

JERSEY / JUDGMENT

Crociani -v- Crociani [2016]

JRC 112 (01 July 2016)

[2016] JRC 112

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons for granting an extension of time on the application of the first, second and fourth defendants for the provision of witness statements, including my reasons in relation to the imposition of sanctions consequent upon the extension granted. The relevant background 2. The general background to the dispute has been rehearsed in a number of previous judgments in relation to this matter and it is not necessary for me to repeat the underlying dispute, save to note that it is reasonably complicated and there are significant financial amounts involved. 3. The current stage of the proceedings is that directions have been given for this matter to proceed to trial commencing in January 2017 with a time estimate of 12 weeks. In addition to directions for the exchange of evidence by witnesses of fact, which is the subject matter of the present application, directions have also being given for production of expert evidence by the end of September 2016, for meetings of experts by mid-November 2016 and for a pre-trial review before the trial judge in mid-December 2016. The expert evidence cannot be finalised until witness statements have been exchanged. 4. Both parties have also been through a significant exercise of providing documents to the other with the result that the parties have received significant amounts of documentation. There are certain requests for specific discovery which are in the process of being dealt with, which may lead to further applications, but in general terms the obligation to provide documents is close to completion. Any further specific discovery issues will not affect the timetable set out above significantly if at all. 5. In relation to the exchange of witness statements of fact, by an act of court dated 12 th January, 2015, exchange of witness statements of fact was first ordered to take place by 18 th September, 2015. In light of disputes over the provision of further and better particulars and amendments to pleadings, this deadline was extended by an act of court of 11 th November, 2015, to 29 th February, 2016. 6. On 20 th January, 2016, by an act of court the deadline for exchange was extended further to 29 th April, 2016. This act of court primarily set the timetable to take this matter to trial as set out at paragraph 3 above. This

order was expressed to be a final order "entitling any party to apply for any appropriate relief, consequent on any other party failing to provide a witness statement in accordance with the terms of this order". 7. Subsequent to this order, Messrs. Carey Olsen ceased to act for the fourth defendant on 3rd February, 2016. As a consequence of the termination of the fourth defendant's retainer by Carey Olsen, the first and second defendants terminated the retainer of Carey Olsen later in February 2016. I address later in this judgment what led to this change in representation. 8. Messrs Collas Crill came on the record for the fourth defendant by 14th February, 2016. However they did not come on the record for the first and second defendants until determination of a fee dispute between the first and second defendants and Messrs Carey Olsen. The first, second and fourth defendants were therefore not going to be able to provide witness statements by 29th April, 2016. The time limit was therefore extended to 14th June, 2016. I again, however, made it clear that the extension was a final order made on the same basis as the order of 20th January, 2016. The parties' contentions 9. Advocate Santos-Costa in support of his application for an extension indicated that one of the principal reasons for seeking a further extension of two weeks was the transfer of representation between Carey Olsen and Collas Crill had been significantly slower than expected. He referred to receiving three hundred chronological bundles on 3rd May, 2016, draft witness statements on 14th May, 2016, further documents relating to specific discovery on 18th May, 2016, and a further fifty-seven boxes of files on 1st June, 2016, which he had not yet reviewed. He further explained that the witness statements when provided were not as advanced as he had thought would be the case. Moreover, he was also trying to take a more proportionate approach to who worked on the matter. This was partly driven by the amount of costs that had been incurred already when the matter was handled by Carey Olsen and partly by a desire to focus on what was at the heart of this dispute. He had already cut down the number of witnesses involved from thirty-seven to ten. 10. He indicated that the witness statement of the second defendant was finished and that of the first defendant was all but finished subject to her final approval. The other witness statements of the witnesses he now intended to call would not be finished by 15th June, 2016. The deponent of the evidence to be given on behalf of the fourth defendant was away on honeymoon until 20th June, 2016, which had not been known by Advocate Santos-Costa until recently. He also needed further discussions with the other witnesses, who were family and friends before their statements could be finalised. 11. Advocate Santos-Costa understood that some form of sanction should be imposed, but he felt sure that compliance would occur if the extension asked for was granted. 12. In terms of the legal test to be adopted, I was referred to the decision of Master Wheeler in *De Gruchy v Planning and Environment Committee*

[2001] JLR 196 approved in *Ball v King*

[2006] JRC 143 . 13. Advocate Lewis in response contended as follows:- (i) As a matter of principle court orders and timetables should be adhered to. If they are not then the court will take steps to enforce its orders. (ii) This is a late application made on the day that witness statements of fact should have been exchanged. (iii) The blaming of Carey Olsen did not stand up to

analysis.

The statements were nearly ready and therefore the application was based on the failure by Collas Crill to have completed the work within the time period previously allowed. (iv) In respect of the fourth defendant, the lack of availability of the witness until after the deadline was not the fault of Carey Olsen; it was for Collas Crill to have ensured that a statement was ready to be provided in time since they had been acting for the fourth defendant from the end of February 2016. (v) The remaining witnesses were not central players to the dispute. (vi) Accordingly a further two weeks was not needed and a shorter time limit should be allowed. (vii) While there was six months until trial, there were a number of other issues that still needed to be dealt with; delaying matters unnecessarily had a cumulative effect which could cause problems later on. (viii) The fact that Collas Crill may resume acting for the fifth defendant (her retainer with Le Gallais & Luce having been terminated) and her need to prepare a witness statement should not justify an extension in terms of the existing obligations of the first, second and fourth defendants in particular when she was in default without any application to extend time. (ix) The order that should be made is to bar any witness whose statement is not filed in time from giving evidence, because there had to be a sanction. 14. Advocate Santos-Costa in response explained he was seeking a two week extension because he was confident he could meet such a deadline. He appreciated that any further extension would carry the sanction of some form of unless order and he did not want to fall foul of any such sanction. 15. In respect of the suggestion from me during the course of argument that, in relation to the first, second and fourth defendants, if they did not provide witness statements in time, including from the representative on behalf of the fourth defendant, then paragraph 153 of the amended answer should be struck out, Advocate Santos-Costa did not oppose this sanction. He also did not oppose other witnesses being debarred if they did not produce witness statements within the period he was asking for. He also did not oppose an order for the costs of the application being paid by his clients on an indemnity basis. 16. In relation to the fourth defendant there had been a management buyout and the person who originally involved was no longer working for the fourth defendant. An appropriate witness therefore had to be identified. At the previous hearing Collas Crill had not been aware that he would be absent at the time the previous deadline was ordered. 17. He could not devote more resources at this stage partly because it would be too late to get someone else to read in and because his client wanted to take a realistic approach to costs, compared to what she felt had gone on before. 18. He would not oppose a debarring order being made against the fifth defendant if her statement was not in time. Decision 19. I agree with Advocate Lewis that timetables set by the Royal Court should be adhered to and if they are not going to be met, parties should come back to court as soon as possible. In this case the court and the other parties were

first notified of problems by an email from Advocate Santos-Costa dated 10 th June, 2016, i.e. only three working days before expiry of the deadline. The application has therefore been left late. 20. In relation to the approach to be adopted, I agree that generally the approach to be taken is as set out in *De Gruchy v Planning and Environment Committee* case. I observed, however, if anything matters have moved on with more recent decisions on procedural applications emphasising the importance of adhering to timetables so that matters can be concluded in an appropriate time frame and at a proportionate cost. I have reminded the parties in this case in previous judgments reported at *Crociani v Crociani*

[2015] JRC 145 and *Crociani v Crociani*

[2015] JRC 177 of the importance of taking a proportionate approach to litigation and the well-known objective referred to in the *Esteem Settlement*

[2000] JLR Note 41A of all involved in civil proceedings to progress matters to trial in accordance with an agreed ordered timetable at a reasonable level of cost and with a reasonably short time. Any applications for an extension of time therefore have to be justified; if granted the extension is likely to carry sanctions. 21. In this case it is too simplistic to simply to blame Carey Olsen for the difficulties that Advocate Santos-Costa now faces in complying. What led to Carey Olsen ceasing to act for the fourth defendant and having their retainer terminated as a consequence was the fourth defendant purporting to retire as trustee of the Grand Trust and to appoint the eighth defendant as trustee in its place without prior notice to any other parties and to the Court. As it was put by Commissioner Clyde-Smith at paragraph 38 of his judgment of 18 th April, 2016, reported at *Crociani v Crociani*

[2016] JRC 085 , the position is concerning. Paragraph 38 states as follows:- "38. This Court is very concerned at the picture that is emerging from the documents and explanations so far provided. The fourth defendant and GFin , possibly funded by the first defendant, appear to have procured:- (i) The removal of the remaining but still substantial trust assets beyond the reach of this Court, and (ii) The creation of a platform, the declarations in the 2016 appointment, from which GFin has launched the new Mauritius proceedings in defiance of the Privy Council decision, proceedings which may have been contemplated when it was appointed trustee by the fourth defendant." 22. In paragraph 39 Commissioner Clyde-Smith did recognise that the first defendant and the fourth defendant had not had an opportunity to respond to the court's concerns. 23. To date no such explanation has been forthcoming. The first, second and fourth defendants have also not provided any affidavit to explain their position as required by paragraph 7 of the act of court of 11 th April, 2016. In the absence of such an explanation, while I accept that Collas Crill are in difficulty, what ultimately led to that difficulty and the delay in the exchange of witness statements was the cessation of Carey Olsen's representation. In my judgment at present that cessation of representation followed on from the fourth defendant purporting to appoint the eighth defendant as trustee and the subsequent steps being taken in Mauritius. The difficulty the first, second and fourth defendants' advocates therefore now find themselves, in my view, ultimately arises out of the actions taken in Mauritius. 24. I should

record that Advocate Santos-Costa indicated that the witness statements provided will address this issue but at present in the absence of any evidence which should have been provided by 31 st May, 2016, I considered I was entitled to reach a conclusion as to what has led to the present difficulties. 25. Given the number of orders already made for exchange of witness statements of fact, I considered that the time has come to impose a sanction which will apply should witness statements not be exchanged. Where the witness statements of the first, second and fourth defendants' own evidence (the latter through a duly authorised representative) themselves are not provided, I considered that the plaintiffs' suggestion that they be debarred from giving evidence went too far in the context of what is at stake in relation to these proceedings. These defendants are central to the steps taken and their evidence will be at the heart of the dispute and what will need to be considered. To prevent them at this stage from giving evidence at all in my judgment would be a disproportionate sanction to apply when this is a dispute that requires adjudication. That does not mean that a point could not arise where a party could be debarred from giving evidence because of persistent breaches of court orders. However, in my judgment this case was not at that stage (and I hope that such a stage is never reached). Preventing a party from giving evidence or striking out its case completely is therefore a sanction available but it was not appropriate to exercise it in respect of this application. 26. This conclusion did not mean however a sanction should not be imposed in respect of any failure by any of the first, second or fourth defendants to provide their own evidence. In this case at paragraph 153 of the amended answer the first, second fourth defendants seek to rely on clause 5S of the Grand Trust agreement which provides for the trustees not to be held liable for any loss or damage sustained as result of acting on legal advice. They also ask to be excused from liability under the relevant statutory provision under the proper law of the Grand Trust. 27. In my judgment, if the first, second and fourth defendants did not provide their own witness statements (as distinct from other witnesses they intend to call), it was an appropriate sanction to prevent them from relying on any exculpation clause or seeking relief from liability as pleaded in paragraph 153 of their amended answer where they have failed to adhere to a number of court orders. This sanction meant that, assuming a breach occurs, and even if witness statements are produced and permitted to be produced at a later date, any defaulting defendant would not be able to ask to be excused from liability if found to be in breach of trust. I did not regard this sanction as disproportionate. 28. As far as the fifth defendant was concerned, she has never been a trustee. Throughout these proceedings, she has also played a lesser role. The key aspect of the claim is a challenge to the decisions of the trustees. Accordingly, I considered that debarring her from giving evidence was an appropriate sanction for her if she failed to file a witness statement in any time allowed. In reaching this conclusion I took into account the fact that the retainer of Advocate Clarke as her legal adviser had been recently terminated without any explanation as to the circumstances. In particular, I did not and do not know why this occurred and whether the termination was a decision of the fifth defendant or of Advocate Clarke. 29. As far as the other witnesses the first, second and fourth defendants intend to call were concerned, I

agreed with Advocate Lewis that these witnesses are not likely to be central to the issues in this case. Accordingly I agreed that the appropriate sanction was to debar any such witness from giving evidence should their witness statement not be produced in time. Such an order will take effect automatically. 30. The time period I was prepared to allow for the extension was the 14 days sought by the first, second and fourth defendants. This was because while I considered it possible for such witness statements to be produced before this date, the sanctions I imposed were serious. Given there was still six and a half months until trial, I did not consider it just to impose such a tight timetable that the first, second and fourth defendants inadvertently were caught by the sanctions I had imposed in this case. I therefore allowed the time sought so that the first, second and fourth defendants could not complain that a sanction had taken effect in circumstances where they ran out of time to fulfil their obligations. 31. I also decided that the first, second and fourth defendants on a joint and several basis should pay to the plaintiffs and the third and seventh defendants the costs of and occasioned by the application for a time extension on the indemnity basis. I extended this order to the third and seventh defendants because they were ready to exchange witness statements in accordance with the previously ordered timetable and did not need any extension of time. I ordered indemnity costs because of the number of orders I had previously made which were final orders, the fact that the application was made late in the day, and my present view that the need for an extension was ultimately brought about as a consequence of steps taken to purportedly appoint the eighth defendant as trustee. 32. To ensure that the first, second and fourth defendants had full opportunity to comply and exchange witness statements, I also adjourned the plaintiffs' application that the first, second and fourth defendants were in breach of paragraphs 13 and 14 of my orders of 24 th February, 2016, and the Royal Court's order of 21 st March, 2016, for the a hearing to now take place on Monday, 25 th July, 2016. On that date I also indicated that I wished to deal with any other orders which it is said have not been complied with. *Authorities De Gruchy v Planning and Environment Committee*

[2001] JLR 196 . *Ball v King*

[2006] JRC 143 . *Crociani v Crociani*

[2015] JRC 145 *Crociani v Crociani*

[2015] JRC 177 . *Crociani v Crociani*

[2016] JRC 085 . *Esteem Settlement*

[2000] JLR Notes-41A. Page Last Updated: 18 Jul 2016 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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