CROCIANI v *CROCIANI*

A review of the Royal Court judgment

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ABSTRACT

- *On 11 September 2017, the Royal Court of Jersey delivered judgment for the plaintiffs in the long-running case of* Crociani *v* Crociani.[1] *The case has previously gone to the Privy Council*[2] *in respect of the approach to exclusive jurisdiction clauses in a trust deed. The trial in the main proceedings took place over a period of three months at the beginning of 2017, and the judgment runs to some 238 pages.*
- *There are now three separate appeals to aspects of the judgment, which are due to be heard by the Court of Appeal of Jersey in February 2018. Any article about the case requires circumspection in light of the impending appeals, and the authors do not intend to say anything on the issues that are the subject of appeal. One issue that is not the subject of an appeal is the standing of A and B, both minors and the second and third plaintiffs, to bring the claim. The question to be determined was whether or not, having been born before their parents married, they were 'issue' of their mother, Cristiana Crociani, and therefore, in accordance with the trust deed, beneficiaries of the Grand Trust. Under the law of the Bahamas, where the trust was created, they were not; under the law of Jersey, where the Grand Trust had been exported, they were.*
- *Could the meaning of 'issue' be changed by a change of the governing law? The Royal Court's decision forms part of a trio of recent cases that are relevant to that question.*

1 [2017] JRC 146
2 *Crociani* v *Crociani* [2014] UKPC 40

The Grand Trust was, initially, a Bahamian trust settled by Madame Crociani in 1987, for the benefit of her young daughters, Camilla and Cristiana. Madame Crociani was the widow of an extremely wealthy Italian industrialist, Camillo Crociani, who had built up a successful engineering, technical, and logistics services business in Italy, called Vitrociset SpA. He had amassed considerable wealth, including a tremendous collection of fine art. Madame Crociani had, in her youth, been an actress and appeared in a number of Italian films. She married Camillo, who was 20 years her senior, when she was 30. A financial scandal drove the family from Italy, and Camillo died in 1980 when they were living in Mexico. Madame Crociani moved to New York with

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her young daughters and bought a large apartment on Fifth Avenue. She was contemplating taking up residence there and sought advice from the US law firm Finley Kumble about how best to structure her affairs; at that time, she had the benefit of significant income from outside the US, as she was the then owner of Vitrociset. Finley Kumble went into liquidation soon after, and though the firm's files were not available to the Royal Court (the Court), it was assisted in understanding the advice that had been given to Madame Crociani by a few surviving documents, and the evidence of eminent US tax experts, between whom there was a large measure of agreement.

The key issue in the case was whether or not Madame Crociani had ever been intended to benefit from the Grand Trust. There had been an appointment of assets out of the Grand Trust (with an estimated value of USD132 million, comprising a portfolio of investments, receivables and works of art) made in 2010 by the trustees at the time, including BNP Paribas Jersey Trust Corporation Limited (BNP). The 2010 appointment was made to a trust called the Fortunate Trust, of which Madame Crociani was the sole beneficiary during her lifetime, and over which she held extensive powers, including the power to revoke it and to take its assets for herself. As events transpired, following a breakdown in family relations between Cristiana, on the one hand, and her mother and sister on the other, Madame Crociani did indeed revoke the Fortunate Trust. The provision of the Grand Trust under which the 2010 appointment was made (clause Eleventh) expressly provided that such an appointment to another trust had to be 'in favour or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (other than the settlor)...'.

Unsurprisingly, the Court's construction of that clause was such that it precluded an appointment of assets from the Grand Trust to another trust from which Madame Crociani could benefit. The 2010 appointment was outside that provision. Cristiana and her own young daughters, A and B (through their guardian *ad litem*), successfully sued as beneficiaries of the Grand Trust to reconstitute the trust fund for what had been paid away to her mother by the then trustees, and for lost value since 2010. This breach of trust claim was not the only one in this case, but it was the largest.

Madame Crociani's case throughout was that she had been intended to be able to benefit from the Grand Trust through a Bahamian company called the Camillo Crociani Foundation Limited (the Foundation), which was named as a beneficiary. However, the Foundation had been set up some months before the creation of the Grand Trust as a not-for-profit guarantee company with exclusively charitable objects. Madame Crociani claimed, in the alternative, that, if the Court found that she could not benefit from the Grand Trust, then she had set it up, and settled assets within it, based on a mistake as to her ability to benefit, and it should be set aside on that basis.

In the event, with the trial due to commence on the following Monday, Madame Crociani wrote to the Court on Friday 13 January 2017 to say she would neither attend the trial to give evidence nor be legally represented at trial. Camilla had written in similar terms. The Court had little trouble in concluding that both had deliberately decided to stay away. Madame Crociani's excuse that she was too old and ill to attend was unsubstantiated by any evidence, and somewhat weakened in the eyes of the Court by Facebook photographs showing her partying at the Sporting Club in Monaco on New Year's Eve – seemingly, as the judgment notes, in 'rude health'.

One effect of Madame Crociani staying away was that the Court quickly dismissed her alternative case in mistake, as she was not present to prosecute it. The case was now solely concerned with the

construction of terms of the Grand Trust, without evidence of her subjective intent being admissible, set against the factual matrix at the time it was set up.

The most important aspect of the factual matrix was the Finley Kumble tax planning that lay behind the creation of the Grand Trust. The Court found, with the assistance of the US tax experts, that the Grand Trust was intended to be a foreign non-grantor trust. By settling it before she took up US residence for tax purposes – a so-called 'drop-off' trust – she would not face a federal income tax charge on its income. What she settled on the Grand Trust was a valuable long-term promissory note (the Note) paying interest funded out of dividends from Vitrociset. In time, those payments amounted to the sizeable fund, which was paid away in 2010. Key to the success of this tax planning was the requirement that Madame Crociani, as settlor of the Grand Trust, could not benefit from it in any way, including through the Foundation, which the Court found had exclusively charitable objects. The terms of the Grand Trust, including clause Eleventh, were all consistent with that advice.

Those defendants who did continue with the trial were Madame Crociani's fellow trustees at the time of the 2010 appointment: a Dutch lawyer called Paul Foortse, BNP and Appleby Mauritius. The latter had been appointed as the replacement trustee for the Grand Trust in 2012, when the proper law of the Grand Trust was changed from that of Jersey to Mauritius. The Court granted the plaintiffs' application to set aside the appointment as not being in the interests of the beneficiaries of the Grand Trust as a whole. It went further in finding that the appointment had been motivated by Madame Crociani's desire to impede Cristiana's claims, and that Appleby's subsequent conduct demonstrated that the firm shared that intention.

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While these proceedings were ongoing, Appleby decided to stand down as trustee without notice to the Court or the other parties. Before it did so, it purported to amend the terms of the Note (the last asset remaining in the Grand Trust after the 2010 appointment), delaying its repayment by the debtor company (now believed to be owned by Camilla) from December 2017 to December 2022. The Court found the exercise to be manufactured and not a genuine negotiation. Appleby purported to appoint a Mauritius service provider, GFin, as the new trustee and assign the amended note to it. Both Appleby and GFin purported to confer exclusive jurisdiction on the courts of Mauritius, and GFin used that as a platform for launching fresh proceedings in Mauritius, with Madame Crociani as paymaster, asserting that the Court lacked jurisdiction to decide the present case. In setting these actions aside as breaches of trust, the Court held that Appleby had interfered with the administration of justice in Jersey by its actions.

The Note remains in the hands of GFin. Appleby has been found liable in breach of trust for its loss, and there is to be an inquiry into the amount of compensation to be paid. The face value of the Note lies in the region of EUR50 million, and Appleby has been ordered by the Court to pay that into court within 28 days as security. There are other inquiries to be carried out, such as regarding the loss in value of the portfolio appointed out in 2010, and the value of certain paintings also lost to the Grand Trust through the 2010 appointment. BNP has been ordered to pay an initial USD100 million to the new trustee as partial reconstitution of the Grand Trust, with full reconstitution to follow once the inquiries have been determined.

BNP, Appleby and Camilla have all appealed. One issue that is not the subject of any appeal is the status of A and B as beneficiaries of the Grand Trust.

A AND B

A and B, the second and third plaintiffs, are Cristiana's daughters. They appeared by their guardian *ad litem*, their father Nicolas Delrieu. A and B were born illegitimate, though their parents subsequently married on 20 November 2012. Certain defences – such as acquiescence, on which the defendants relied in response to Cristiana's claim – would not be available against A and B if they were held to be beneficiaries of the Grand Trust.

Under the terms of the Grand Trust, Cristiana's 'issue' were beneficiaries. When Madame Crociani executed the Grand Trust in 1987, the law of the Bahamas was its governing law. At the time, Bahamian law followed common law, and 'issue' meant legitimate issue in the absence of a contrary intention in the trust document. Under s10 of the Bahamian *Legitimacy Act 1956*, Nicolas and Cristiana's marriage legitimated A and B as from the date of the marriage. However, the Act provides that a legitimated person shall be treated as legitimate in respect of a disposition only if the disposition came into operation after the date of legitimation.[3] Accordingly, A's and B's legitimation by their parents' marriage in 2012 would not make them beneficiaries of the Grand Trust created in 1987, if the Grand Trust were still governed by Bahamian law.

The Court pointed out, however, that the Grand Trust was not still governed by Bahamian law. From 2007, the Grand Trust has been governed by Jersey law, because the Grand Trustees exercised the power in clause Twelfth: this authorises the trustees on the appointment of trustees in another jurisdiction 'to declare that the trusts hereof shall be read and take effect according to the laws of the country of the residence or incorporation of such new Trustee or Trustees'. It also provides that, after the change:

> 'the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country'.

Under Jersey law, A and B became beneficiaries in 2012. The *Legitimacy (Jersey) Law 1973* provides for a child to become a child legitimated *per subsequens matrimonium* if their parents marry after their birth.[4] A child legitimated *per subsequens matrimonium* is treated under Jersey law as a legitimate child for all purposes, whether in respect of an instrument made before or after the marriage.

3 Sections 3(3) and 6
4 Article 4(1)

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The power to change the governing law therefore carried with it the power to change the interpretation of the trust deed, and to change the rights of existing beneficiaries.

IN THE MATTER OF THE A TRUST[5]

Contrast, then, the approach in Bermuda in the case of *the A Trust*.

With effect from 2004, Bermuda had abolished by statute any distinction between legitimate and illegitimate children. There were transitional provisions providing that the change was not to be retrospective in respect of instruments or dispositions created prior to the legislation coming into force. In 2007, the A Trust was created in the Cayman Islands; however, by 2017, the trustees wished to change the governing law to that of Bermuda to take advantage of the flexible jurisdiction conferred by s47 of the Bermuda *Trustee Act 1975* (Trustee Act). The trustees were concerned that if the effect of changing the law of the A Trust to the law of Bermuda would be to make illegitimate children members of the class of beneficiaries, then they could not properly do so, having regard to the interests of the existing beneficiaries. They sought a declaration from the Supreme Court of Bermuda that this would not be the case.

Kawaley CJ held that it would not. The transitional provisions preventing retrospective effect were not the answer, because the A Trust postdated the Trustee Act. But he held that clearer statutory language was required to construe the statute as automatically interfering with existing property rights on a foreign trust becoming subject to the law of Bermuda, and to that extent having 'retrospective' effect.

5 [2017] SC (Bda) 38 Civ

So, in *Crociani*, the issue was one of interpretation of the trust deed (and clause Twelfth in particular), whereas, in *the A Trust*, it was one of interpretation of the relevant statute. Note that there were no transitional provisions in the equivalent Jersey statute, and nothing to prevent it having retrospective effect. Note also that it is implicit in the decision in *the A Trust* that, had the Bermudan statute been clear, its effect would have been to make illegitimate children beneficiaries – thereby interfering with the existing rights of the beneficiaries.

HAND v *GEORGE*[6]

The question of retrospective interference by statute with the rights of beneficiaries has arisen, in a different context, in England and Wales.

As in Bermuda, there is statutory provision in England and Wales that abolishes any distinction between illegitimate and legitimate children: the *Family Law Reform Act 1988*. In relation to adopted children, there is statutory provision treating them as the legitimate children of their adopters: the *Adoption Act 1976*. The above statutes do not apply to 'dispositions' made before their creation. The question that arose in *Hand* v *George* was whether this was contrary to the *Human Rights Act 1998* (HRA).

Henry Hand died in 1947. His will left part of his residuary estate on trust for his son Kenneth for life and, thereafter, for Kenneth's children. There were default trusts in favour of Kenneth's siblings. Kenneth died in 2008 (after the HRA had come into effect), leaving two children, both adopted. They accepted that, under the domestic law then in force, they were not Kenneth's 'children' for the purposes of the will. They asserted that this was a breach of their rights under arts.8 (respect for private and family life) and 14 (non-discrimination) of the *European Convention on Human Rights* (ECHR).

Mrs Justice Rose had little doubt that the children's ECHR rights were infringed, pointing out that the European Court of Human Rights has consistently held in case law that the interpretation of a testamentary disposition to discriminate against adopted and illegitimate children infringed their rights under arts.8 and 14.

The real question was whether the HRA could have retrospective effect in respect of rights that had been acquired in 1947, long before the Act was enacted. The House of Lords had said, in *Wilson* v *First County Trust Ltd*,[7] that the HRA was generally not retrospective. However, Mrs Justice Rose found that the time for determining whether or not Kenneth Hand had children was on his death in 2008, and, as by then the HRA had come into effect, there was no retrospective application of the HRA. Further, she found that, to the extent that there was interference with any rights of the other beneficiaries, it was not unfair, because none of them had done anything to avail themselves of their rights.

The case is being appealed. If it is upheld, it will have far-reaching consequences.

CONCLUSION

The saga of *Crociani* v *Crociani* continues, with appeals and inquiries pending. In the meantime, at least one issue – the status of A and B as beneficiaries of the Grand Trust – has been conclusively resolved. The Royal Court decision is authority for the proposition that the interpretation of a trust and the rights of beneficiaries can be changed by a change of the governing law, a proposition that divides experienced practitioners in this field.

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6 [2017] EWHC 533 (Ch)

7 [2004] 1 AC 816