010²¹ or 28th October 2010 but on 1st December 2010 - critically he says, after Judge Beethoven's decision placing Katia Rabello into the Petroforte Bankruptcy. Moreover, that by their selective disclosure of the documents "cherry picked" from the TJSP file, the Plaintiffs sought further to mislead this Court as to what was relied upon by the TJSP when it dismissed the appeals. Moreover, it had become incontrovertibly established by Mr. Liesegang that there was a separate file created for the TJSP, but this was another fact asserts Mr. Simpson, that the Plaintiffs had sought to conceal by asserting that the entire File 2250 had been submitted to the TJSP.

61. According to Mr. Simpson, the dishonesty of the Plaintiffs' Brazilian lawyers and of Mr. Macaulay, having been exposed; it does not matter which of them should be blamed. The dishonesty must be attributed to the Plaintiffs and their case should be struck out (on the basis of the principles of the case law to be considered below) once a dishonest abuse of the process of this Court is shown to have been attempted.

62. Mr. Simpson had nonetheless put in cross-examination to Mr. Macaulay that, in converting Viviane De Moraes' Declaration into her draft statement, it was he who had deliberately altered not just the contents but also the meaning and effect of her declaration. This is apparent from a comparison between the wording in paragraphs 3a

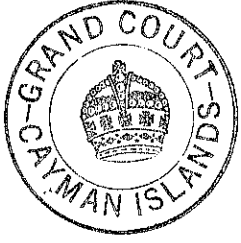
²¹ The actual date of the filing of Dr Braga's petition against Katia Rabello.



and 3e of her statement (going to the extent of the Cayman Documents placed upon and still remaining on the Bankruptcy Court File) and the words less specifically to that effect in the Declaration. He also argued that the words in paragraph 3e are deliberately misleading in light of what the inspection of File 2250 has revealed to be its true contents.

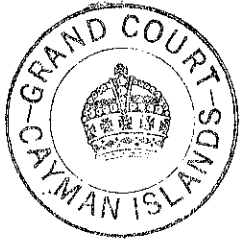
63. This, said Mr. Simpson, was a dishonest attempt by Mr. Macaulay to mislead this Court into accepting that virtually all if not all the Cayman Disclosure had been placed upon and remained upon the Bankruptcy Court File 2250 when Viviane de Moraes' Declaration had expressly referenced only a "number of" such documents still remaining on the File and when (as had by then been established by the Liesegang affidavit) the Cayman Disclosure had not yet been placed upon File 2250 itself on 28th October 2010 when Judge Beethoven made his decision adverse to Katia Rabello. In this context, Mr Simpson referred to the "*unchallenged*" evidence of Mr. Liesegang that the Cayman Disclosure had not been placed on File 2250 until 1 December 2010.
64. These accusations were stoutly rejected by Mr. Macaulay who insisted that he had sought only to clarify Viviane de Moraes' Declaration by making it more specific to the Cayman proceedings and less ambiguous as it made reference (apparent on its face) to other proceedings as well. As regards the wider import of her witness statement, he testified that he had spoken to Eucelli Perone, another Brazilian lawyer engaged by Katia Rabello²², and was told that the *Bankers Trust* documents remained upon the Bankruptcy Court File. It was on that basis that he drafted the witness statement and presented it to Viviane de Moraes for her acceptance and execution. The statement and

²² According to Eucelli Perone, to act as a central liaison for all the Rabello lawyers in Brazil as they responded to the various proceedings and inquiries there and abroad.



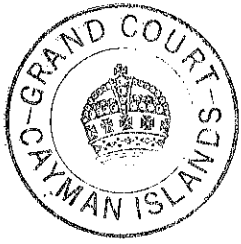
the contents are hers. He, however, accepted that it would have been more accurate for Ms de Moraes' witness statement to have stated that only a "number of the Cayman Documents" remained on the File.

65. None of this ultimately matters though, said Mr. Macaulay , because the indisputable fact of the matter is that the entirety of the Cayman Disclosure had already been placed upon File 1819 on 5th October 2010 and so was generally available to and would have been seen by Judge Beethoven and considered by him, when he later extended the Petroforte Bankruptcy to Katia Rabello (and consistent with its extension to Securinvest). The totality of the documents had also been provided to the BCB from File 1819, insisted Mr Macaulay. Furthermore he continued in cross-examination, the specific file numbers cited by Viviane de Moraes, both in her Declaration and in her witness statement, included both the general Bankruptcy Court Petroforte Bankruptcy file (0100) as well as the Katia Rabello sub-file (2250). These are the reasons why, he insisted, the Plaintiffs are ultimately able to aver that Judge Beethoven relied upon all the Cayman Disclosure, although it is now shown (per Mr. Liesegang) that it did not make its way to File 2250 specifically until 1st December 2010, some five weeks after the assets of Katia Rabello were taken into the Petroforte Bankruptcy on 28 October 2010.
66. Nor did it matter, protested Mr. Macaulay, that the TJSP would have had limited access to only some *Bankers Trust* documents. This, as he asserts, is because Judge Akel of that Court would have considered and upheld Judge Beethoven's decisions and what the Plaintiffs have pleaded is that the totality of the Cayman Disclosure had been placed



before Judge Beethoven before he made his decision on the 28th October 2010 and relied upon by him in coming to that decision.

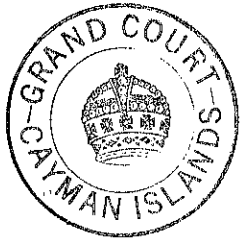
67. As regards the seemingly incomplete disclosure given in the June 2015 Drop Box, Mr. Macaulay offered no explanation. He said that he had been sent the Drop Box by Viviane de Moraes through Eucelli Perone and had simply passed it on to Stuarts (per Mr. Annette) for onward disclosure in these proceedings. He had not altered the contents in any way.
68. Eucelli Perone was cross-examined about her dealings with the June 2015 Drop Box and denied having altered its contents as received from the de Moraes Firm before passing it on to Mr. Macaulay. It was nonetheless suggested to her by Mr. Simpson in cross-examination, that someone must have "*filleted*" the retrieval certificates from File 2250 and replaced them with the *Bankers Trust* material and if not at the Firm, then it must have been either herself or Mr. Macaulay, an allegation which she, for her part, robustly denied. She was adamant that she simply passed on what she had been given.
69. For his part Mr. Macaulay also described these allegations of dishonesty raised against the Plaintiffs and himself in particular, as a "smoke screen" and "a red herring". This criticism he said is justified in light of the fact that the Plaintiffs' case has always been and remains, that the totality of the Cayman Disclosure had been available to Judge Beethoven, even if not yet put on File 2250 itself when he extended the Petroforte Bankruptcy to Katia Rabello. The provision of the June 2015 Drop Box and the documents from the TJSP File as proof of that fact was therefore nothing new – whatever the state of the Brazilian court files might have been after the execution of the



Retrieval Order by Dr Braga – an event which took place well after Judge Beethoven took his crucial decisions in October 2010. He accused the Defendant of trying to avoid the difficulties it must therefore face in dealing with the Plaintiffs' summary judgment application, to which he asserts, the Defendant has no prospect of a successful defence.

70. Those being in summary the allegations raised by Mr. Simpson in the alternative as against Mr. Macaulay, Eucelli Perone or more obliquely Viviane de Moraes, (and Mr. Macaulay's and Eucelli Perone's responses); I now turn to consider Mr. Annette's responses as presented especially in his third affidavit. This is evidence of Mr. Annette's which Mr. Simpson expressly conceded was not to be challenged and did not challenge.
71. Mr. Annette's responses to the allegation of filleting and manipulation of the June 2015 Drop Box, had in fact been very early adumbrated by Ms Day QC on the 4th March 2016, when the allegations were first raised.
72. Then, at 3:45pm, she said of the letter of 16th June 2015 from Stuarts which disclosed the June 2015 Drop Box:

"So what the letter— the letter from Stuarts...what was said was sent, were the Bankers Trust documents, which were on the file. There never was an assertion that that was the entire file".
73. Ms Day, anxiously supported by Mr. Akiwumi in this regard, insisted that the Plaintiffs had not had a proper opportunity to respond to the allegations being stridently and



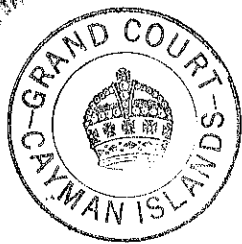
assertively raised by Mr. Simpson but given sufficient time, the explanations would be forthcoming.

74. Having now seen and considered Mr. Annette's affidavit, it is indeed regrettable, that in the contentious atmosphere then prevailing, the fuller explanations he provides were not available.
75. Mr. Annette sets the context for his responses by explaining the Plaintiffs' prior knowledge that the Defendant was itself very well placed to know what constituted the various Brazilian court files. This is because they acted for Dr Braga and had moreover been under an obligation to see to Dr Braga's fulfilment of his undertaking, given to this Court, to recover the *Bankers Trust* disclosure in keeping with the Retrieval Order.
76. He continues at paragraph 46 and following:

"It is important to appreciate that Stuarts were not instructed (save in respect of the actual Cayman Disclosure) in respect of the detail as to exactly what documents were before each of the relevant Courts in various different sets of proceedings and appeals, nor were our instructions focused on the various different specific Court files or applicable Brazilian procedure.

Our instructions were that it was the case that the Cayman Disclosure (including both the Norwich Pharmacal and Bankers Trust documents) had been provided by Dr Braga to the Bankruptcy Court, the TJSP and the STJ.

The focus of both our requests and the requests from the Defendant was very largely on specific disclosure of specific documents from the various proceedings; it was not on



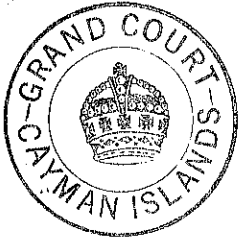
the wholesale disclosure of everything that had been filed in the multiple different Brazilian proceedings, until 4 January 2016 when the Defendant requested to inspect the Bankruptcy Court and TJSP Files.

This was also a practical issue in that essentially all of the documents on the court files (save for the Cayman Islands and BVI Disclosure) were in Portuguese. Obtaining literally 1000s of pages of documents in Portuguese was of no practical assistance; it was impossible for me (or anyone else at Stuarts) to read the documents. There were also repeated costs concerns in translating even individual documents...

The focus was therefore on obtaining individual documents responsive to specific requests and on doing our best to get translations of those individual documents. In this context, we did not specifically request a full copy of the Bankruptcy Court file or a full copy of the documents before the TJSP, instead we sought to obtain the relevant documents that were either responsive to specific requests or which we had identified as being important in the context of the overall Proceedings and the Summary Judgment applications. The first time that we received a full copy of the Bankruptcy File was when it was sent to us electronically on 3 March 2016". [emphasis added].

77. Mr. Annette then proceeds in his affidavit to describe in detail the terms and contexts of specific requests from Appleby (on behalf of the Defendant) for disclosure and to which, he explains, Stuarts responded specifically.
78. This begins with a request from Appleby by letter dated 20 January 2015:

"Your clients' case is that the Brazilian courts relied upon the Cayman Disclosure both in ordering that Katia Rabello's assets be brought within the bankrupt estate and in



refusing Securinvest's appeal against the inclusion of its assets in the bankrupt estate. Following the Order of Smellie CJ dated 25 July 2011 (sic) were the STJ (Securinvest's appeal, 9 August 2011) and/or the TJSP (Katia Rabello's appeal, 27 September 2011) informed of and/or sent a copy of that Order and asked to remove the Bankers Trust documents from the Court file by Dr Braga, by your client, or by both? If so what were the dates of those requests and were they complied with?'

79. Notwithstanding his scepticism evinced from being mindful that the Defendant would have been well placed as Dr Braga's lawyers to get the answers for themselves, Mr. Annette avers that he had referred this query to Mr. Macaulay in a letter of 21 January 2015 seeking a response and in which he wrote as follows:

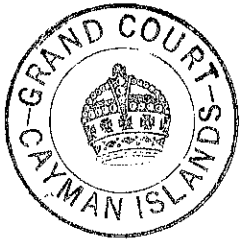
"Bob,

The only way that I am aware of documents from Cayman being before the Brazilian courts is by being annexed to Braga's 25 October 2010 petition and then subsequently sent to the STJ (and also obtained by the BCB).

Most importantly, the documents annexed to the Petition are only a selection of the Documents.

*Can you please confirm whether **all** of the Cayman Disclosure was actually provided to the Courts and if so, specifically how?"(emphasis in original)*

80. Mr. Annette then relates further exchanges with Mr. Macaulay on this subject, with him emphasizing to Mr. Macaulay the importance of proof to show exactly what documents



of the Cayman Disclosure were put before the Brazilian courts, especially Judge Beethoven's Court.

81. By email on 20. 1. 15, Mr. Macaulay replied by sending a selection of documents:

"Richard,

Attached is a sample of documents pulled from the TJSP file with my explanatory notations. A clean set is also attached. As you can see, these documents were filed in the bankruptcy court on October 5, 2010 and in the TJSP on December 1, 2010. These are from volume 19. The Cayman docs are included in volumes 15-22 , all dated 12/1/10. Hopefully this is what you need.

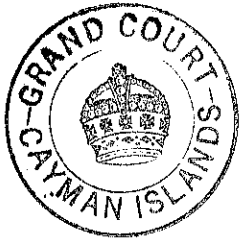
Bob"

82. There having been as yet no response from Stuarts to Appleby's letter of the 20th January, Mr. Annette refers to a further request from Appleby in the following terms some three weeks later by letter dated 6th February 2015:

"May we please have an urgent response to our letter to you of 20 January 2015 (copy enclosed for reference).

By reference to Schedules A and B of your Reply, please additionally provide us as a matter of urgency with a list of all the Bankers Trust documents that you allege Dr Braga filed with (1) the Bankruptcy Court (2) the STJ and (3) the TJSP..."

83. Appleby, Mr. Annette emphasises, were here specifically asking for **"a list of all Bankers Trust Documents you allege were filed with (1) the Bankruptcy Court, (2) the STJ and (3)the TJSP"**



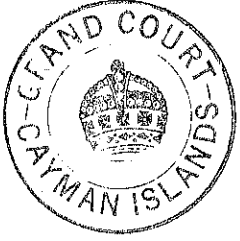
84. Again, notwithstanding his scepticism and being mindful that these proceedings were not yet at the stage of general discovery, Mr. Annette explains that he forwarded this letter of Appleby's to Mr. Macaulay by letter on 9th February 2015 (that mentioned above at paragraph 53). There then followed further exchanges with Mr. Macaulay which are set out in full in Mr. Annette's affidavit but which I see no need to set out in detail here. In essence, they discussed the practicality of having to copy and provide copies of all the Cayman Islands disclosure to Appleby which all the parties are on record as having already obtained either in the earlier Cayman Islands proceedings or in these; or which Appleby, as the Defendant's lawyers, should be expected to have obtained from the Defendant as having been acquired by them when they acted for Dr Braga.

85. Again, on the 12 February 2015, the Defendant made yet a further request for specific disclosure to Stuarts for:

"...the Bankers Trust documents your clients allege were filed with the Bankruptcy Court, the STJ and the TJSP" (emphasis added by Mr. Annette).

86. As to this last request when taken with the earlier requests, Mr. Annette comments at para 76 of his affidavit:

"I note that the Defendant was asking for copies of those documents, on its stated understanding of the Plaintiffs' case, which had been "filed with... the TJSP", albeit the basis of one of the Defendants allegations of "deliberate dishonesty"[in this abuse of process/ strike out application] is that it had allegedly understood, without any proper foundation given the above correspondence, that the Plaintiffs were maintaining



that the documents had only been filed with the Bankruptcy Court [which File became the TJSP file] and there was no TJSP File”.

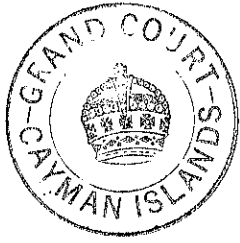
87. This, I note here, is fair comment, given the stated basis of Mr. Simpson’s allegation (as described above) that the hard copy documents disclosed by the Plaintiffs as coming from the TJSP File, had been “cherry picked” to hide the fact that the Bankruptcy Court File 2250 had not been simply sent up to the TJSP (as the Plaintiffs were assumed to be contending) and that a separate file had been created for the TJSP.
88. To further explain the context, Mr. Annette then sets out at paragraph 77, the following extract from a letter from Mr. Macaulay by email received on 12 February 2015 (emphasis by Mr. Annette):

“Richard’

The attached motion from Braga dated 14/10/10 confirms that Braga has filed all of the Cayman disclosure with the court and that he will now proceed to file translations. He also requests that the translations be given to the bankruptcy prosecutor’s office²³. Judge Beethoven grants the motion in the handwritten language on the first page. The attached order dated 6-7/10/10 reflects that Beethoven gave the entire file to the prosecutor on Oct. 7 and the file was returned on 13/10.

I have reviewed all of the relevant documents, and they all are stamped with the TJSP seal and were filed with the TJSP on 1/12/10. I don’t see the need for my staff to spend several hours scanning thousands of pages of documents that we already have in order to provide a discovery response that we can make much

²³ I gather that this would have been for the purposes of the OAR Investigation.



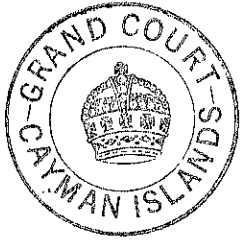
easier. Just sending these two documents to Appleby, along with sample cover pages from a couple of volumes and copies of their opinion and letter agreement from the file with TJSP stamps, with a confirmation that all of the Cayman docs are in fact in the file, should be sufficient”.

89. In light of those exchanges and the concerns about practicality and costs being recognized as between Stuarts and Mr. Macaulay, by the pivotal letter of 24 February 2015 Stuarts wrote to Appleby in response to their above mentioned letters of 20 January, and 6 February 2015 and specifically in connection with their request for “confirmation of which specific documents from the disclosure obtained by your Client from Equity Trust and the CIBC Defendants... were before the Bankruptcy Court, the TJSP and the STJ” (emphases by Mr. Annette); in the following terms:

“The Cayman Islands Disclosure before the Bankruptcy Court and the TJSP.

The entirety of the Cayman Islands Disclosure was first placed on the Bankruptcy Court File on 5 October 2010. Following this, the Cayman Islands Disclosure was taken from the Bankruptcy Court File and re-submitted before the TJSP. The documents were filed with the TJSP on 1 December 2010.

We have obtained from our clients a complete set of the Cayman Islands Disclosure taken from the TJSP file (the “TJSP Copy Documents”). Each of the TJSP Copy Documents are individually stamped “Copia Extraida No Tribunal De Justicia De Sao Paulo” which demonstrates that the copies we have been provided with are copied from the documents actually on the TJSP file.



In addition, the disclosure contains cover pages confirming that the documents were copied from Judge Beethoven's Bankruptcy Court File.

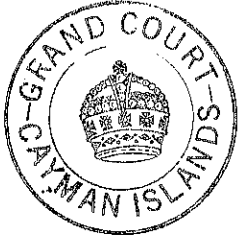
[The letter then gave to Appleby a detailed explanation of pages of documents which had comprised certain sections of the Bankruptcy Court File but which appeared not to have made their way onto the TJSP File, concluding with the following comments:]

"Therefore, it would appear that the two missing sections were originally filed before the Bankruptcy Court but were inadvertently not included in the TJSP File.

In summary, for all intents and purposes, the totality of the Cayman Islands Documents was before both the Bankruptcy Court and the TJSP and this is demonstrated by the individually stamped copy documents and the Bankruptcy Court and TJSP pagination".

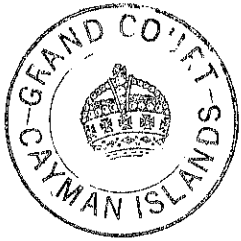
90. The letter of 24 February 2015 then addressed the issue of the Defendant's request for further and better particulars dated 19 November 2014 in terms already set out about at paragraph 48 above.
91. As Mr. Annette comments in his affidavit, it is to be noted that despite the clear terms of this letter of 24 February 2015 to the contrary²⁴, the Defendant - in the context of the present allegations of dishonesty, (elaborated in a letter handed up to the Court by Mr. Simpson on 8th March 2016) - asserted that:

²⁴ It must be noted however, that in a letter of 6th March 2015 (and so subsequent to that of 24 February 2015) from Stuarts to Appleby, Mr. Annette had stated on the basis of instructions, that the Bankruptcy Court File would have been transmitted to the TJSP.



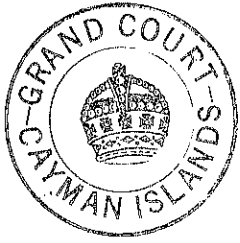
"The Plaintiffs' case, as the Defendant has always understood it, is that the Bankruptcy Court File was transferred to the TJSP and was the file (and the only file) before it when it heard the appeal"(emphasis added).

92. All of these exchanges, for the purposes of drawing any adverse inference proposed by the Defendant, must be considered also in the context of what Mr. Annette was entitled to assume would have been known to the Defendant - or within its gift to ascertain about the state of the Files before the Brazilian Courts, generally.
93. Mr. Annette, at paragraph 89 of his affidavit, confirms that there was never any intention to suggest to Appleby that the TJSP would not have had its own file. "Indeed" he states "*not only did we have no instructions as to the applicable Brazilian procedure but the TJSP having its own file or files would presumably be self-evident in that there would necessarily need to be an Appeal file to contain not only all the Appeal related documents, but indeed also the Cayman Disclosure.*"
94. This I regard as a reasonable assumption, given that Katia Rabello's appeal to the TJSP had been filed for some seven months by the time the Retrieval Order was issued by this Court.
95. Mr. Annette also points to the fact that, following this last letter from Stuarts, Appleby by their letter dated 25 February 2015 expressly requested that Stuarts provide them with "*copies of the stamped TJSP Copy Documents*" (emphasis added).
96. It was in response to this request, avers Mr. Annette, that on 5 March 2015 he sent to Appleby the three hard copy files of effectively all of the Equity Trust and CIBC Disclosure [ie: the Cayman Disclosure] stating in his letter of that date:



“In respect of Request (1)(a) we enclose three files containing the Equity Trust and CIBC Disclosure included in the TJSP Court File which we referred to in our letter dated 24 February 2015” (his emphasis).

97. At paragraphs 93 -103 of his affidavit, Mr. Annette goes on to explain that this response of his was also expressly responsive (1) to the Defendant’s Order 24 Rule 10 Notice dated 2 March 2015 for copies of documents being *“the documents obtained by Dr Braga which were included in the Petroforte case file, as defined by the Witness Statement [of Viviane Barci de Moraes dated 27 February 2015] [ie: the Cayman Documents]* and (2) to point 2 in Appleby’s letter of 25 February 2015 being a request for *“copies of the Stamped TJSP Copy Documents”*.
98. Mr. Annette goes on to explain that in responding as he did in his letter of 5th March 2015, he had understood that the documents had originally been put on the Bankruptcy Court File and then taken off (or copied) and provided to the TJSP. That this was because it was plain from reviewing the documents that they had paginated numbers on them and he had been instructed that the number stamps were from the Bankruptcy Court and the TJSP, indicating also that the copy with the TJSP originated from the Bankruptcy Court File.
99. In so far as the documents sent were responsive to the request relating to the Bankruptcy Court File, the intention says Mr. Annette *“was to show what documents had been filed with the Bankruptcy Court,”* (his emphasis) without seeking to strike a distinction between File 1819 or File 2250. Nor was it his intention, he avers, to demonstrate the current position in terms of what Cayman Islands documents were (as



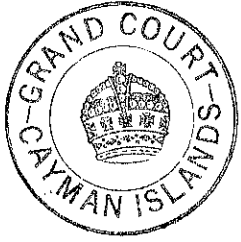
at 5 March 2015) still on the Bankruptcy Court File. The request in the Order 24 Notice dated 2 March 2015 had been expressly for those documents "which were included in the Petroforte case file" and "... documents obtained by the Petroforte bankruptcy trustee, (Dr. Braga) in proceedings in the Cayman Islands which were filed in October 2010 ((per) paragraph 3(a) of Viviane Barci de Moraes Witness Statement dated 27 February 2015) (Mr. Annette's emphases).

100. Mr. Annette continues in his affidavit, averring that no representation was made that those documents remained on the Bankruptcy Court File, that not being an issue which was addressed by the provision of the documents. And, in so far as the documents were responsive to the request relating to the TJSP, his understanding avers Mr. Annette:

"was that these were copies of documents that had been 'pulled from the TJSP file' and that the documents remained with the TJSP. The intention of this disclosure was to show what documents had been filed with the TJSP. It was not intended to demonstrate the current position in terms of what Cayman Islands documents were (as at 5th March 2015) filed with the TJSP (although our instructions were that they in fact remained with the TJSP)." (Again his emphasis).

101. He continues:

"I also note that the letter dated 5 March 2015 expressly explained our understanding that the Cayman Documents were "included in the TJSP File"; but the Defendant has maintained, without providing any sufficient particulars, that the Plaintiffs had misled it into believing that the Plaintiffs' case was that no such TJSP file existed.



Likewise, our understanding (based on instructions) was that all of the Cayman Documents remained filed with the Bankruptcy Court, the TJSP File and the STJ, which was re-iterated in our letter of 6 March 2015”.

102. This narrative on the TJSP file concludes on 1 April 2015 with a letter from Appleby to Stuarts in which, amidst allegations that the Plaintiffs were being “evasive” in earlier answers provided in respect of discovery, at page 5 Appleby state:

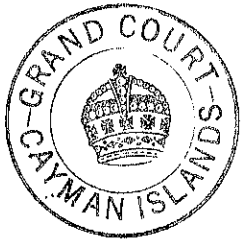
“It must have been Katia Rabello herself (by her attorneys) who filed Dr Braga’s motion and supporting documents on the TJSP file for File 2250 when she appealed against Judge Beethoven’s Order” (emphasis added).

103. Here, as Mr. Annette also observes, was early indication that the Defendant was itself indeed aware that there was both a Bankruptcy Court File and a TJSP File (or Files).

104. Nonetheless and rather confusingly, the 1 April 2015 letter went on to state:

*“Whether or not the entirety of the Cayman Disclosure went onto File 2250, it is clear from the fact that there was a single Court file, which was transferred from the Bankruptcy Court to the TJSP, that the effect of Judge Beethoven’s granting of Dr Braga’s motion was to approve (1) **the removal of any Bankers Trust documents from TJSP File 2250** and (2) the delivery of those documents to Katia Rabello’s attorneys”.*

105. These last words in emphasis, are, as Mr. Annette observes, doubly confusing when taken not only with the earlier passage quoted above from this same letter of 1 April



2015 but also with the allegations elaborated upon in writing by Mr. Simpson in his letter submitted to this Court on 8th March 2016²⁵, in which he asserted that:

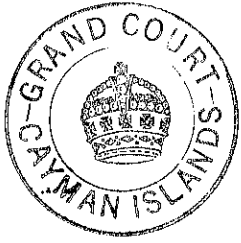
“The Plaintiffs’ case as the Defendant has always understood it, is that the Bankruptcy Court file was transferred to the TJSP and was the file (and the only file) before it when it heard the appeal”

106. Thus, the Defendant is shown at once to be alleging both that there was a separate TJSP File and that there was a single File 2250 which had become the TJSP File and still further, that its understanding was that the Plaintiffs’ case in this regard was always the latter.

107. About this state of confusion Mr. Annette states (again quite plausibly in my view), in response to the general allegation that the Plaintiffs have sought to mislead the Defendant as to the true state of the Bankruptcy Court and TJSP Files, as follows (at paras 109- and 113 of his affidavit):

“I confirm that Stuarts, as the Plaintiffs Cayman Islands Attorneys, did not understand that the Defendant had taken the view that the “Bankruptcy Court File was transferred to the TJSP and was the file (and the only file) before it when it heard the appeal”. To the contrary, Stuarts and my understanding was that the Plaintiffs and the Defendant ... were proceeding on the basis that there was in fact at least a Bankruptcy Court File and separately a File or Files with the TJSP. However, again, we were not focused on the procedure for filing documents with the Brazilian Courts, we were focused on demonstrating that the Cayman Documents had been before those Courts ...I further

²⁵ See also above at paragraph 91



note, that as far as I am aware, the Defendant never requested that the Plaintiffs disclose the full and complete filings with the TJSP, albeit they requested inspection of the TJSP File [as also contended by the Defendant in this Court on 4 January 2016] and contended the TJSP stamped documents that had been disclosed were not from the TJSP by way of letter dated 17 February 2016”.

108. I must now consider how these averments of Mr. Annette’s stack up against what was actually demanded by Appleby in their accusatory letter of 1st April 2015, as that all fits into the allegations made about the disclosure of the June 2015 Drop Box²⁶.

109. Appleby’s letter of 1st April 2015, having described Appleby’s understanding of the theory of the Plaintiffs’ case, and Appleby’s stated misgivings about the disclosure so far given by the Plaintiffs, concluded as follows:

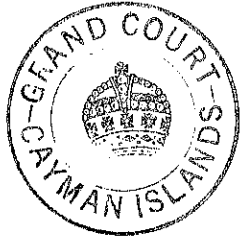
“We therefore request that, within 7 days, you:

Answer the questions in our letter of 20 January, ...supplying copies of any relevant Motions filed by Dr Braga [pursuant to the Retrieval Order] and any consequential orders made by the TJSP and the STJ.

-

Confirm that it was Katia Rabello (or her attorneys) who filed the Cayman Islands Disclosure on File 2250 on 1 December 2010. [I note here in passing that this request is presented as based upon an assertion made earlier (at page 5) of this Appleby letter that “Further, it must have been Katia Rabello herself (by her attorneys) who filed Dr

²⁶ Another Drop Box was provided by Mr. Annette at around the same time, containing the documents said by the Plaintiffs to have been filed before the STJ. That Drop Box does not appear to be an issue of concern for the Defendant.



Braga's motion and supporting documents on the TJSP file for File 2250, when she appealed against Judge Beethoven's Order..." [again indicating, as Mr. Annette also observes in his affidavit], the awareness on the part of the Defendant that there was indeed a separate TJSP File].

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- Confirm that the entirety of the Cayman Disclosure was not filed on File 2250 but on File 1819, and that the only Cayman Documents filed on File 2250 were those annexed to Dr Braga's motion of 25 October 2010.

- ...

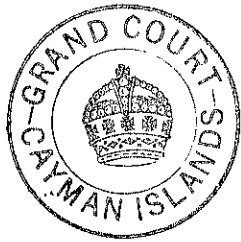
- ...

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We look forward to hearing from you...etc"

110. (There having been telecons in the meantime), Mr. Annette's substantive response on behalf of the Plaintiffs followed six weeks later, by way of the much maligned letter of 16 June 2015²⁷. It came after Mr. Annette, (as he explains at paragraph 119 of his affidavit) had received the contents of the June 2250 Drop Box from Mr. Macaulay at 4pm the day before, Mr Macaulay himself having earlier received it from Eucelli Perone under cover of an email message which said:

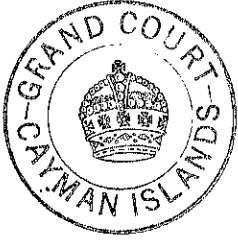
²⁷ See paragraphs 30 – 31 above.



“Follow(ing) the documents annexed to the ancillary proceeding 2250 (Katia) before the Bankruptcy court, related to Cayman” (emphasis added by Mr. Annette as set out at his paragraph 121.)

111. Mr. Annette’s 16 June 2015 letter had begun with a refutation of the Defendant’s characterization or “understanding” of the Plaintiffs’ case as being vitally dependent upon establishing that the Brazilian courts relied not only upon *Norwich Pharmacal* but also upon *Bankers Trust* disclosure, as well. Mr. Annette therefore reminds in this letter that while the Plaintiffs’ case is that all the Cayman Disclosure was available to and relied upon by the Brazilian courts, it would suffice for establishing the Defendant’s liability if only *Norwich Pharmacal* disclosure had been relied upon. In this letter, Mr. Annette also gives replies seriatim to the several questions with which Appleby’s letter of 1 April 2015 concludes (as set out in outline above in paragraph 109).
112. His first answer is illustrative of the premise of the Plaintiffs’ case being cast much wider than seemingly understood by the Defendant, referring especially to the significance of the TJSP and the STJ (as the appellate courts), having been made aware of the Retrieval Order:
113. *“... the STJ was informed of the Cayman Order dated 20 May 2011 and filed on 25 July 2011 when it was filed with the STJ in July 2011. No application was made to the STJ to remove any Cayman documents. As set out above, a drop box²⁸ file containing a copy of the entire STJ file (case no 15526) which reflects the extensive filing of and use*

²⁸ This is the separate STJ Drop Box also disclosed with this letter of 16 June 2015.



against the Plaintiffs of the Cayman Documents and the October 2010 bankruptcy motion and Order²⁹, is being sent to you separately by email”

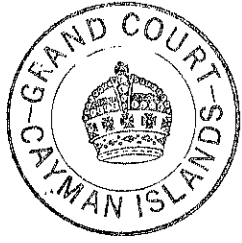
114. It is, in my view, clear from Mr. Annette’s letter both in that response and in his refutation of the “mischaracterization” of the Plaintiffs’ case, that he was indicating that this issue of what had been actually disclosed to the Brazilian courts at different times and to what extent relied upon by the Brazilian courts, would have to be established at trial if not settled earlier by formal mutual discovery. It is also clear from his responses that as much reliance was to be placed by the Plaintiffs on what Cayman Disclosure had been placed before the appellate courts all the way up to the STJ, as upon what had been actually placed before Judge Beethoven at first instance.

115. Further, under the heading “**Improper Use of Cayman Islands Disclosure by Dr Braga**” at page 3 of his letter of 16 June 2015, Mr. Annette discloses the File 2250 Drop Box in these terms:

‘As we have already previously stated, effectively the entire Cayman Islands Disclosure was before both the Bankruptcy Court and the TJSP. Furthermore, to put this beyond doubt, we have provided copies of all those documents.

In addition, we have also now been provided with a complete set of the documents filed before the STJ and a link to a drop box containing these documents is being sent to you by email. We are also sending you by email a link to a drop box containing all the non-Brazilian documents filed in Bankruptcy Court case no.2250 (the case in which Katia Rabello was thrown into bankruptcy).

²⁹ That made by Judge Beethoven on 28 October 2010 against Katia Rabello.



*It should be noted that, despite the impression sought to be created by your letter of 1 April 2015, our Clients have previously provided your Client with very extensive disclosure of the actual documents **filed in** the various Brazilian proceedings” [Mr. Annette’s emphases].*

116. Mr. Annette next proceeds in his affidavit to explain the purpose, as he saw it, of sending the drop-box:

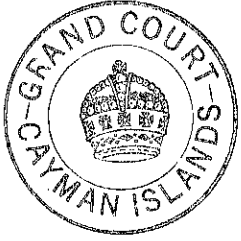
“The purpose... of sending the drop-box named “2250” was to disclose to the Defendant the Cayman Islands documents which had been placed onto and copied from the Bankruptcy Court File (as opposed to from the TJSP) and to respond to Appleby’s 1st April 2015 letter”.

117. This thinking he asserts, is evident from the words last in emphasis above from his 16 June 2015 letter: *“a dropbox containing all the non-Brazilian documents filed in Bankruptcy Court case no 2250.”*³⁰

118. He goes on (at paragraph 135), in response to the Defendant’s allegation that the June 2250 drop-box had been sent as representing the entire contents of File 2250 to state:

“There is no representation in the 16 June 2015 letter that it was the whole File 2250 being disclosed; the explanation of the contents of the 2250 Drop-Box (given in good faith) was the reverse, that it was expressly a sub-set of those documents.

³⁰ The more generic term “*non-Brazilian*” is employed because (as Mr. Annette mentions elsewhere in his affidavit) the BVI documents which had been obtained by use of the Cayman Islands disclosure in the BVI, were also included.



Further, no representation was made in the 16 June 2015 letter, as to when, in the past, the documents had been filed with the Brazilian Bankruptcy Court; these were documents expressly stated to have been filed with the Bankruptcy Court, which is not disputed and is accepted by the parties to be correct”.

119. He then comments in detail on the fact that on its face, the 2250 Drop-Box was not presented as a full disclosure of File 2250, it being apparent from the Index of the contents which was included in the disclosure, that many documents (1703 of the first 7000 pages - almost 25% of the File) were missing from the Drop-Box; adding on this point:

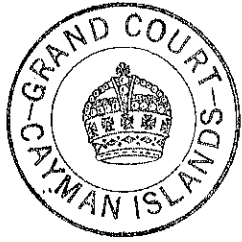
“The 2250 Drop Box was never represented to be the complete file and on its face the index to the drop box immediately indicated that it was very substantially incomplete. It would also be plainly incomplete when printed off due to the missing paginated page numbers..... the first time to my knowledge the Defendant raised a complaint about its contents was by way of letter dated 17 February 2016 and then repeated on Sunday 28 February 2016, the day it was agreed the parties would exchange Reply Submissions [for the then pending hearing of their cross-summons]... The Defendant therefore waited for virtually 8 and a half months and then with the Hearing commencing on 1 March 2016, on 28 February 2016, accused the Plaintiffs of having attempted to deceive it... Put another way, in 8 and a half months of examining a file plainly not complete on its face, the Defendant did not once request copies of the obviously missing pages but then accused the Defendant of dishonesty in not having provided the same, when the documents were never presented as a full copy of the 2250 File and when the index provided showed that it was incomplete”.

120. Mr. Annette goes on at paragraphs 147 – 158 to respond to the further allegations of “*deliberate and dishonest misrepresentations*” said by the Defendant to have been the effect of what was reported in Stuarts’ letter of 16 June 2015. His responses at those paragraphs of his affidavit speak compellingly for themselves and so I see no need to deal with them in this judgment which focusses upon the main allegations in relation to the pleadings, the hard copy TJSP disclosure and the June 2250 Drop Box , all as discussed above.

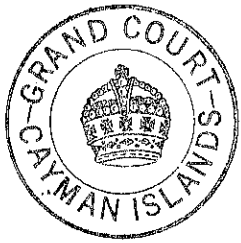
The applicable law

121. Wilful disobedience to an order for discovery may be justification for striking out a party’s case and giving judgment for the opposite party, even if a fair trial is still possible. See **Brown v Horvat Properties (Cayman Islands) Ltd. and Horvat 1992-93 CILR N-5**. It must follow *a fortiori*, that a claim will be struck out after disobedience to an order for discovery in circumstances where a fair trial is no longer possible: **TMSF v Wisteria Bay**, 2008 CILR 231.

122. Those principles may not be invoked in this case however, because proceedings had not yet reached the stage of formal discovery and no order for discovery had yet been made by the Court spelling out the Plaintiffs’ obligations in that regard. Thus, there is no clear prism of an order of the Court, based upon a proven obligation of disclosure, through which to scrutinize the allegations of deliberate dishonesty raised against the Plaintiffs here.



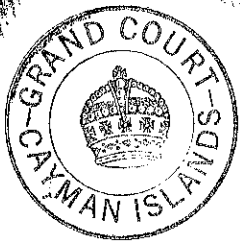
123. Instead, I am invited to proceed on the basis that proof of the alleged transgressions is a matter of inferences, which the Defendant also submits, must be drawn from all the known circumstances.



124. Whatever the premise, in any civil case, the standard of proof remains the balance of probabilities, and this is so notwithstanding that there are, as here, allegations of deliberate dishonesty. But as the case law also establishes, the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged: **Re H (Minors) (Sexual Abuse: Standard of Proof)** [1996] AC 563(HL). There at page 586, Lord Nicholls explained that *“When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.”*

125. While that degree of flexibility will likely redound to the benefit of a respondent to such serious allegations, Mr. Simpson emphasised that the evidence does not need to satisfy the Court that a fraud has been committed *“beyond all reasonable doubt”*, which is the criminal standard: **Hornal v Neuberger Products** [1957] 1 QB 247(CA).

126. I accept that this is so. More particularly, where allegations of fraudulent litigation conduct are disputed as in this case; establishing dishonesty will require the applicant



seeking to strike out the action as an abuse of process, to satisfy at least one of two specific tests established by the case law, on the balance of probability:

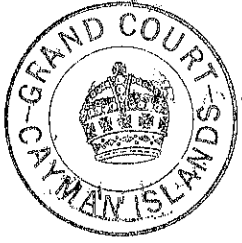
- The well-known test for mens rea in deceit (**Derry v Peek** (1889) 14 App 337 (HL)), namely, that a misrepresentation has been made: (i) knowingly; (ii) without belief in its truth; or (iii) recklessly, careless whether it be true or false; or
- The familiar test applied in equity, that is to say: *“not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity; as distinct from the objectivity of negligence...Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty”*: **Royal Brunei Airlines v Tan** [1995] 2 AC 378 (PC) (per Lord Nicholls at 389C).

Attribution

127. There being no evidence in this case to suggest that the Plaintiffs were themselves involved in or directly aware of the alleged dishonest conduct of their lawyers, the Defendant must establish that the law would attribute the dishonesty of their lawyers (if proven) to the Plaintiffs. For this purpose, Mr. Simpson relies on the doctrine of agency, citing **Bowstead and Reynolds on Agency** as summarizing the relevant law in these terms³¹:

“The principal is liable if the agent made the false representation fraudulently, it being within the scope of (the agent’s) actual or apparent authority and within the course of his employment, to make such a representation”.

³¹ Citing *Briess v Woolley* [1954] AC 333 [er; per Lord Reid at 348-9]



128. Given the conclusions at which I have arrived on the facts of this matter, all I think I need say on the subject of attribution, is that I consider it a self-evidently correct proposition, that the Court must be able to protect its process and the other parties from abuse by litigants who would seek to hide behind the egregious conduct of their lawyers acting within the scope of their authority. I therefore also accept, as a matter of principle, that the sanction of strike out would be available for deployment in such circumstances, at the discretion of the Court.

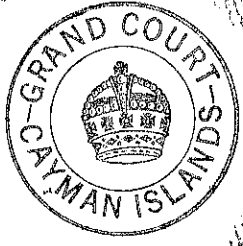
129. Those being a summary of the defining principles for the examination of the allegations of dishonesty raised against the Plaintiffs here, the manner of the exercise of the discretionary power was not disputed and can be explained as follows.

130. Where a plaintiff is guilty of misconduct in proceedings which is so serious that it would be an affront to the Court to permit him to continue to prosecute the claim, the claim may be struck out at an early stage to stop the proceedings and to prevent further waste of resources. In such cases, the plaintiff has by his misconduct, forfeited the right to have his claim determined by the Court: **Masood v Zahoor** [2010] 1WLR 746 (CA).

131. As examples of this broad proposition, (i) fraudulent conduct in litigation undertaken with the object of preventing a fair trial and (ii) failing to make frank disclosure in respect of such conduct, have been held to justify striking out a plaintiff's claim in its entirety: **Arrow Nominees v Blackledge** [2001] 1 BCC 591 (CA)³².

132. In particular, in **Arrow Nominees** Chadwick LJ stated:

³² Followed and applied in **TMSF v Wisteria Bay** (above) in which such egregious conduct resulted in the claim being struck out.



"[54] ... But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe or where it amounts to such an abuse of process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.

[55] Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed."

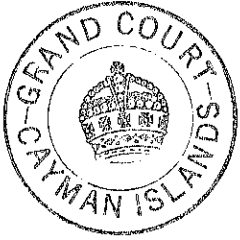
133. Relying especially on those passages, Mr. Simpson submits that it is clear that the test for whether there can be a fair trial is a very broad one and that cases can, and should, be struck out for abuse of process :

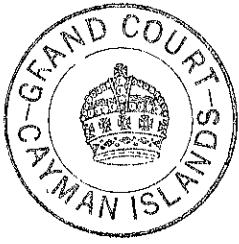
“Where litigants have (as, according to him the Plaintiffs here) demonstrated that they are determined to pursue proceedings with the object of preventing a fair trial; and also

Where (as here) the trial (in the context of the hearing of the Plaintiffs’ and Defendant’s cross-summonses then underway) has been “hijacked” by the need to investigate the true position.”

134. He acknowledged that this court recently considered and applied both **Masood v Zahoor** and **Arrow Nominees in AHAB v Saad Investments** 2011(2) CILR 434, summarizing the relevant principles at paragraph 32 as they applied in the context of that case and concluding, that although AHAB’s explanations for its late disclosure were “*patently implausible*”, a fair trial was still possible. However the AHAB case Mr. Simpson submits, differed substantially from the present one in that this Court did not then consider that it was important to the defendants’ case that the question of AHAB’s explanation for failing to disclose certain bundles, be resolved at that stage. By contrast, he submits that in the present case, this Court considered the conduct alleged to be serious enough to interrupt the hearing of the cross-summonses, in order to hear this free standing abuse of process/strike out application by the Defendant.

135. Mr. Akiwumi, for his submissions on behalf of the Plaintiffs, relied upon **Logicrose Limited v Southend United Football Club Limited** (unreported save in the Times of 5





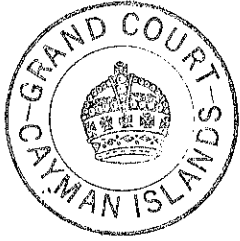
March 1998) and which is referenced by both Chadwick LJ and Ward LJ in **Arrow Nominees**. In **Logicrose** there had been a deliberate suppression of a crucial document. This was later produced and it was consequently held that a fair trial could still be had. In coming to this conclusion and allowing the claim to proceed, the Court noted, among other things, that it must always guard itself against allowing its indignation at misconduct to lead to a miscarriage of justice by striking out a claim prematurely.

136. While the Plaintiffs here strenuously deny that there has been any deliberate misleading of this Court, the Plaintiffs do rely, said Mr. Akiwumi, on **Logicrose**, as applied locally in **Renova Resources Private Equity Limited v Gilbertson** [2011 (2) CILR 148], to further demonstrate that a fair trial is still possible in the present circumstances and to illustrate their proposition, that if the Plaintiffs' claim were struck out, there would be precisely the sort of miscarriage that Courts must guard against, in that *bona fide* claims for significant breaches of fiduciary and contractual duties would be unfairly evaded.

137. It is also notable submits Mr. Akiwumi, that the recent and important decision of the Court of Appeal of England and Wales in **Alpha Rocks Solicitors v Olade** [2015] 1 WLR 4535 (CA) is a mere footnote in the Defendant's cursory and selective review of the case law. This is surprising he submits, given that the judgment of Lord Justice Vos in **Alpha Rocks** provides a clear summary at paragraphs 21 through 24 of the principles on which the Court should act informed by the earlier cases³³. I agree that this analysis by Vos LJ of the principles on which the Court should act bears full reproduction and I adopt them as follows:

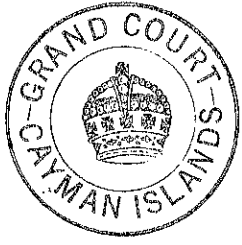
³³ Including *Masood (above) and Summers v Fairclough* [2012] 1 WLR 2004.

“The principles on which the court should act



138. *It is important first to emphasise, as did Lord Clarke in Summers (supra), the range of available remedies when a situation arises in which a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise. Establishing fraud without a trial is always difficult. And it is open to a defendant to seek summary judgment on the claim under CPR Part 24.2(a)(i), without seeking a strike out for abuse of process. As Masood and Summers (supra) also demonstrate, striking out is available in such cases at an early stage in the proceedings, but only where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are nonetheless important. They include costs and interest penalties and proceedings for contempt of court or criminal prosecution.*

139. *Returning to the early stages of proceedings, it is, of course, always open to the court to strike out or grant summary judgment in respect of the impugned part of the claim, as opposed to the whole. In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of a fair trial of the issues between the parties.*

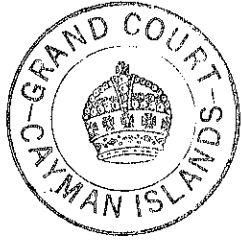


As CPR Part 3.4(2)(b) itself says, "[t]he court may strike out a statement of case if...the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings"

140. *The cases I have mentioned were right to emphasise in the context of striking out what is effectively factor (a), namely the need for litigation to be conducted efficiently and at proportionate cost. The need for compliance with rules and orders is equally important. But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is worth emphasizing, before I turn to the particular circumstances, that litigants should not be deprived of their claims unless the abuse relied upon has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved. This aspect is obviously inter-related with whether or not a fair trial remains possible. Moreover, the fact that solicitors have signed bills that appear to be inaccurate or worse is obviously a matter for concern, but that concern does not abrogate the need for the issue of whether the bills were indeed inaccurate to be fairly resolved between the parties, if that remains possible."*

Analysis and conclusions

141. From the detailed examination of the evidence as set out above, I am compelled to the conclusion that this strike out application is premised only argumentatively upon the Defendant's particular interpretation or views taken of the Plaintiffs' case or of the basis upon which the Plaintiffs were providing disclosure of the Brazilian court files in these proceedings.



142. A clear example of this is the treatment of Viviane de Moraes' witness statement by Mr. Simpson in his written submissions in support of strike out, where at paragraph 6 he states:

"The Witness Statement of Ms de Moraes filed on 27 February 2015 was a critical part of the Plaintiffs' resistance to the strike out application ([which was due for hearing in March 2015]). It sought to neutralize the "very good answer" that Mr. Annette had identified, in relation to each of the Bankruptcy Court and the TJSP in that:

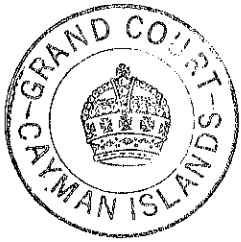
- *It stated that the Cayman Disclosure had been filed on file 2250 in October 2010, i.e before Judge Beethoven's decision of 28th October.*
- *It stated that the Cayman Disclosure had remained on file 2250 up to February 2015 [the date of Ms. de Moraes' statement], notwithstanding this Court's recall Order for the Bankers Trust documents made on 25th July 2011".*

143. Whatever the intention in presenting this statement (either on the part of Ms. de Moraes herself or Mr. Macaulay as its draftsman), the fact of the matter is that Mr. Simpson's description of it as set out immediately above, is an argumentative characterisation.

144. I must have regard to what the statement actually states, when called upon to draw adverse inferences. In this regard paragraph 2 must be read in context with the impugned paragraph 3e as follows³⁴:

"2. The Firm has represented Katia Rabello since November 2010 in connection with the bankruptcy proceedings of Petroforte Brasileiro de Petroleo Ltda and others, State

³⁴ See also page 22 above.



of Sao Paulo 18th Judicial Circuit Court (the "Bankruptcy Court") Case No 1017402-40.2001.8.26.0100 (58300.2001.074201-2/002250) (the "Petroforte Case")

3. I have reviewed the Bankruptcy Court's file in connection with the Petroforte Case and confirm the following:

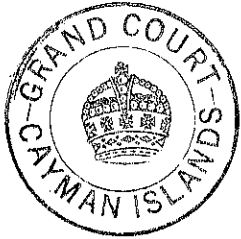
....

e. The Cayman Documents filed by Braga in the Petroforte Case have remained in the Bankruptcy Court file since October 2010." (emphasis added).

145. The premise of Mr. Simpson's accusation here is the now known fact that the Cayman Disclosure was not placed on File 2250 itself until 1 December 2010³⁵. It follows he says, that the de Moraes statement is deliberately misleading as by its reference to File 2250, it must be speaking only to the contents of that File. But this is not clearly so. Paragraph 2 as quoted immediately above, references two full sets of file numbers together describing them as the 'Petroforte Case'. Paragraph 3 then states "I have reviewed the Bankruptcy Court's file in connection with the Petroforte Case and confirm ...".

146. Since releasing this judgment in draft, it has been pointed out to me that Mr Liesegang's uncontroverted evidence is that both sets of numbers in the de Moraes statement are in fact the updated file reference number for File 2250 and this is said to give support to the argument that the statement was intended to mislead. I am also reminded that at paragraph 5 of his second affidavit Mr. Macaulay specifically refers to the Katia Rabello Bankruptcy court file 2250 by means of the same file numbers used

³⁵ Per Mr. Liesegang's Affidavit (above).



in the de Moraes statement. This too is posited by Mr. Simpson as revealing an intention to mislead the Defendant and this Court.

147. However, as Mr. Macaulay strove adamantly under cross-examination to explain, he regarded the file reference as being to the Petroforte Case as a whole. There was no intention to single out File 2250 as a separate file exclusively referable to Katia Rabello's case; the statement he insists, is speaking to the Cayman Disclosure having been placed on the Bankruptcy Court's Petroforte File in October 2010, where it has remained ever since. He insisted that this is what he had been told, this is what he had in mind when drafting the statement and this remains the position until now.

148. While there is room for doubting his explanation, inference of dishonest intent adverse to Mr Macaulay on this issue would not be a safe inference to draw. The de Moraes statement taken as written, is fully consonant with the Plaintiffs' case as it has been expressed all along³⁶. This is that Judge Beethoven, in extending the Petroforte Bankruptcy to Katia Rabello on 28th October 2010, had access to and had undoubtedly seen and considered the entirety of the Cayman Disclosure which was already filed in the Petroforte Case, on File 1819, where it is now acknowledged by the Defendant to have been filed on 5 October 2010 at latest. That being the Plaintiffs' case, Mr Macaulay (or those instructing him from Brazil) would have very little to gain by seeking to mislead this Court into thinking that the Cayman Disclosure had been placed specifically upon File 2250 as distinct from upon the Petroforte case file in general, from the outset.

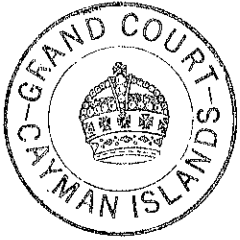
³⁶ As to the merits of which I emphasize that I express no views one way or the other.

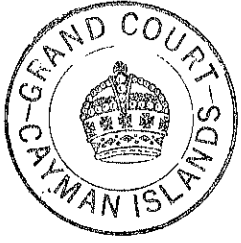
149. It is in this context also that Mr. Simpson's further complaints in relation to the de Moraes statement must be considered.

150. He alleges further that the statement resulted in the amendment to the Plaintiffs' pleadings, in paragraph 259 of the Reply to the Defence, in effect pleading a new case – changing from one in which the Plaintiffs had asserted that only the documents filed with Dr Braga's petition had been relied upon by Judge Beethoven, to a much wider reliance by Judge Beethoven, following immediately after the de Moraes statement was filed. Accordingly, the de Moraes statement, in describing a wider availability and reliance upon the Cayman Disclosure, was a misleading attempt to answer the Defendant's "good argument" as it had been identified and explained to Mr. Macaulay by Mr. Annette.

151. But again in this regard, far from stating anything new about the Plaintiffs' case, the letter from Stuarts, dated 24 February 2015 responding to the Defendant's request for clarification stated: "*...paragraph 259 of the Reply to the Defence should thus be taken to be amended to include not only all documents annexed to Dr Braga's petition on the 25th October 2010, but also all of the other Cayman Islands disclosure, which was put before Judge Beethoven and relied upon in support of the application to place Katia Rabello into bankruptcy.*"

152. Further, it must also be noted in this regard, that the Defendant's witness Mr. Liesegang acknowledged under cross-examination by Mr. Akiwumi, that the seal on File 1819 had been broken on 29 September 2010 by Judge Beethoven or by his direction and that the Judge would have had access to and considered the full contents





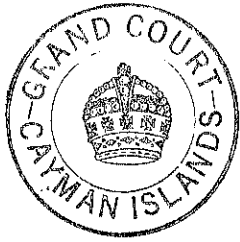
of that File for the purposes of the investigation he was then directing. Thus, it may indeed become a matter of inference unless refuted at trial in this case, that the Judge would have had access to the Cayman Disclosure before his decision was taken adverse to Katia Rabello on 28 October 2010.

153. This undermines any adverse inference that the de Moraes statement, read as referring to the Bankruptcy Court File as a whole (rather than just to File 2250), is clearly untrue in its description of what documents were before the Bankruptcy Court.

154. In re-examination of Mr Liesegang, Mr. Simpson obtained confirmation that translations of the Cayman Documents would have been required before Judge Beethoven, a native speaker of the Portuguese language, could have considered them for the purposes of his decision. There was however, no evidence before me as to the extent, if at all, to which the Cayman Documents were found in Portuguese on either the main Petroforte File, File 1819 or File 2250.

155. In evidence next given by Mr. Roberto Castro de Figueiredo, (the Plaintiffs' Brazilian legal expert), he expressed the firm opinion that Judge Beethoven would have had access at least to both Files 1819 and 2250, when considering Dr Braga's petition to extend the Petroforte Bankruptcy to Katia Rabello. He moreover, cited paragraph 25 of Judge Beethoven's decision as making express reference to his reliance on the "*documents which had been obtained through an investigation authorized by the Judge himself*"; viz: the OAR Investigation, the subject of File 1819.

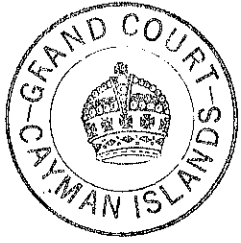
156. Given all that background and while there is no express reference in Viviane de Moraes' statement (or in her Declaration for that matter) to File 1819, the balance of



probabilities must here weigh in her (and Mr. Macaulay's) favour and hence in the favour of Plaintiffs, as well. It would, in my view, be unsafe and unreasonable on the state of the evidence as it stands, to conclude as alleged, that paragraph 3e of Viviane de Moraes' statement is intended misleadingly to refer only to File 2250 to the exclusion of the rest of the Bankruptcy Court File for the Petroforte case. It must also follow that it would be equally wrong to conclude that the de Moraes statement was crafted misleadingly to respond to Mr. Annette's cautionary advice³⁷ while nowhere in that advice, was a distinction sought to be struck as between the Bankruptcy Court file as a whole and any sub-file of it that may have been put before any particular court.

157. The same holds true, in my view, of the allegation of recklessness raised against the Plaintiffs in the alternative by Mr. Simpson; here relying on the principle that dishonesty also constitutes of making a misrepresentation being reckless as to whether it is true or false (in the sense of **Derry v Peek** above) or failing to act as an honest person would in the circumstances (in the sense of **Royal Brunei Airlines**, above).
158. The application of these principles must be considered in the context of what it can safely be inferred the Plaintiffs' advisers must have been thinking. I am satisfied that when Mr. Simpson's alternative allegation of recklessness is considered in the light of the legal principles, it too must be rejected.
159. In drafting paragraph 3e of the de Moraes witness statement by way of response to Mr Annette's cautionary advice, it must be assumed that Mr. Macaulay (if not also Ms. de Moraes herself) had in mind what has been the Plaintiffs' case all along; which is that all the Cayman Disclosure was before the Bankruptcy (and later the appellate) Courts.

³⁷ See pages 18 – 20 above.



See in this regard, paragraphs 170 and 171 of the Statement of Claim as extracted above³⁸ (for example). The de Moraes statement, on its face, does not depart from the Plaintiffs' pleaded case, it supports it. Thus, there simply is no safe basis for an adverse inference of an intention or recklessness on the part of the Plaintiffs to mislead, if the statement is read as referring to the Petroforte case file in its generality.

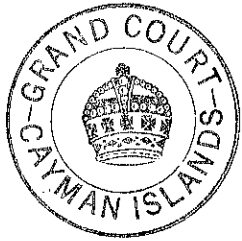
160. I should note that I have not overlooked Mr. Macaulay's admission under cross-examination, that paragraph 3e of the de Moraes statement is now shown to be incorrect in its assertion that the Cayman Disclosure "*have remained in the Bankruptcy Court file since 2010.*"

161. Incorrect also was the representation made two weeks later in Stuarts' letter of 6 March 2016 as it was informed (at least in part) by paragraph 3e, that : "*Our clients are unaware of any of the Cayman documents being returned by the Bankruptcy Court, the TJSP or the STJ based upon the retrieval order*".

162. This implication that the Retrieval Order had not been implemented was shown to be untrue from an examination of File 2250 itself as finally and fully disclosed in these proceedings, including the certificates of removal which evidenced Dr Braga's compliance with the Retrieval Order.

163. To the extent then that the quoted phrase from paragraph 3e or from Stuart's letter of 6th March 2015 was intended by Ms. de Moraes and/or Mr. Macaulay to give the Defendant the impression that the Cayman Disclosure always remained on File 2250, it would be dishonest and misleading, at least recklessly so.

³⁸ At pages 7 – 9 above.

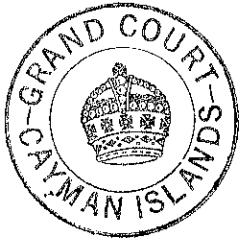


164. But Mr. Macaulay's responses on this issue must also be carefully considered before arriving at that adverse conclusion. It was - under cross-examination by Mr. Simpson as to why he drafted the phrase in paragraph 3e in terms so capable of misleading - to the effect that that was what he had been told by those instructing him from Brazil and he made no further enquiries despite being aware of the Retrieval Order. This happened, simply because he accepted what he had been told and he had no concern that if it turned out to be incorrect, it would not have been corrected by the Plaintiffs later on or certainly by the Defendant itself. There was and could have been he insisted, no intention to mislead nor any risk of that happening, because the state of the Brazilian court files is a matter of public record and no one has been better placed to ascertain whether Dr Braga had complied with the Retrieval Order than the Defendant who represented him before this Court on his undertaking given to this Court as to the implementation of the Retrieval Order³⁹. Viewing the circumstances in that way, said Mr Macaulay, there was and could have been no intention to mislead the Defendant (and through it this Court) about a matter that was peculiarly within the Defendant's gift to ascertain.

165. Given the consequences of an adverse finding against Mr. Macaulay and the Plaintiffs on this issue, and the clear advice given in the case law about the standard and burden of proof and the proper approach to the assessment of the evidence, I am obliged to conclude in all the circumstances here presented, that the Defendant has failed to prove

³⁹ For the sake of completeness, I note the affidavits filed by Mr. Nick Dunne an attorney with Walkers, the Defendant. In them he avers as a member of the Walkers team who acted for Dr. Braga, that there had been no feedback to the team about Dr Braga's compliance with the Retrieval Order until File 2250 was disclosed in these proceedings. I make no findings about these assertions, my focus being upon what the Plaintiffs themselves must have known or intended.

a dishonest intention to mislead or even recklessness on the part of the Plaintiff, in this regard.



166. While the de Moraes statement is shown to have misrepresented the present state of File 2250 post the Retrieval Order, it would be unsafe to conclude that this was a dishonest attempt to mislead the Defendant or this Court. Given the real focus of the Plaintiffs' case being upon what was before the respective Brazilian courts at the relevant times, there simply appears to be no motive or purpose in seeking to mislead on this tangential issue – one which itself was so capable of being established from the public records of the Brazilian courts.

167. The Defendant's criticisms of the disclosure of the File 2250 DropBox and of the hard copy TJSP disclosure, can fair no better; especially when considered in the context of the explanations provided in Mr. Annette's third affidavit. These include, importantly in my view, the fact that the discovery stages had not yet been reached and, as already observed above, the Plaintiffs through those representing them, were in no position to control or know the true extent of the Defendant's knowledge about the state of the Brazilian court files at the different crucial stages.

168. For his part, Mr. Annette also emphasizes the fact that at each stage as explained in detail above, he was responding to specific questions or requests from the Defendant's lawyers, Appleby.

169. In relation to Mr. Simpson's allegation of "cherry picked" disclosure of the TJSP File or of an attempt to hide the fact that a separate TJSP File existed, Mr. Annette's

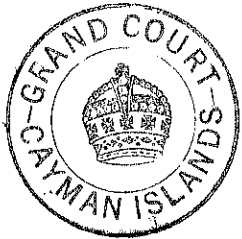
detailed explanations set out above herein at pages 29 – 34 are, in my judgment, compelling and conclusive.

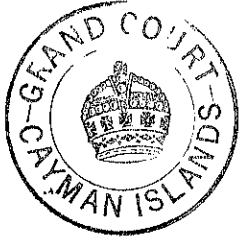
170. So too are his responses at pages 35 – 39 compelling and conclusive of the allegations of “filleting” and “manipulation “ of the File 2250 Drop Box. In particular, I accept on this score as well, that Mr. Annette (and those responding from Brazil) were not responding to a request for disclosure of the entire File 2250, but to a request to disclose to the Defendant (per Appleby’s letter of 1 April 2015) “*the Cayman Islands documents which had been placed onto File 2250*” as copied from the wider Bankruptcy Court File. Hence the words used by Mr Annette in sending the Drop Box: “*a drop box containing all the non-Brazilian documents filed in Bankruptcy Court case no 2250.*”

171. As discussed in detail above, Mr. Annette regarded this as encompassing the Cayman Disclosure as it would have been available to Judge Beethoven and in contra-distinction to whatever else may have been on the Bankruptcy Court File. He was not purporting to disclose File 2250 in its entirety, contrary to what the Defendant seems to have assumed⁴⁰ and contrary to the much narrower premise of its own requests conveyed in Appleby’s letters.

172. For all the foregoing reasons, I find that the Defendant has failed to establish its allegations of dishonesty or recklessness against the Plaintiffs. And while I am fully satisfied that this is the proper conclusion to reach on the Defendant’s strike out application and that there is nothing about which this Court should be affronted, it is

⁴⁰ Although Mr. Simpson later accepted during the hearing that the Plaintiffs were not purporting to disclose the complete file.





also clear that whatever one might make of the allegations against the Plaintiffs, a fair trial of the issues between the parties in this case can still be attained. That also devolves - in keeping with the principles from the case law as discussed above - in favour of allowing the Plaintiffs to have their day in court.

173. The Defendant's application is dismissed accordingly, with costs to the Plaintiffs in any event, to be taxed on the standard basis if not agreed. This determination as to costs is the outcome of my being satisfied that the Defendant's application to strike out was not only unfounded but also the result of its failure to have had proper regard to its own earlier exchanges with the Plaintiffs. I do not however, go so far as to grant costs on the indemnity basis. In light of the potentially misleading contents of paragraph 3e of the de Moraes statement, I would not find that the Defendant's application to strike out crossed the threshold into the realm of unreasonableness⁴¹ where such an order would

be justified. .

A handwritten signature in black ink, appearing to read "Anthony Smellie", written over the text "be justified. .".

Hon. Anthony Smellie

Chief Justice

Cayman Islands

Released with amendments 10 August 2016

⁴¹ See *Talent Business Ltd v China Yinmore Ltd* 2015 (2) CILR 113 and the cases discussed therein.