

# Case Note

## *Crociani v Crociani*

Eason Rajah QC\* and Anthony Robinson†

### Abstract

On 11 September the Royal Court handed down its judgment in *Crociani & O'rs v Crociani & O'rs* [2017] JRC146 in favour of the Plaintiffs. Eason Rajah and Anthony Robinson discuss the judgment.

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### Introduction

1. In 2010, the Grand Trust had assets of approximately USD 180 million including a promissory note for approximately USD 32 million repayable on 31 December 2017. In the events which formed the basis of substantive legal proceedings in Jersey, all the assets of the Grand Trust apart from the promissory note have been transferred to Edoarda Crociani ('Mme Crociani'), one of its trustees, and have been salted away around the world. The promissory note itself is now held by GFIN Corporate Services Ltd ('GFIN'), a Mauritian corporate services provider, who refuses to submit to the jurisdiction of the Royal Court. Appleby (Trust) Mauritius Limited ('Appleby Mauritius') has attempted to revise the terms of the promissory note so that it is purportedly no longer payable at the end of 2017.

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2. In 2013 Cristiana Crociani ('Cristiana') and her two minor children A and B (through Nicolas Delrieu, their Guardian *ad litem*) brought proceedings in the Royal Court of Jersey seeking to enforce their rights as beneficiaries of the Grand Trust, and to reconstitute the trust fund of the Grand Trust in the hands of new trustees. The principal Defendants were the trustees of the Grand Trust (Mme Crociani, a Dutch lawyer called Mr Paul Foortse, and BNP Paribas Jersey Trust Corporation Limited ('BNP')) who claimed to have retired as trustees, and Appleby Mauritius who claimed to be the new validly appointed trustee.

3. The proceedings have not been straightforward. Instead of being neutral (as trustees ought to be), BNP and Appleby Mauritius, indemnified by Mme Crociani, joined with her in what the Plaintiffs asserted was a strategy of attrition and delay. This included an unsuccessful challenge to Jersey being the appropriate forum for this dispute. The Royal Court's decision in 2013<sup>1</sup> was appealed unsuccessfully to the Court of Appeal<sup>2</sup> and then to the Privy Council.<sup>3</sup> The Privy Council upheld the Royal

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1. *Crociani v Crociani* [2013] JRC 080.

2. *Crociani v Crociani* [2014] JCA 089.

3. *Crociani v Crociani* [2014] UKPC 40.

Court's decision that Jersey was the proper forum for this dispute.

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4. In a remarkable turn of events, and notwithstanding the fact that these proceedings had by then been on foot for three years, on 29 January 2016, Appleby Mauritius secretly purported to resign as trustee of the Grand Trust in favour of GFIN Corporate Services Ltd ('GFIN') and purported to confer exclusive jurisdiction for all disputes relating to the Grand Trust to the Mauritius courts. GFIN immediately commenced rival proceedings against the Plaintiffs in Mauritius. Consequently, the Plaintiffs also joined GFIN to the Jersey proceedings but it failed to enter an appearance nor did it submit to the Royal Court's jurisdiction.

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5. On 11 September 2017, after a three-month trial earlier in the year, the Royal Court delivered judgment for the Plaintiffs and ordered a series of inquiries as to quantum. Mme Crociani and BNP were ordered to pay an initial USD 100 million to the new trustee of the Grand Trust within 28 days, on account of their liability to reconstitute the Grand Trust. Appleby Mauritius was ordered to pay Euro 50 million into Court within 28 days by way of

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6. There are now three separate appeals in respect of the Royal Court's decision which means that any article about the case requires some circumspection. Nevertheless, the circumstances of the case are unusual and worth recounting, even if necessarily by way of crude summary. Two of the appeals (by BNP and Camilla Crociani) raise an issue as to the correct approach to reconstitution of a trust fund where a discretionary beneficiary has acquiesced in the breach of trust. Without trespassing on the arguments which will be heard on the appeal, this article also seeks to identify and outline this issue.

## Background

7. Mme Crociani created the Grand Trust under the laws of the Commonwealth of the Bahamas by an irrevocable deed dated 24 December 1987. Mme Crociani was named as settlor and Mme Crociani, Girolamo Cartia, and Bankamerica Trust and Banking Corporation (Bahamas) Limited as the original trustees.

8. Mme Crociani settled on the trustees of the Grand Trust a promissory note (the PN) dated 10 December 1987 in the principal sum of 75 billion lire<sup>4</sup> issued by a company registered in the

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4. Roughly equivalent to €37.5 million.

Netherlands, Croci International BV (Croci BV). Croci International NV (Croci NV) owned the issued shares in Croci BV.

9. The Grand Trust deed records Mme Crociani's intention to set aside a separate trust for each of her children, Camilla and Cristiana ('Camilla's Trust' and 'Cristiana's Trust', respectively). The recital reads as follows:

The Settlor wishes to record that she intends by this Agreement to have set aside a separate trust for each of her children CAMILLA (aged sixteen (16) years as of the date of this Agreement) and CRISTIANA (aged Fourteen (14) years as of the date of this Agreement.

...

The Trustees shall divide the property described in the annexed Schedule A into two (2) substantially equal (as to value) separate trusts, one of which shall be identified by the name of CAMILLA and one of which shall be identified by the name of CRISTIANA. Each such separate trust shall be disposed of as hereafter directed in this Agreement.

10. The trust deed goes on to direct that during the life of each child, the Trustees should pay such income as they deemed advisable from that child's trust to the child or to the Camillo Crociani Foundation Limited ('the Foundation'). The trustees had the power to apply capital to or for the benefit of the relevant child. Camilla and Cristiana had the power to appoint which of their issue received the capital of their trust on their death.

11. Clause 11th, which was to become critical, conferred an overriding power upon the trustees to transfer the trust fund to the trustees of any other trust 'in favor or for the benefit of all or any one or more exclusively of the others or other of the beneficiaries (other than the Settlor)'.

12. On 6 August 1987, the Foundation had been incorporated and registered in the Bahamas as a company limited by guarantee under the name of the Camillo Crociani Foundation Limited. The Royal Court was to find that its original objects were exclusively charitable. However, on 25 June 1991 the

directors of the Foundation resolved to have it registered as an International Business Company, limited by shares, under the name The Camillo Crociani Foundation IBC (Bahamas) Limited. Mme Crociani maintained that she was the owner of the Foundation and that it was a vehicle for her to benefit from the Grand Trust.

13. The Royal Court rejected this contention. The court found, with the assistance of expert evidence on US tax, that the Grand Trust was 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. Key to the success of this tax planning was the requirement that Mme Crociani, as settlor of the Grand Trust, could not benefit from it in any way, including through the Foundation. The terms of the Grand Trust, including clause 11th, were all consistent with that advice.

14. After the creation of the Grand Trust there were various changes in the trustees. By 2007, Mr Foortse and Banque Paribas International Trustee (Guernsey) Limited ('BNP Guernsey') were trustees of the Grand Trust with Mme Crociani and the proper law of the Grand Trust was the law of Guernsey. On 2 October 2007, BNP Guernsey retired as a trustee and BNP Jersey was appointed in its stead. The proper law was changed from that of Guernsey to that of Jersey.

15. In around October 1992 Mme Crociani, Cristiana, and Camilla moved to Monaco. From then until early April 2011 (at the latest) Cristiana, Camilla, and their respective families shared a home in Mme Crociani's apartment in Monaco.

16. By a deed dated 9 February 2010, BNP, Mr Foortse and Mme Crociani appointed all of the assets of the Grand Trust, save for the promissory note, to BNP Jersey and Mme Crociani as trustees of another trust created by Mme Crociani in 1989, the Fortunate Trust ('the 2010 Appointment'). Under the terms of the Fortunate Trust, Mme Crociani was the sole beneficiary during her lifetime. Further, she had a unilateral power that enabled her to revoke that trust and to make its assets her own property. The Royal Court found that the 2010

Appointment was void for a host of reasons, including the fact that it was made to benefit Mme Crociani who was not a beneficiary of the Grand Trust.

17. In April 2011, Cristiana discovered that Mme Crociani was taking advantage of the trust and confidence which she had placed in her mother. She learned that Mme Crociani and Camilla were secretly arranging to reduce or eliminate her share of the family wealth and to increase both Mme Crociani's and Camilla's shares. Cristiana found documents which showed a planned secret restructuring of all of the family wealth. The plans indicated that the assets of the Fortunate Trust and the Grand Trust were to be removed from their existing trust structures and placed in a new trust called the Mozart Trust. The Mozart Trust was for the benefit of Mme Crociani, Camilla, Camilla's two daughters and their issue. Cristiana was to be named as a remote default beneficiary, only once Mme Crociani and Camilla and all of her issue had passed away. The restructuring was to be achieved by appointing assets of the Grand Trust to the Fortunate Trust, followed by the revocation of the Fortunate Trust.

18. After Cristiana's discovery of these matters in April 2011, Cristiana left the family home and her relationship with her mother and her sister broke down completely.

19. By an instrument dated 30 June 2011, Mme Crociani revoked the Fortunate Trust and withdrew all the assets for herself.

20. Until Cristiana began to enunciate her claims, there was no connection of any kind between her claims and Mauritius. In late 2011, in correspondence sent to Mme Crociani's foreign lawyers, Cristiana's French lawyers threatened to take steps against the Grand Trustees. Shortly afterwards, by a deed dated 10 February 2012 Mme Crociani, Mr Foortse and BNP Jersey purported (i) to retire as trustees of the Grand Trust, (ii) to appoint as their replacement Appleby Mauritius, a company incorporated and registered in Mauritius, and (iii) to change the proper law from that of Jersey to that of Mauritius ('the 2012 Retirement'). The Royal Court found that the 2012 Retirement had been made as part of Mme

Crociani's and Camilla's attempts to place impediments in the way of Cristiana and her attempts to enforce her rights as a beneficiary of the Grand Trust.

21. On behalf of Cristiana, Bedell Cristin wrote a letter before action dated 3 July 2012 which outlined her claims relating to the 2010 Appointment and the 2012 Retirement. Mourant Ozannes, who were then acting for Mme Crociani, BNP, Mr Foortse and Appleby Mauritius, replied by letter dated 27 July 2012 informing Advocate Robinson that they were conducting 'a thorough review of the claims made in his letter', that the review process was continuing and that they would provide a full reply shortly.

22. In fact, the Grand Trustees and Appleby Mauritius then took the following steps which they kept secret from Cristiana and her advisors until after they had taken them. Having taken advice from what was described by Mr Foortse in his evidence as a 'galaxy of legal superstars' on 2 August 2012 (i) Appleby Mauritius and Mr Foortse declared the terms of the Agate Trust and (ii) Mme Crociani, BNP Jersey, Mr Foortse and Appleby Mauritius executed a deed which purported to appoint the assets, which had been the subject of the 2010 Appointment (including any rights or choses in action that might enable the trustees of the Grand Trust to seek to recover value passing under the 2010 Appointment or the assets now representing that property), to the Agate Trust ('the Agate Appointment'). Under the terms of the Agate Trust the trustees were to hold the trust fund and its income for the Foundation if Mme Crociani survived seven days from its date. If valid, the Agate Appointment would have killed the Plaintiffs' claim. The Royal Court held that the Agate Appointment was a tactical response to Cristiana's threatened claim and was fundamentally flawed as it was made for the benefit of Mme Crociani who was not a beneficiary and riven with insurmountable conflicts of interest on the part of Mme Crociani, BNP, and Mr Foortse. Saying that it found the Agate Appointment exercise 'disheartening, given the standing of the lawyers involved' the Royal Court declared it void and set it aside.

23. In May 2015, BNP finally sought separate representation from Mme Crociani, Mr Foortse and Appleby

Mauritius. It continued to defend the Plaintiffs' claims on much the same grounds as the other Defendants, but it also issued a third-party claim seeking an indemnity from Mme Crociani in respect of any liability which it was found to have to the Plaintiffs. The Royal Court granted BNP the relief it sought.

24. By deed dated 29 January 2016, without any warning to the Plaintiffs or the Royal Court, Appleby Mauritius purported to retire as trustee of the Grand Trust in favour of GFIN, and, notwithstanding the decision of the Privy Council, Appleby Mauritius purported by its deed of retirement to confer exclusive jurisdiction for all disputes in relation to the Grand Trust to the Mauritius courts ('the 2016 Retirement'). The Royal Court found that this was a deliberate attempt to interfere with the administration of justice in Jersey by putting the last remaining asset of the Grand Trust beyond its reach and accordingly declared the 2016 Retirement void.

25. On 10 March 2016, GFIN, notwithstanding that it would be bound by the Privy Council decision if it had been properly appointed as a successor trustee of the Grand Trust, commenced proceedings in Mauritius seeking an anti-suit injunction to stop the proceedings in Jersey. The Royal Court joined GFIN to the Jersey proceedings on 21 March 2016, injuncted Appleby Mauritius and GFIN from any further dealings with the promissory note and directed them to hold it to the Royal Court's order. The Royal Court took the unusual step of writing directly to the Supreme Court of Mauritius in relation to GFIN's proceedings.

26. On 5 July 2016, the Supreme Court of Mauritius refused GFIN's application for an anti-suit injunction observing *inter alia* that no justifiable and convincing reason had been advanced for the retirement of Appleby Mauritius and the appointment of GFIN in the middle of the Jersey proceedings, and that it was reasonable to conclude that the purpose of the terms of the 2016 Retirement were to circumvent and defeat the effect of the Privy Council decision.

27. GFIN did not enter an appearance in the Royal Court, appealed the refusal of an anti-suit injunction and continued to pursue its proceedings in Mauritius until after the Royal Court's judgment.

28. On 4 August 2016, BNP issued a Supplemental Order of Justice seeking worldwide injunctions against Mme Crociani which sought to freeze USD 194 million of her assets and orders that she disclose the whereabouts of her assets. On 4 August 2016, the Bailiff made such orders *ex parte* and at an *inter partes* hearing on 2 September 2016 he confirmed them. Mme Crociani appealed but failed to comply with orders made by the Court of Appeal for disclosure of the whereabouts of her assets.

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

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30. In its judgment the Royal Court found for the Plaintiffs and declared void all of the 2010 Appointment, the 2012 Retirement, the Agate Appointment, and the 2016 Retirement and set them aside. The judgment is uncomfortable reading for both professional trustees, but it is highly critical of Appleby Mauritius in particular, the Royal Court finding that from its appointment it had conducted itself in a manner which was consistently hostile and disloyal to the beneficiaries of Cristiana's Trust of which it purported to be the trustee.



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## Reconstitution and acquiescence

31. The Royal Court ordered BNP and Mme Crociani to jointly and severally reconstitute the Grand Trust and made an order for the immediate payment of an initial USD 100 million on account of that liability.

32. BNP accepted its liability for the reconstitution of 50 per cent of the Grand Trust in respect of Cristiana's Trust. It argued, however, that it should not be made to reinstate Camilla's Fund. It submitted, and the Royal Court accepted, that Camilla had not just acquiesced in BNP's breaches of trust but had benefitted at least to some extent from the assets appointed out of the Grand Trust. The Royal Court accepted that it would be unjust for Camilla to enjoy the fruits of that breach of trust and at the same time have the Grand Trust reconstituted so that she could benefit from it as well.

33. BNP's difficulty, however, was that Camilla was not the only beneficiary of Camilla's Trust. Camilla's issue were also beneficiaries. So too were Cristiana and her issue - as default beneficiaries and as objects of the clause 11th overriding power of appointment. It was the right of each of those beneficiaries to have the Grand Trust reconstituted in full.

34. Nor was it possible to impound Camilla's interest because, while clearly the principal beneficiary of Camilla's Trust, she was still merely a discretionary object.

35. Instead the Royal Court followed a course suggested by the Plaintiffs and supported by *Lewin on Trusts*.<sup>5</sup> It ordered the reconstitution of the Grand

Trust in full but declared that no power or discretion could be exercised by the new trustee in favour of Camilla and her children without the permission of the Royal Court. The Royal Court made clear that its intention was that this direction should remain in force until the assets appointed out of the Grand Trust were recovered and paid to the new trustee or to BNP (assuming it had reconstituted the Grand Trust).

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36. BNP's appeal includes an appeal in relation to its liability to reconstitute the Grand Trust in respect of Camilla's Trust. Camilla, having failed to attend the trial, has also appealed. She seeks to uphold the Royal Court's decision that BNP should reconstitute the Grand Trust in full, including in respect of her Trust, but she seeks to appeal the Royal Court's order debarring her from benefiting from that reconstituted fund without the Court's permission.

## Conclusion

37. There are lessons in this case for professional trustees and their advisors to learn. The Royal Court was critical of BNP's 'casual' approach to the 2010 Appointment and plainly unimpressed by the steps taken subsequently by both Appleby Mauritius and BNP to place obstacles in the path of Cristiana, including in relation to the 2012 Retirement, the

5. *Lewin on Trusts*, (19th ed, Sweet & Maxwell, UK 2014). para 39-125.

Agate Appointment, and the 2016 Retirement. Having relied upon their indemnities from Mme Crociani, and her underwriting of their legal costs of proceedings, both BNP and Appleby were eventually left holding the baby when she failed to attend at trial and disinstructed her lawyers. The case continues with appeals and inquiries pending.

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