

JERSEY / JUDGMENT

Crociani -v- Crociani [2017]

JRC 212 (12 December 2017)

[2017] JRC 212

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judgment

the MASTER:

Introduction

1. This judgment contains my detailed written reasons for ordering the fifth defendant to provide discovery in relation to the Appleby Mauritius enquiry. What is meant by the Appleby Mauritius enquiry is explained in the next section of this judgment.

Background

2. This judgment follows on from the judgment of the Royal Court following the trial of this matter reported at Crociani-v-Crociani

[2017] JRC 146 dated 11 th September, 2017 (the "trial judgment"). 3. For the reasons set out in the trial judgment, paragraph 6 of the Act of Court dated 11 th September, 2017 stated: "The fourth defendant was found to have acted in breach of trust in: a. not collecting the accrued and accruing interest on the Promissory Note; b. agreeing to the amendments to the Promissory Note; c. assigning the Promissory Note to GFin; and d. amending the provisions of the Grand Trust, thus giving GFin a platform to commence rival proceedings in Mauritius." 4. At paragraph 23 of the same Act the Court left over to a further hearing what orders to make relating to the assessment of compensation payable by the fourth defendant arising from its breaches of trust. However, the fourth defendant was ordered to pay into court the face value of the capital and accrued interest on the un-amended promissory note in the sum of 52,607,480 Euros which payment has been made. 5. At paragraph 35 of the Act of Court of the 11 th September, 2017, case management of all enquiries ordered was delegated to me. 6. By an Act of Court dated 15 th September, 2017, the Court ordered an enquiry as to the loss caused by the breaches of trust by the fourth defendant. This is the Appleby Mauritius enquiry. Receivers were also appointed of the Promissory Note. 7. On 10 th October, 2017, directions were given by the Royal Court in respect of the Appleby Mauritius enquiry (as well as in respect of the other enquiries ordered by the Royal Court involving the third defendant). At paragraphs 11 to 16 the

following orders were made:- "11 the Plaintiffs shall confirm in writing to the Fourth Defendant's advocate by no later than 5pm on Friday 13 October 2017 the date on which they say that the Fourth Defendant should have given 30 days' notice to Crociani International BV to pay all of the accrued interest due under the Promissory Note, as referred to in paragraph 665 of the Judgment of 11 September 2017; the Fourth Defendant shall by no later than 5pm on Friday 1 December 2017 file and serve on the Plaintiffs their pleaded case in respect of the Appleby Mauritius Inquiry; the Plaintiffs shall by no later than 5pm on Friday 19 January 2018 file and serve on the Fourth Defendants their pleaded response to the Fourth Defendant's pleaded case; the Plaintiffs and the Fourth Defendant shall by no later than 5pm on Friday 16 February 2018 simultaneously exchange and file any documents relating to any matter in question in the Appleby Mauritius Inquiry which they have in their possession, custody or power, but which have not already been disclosed in the proceedings; the Receivers appointed by the Act of Court dated 15 September 2017 shall by no later than 5pm on Friday 16 February 2018 serve on the Plaintiffs and the Fourth Defendant any documents relating to any matter in question in the Appleby Mauritius Inquiry which they have in their possession, custody or power, but which have not already been disclosed in the proceedings, save that the Receivers shall not have to disclose documents in the possession, custody or power of the Fourth Defendant; the Third Defendant shall by no later than 5pm on Friday 16 February 2018 serve on the Plaintiffs and the Fourth Defendant any documents relating to a purported repayment of interest paid on or around 3 June 2004 on the Promissory Note, which they have in their possession, custody or power, but which have not already been disclosed in the proceedings" 8. On 1 st December, 2017, the fourth defendant summarised its position in relation to the amount due under the Appleby Mauritius enquiry in paragraph 19 of its compensation particulars as follows: "19 The position of the Fourth Defendant is that there has been no loss or minimal loss suffered by the Grand Trust as a result of the Fourth Defendant's breaches of trust: a. In all likelihood the true value of the Note increased between 2012 and September 2017 to such an extent that a failure to demand and collect the interest and principal in 2012 caused no loss. In particular, the interest rate of 8% on the principal provided a better return than would have been achieved had the principal and accrued interest been collected in May 2012; b. To the extent that the Promissory Note is valued as a defaulting note the 2016 Amendments are irrelevant. If contrary to this position the 2016 Amendments are relevant, they have enhanced the trust value of the Note; and c. The assignment of the Note to GFin, the appointment of GFin and the purported amendments to the Grand Trust deeds have had a negligible impact if any on the true value of the Note, in particular given that proceedings to enforce the Note in the Netherlands were in any event inevitable." This position will ultimately require the Royal Court to assess the true value of the Promissory Note. 9. The Promissory Note, the subject of the Appleby Mauritius enquiry, was issued by Croci International BV ("Croci BV") a company incorporated in the Netherlands to the first defendant. She assigned it to the Grand Trust. The Note was originally issued with a face value of 75 billion Italian lire with interest at the rate of 8% per annum. The capital was payable on 10 th December, 2017.

Under the provisions of the Grand Trust deed, the trustees were not obliged to enforce their rights under the Promissory Note. Ownership of Croci BV and what was owned by Croci BV are described in paragraph 8 of the trial judgment as follows: "8 At the time of the 2010 appointment, Croci BV was owned by Croci International NV ("Croci NV"), a company incorporated in the Netherlands Antilles beneficially owned by Madame Crociani. Croci NV and Croci BV formed part of what is described as "a Dutch sandwich", the purpose of which was to reduce withholding tax on dividends paid to Croci BV by its wholly owned Italian subsidiary, Ciset SRL, ("Ciset"), which through its Italian subsidiary Vitrociset SPA ("Vitrociset") operates a successful engineering, technical and logistics services business in Italy. There are numerous other companies within the Croci Group, holding prestigious real estate and a luxury yacht." 10. It is also relevant to record that some form of restructuring of Croci BV has taken place as recorded at paragraph 716 of the trial judgment as follows: "What is of concern in this respect is that at the end of the hearing, we were informed by Advocate Moran that there had been a restructuring of Croci BV, in which, by way of a demerger, Ciset had gone to a new Croci BV 2, with the real estate being retained in the original Croci BV. We were told that under the rules of demerger, this did not affect the creditors, because the debts of Croci BV remain the debts of Croci BV 2. The purpose behind this demerger is not known, but it demonstrates how delay in enforcing its rights under the Promissory Note may well prejudice the interests of the Grand Trust, as it gives Camilla and Madame Crociani time and room to manoeuvre. More recently the Court gave leave to BNP Jersey and Appleby Mauritius under the injunction of the 21 st March, 2016, to bring proceedings in the Netherlands and Italy to secure the value of the Promissory Note, those parties having learnt that Ciset was about to be sold and the professional directors of Croci BV and its holding company replaced." 11. What has ultimately led to the present application is that to assess the true value of the Promissory Note, the fourth defendant requires information on the underlying assets, Ciset and Vitrociset, and what is said to be valuable real estate held through various special purpose vehicles. The Submissions 12. Advocate Moran for the fourth defendant indicated that what she was interested in was information about the underlying assets ultimately owned by Croci BV and Croci Holding NV ("Croci Holding"). A structure chart was provided (which was not challenged) showing a series of companies owned by Croci BV which I was informed primarily held real estate. Ciset and Vitrociset were now held through a company known as Croci International 2 ("Croci BV 2"), a Netherlands company following the restructuring referred to above. Croci BV and Croci BV 2 were both shown on the structure chart as being owned by Croci Holding. 13. The information the fourth defendant was now seeking had not been provided as part of discovery orders previously made because the value of the assets of the underlying structure was not an issue in respect of the matters that led to trial. This information was in the control of the fifth defendant and her mother, the first defendant. 14. The fact that the fifth defendant had valid information could be seen from her third affidavit sworn in 2015 in opposition to a pre-emptive costs application brought by the plaintiffs which application was later abandoned. 15. At paragraph 18 of her third affidavit the fifth defendant deposed as

follows: "18 In fact, I understand that the financial position of the trading companies underlying Croci BV is such that the future prospects of collecting the accrued interests due under the Promissory Note (and thus the interests of the Grand Trust and the beneficiaries thereof) are best served by allowing interest to carry on accruing. Indeed, I understand that, for the reasons to be more fully set out in the Third Affidavit of Mme Crociani, the financial consequences of Appleby Mauritius seeking to enforce its rights under the Promissory Note could be severely prejudicial to the trading companies underlying Croci BV and, hence, to the future prospects of recovering further interest and, ultimately, capital due under the Promissory Note." 16. The first defendant in her third affidavit also sworn in opposition to the pre-emptive costs application stated at paragraph 32 and 33 as follows: "32 As Cristiana is well aware, the accrual of interest is primarily a result of the financial performance of Croci International BV's main operating subsidiary Vitrociset, as well as a result of other decisions - certain of which Cristiana has even approved in writing - to invest sums in other assets on the basis that this was in my family's broader interests. In the years following Croci International BV's purchase from me of Ciset SpA there has been a fair degree of restructuring and Croci International BVC has acquired controlling stakes in various other companies. Set out at page [] is a diagram showing the current structure of the group of companies owned by Croci International BV (the "Croci Group)". 17. Detailed information about dividends declared by Vitrociset from the years 2004 to 2014 was also provided by the first defendant. How these dividends were used was set out in paragraph 38 leading to the first defendant stating at paragraph 39 of the third affidavit as follows: "39 At around the time when these payments were made the view was taken that keeping available funds within the Croci Group (both to support the group and to make sure that funds would be available for worthwhile investment opportunities that could themselves support the Croci Group) - rather than dividends being paid immediately to Croci International BV for payment of interest under the Promissory Notes - was the best way to further the long-term interests of Croci Group and, consequently, the Grand Trust and my wider family." 18. By reference to these affidavits, it was argued that the fifth defendant clearly had access to information about the underlying assets. 19. The fifth defendant's access to information was said to be confirmed by a recent newspaper article concerning a possible sale of Vitrociset where the fifth defendant described herself as the controlling shareholder of Vitrociset. It was also clear from the articles that a data room had been created for the sale of Vitrociset which would contain information as to its value. 20. Advocate Robinson in respect of the plaintiffs was neutral in respect of the application save that his client did not want any unnecessary delay. 21. Advocate Hoy argued for the fifth defendant, firstly, that general discovery had been given and his client had sworn an affidavit of discovery when represented by Collas Crill who now acted for the fourth defendant. Despite this there had been no challenge to the affidavit of discovery until now. This led the fifth defendant in her skeleton argument to contend that she did not have any further relevant documents to disclose. 22. It was also argued that the discovery sought was not necessary because the fourth defendant had not produced any analysis of why the market value or the liquidity of underlying assets was

relevant to the value of the Promissory Note. The case for necessity was not made out. 23. It was also argued that the order sought was not cost effective. Decision 24. The discovery order I made was to require the fifth defendant to produce any documents relating to any matter in question in the Appleby Mauritius enquiry in so far as such documents had not already been disclosed by any party. I reached this view for the following reasons. 25. There is clearly an issue for the Royal Court to determine about the value of the Promissory Note issued by Croci BV. This will ultimately depend on the value of Croci BV which in turn is likely to reflect the value of assets ultimately owned by Croci BV or Croci BV 2 following the restructuring. In particular the fourth defendant is contending that no loss has been suffered because the value of the Promissory Note has increased. In my judgment it is not difficult to conclude that the value of assets underlying Croci BV as the issuer of the Note has to be relevant to an assessment of the value of the Note. It does not require expert evidence to reach such a conclusion. The Court is sufficiently experienced to be able to conclude that the value of the Note depends on the value of the issuer which in turn depends upon what assets it ultimately owns, whether in its own name or through subsidiary or associated companies. This conclusion also applies to Croci BV 2 given the debts of Croci BV remain the debts of Croci BV 2. 26. Secondly, it is clear both by reference to the third affidavits of the fifth defendant and the first defendant referred to above and the newspaper articles, that the fifth defendant has or has access to information about the value of the underlying assets. In particular given that the fifth defendant describes herself as the controlling shareholder, it is difficult to understand why she does not have information about the value of the underlying assets or a right to access such information. I do not therefore regard her previous affidavit of discovery as conclusive. 27. In view of the arguments advanced by the fifth defendant, I wish to make it clear that, if the fifth defendant in providing discovery wishes to argue that she does not have a right to the discovery ordered, then I expect her affidavit to set out exactly why she is not entitled to the information asked for, identifying any requests made and any refusals to give effect to such requests including the reasons for any such refusals. 28. Where I am sympathetic to the fifth defendant, is in being required to make disclosure in respect of assets of limited value compared to the value of the Promissory Note and accrued interest. Therefore for assets below Euros 100,000, I would consider favourably an order limiting disclosure to assets above this figure if it can be shown that the discovery order would otherwise be oppressive. I did not make such an order at this stage because I was told that the underlying assets held are likely to be of significant value and because the assets of interest to the fourth defendant were: (i) Accounts of Ciset and Vitrociset in so far as they have not already been disclosed and (ii) Details of any immovable property held by special purpose vehicles owned or ultimately owned by Croci BV. These were likely to be significantly in excess of Euros 100,000. Initially, any question of the further discovery being oppressive is therefore left to the parties and their advisers to try and resolve having regard to this decision. 29. In relation to the criticisms of Collas Crill in not challenging the affidavit of the fifth defendant earlier, this is not a reason not to order discovery at this stage, now that an enquiry has been ordered. While it could be said that the issue of what

compensation might flow from a breach of trust could have been dealt with at trial, a cursory review of the index to the trial judgment makes it clear just how complex the trial was and therefore why the focus of the fourth defendant on whether discovery has been given for the account has now only occurred. 30. In addition although the fifth defendant was critical of Collas Crill for acting for the fourth defendant when Collas Crill had previously acted for the fifth defendant, I was informed by Advocate Hoy that to date no application had been made to challenge the ongoing representation of the fourth defendant by Collas Crill. Given the lack of any challenge (which is a matter for the Royal Court), the fact that Collas Crill previously acted for the fifth defendant is not therefore a basis to refuse to order discovery. I record for the sake of completeness that, although Collas Crill acted for the fifth defendant in 2015, I was informed by Advocate Moran that her firm was not involved in the preparation of the third affidavits of the fifth defendant and the first defendant as these were produced by Carey Olsen who were acting for the first defendant in 2015. 31. For all these reasons the fourth defendant's application was therefore granted. *Authorities Crociani-v-Crociani*

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