

JERSEY / JUDGMENT

Crociani -v- Crociani [2015]

JRC 103 (14 May 2015)

[2015] JRC 103

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons in relation to an application for an extension of time by the first to fourth and seventh defendants in relation to the provision of discovery by electronic means. In response, the plaintiffs issued applications dealing inter alia with the form and manner in which hard copy documents had been disclosed by the first to fourth defendants, that any exchange of electronic discovery should be mutual, the method of inspection of discovery, and confirmation of the process required to verify discovery of documents held in electronic form. As far as I am aware this judgment is the first occasion upon which the courts have had to consider issues of discovery of documents held or provided in electronic format. 2. The background to the present dispute is set out in the Court of Appeal's judgment reported at *Crociani-v-Crociani*

[2014] JCA 089 at paragraphs 6-30 and the Privy Council judgment reported at *Crociani-v-Crociani*

- [2014] UKPC 40 at paragraphs 5-12. Relevant chronological history 3. While the jurisdiction issues were not determined by the Privy Council until the end of 2014, certain procedural steps relevant to the present application took place in 2014. In particular, by an Act of Court dated 23 rd April, 2014, the plaintiffs were given leave to amend their Order of Justice with corresponding directions permitting an amended answer and reply. Paragraph 9 of the Act of Court of 23 rd April, 2014, at that stage, directed the parties to apply by the end of May 2014 to fix a date for further directions to be given, such summons to be held in the first two weeks of September 2014. 4. In the context of correspondence as to when that summons for directions should take place, in an email to Advocate Robinson dated 28 th May, 2014, I stated as follows:- "That is not say however that the next few months should be wasted. Given the length of the pleadings, it is likely that discovery will be a time consuming task. There is nothing to stop the parties commencing the process of gathering documentation and starting to list it. That documentation will be relevant whether the dispute is heard in Mauritius or in Jersey. In that regard I note that the defendants

accepted for the purposes of their appeal to the Royal Court and the Court of Appeal that they would abide by the same disclosure rules as are applicable in Jersey even if the case was argued in Mauritius. I therefore see no reason why the parties cannot start the process of gathering documents. The availability of this period can be taken into account in deciding what period of time to allow for discovery. I wish to repeat that this statement is made subject to any arguments about whether discovery should be ordered at all, as I have already noted in this email." 5. After this letter, the Privy Council informed the parties that the appeal on jurisdiction could be heard in October 2014. Advocate Robinson therefore applied to adjourn his summons for directions. I consented to that request by a letter to all parties dated 10 th June, 2014. The third and fourth paragraphs read as follows:- "So that there is no misunderstanding between any of the parties, adjourning the plaintiffs' summons for directions is not to be construed as a general stay of the proceedings. If any such stay is required then an application will have to be made to the Royal Court. This firstly means there is no stay of any steps the plaintiffs may take in relation to costs. Secondly, there is no stay of any time limits applicable to the fifth to seventh defendants to issue any challenge to jurisdiction or forum they might wish to bring. The adjournment also means, if I have to give directions in the future should the Privy Council appeal be determined in the plaintiffs' favour, I consider I can take into account what steps to prepare for discovery have been taken by the parties as I referred to in my email of 28 th May, 2014." 6. The matter next came before me on 12 th January, 2015. Shortly before that hearing Messrs Carey Olsen on behalf of the first to fourth and seventh defendants had written a letter dated 7 th January, 2015, in respect of the parties' discovery obligations. Paragraphs 6 to 10 of their letter stated as follows:- "6. Without waiving privilege, we have, since being instructed, taken appropriate steps to inform our clients of the nature and extent of their discovery obligations under Jersey law, including providing them with a detailed guide to discovery.

7. We asked that they ensure that any documents in their possession, custody or power were preserved and that we were notified of the existence of any such documents (whether or not they remained within their possession). We also explained what would be classed as a document, and the media upon which any information may be recorded.
8. We have obtained and taken a hard copy of the Third Defendant's files relating to the Grand Trust and the Fortunate Trust (as well as other potentially related matters). The entirety of those files is being manually reviewed for relevance. We are in the process of investigating if there are further documents from connected and/or related BNP entities.
9. We have requested and obtained copies of all relevant documents from the First Defendant relating to the Foundation, the Grand Trust and the Fortunate Trust. The entirety of those documents is being manually reviewed for relevance. We are also intending to disclose relevant bank statements.

10. We have already been provided with, and reviewed, many documents which the Fourth Defendant considers to be discoverable. We are seeking a copy of the entirety of the Fourth Defendant's files and records relating to the Grand Trust in order to complete the process of discovery in relation to the Fourth Defendant ourselves." 7. Following argument on 12 th January, 2015, I ordered that the Jersey advocates, for the plaintiffs and the first to fourth defendants were to meet to discuss the most practical method of providing electronic discovery as soon as reasonably practicable (the "discovery meeting"). 8. I did not order a precise date by when the discovery meeting should take place because this was left to the parties with their advocates to arrange. 9. I also ordered that discovery of documents held in non-electronic format should take place by 2 nd April, 2015, and documents held in electronic format by 1 st May, 2015, in relation to the plaintiffs and the first to fourth defendants. 10. Regrettably, Messrs Bedell Cristin for the plaintiffs did not write to arrange a meeting until 3 rd February, 2015. I say regrettably because while I had understood that the parties could not meet to discuss the process of electronic discovery in January 2015, I was somewhat surprised that the meeting did not take place until March. In my judgment arrangements for a meeting to take place should have been agreed shortly after the directions given by me on 12 th January, 2015. 11. The date arranged for the meeting was initially 1 th March, 2015. Although earlier dates were proposed by the plaintiffs these were not acceptable to the first to fourth defendants. 12. On 2 nd March, 2015, Bedell Cristin wrote to Carey Olsen, who represent the first to fourth defendants. Bedell Cristin's letter set out a summary of the approach the plaintiffs intended to apply to their discovery obligations and what they expected from the first to fourth defendants' approach to discovery in anticipation of a meeting, then fixed for 5 th March, 2015. This letter was in effect a reply to Carey Olsen's letter of 7 th January, 2015, to which I have referred. 13. The effect of the letter of 2 nd March was to lead to the meeting arranged for 5 th March, 2015, being postponed. 14. In an affidavit filed for the hearing before me and sworn by Mr John James McCormick, an employee of Carey Olsen, at paragraph 32, Mr McCormick deposed that Messrs Grant Thornton were approached by Carey Olsen on 9 th March, 2015, to assist in relation to the task of electronic disclosure. 15. It appears this was prompted by Carey Olsen being informed by Bedell Cristin the previous week that Deloitte LLP, had been retained by the plaintiffs to help them with the process of electronic discovery. 16. Ultimately, the discovery meeting took place on 1 th March, 2015. This meeting resulted in both Bedell Cristin and Carey Olsen setting out their views of what happened at that meeting, by an exchange of letters dated 13 th March, 2015. 17. On 2 nd April, 2015, as deposed by Mr McCormick at paragraph 13 of his affidavit, Messrs Carey Olsen were not ready to make discovery of documents in non-electronic form on behalf of their clients due to a number of errors contained within the lists. Ultimately, lists of documents were provided by email on 7 th April, 2015, as a result of significant work having being carried out by Carey Olsen over the Easter Weekend. 18. On 7 th April, 2015, the time limit for providing discovery of certain non-electronic format documents was extended to 1 st May, 2015. 19. The extent of the non-electronic disclosure amounted to 6386 documents running to around 123 lever arch files. 63 files of discovery in non-electronic form were provided to Bedell Cristin on 24 th April, 2015, and the remainder was provided

on 1 st May, 2015. The defendants' application 20. Without being discourteous to Advocate Kelleher's submissions, having quite properly apologised for his clients' discovery being late, Advocate Kelleher contended that there was no intention to delay the discovery process. What had occurred ultimately was that his firm had to deal with a process that was more complicated than had been envisaged in January 2015 at the hearing before me. 21. Prior to January 2015, Carey Olsen had obtained the third defendant's documents and created a core bundle as well as collating material from local law firms and their clients. This led to the creation of a core bundle of some 30 files. It certainly was not the case that the defendants he represented had sat on their hands doing nothing. This would be entirely inappropriate not least because three of his clients were regulated entities. What was important to his clients was to do the discovery exercise properly. The range of material obtained was broad; it had originated from some ten countries and amounted to 50,000 documents with much duplication. There was also a similar amount of electronic discovery. 22. The process was also complicated because the obligation to disclose hard copy documents in April in advance of discovery of electronic documents meant that the electronic disclosure then required an analysis to avoid duplication of documents already disclosed. Given the amount of documentation due to the number of lawyers involved in Jersey and elsewhere and the number of countries the family had dealt with, this was a difficult task. 23. The issue was also complicated by questions of privilege. While advice obtained by the trustees at the expense of the trust fund was disclosable, all legal advice still had to be reviewed. As an example, a decision had to be made whether disclosure of legal advice was going to be made in respect of the 2010 appointment made by the trustees. 24. While Advocate Kelleher accepted that there was mistrust between the parties, which at times reflected itself in the correspondence, the requirement for a discovery meeting by the court ultimately had helped the process of discovery because it caused the parties to reflect on what was expected. He further explained that the discovery process was ongoing. To the extent that the plaintiffs had made criticisms of certain parts of the list not containing descriptions, these had been addressed so that each document listed now contained a description. 25. The matter was also complicated because, as discovery was analysed, further material at times had to be requested or was received. 26. In relation to criticisms by the plaintiffs that the lists were not in chronological order, Advocate Kelleher contended that listing in chronological form was not required by Practice Direction RC05/04 or paragraph 24/5/4 of the 1999 White Book . While paragraph 24/5/4 indicated that 'lists should usually consist of items in order of date, this did not apply where documents were too numerous. It also did not apply to bundles of documents. He therefore invited me to review the lists filed and assess before giving my decision whether or not the documents were in a convenient order. 27. In terms of electronic disclosure, all the material had now been extracted from any device held by or for the first to third defendants. The next stage of the process was for Messrs Grant Thornton to remove duplicates or multiple copies. Carey Olsen had then retained paralegals who would then review documents to prepare a list. This had occurred for 8,000 documents with a further 30,000 documents in electronic format being considered by Grant Thornton and their paralegals. 28. The list produced by the paralegals was then

referred to Carey Olsen for review. At the Carey Olsen stage, the approach being taken was to review documents where a particular question had arisen and to test the accuracy of work carried out by the paralegals to fulfil the first to fourth defendants' discovery obligations. 29. Advocate Kelleher also raised that the resources of Carey Olsen had been affected by the plaintiffs seeking a protective costs order, which is before the Royal Court. While he did not contend that such an application was deliberate to put pressure on the defendants during the discovery exercise, he did contend that the making of such an application, and the obligations imposed on him to respond to it, did divert resources from the discovery process. The plaintiffs' submissions 30. Advocate Robinson in response was critical of the approach of Carey Olsen. Ultimately, the main thrust of his submissions was that Carey Olsen did not really start the work required until after the act of court of 12 th January, 2015. Had they commenced the process of producing discovery much earlier, then the difficulties the defendants now face were avoidable. While he did not contend that the defendants' conduct was deliberate, his clients felt that the defendants were taking a relaxed attitude to the court's expectations and orders. Although his clients were in the court's hands, it should be made clear to the defendants that they could not ignore their obligations. The court therefore had to impose some form of discipline on the defendants. 31. He, in particular, emphasised that the affidavit of Mr McCormick, to the extent that it revealed when steps had been taken, only identified dates after January 2015 and was silent in terms of dates about what had been done prior to the January hearing. He pointed out that Messrs Grant Thornton were only retained sometime in March 2015, after the plaintiffs had indicated that they had retained Deloitte. Likewise extraction of the second defendant's documents only took place on 13 th April, 2015, and the first defendant's documents on 20 th April, 2015. Paralegals were only retained at the end of April 2015. 32. The form of the list of non-electronic documents further illustrated how disorganised, he contended, the defendants were. While these points have now been corrected, initially for many documents, no description had been inserted in the list. The list was also in random form. The lists produced by the first plaintiff contained 118 separate discovery lists where there was no logic for this and where documents listed were not in any form of order. He argued strongly that the required practice was for documents to be put together in one list in chronological form. That was what was expected from the White Book and how Practice Direction RC05/04 should be construed. It was certainly normal practice. 33. He was therefore critical of the original state of the lists, the lack of description, the lists not being in chronological form, and how long it took to produce documents for inspection. The poor way in which discovery had been produced did not make it easy for the plaintiffs to analyse what had been produced, or where documents were to be found. Analysing a list in itself, whether it is in chronological form or some logical form, is a way of identifying quickly whether there are any obvious gaps to the discovery that has been listed. This could not occur as matters stood. The approach also had real consequences because the team retained to inspect and analyse documents had to stand down due to the delays in providing documents. 34. Ultimately it should not be for the plaintiffs to put right the defendants' mistakes. As to how mistakes were remedied, the plaintiffs were in the court's hands and accepted that it was for the court

to decide whether the defendants should put right what had gone before. Decision 35. I start by reference to the form in which the defendants provided discovery in non-electronic format. 36. Having considered the format in which the discovery was provided before giving my oral decision, I was not satisfied with the manner in which the discovery in non-electronic form was provided. There is no justification for exhibiting 118 separate lists to the discovery affidavit of the first defendant. The number of lists is not justified either by reference to being a bundle of documents (as permitted by paragraph 24/5/6 of the White Book) or by having been received from a particular source. 37. Even if documents had been received from a particular source I would have expected that documents from that source still to be listed chronologically or in some other logical order. From my review of the discovery lists provided, there is no logic to the lists provided, why 118 lists were required, or in a number of the lists, the order in which documents have been listed. The approach taken is not therefore in accordance with Practice Direction RC05/04 which requires documents to be listed in a convenient form. In my judgment convenient must mean convenient for use by the other party or parties to the dispute and the Court. A list in chronological form or a list from an identifiable source in chronological form allows the party receiving the list to review quickly whether or not there are obvious categories of documents missing. The plaintiffs at present are unable to perform such a task. 38. I am also not satisfied that the amount of documentation to be disclosed is too numerous to modify the normal or usual practice of a list being in date order. I was informed by the plaintiffs that the amount of documentation disclosed was some 6386 documents which assertion was not challenged. Some 6,300 documents in my judgment is not a number of documents that falls into the category of being too numerous for the normal practice not to be followed. In future cases, discovery should therefore usually be in chronological form or by category as long as that category is explained by the party making disclosure and that the listing of documents within that category itself is in a usable form which will usually be in chronological order. If a list is produced that is not in date order the other party from the list or the verifying affidavit should be able to understand the way in which documents have been listed. 39. As this did not happen in this case, I required the first to fourth defendants to produce a composite list in chronological form at their own expense. 40. I also required the first to fourth defendants to add a metadata field to the non-electronic documents scanned so that the non-electronic documents provided to the plaintiffs can be sorted by the plaintiffs in such order as they see fit. Again this is to be done at the first to fourth defendants' expense based on advice from Messrs Grant Thornton. 41. In relation to electronic discovery, I start by reference to the direction given in January when I required the parties to meet. The rationale for this was to look to agree the process of electronic discovery. This is because in larger cases (and this is clearly a larger case), there are a number of different ways a party might provide discovery of documentation held in electronic form. It can be a complex process depending on where documents are stored, the systems used to store documents and the number of parties, witnesses and countries involved. . In England, Practice Direction 31B has been issued which sets out the guidance to be followed in that jurisdiction. While that guidance arises out of a different set of rules, it is

helpful (although not perfect) because it illustrates the sort of issues in a reasonably large case that parties have to tackle. What is important from the questionnaire is that it requires parties to communicate with each other about the electronic data they hold and how they propose to provide it to the other party. It was because of the importance of such communication taking place before discovery that I ordered the parties to meet in advance of discovery being provided. This may well be necessary in other cases in the future. 42. In the present case, because of the delays that have already occurred as of a result of the jurisdiction challenge, and because this is a family dispute, there is a certain level of mistrust between the parties. This mistrust meant that the concept of a meeting to agree a process for electronic discovery only met with partial success because the parties through their advisers at times fell into error by debating the discovery process by correspondence. This should be avoided in the future as far as is possible. 43. The parties at times also confused the obligation to agree a process for providing electronic discovery with the ambit of the discovery required. Parts of the correspondence therefore read more like requests for specific discovery than how parties were going to gather and exchange information held in electronic form. Again parties should try to avoid such an approach. 44. The first to fourth defendants also fell into error by suggesting it was not appropriate for Deloitte on behalf of the plaintiffs and Grant Thornton for the first to fourth defendants to talk to each other. I disagree. While it is for lawyers to meet and agree search terms to be used by any experts retained by them, because the lawyers by reference to the pleadings will be able to define the search terms required (possibly with the help of their own advisers), the same does not apply to the mechanics of how information is to be gathered, from what electronic devices and by what means. These are matters that experts can discuss directly with each other. 45. However, equally as Advocate Kelleher fairly stated, the discovery meeting and related correspondence was useful both in understanding the plaintiffs' expectations and in reviewing whether or not discovery obligations had been met. Nevertheless in future cases, while it may be helpful to set out in complex matters where discovery may be found, and the process of electronic discovery inevitably involves some analysis of the sources of documents, care should be taken to avoid a debate in correspondence or pre-emptive or premature specific discovery requests if agreement cannot be reached. 46. If there is significant disagreement between parties on the process to be followed the matter should be returned to the court for directions. Other areas of potential dispute, for example on the extent of search terms, may also be referred back to the Court. However they may resolve themselves on discovery and inspection. Much depends on the extent of the difference, and its importance to an issue. If an issue still remains the matter can be addressed on a specific discovery application if it is necessary to do so. 47. Matters were complicated in this case by the parties not meeting earlier and by appropriate support not being retained by the first to fourth defendants until relatively late in the day. For a case of this complexity, it is almost inevitable that some form of third party assistance to provide electronic discovery is going to be required and the first to fourth defendants should have realised that earlier. 48. The view I have also formed of Mr McCormick's affidavit is that more of the discovery work was done after 1st January, 2015, than before and it was the scale of that task and the time it took

to obtain documents that has caused delay. I do not believe this was deliberate; rather the scale of what was needed and how it was to be provided was underestimated. 49. In deciding what time therefore to allow the electronic discovery process to be completed, I also took into account the fact that the defendants are required to deal with a pre-emptive costs application by the plaintiffs which is not of the defendants' making. In any dispute there are a number of resources and it is important for advocates to be able to discharge their discovery obligations properly. The extension of time I allowed recognised that part of Advocate Kelleher's time will be spent dealing with this application which limits his ability to address, as the partner responsible for the matter, any discovery questions that require his input. 50. I have also taken into account the fact that the expectations I set out in my communications of May and June 2014 do not appear to have been adhered to fully. Furthermore, the timetable set by the act of court of 12 th January, 2015, is not going to be met either. I also accept that Advocate Robinson is correct to point out that the first defendant as far as the plaintiffs are aware has significant wealth and uses lawyers extensively. This is not therefore a question of resources preventing discovery. 51. In exercising the discretion vested in me, I therefore directed that the time limit for electronic discovery be extended to th June, 2015. I also made it clear that this was to be a final order. Any further applications would therefore justify the plaintiffs asking for an "unless order". Any application for a further extension of time would only be likely to be looked at sympathetically if it related to matters outside the control of the first to fourth defendants or their advisers. 52. I also made consequential orders for inspection. Once inspection has taken place an affidavit is to be produced by the individual with primary responsibility for the process of obtaining electronic documentation to verify the sources from which documentation had been obtained, when the information was collected and how this occurred. I required this to be verified by affidavit because in this jurisdiction the discovery process is by affidavit and the provision of electronic discovery and the method used is part of that process. Costs 53. In relation to costs, I decided to award the costs of and incidental to this hearing on the standard basis, notwithstanding an application for indemnity costs by the plaintiffs. This was because the effect of the orders I had made was to require the first to fourth defendants to redo and produce a single list of documents in chronological order at their own cost, to attach metadata to the non-electronic documents already scanned so that those documents could be searched in any order the plaintiffs wished, again at the first to fourth defendants own expense and to require the first to fourth defendants to retain sufficient resources so that the time limit of 19 th June, 2014, was met, otherwise the defendants were in the territory of an unless order. I felt that this was sufficient sanction for non-compliance with the indications I gave last year and the orders made in January this year. Had I been satisfied that the delay was deliberate I would have imposed an indemnity costs order. However, I made it clear that I was close to making an indemnity costs order and any further delays were likely to lead to both unless orders being made in the plaintiffs' favour and indemnity costs orders to express the court's displeasure. *Authorities Crociani v Crociani*

[2014] JCA 089 . Crociani v Crociani

[2014] UKPC 40 . 1999 White Book. Practice Direction RC05/04. English Practice Direction 31B.

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Prepared on 26 October 2026 · Esheria