

JERSEY / JUDGMENT

Crociani -v- Crociani [2017]

JRC 145A (11 September 2017)

[2017] JRC 145A

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judgment

the commissioner: 1. The Court sat on Friday, 8 th September, 2017, to hear argument on the orders to be made on the handing down of the final judgment in this matter. 2. Time did not permit that exercise to be completed and so we adjourned the matter to today. 3. Firstly, we do now formally hand down the final judgment, which has been amended to change the value of the portfolio as agreed at the last hearing. That has been sent to counsel electronically and we have not had it printed out again. 4. Before we turn to the orders to be made, there are two substantive issues that we have to address. The first is the equitable compensation of Camilla's Fund. Equitable compensation of Camilla's Fund 5. Advocate Redgrave, for BNP Jersey, asked the Court to reconsider its decision that the whole of the trust fund of the Grand Trust must be reconstituted, as reflected in paragraphs 686 to 689 of the final judgment. The Court had expressed some sympathy with BNP Jersey's wish to limit compensation to Camilla's Fund, because Camilla had acquiesced in the 2010 Appointment, and at least to some extent, benefited from it. 6. Even with the direction that the Court will give to the New Trustee, preventing Camilla from benefiting, BNP Jersey would have to pay a very substantial sum - at least US\$50M - into Camilla's Trust, which as she is the only discretionary beneficiary, in practice, of income and the only discretionary beneficiary of capital, would sit there, Advocate Redgrave said, for the rest of her life

- potentially some 30 - 40 years. That submission did overlook the overriding power of appointment of course contained in clause Eleventh. 7. The arguments propounded by Advocate Redgrave are set out in his skeleton argument, which we will not repeat, but his draft order helped clarify what is being proposed, namely that BNP Jersey was not seeking to avoid its liability to reconstitute Camilla's Trust. The discharge of that liability would, under his proposals, be stayed until further order, with liberty to the beneficiaries of the Grand Trust to apply. If any beneficiary sought a distribution or appointment out of Camilla's Trust, then an application could be made and, if sanctioned by the Court, BNP Jersey would have to fund it in part discharge of its liability. 8. We have given careful consideration to this proposal, but we are not prepared to reconsider our decision for the following reasons:- (i) Money that would be liable to be paid into Camilla's Trust would be held outside it by BNP

Jersey, giving rise to issues as to how it should be managed and invested. Within Camilla's Trust, it would, of course be invested, presumably with a view to growth. (ii) Having no funds within Camilla's Trust would inevitably have a knock-on effect in terms of administrative costs to the prejudice of Cristiana's Trust. (iii) Whilst we do not wish to insinuate that BNP Jersey would seek to avoid its liability to reconstitute Camilla's Trust when required to do so at some future date, it is a substantial liability that would endure for many years and, as Advocate Robinson put it, why should the New Trustee and the beneficiaries have to worry as to whether BNP Jersey will always be there to meet it? (iv) Fundamentally, it is contrary to principle for the reasons set out in paragraphs 688 to 689 of the final judgment. It is Camilla who has acquiesced in the 2010 Appointment. Her children, who are still minors, are innocent parties. They have an interest in Camilla's Trust as do Cristiana and her children. They are all entitled to have the trust fund of Camilla's Trust reconstituted. Advocate Robinson reminded us of the latter part of the passage from Lewin, cited at paragraph 690 of the final judgment, which we will not repeat. 9. Advocate Redgrave talked in terms of the injustice to BNP Jersey in having to reconstitute the trust fund of Camilla's Trust when Madame Crociani, and to some extent Camilla, have the benefit of the monies wrongfully appointed out, which Madame Crociani has hidden away in various parts of the world. Madame Crociani and Camilla should, he said, disgorge the assets they have received first, before BNP Jersey is required to pay anything into Camilla's Trust. If they did disgorge the assets, then of course BNP Jersey's liability would fall away, or be greatly reduced. 10. However, we remind ourselves that from the point of view of the trust estate, it was BNP Jersey, the institutional trustee, who promoted and was a party to the 2010 Appointment, and in our view, justice requires that it should discharge its obligations to the Grand Trust in accordance with clearly established principles of law, seeking redress for its loss from Madame Crociani under the indemnity in the 2010 Appointment upon which it relied in making that appointment and from the indemnities this Court is going to give it. Promissory Note - Receivership 11. Turning now to the Promissory Note and the issue of possible receivership, the Court now has the benefit of further submissions from Advocate Robinson and Advocate Moran which have enabled it to focus more on how the compensation payable by Appleby Mauritius arising out of its breaches of trust should be assessed. The Court also has the benefit of further information arising out of recent developments in both Mauritius and the Netherlands. 12. Appleby Mauritius applies by way of representation dated 5th September, 2017, for the appointment of receivers over the Promissory Note who would take action in the Netherlands, Italy and Mauritius to secure and call in the sums due under the Promissory Note, the best way, Advocate Moran said, of assessing its real value. 13. Appleby Mauritius would fund the receivers with the proviso that it should be entitled to apply for reimbursement if some of the costs incurred would have been incurred by the New Trustee in any event, and were not attributable to any breach of trust of Appleby Mauritius. 14. By necessary implication, the assessment of the compensation payable by Appleby Mauritius would be undertaken at the end of this receivership process. 15. It is clear that the Court has the power to appoint receivers, but, in the words of Sir Michael Birt, then Deputy Bailiff, in *In the matter of the IMK Family Trust*

[2008] JLR 250 , "It is an exceptional remedy to be granted only where there is a clearly identified need to do so." 16. Now that we have handed down the final judgment, and will shortly be appointing the New Trustee as the trustee of the Grand Trust in place of the former trustees, the New Trustee will be beneficially entitled, as trustee, to the Promissory Note, and we do not have the benefit of its views as to the appointment of receivers over a trust asset. We doubt whether it would be appropriate for us to appoint receivers in these circumstances, without the support of the New Trustee, although Advocate Moran did submit to us that the New Trustee should in her view rest on the wisdom of the Court. 17. The plaintiffs want nothing to do with this proposal, which Advocate Robinson described as "a can of worms." On the assumption that the appointment of receivers by this Court would be recognised by the courts in the Netherlands, Italy and Mauritius (and that is by no means certain), the recent conduct of both Croci BV and GFin show that any proceedings will be hard-fought and long-drawn-out. Whilst litigation commenced by the receivers would be funded by Appleby Mauritius, there would be potential for what may be substantial costs incurred to be revisited upon the New Trustee, so that it will inevitably have to be involved in monitoring what would be complex litigation, in potentially three jurisdictions and setting aside reserves for that contingent liability. 18. There is no way of knowing how long such a receivership process would take, but with appeals against decisions, it could be many years. It is not encouraging that Appleby Mauritius's application before the courts of Mauritius on 6 th March, 2017, for a holding injunction over the Promissory Note will not apparently be heard until May 2018. 19. Advocate Moran informed us that Appleby Mauritius was insured and could meet its obligations under the final judgment, but the New Trustee and the beneficiaries have no certainty that this will be the case going forward over what may well be many years. The sums involved are substantial. 20. The plaintiffs seek an order that Appleby Mauritius should pay the face value of the Promissory Note into the Court now, and we agree that this is justified in the light of the conduct of Appleby Mauritius in transferring the Promissory Note away, adopting the wording used in paragraph 717 of the final judgment, "in a brazen attempt to evade the decision of the Privy Council and to put the same beyond the reach of this Court." It was an interference with the administration of justice here. Such an order is supported by authority. Quoting from paragraph 91.12 of Underhill and Hayton : "It is obviously a severe measure to order a trustee to pay money into court pending the trial of an action. It will, therefore, only be done where the trustee has admitted that he has the money in his hands, or possibly where he has admitted that he has had it and has either misappropriated it or not accounted for it, or not invested it, or has invested or paid it away improperly , and it is clear that he has no real defence". (our emphasis) We are now of course post-trial and the Court has found that the Promissory Note was paid away improperly. 21. By such a payment the Grand Trustee will be provided with full security for the losses it has suffered as a consequence of the breaches of trust committed by Appleby Mauritius and it is just, in our view, that it should have that security. The plaintiffs do not contend, as we understand it, that the losses suffered by the Grand Trust arising out of the breaches of trust committed by Appleby Mauritius exceed

the face value of the Promissory Note. 22. In the light of the Court's final judgment, the plaintiffs are no longer pressing for the face value of the Promissory Note to be paid directly to the New Trustee now, a payment which the Court was concerned might put the Grand Trust into a better position than it would otherwise have been (paragraph 719 of the final judgment). Two options are before the Court as to how the compensation should be assessed:- (i) The appointment of receivers over the Promissory Note, as favoured by Appleby Mauritius, which would entail the beneficiaries of the Grand Trust having to wait for what may be years whilst enforcement proceedings are brought by the receivers against Croci BV before the full amount of the losses suffered can be assessed. (ii) An inquiry in early course into the losses suffered, as favoured by the Plaintiffs. Whilst not formally setting out the parameters of such an inquiry, we suggest that it will have to assess firstly the true current value of the Promissory Note, which we think would take into account the cost of enforcement and the likelihood of recovery, and secondly, if the true value is less than the face value, the extent to which the breaches of trust committed by Appleby Mauritius have contributed to that diminution in value. 23. This is a discussion however which needs to take place in the presence of the New Trustee, which as of today as we have said will beneficially own the Promissory Note, and the observations which now follow constitute our initial views. 24. Whilst it might be possible for receivers to be appointed over the Promissory Note, in principle we do not think it just that the beneficiaries of the Grand Trust should have to wait for such a potentially lengthy period for the process to be completed, with all the uncertainty that goes with it, before having the full amount of compensation assessed. We favour therefore an early inquiry for the amount of that compensation to be assessed. 25. As the New Trustee will be receiving that compensation from funds paid into Court, it follows, in our view, that Appleby Mauritius should have the Promissory Note assigned to it now, so that it has the standing to take enforcement action. It is clear that it is well placed to take action to recover the Promissory Note, having already engaged in proceedings in the courts of the Netherlands and Mauritius, and as Advocate Moran says in her skeleton argument, its lawyers are ready to take action in early course. 26. Any balance left in the funds held in Court after the compensation has been paid to the New Trustee would be released to Appleby Mauritius. It would be entitled to use any monies it recovers from Croci BV to reimburse itself for the amounts paid over to the New Trustee from the funds held in Court. In the perhaps unlikely event that Appleby Mauritius recover more from Croci BV than is paid over to the New Trustee, then there would be liberty to the parties to apply to the Court. 27. We will therefore order the payment into Court within 28 days but will hold back making further orders in relation to the compensation payable by Appleby Mauritius until a further hearing involving the Plaintiffs, Appleby Mauritius and the New Trustee has taken place. As it may be necessary for action to be taken in early course to preserve the value of the Promissory Note, that hearing will take place this Friday the 15 th September, at 2.30p. It would be helpful to have skeleton arguments filed on Thursday with suggested draft orders in advance. 28. We now turn to the orders. Authorities In the matter of the IMK Family Trust

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Prepared on 23 October 2026 · Esheria